No. 21-10034

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

---

Treva Thompson, *et al.*,
*Plaintiffs-Appellants,*

v.

Secretary of State for the State of Alabama, *et al.*,
*Defendants-Appellees.*

---

On Appeal from the United States District Court for the
Middle District of Alabama, Case No. 2:16-cv-00783-ECM-SMD

---

# BRIEF OF APPELLANTS

---

Jessica Ring Amunson
Noah B. Bokat-Lindell
Jenner & Block LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001

Jason Hipp
Jenner & Block LLP
919 Third Avenue
New York, NY 10022

Joseph Mitchell McGuire
McGuire & Associates LLC
31 Clayton St.
Montgomery, AL 36104

Mark P. Gaber
Danielle M. Lang
J. Gerald Hebert
Molly E. Danahy
Jonathan M. Diaz
Caleb Jackson
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005

James U. Blacksher
825 Linwood Rd.
Birmingham, AL 35222

*Counsel for Appellants*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Plaintiffs–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Alabama Attorney General's Office
2. Alabama Board of Pardons and Paroles
3. Alabama Secretary of State's Office
4. Amunson, Jessica, *Attorney for Plaintiffs/Appellants*
5. Ayers Sr., Marc J., *Attorney for Movant Cam Ward*
6. Beito, David T., *Expert Witness for Defendants/Appellees*
7. Blacksher, James U., *Attorney for Plaintiffs/Appellants*
8. Bokat-Lindell, Noah B., *Attorney for Plaintiffs/Appellants*
9. Borden, Gray M., *United States Magistrate Judge*
10. Bowdre, A. Barrett, *Attorney for Defendants/Appellees*
11. Bowie, Blair
12. Brasher, Hon. Andrew J., *Former Attorney for Defendants/Appellees*
13. Campaign Legal Center, *Counsel for Plaintiffs/Appellants*
14. Capel, Hon. Wallace, *United States Magistrate Judge*
15. Chynoweth, Brad A., *Former Attorney for Defendants/Appellees*
16. Corley, Laura, *Former Plaintiff*
17. Coody, Hon. Charles S., *United States Magistrate Judge*
18. Danahy, Molly E., *Attorney for Plaintiffs/Appellants*
19. Davis, James W., *Attorney for Defendants/Appellees*

20. Derfner, Armand, *Attorney for Plaintiffs/Appellants*
21. Derfner & Altman, *Counsel for Plaintiffs/Appellants*
22. Diaz, Jonathan, *Attorney for Plaintiffs/Appellants*
23. Doyle, Hon. Stephen Michael, *United States Magistrate Judge*
24. Dyar, Robert F.
25. Engelhardt, Todd, *Attorney for Movant Mobile County Board of Registrars*
26. Fairbanks, Philip G., *Former Attorney for Defendants Lyn Head and Cindy Sahlie*
27. Faulkner, Rep. David, *Movant*
28. Fedornak, Melissa T., *Attorney for Plaintiffs/Appellees*
29. Francois, Aderson B., *Attorney for Plaintiffs/Appellants*
30. Gaber, Mark P., *Attorney for Plaintiffs/Appellants*
31. Gamble, Darius, *Plaintiff/Appellant*
32. Giles, Antwoine, *Former Plaintiff*
33. Greater Birmingham Ministries, *Plaintiff/Appellant*
34. Gwathney, Leigh, *Defendant/Appellee*
35. Harris, Julie, *Attorney for Interested Party United States of America*
36. Head, Lyn, *Former Defendant*
37. Hebert, J. Gerald, *Attorney for Plaintiffs/Appellants*
38. Hipp, Jason, *Attorney for Plaintiffs/Appellants*
39. Howell, Laura E., *Former Attorney for Defendants/Appellees*
40. Institute for Public Representation, Georgetown University Law Center, *Counsel for Plaintiffs/Appellants*
41. Jackson, Caleb, *Counsel for Plaintiffs/Appellants*
42. Jenner & Block LLP, *Counsel for Plaintiffs/Appellants*

43. Karlan, Pamela, *Former Attorney for Plaintiffs/Appellants*
44. Kidd, Quentin, *Expert Witness for Defendants/Appellees*
45. King, Pamela, *Plaintiff/Appellant*
46. LaCour, Edmund G., Jr., *Attorney for Defendants/Appellees*
47. Lang, Danielle M., *Attorney for Plaintiffs/Appellants*
48. Lanier, Timothy, *Plaintiff/Appellant*
49. Llewellyn, Patrick D., *Former Attorney for Plaintiffs/Appellees*
50. Mangan, Mary, *Former Attorney for Defendants/Appellants*
51. Marks, Hon. Emily C., *United States District Court Judge*
52. Marshall, Steve
53. McCrary, Peyton, *Expert Witness for Plaintiffs/Appellants*
54. McGuire, J. Mitch, *Attorney for Plaintiffs/Appellants*
55. McGuire & Associates, *Counsel for Plaintiffs/Appellants*
56. Merrill, John H., *Defendant/Appellee*
57. Messick, Misty S., *Attorney for Defendants/Appellees*
58. Mobile County Board of Registrars, *Movant*
59. Montgomery County Board of Registrars
60. Newby, Larry Joe, *Former Plaintiff*
61. Noblin, George, *Former Defendant*
62. Owen, Karen L., *Expert Witness for Defendants/Appellees*
63. Public Citizen Litigation Group
64. Reynolds, Anna, *Former Plaintiff*
65. Riser, Robert V., *Expert Witness for Plaintiffs/Appellants*
66. Ross, Jay
67. Sahlie, Cindy, *Former Defendant*

68. Sinclair, Winfield J., *Attorney for Defendants/Appellees*
69. Smith, Daniel A., *Expert Witness for the Plaintiffs/Appellants*
70. Snipes III, James, *Defendant/Appellee*
71. State of Alabama, *Former Defendant*
72. Stewart, Michael E., *Former Attorney for Plaintiffs/Appellees*
73. Strange, Luther
74. Swetnam, Melissa, *Former Plaintiff*
75. Thompson, Treva, *Plaintiff/Appellant*
76. United States of America, *Interested Party*
77. Walker, Clifford, *Former Defendant*
78. Walker, Hon. Susan Ross, *United States Magistrate Judge*
79. Ward, Cam, *Movant*
80. Watkins, Hon. W. Keith, *United States District Court Judge*
81. Weller, Christopher W., *Attorney for Movants D. Faulkner, C. Ward & J. Woodard*
82. Woodard, Jeff, *Movant*
83. Yow, Mario D., *Former Plaintiff*
84. Yun, Jennifer J., *Former Attorney for Plaintiffs/Appellees*
85. Zimmer, Jennifer, *Former Plaintiff*

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

March 18, 2021

Respectfully submitted,

/s/ Mark P. Gaber
Mark P. Gaber
*Counsel for Appellants*

## STATEMENT REGARDING ORAL ARGUMENT

This appeal raises important questions about the proper standard for review on summary judgment, including whether the district court erred in treating Defendant's motion for summary judgment as a bench trial, notwithstanding the parties' genuine disputes over material facts and reliance on contrary legal theories. This appeal also raises important constitutional questions regarding whether the district court erred in finding that the undisputed discriminatory intent underlying Alabama's moral turpitude standard for felony disenfranchisement was cleansed by later legislative enactment; and whether the district court erred in finding that the moral turpitude standard provided Plaintiffs with sufficient notice that they might be punished by disenfranchisement when the punishment of disenfranchisement was meted out entirely at the discretion of individual voter registrars. Appellants believe oral argument would assist the Court in deciding these issues.

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Rules**

**Other Authorities**

## STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(a)(4) and Circuit Rule 28-1(g), Appellants attest that: (1) the district court had subject-matter jurisdiction over Plaintiffs' complaint under 28 U.S.C. §§ 1331, 1343, and 52 U.S.C. § 20510; (2) this Court has subject-matter jurisdiction over the district court's final order and judgment under 28 U.S.C. § 1291; and (3) the district court entered its judgment on December 3, 2020 and Appellants timely filed their notice of appeal on December 31, 2020.

## STATEMENT OF ISSUES

1. Whether the district court erred in deciding Defendants' summary judgment motion as a bench trial.

2. Whether the district court erred in concluding that the discriminatory intent underlying Alabama's moral turpitude standard for felony disenfranchisement was cleansed by later re-enactment.

3. Whether the district court erred in concluding that the undefined moral turpitude standard provided fair warning of felony disenfranchisement such that Alabama's 2017 law enumerating disenfranchising convictions did not subject Plaintiffs to *ex post facto* punishment.

4. Whether the district court erred in finding that Alabama's failure to identify disenfranchising crimes on voter registration forms violates the National Voter Registration Act's requirement to "specify" voter eligibility criteria.

## STATEMENT OF THE CASE

### I. Alabama's Racially Discriminatory and Standardless History of Criminal Disenfranchisement.

#### A. Criminal Disenfranchisement in Alabama Is Rooted in Racial Discrimination.

Alabama designed its 1901 Constitution to disenfranchise Black Alabamians and preserve white supremacy. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) ("[T]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. … [T]his zeal for white supremacy ran rampant at the convention."); Doc.215-3:P.14; Doc.80:P.16. ("It is undisputed that racial animus motivated Alabama lawmakers in 1901 to disenfranchise black voters under the guise of a facially neutral law."). John B. Knox, the 1901 constitutional convention president, declared this purpose openly: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." *Hunter*, 471 U.S at 229.

To that end, the 1901 framers adopted a suffrage provision, Section 182, for which racial animus was the "but-for" motivation. *Id.* at 232; Doc.270-3:P.6-7. Section 182 disenfranchised individuals convicted of a long list of crimes and those convicted of "crimes involving moral turpitude." *Id.* Both the list and the "catchall" moral turpitude provision were understood to involve crimes "thought to be more commonly committed by blacks." *Hunter*, 471 U.S. at 232; Doc.270-3:P.7-8. The

moral turpitude provision was not adopted for any legitimate state interest. *Hunter*, 471 U.S. at 232.

Because Alabama had used convictions for "crimes of moral turpitude" to effectuate its racist convict leasing system for several decades, the 1901 framers understood that the moral turpitude standard's flexibility would allow for selective disenfranchisement of Black citizens. Doc.270-3:P.41 (stating moral turpitude "had been, beginning from 1875, attached rather conveniently to petty crimes for which desperate, starving, and landless African Americans were most often prosecuted[.]"); *see also* Doc.270-3:P.36-43, 45; Doc.270-4:P.10.

Indeed, the flexibility of phrases like "crimes of moral turpitude," together with the "breathtaking latitude afforded the board of registrars," was "the crux" of the 1901 framers' plan for disenfranchising Black citizens and maintaining white supremacy.[1] Doc.270-3:P.46. As Plaintiffs' expert Dr. Riser explains,

> Registrars could choose to use the understanding tests for one man and not the next; registrars could, if they wished, draft separate examinations for separate voter registration applicants; registrars could, and were expected to, decide for themselves what "understanding" citizenship, "good character," and, apparently, moral turpitude meant.

[1] Nor was Alabama alone in adopting a purportedly neutral "moral turpitude" standard for invidious purpose. *See* Doc.268:P.16 (citing Julia Ann Simon-Kerr, *Moral Turpitude*, UTAH L. REV. 1001, 1009 (2012) for the proposition that "[m]oral turpitude was used to police the boundaries of an ideal polity and … invidiously to enforce racial hierarchy").

Doc.270-3:P.45; *id.* at 46 (newspaper owned by Alabama governor William Dorsey Jelks "advised readers the registrars were 'the milk in the cocoanut' of the plan" to ensure white supremacy.). Indeed, as Defendants' expert Dr. Beito admitted, the framers intended that registrars use every test—including criminal disenfranchisement—to effect their discriminatory purpose. Doc.257-1:P.20-21 (quoting John B. Knox, the convention chair: "If you select the test of education, … if you select the test of freedom from commission of crime, every such test, when properly applied, will exclude largely more one race than another.").

To guarantee the success of this plan, state officials carefully selected registrars who would use their discretionary power to disenfranchise Black men. Doc.270-3:P.51 ("[T]he registrars who will be appointed by high officials in the party that has always stood for white man's supremacy will be in sympathy with the best methods yet devised to secure it."). The Governor, State Auditor, and Commissioner of Agriculture were granted the power to appoint registrars, which they maintain today, and appointed only those willing to uphold white supremacy and exploit their discretion to reject Black voters. Doc.270-3:P.51-54. As planned, registrars used every tool available to disenfranchise Black citizens, including the moral turpitude standard. Doc.270-3:P.58.

In 1985, the Supreme Court held that Alabama's suffrage provision was infected by discriminatory purposes. *Hunter*, 471 U.S. at 223, 232. The Court further

held that the passage of time had not cleansed the taint of invidious discrimination. *See id.* at 223. And it noted that the criminal disenfranchisement provision's discriminatory impact continued unabated. *Id*. at 227. As such, the Court declared the provision unconstitutional because it discriminated on the basis of race. *Id.* at 233.[2]

**B. Alabama Re-Enacts the Moral Turpitude Provision.**

In 1995, the Alabama legislature proposed a constitutional amendment striking certain portions of the 1901 suffrage article previously deemed unconstitutional—including the poll tax and literacy test. Without debate or deliberation, the legislature re-enacted the provision disenfranchising individuals convicted of crimes of moral turpitude.

The text of the criminal disenfranchisement provision proposed in 1995 was lifted verbatim from an amendment first proposed in 1973. Doc.261:P.52. Dr. Samuel Beatty, the drafter of the 1973 provision, explicitly sought to eliminate the "redundant" list of disenfranchising crimes by restating the criminal disenfranchisement provision in general terms but did not seek to substantively

[2] Because the legal challenge in *Hunter* involved disenfranchisement based on misdemeanors, the Alabama Attorney General interpreted it to only strike criminal disenfranchisement as to misdemeanors. Alabama maintained enforcement of the provision disenfranchising those convicted of crimes punishable by the penitentiary—*e.g.*, all felonies. Ala. Op. Atty. Gen. No. 92-48, 1991 WL 11870138 (Nov. 4, 1991). However, nothing in *Hunter*'s finding that racial discrimination motivated Section 182 was limited to misdemeanors.

change the provision. Doc.261:P.42. The 1973 Commission adopted Dr. Beatty's restatement of the criminal disenfranchisement provision with "no debate" or historical analysis. Doc.261:P.43. But the legislature failed to act on the Commission's proposals. *Id.* In 1979, another working group was formed to consider revisions to the 1901 Constitution. Doc.261:P.44. Again, the working group neither deliberated over the criminal disenfranchisement provision nor heard expert or historical testimony as to its purpose or effect. Doc.269-3:P.93, 97, 104-05, 129-31, 137. The 1979 working group proposed the same language Dr. Beatty proposed in 1973. Doc.261:P.52.

Notably, when the legislature considered the 1979 working group's proposals, it *did* deliberate over the criminal disenfranchisement provision and struck the moral turpitude provision from the substitute bill. Doc.256-14:P.10; Doc.256-19:P.22-25; Doc.256-16:P.4-5; Doc.270-6:P.6. But the legislature adjourned before the amendment could be adopted. Doc.269-3:P.147.

Finally, in 1995-1996, the legislature proposed—and Alabama citizens approved—Amendment 579. Amendment 579 incorporated the precise criminal disenfranchisement provision proposed by Dr. Beatty in 1973: "No person convicted of a felony involving moral turpitude … shall be qualified to vote until restoration of civil and political rights." Doc.261:P.42-43. Again, however, the 1995-96 Amendment focused on eliminating obsolete disqualifications for voting, including

the gender restriction, poll tax, and literacy test. Doc.257-19:P.3-9.[3] The moral turpitude language was not subject to any deliberation, debate, or testimony. Doc.257-26; Doc.269-2:P.46. Rather, Amendment 579 was sold to both legislators and the public as "'*strictly housekeeping*," undertaken to update Alabama's suffrage provision to reflect post-Jim Crow policies. Doc.257-17:P.52.

### C. Alabama Maintained its Refusal To Define Which Crimes Are Disenfranchising from 1901 Through 2017.

Alabama maintained the key features of the criminal disenfranchisement provision—the flexibility of the moral turpitude standard and the discretion awarded to registrars in applying it—from the adoption of the 1901 Constitution through the 2017 adoption of House Bill 282 ("HB282"), which for the first time enumerated which felonies are disqualifying. During this time, the moral turpitude standard remained undefined and *no* particular felony was authoritatively disqualifying. *See* Ala. Code § 17-3-30.1(b)(1)(b).

Indeed, prior to 2017, state officials repeatedly disclaimed authority to define which crimes were disenfranchising. *See, e.g.*, Doc.270-4:P.21-22 (describing 1970 attorney general opinion admitting it "cannot be dispositively answered" which

[3] The 1995-96 Amendment was assuredly not a reaction to *Hunter*, decided a decade earlier. *See* Doc.269-2:P.45-46 (Defendants' expert testifying she found no evidence that anyone was thinking about *Hunter* during the 1995-96 process). Nothing in the State's Section 5 submission for the Amendment addressed *Hunter* or explained why moral turpitude was included in the Amendment despite the Court's finding of discriminatory intent. Doc.257-26.

crimes involving moral turpitude require disenfranchisement); Doc.66-1:P.51-52 (1985 attorney general opinion compiling a "non-exhaustive" list of moral turpitude crimes); Ala. Op. Atty. Gen. No. 2005-092, 2005 WL 1121853 (March 18, 2005) (Ala. A.G.) ("[T]his Office cannot provide an exhaustive list of every felony involving moral turpitude.").

Over the years, officials relied on several different, contradictory, and non-binding lists suggesting which crimes could be considered felonies involving moral turpitude. In 2007, the Alabama Administrative Office of the Court ("AOC") compiled a list of specific felonies, including their Alabama Code citations, which a state appellate court, Attorney General opinion, or state statute had concluded involved moral turpitude. Doc.269-10:P.7. The AOC list was non-binding and did not prevent disparate determinations of which crimes were disqualifying. Doc.269-4:P.68-69.

In an effort to address concerns that registrars were applying the moral turpitude standard differently from county to county, the Secretary published a different non-binding list of crimes of moral turpitude in 2014. Doc.269-7:P.10; Doc.269-8:P.10; Doc.269-6:P.48. The Secretary's list was copied from a Wikipedia entry on federal immigration law "as a placeholder," without any determination as to whether it had any basis in Alabama law. Doc.269-6:P.31-33.

### D. The Moral Turpitude Provision Continues To Have a Discriminatory Impact on Black Alabamians.

The record shows that the moral turpitude provision has maintained its intended discriminatory impact. Plaintiffs' Expert Dr. Dan Smith found that "while Black individuals represent just over a quarter of the citizen voting age population, they represent nearly half of all felony convictions in Alabama." Doc.260-8:P.21. Moreover, Black people are *even more* overrepresented among people with disqualifying convictions under HB282 than they are among people with felony convictions generally. Doc.260-8:P.24 (finding that Black people represent 26.2% of Alabama's citizen voting age population, 47.2% of people with felony convictions in Alabama, and 50.5% of people with "moral turpitude" felonies under HB282).

Thus, even putting aside the disproportionate impact of the criminal justice system on Black citizens, the moral turpitude provision further amplifies the discriminatory impact of criminal disenfranchisement in Alabama. Notably, HB282 excludes numerous crimes historically associated with fitness to participate in the polity, such as bribery, perjury, embezzlement, and malfeasance in office, but includes low-level nonviolent theft crimes that historically served a discriminatory function in Alabama's criminal disenfranchisement scheme. *See* Ala. Code § 17-3-30.1(c); Doc.257-1:P.4-5 (Defendants' expert explaining historical basis for

disenfranchisement as tied to public corruption crimes);[4] Doc.261:P.18; Doc.270-3:P.41 (tying larceny disenfranchisement to racial discrimination).

## II. Plaintiffs

### A. Individual Plaintiffs

Plaintiff Gamble was convicted of trafficking in cannabis in 2008. Doc.261:P.79. In 2017, HB282 designated trafficking in cannabis a felony of moral turpitude for purposes of disenfranchisement. Ala. Code § 17-3-30.1.

Plaintiff Thompson was convicted in 2005 of theft of property. Doc.261:P.79. In 2017, HB282 designated theft of property a felony of moral turpitude for purposes of disenfranchisement. Ala. Code § 17-3-30.1.

Plaintiff Lanier was convicted of burglary based on events in 1995. Doc.261:P.79. Plaintiff King was convicted of murder in 1995 and served fifteen years in prison. *Id.* In 2017, HB282 designated burglary and murder felonies of moral turpitude for purposes of disenfranchisement. Ala. Code § 17-3-30.1.

[4] *See also Anderson v. State*, 72 Ala. 187 (1882) ("Convictions of bribery, perjury, forgery, 'or other high crimes or misdemeanors,' have been causes of disfranchisement since the constitution of 1819 was adopted. All the crimes enumerated as the causes of disfranchisement, except larceny, are offenses of a public nature, striking at the integrity of elections, or the life of the State, or are violations of public trusts, or usurpations and oppressions by public servants, or high offenses against persons. Larceny alone is an offense against property, and no reason can be assigned for subjecting petit larceny to the same severe punishment affixed to these grave offenses.").

### B. Greater Birmingham Ministries

Plaintiff Greater Birmingham Ministries (GBM) serves low-income and historically disenfranchised communities in the Birmingham area. Doc.215-12:P.2-3. Supporting the restoration of voting rights among those with past convictions is central to its mission. Doc.215-12:P.2-3. GBM expends substantial resources assisting voters in determining whether past convictions render them ineligible to vote; applying for and obtaining Certificates of Eligibility to Register to Vote (CERVs); and applying for remission of fines for CERV-ineligible voters. *Id.* at 3; Doc.257-31:P.4; Doc.271-15:42-59. Furthermore, because Alabama has no authoritative list for determining whether a federal or out-of-state conviction is disqualifying under the moral turpitude standard, GBM must continue devoting substantial resources to assisting voters with such convictions determine their eligibility under Alabama law. *See, e.g.*, Doc.257-31:P.4. These activities consume substantial financial resources and staff time, which would otherwise be devoted to GBM's efforts to register voters, including formerly incarcerated voters, and to increase voter turnout among its core constituencies. Doc.215-2:P.2, 4.

Because Alabama first adopted an authoritative list of disqualifying felonies in 2017, *see* Ala. Code § 17-3-30.1 (2017), the vast majority of individuals that GBM assists in obtaining CERVs were convicted at a time when "[u]nder general law, there [was] no comprehensive list of felonies that involve moral turpitude which

disqualify a person from exercising his or her right to vote" and as such "neither individuals with felony convictions nor election officials [had] a comprehensive, authoritative source for determining if a felony conviction involve[d] moral turpitude and [was] therefore a disqualifying felony," *id.* § 17-3-30.1(b)(1)(b); *see* Doc.260-8:P.24 (Plaintiffs' expert finding 126,047 of 135,579 Alabamians with convictions for felonies of moral turpitude as defined in HB282 were convicted before HB282 went into effect).

GBM routinely encounters individuals who are unable to determine their eligibility, and thus fear legal trouble if they attempt to register, as well as eligible voters who believe they cannot vote. Doc.271-15:P.81-88.

## III. Procedural History

On September 26, 2016, Plaintiffs filed suit in the Middle District of Alabama challenging Alabama's felony disenfranchisement provision on numerous constitutional and statutory grounds. Doc.1. On May 25, 2017, Alabama enacted HB282, which adopted a definitive list of felonies of "moral turpitude" for purposes of voter disenfranchisement for the first time. Doc.80:P.6. On September 28, 2017, the district court granted in part and denied in part Defendants' first motion to dismiss. Doc.75. In a December 2017 opinion, the district court found that several of Plaintiffs' claims—including procedural due process and vagueness claims—were moot in light of HB282. Doc.80:P.28. The district court found that Plaintiffs

had sufficiently pled their intentional discrimination claims, *ex post facto* claim, Eighth Amendment claim, and Fourteenth Amendment wealth discrimination claim, but dismissed the remaining claims. Doc.80:P.39-40.

On March 1, 2018, Plaintiffs filed a supplemental complaint updating their factual allegations in light of HB282, and raising new claims alleging that HB282's retroactive application violates due process and that the state voter registration form and the state-issued instructions to the federal mail-in voter registration form fail to specify voter eligibility requirements in violation of the National Voter Registration Act, 52 U.S.C. § 20508(b)(2)(A) ("NVRA"). Doc.93.

On September 2, 2020, Defendants filed a motion for summary judgment on all remaining claims. Doc.261. Plaintiffs filed a cross motion for partial summary judgment on their NVRA Claim, Doc.260, and opposed Defendants' motion on the other claims, Doc.268. On December 3, 2020, the district court granted Defendants' summary judgment on all claims. Doc.286. The district court acknowledged the racist motivation for the 1901 Constitution's "moral turpitude" standard, but concluded that there was no factual dispute that the 1996 amendment—described at the time as "housekeeping"—was the product of a deliberative, substantive process that cleansed the original discriminatory purpose. Doc.286:P.23, 27-30. The district court likewise concluded that Plaintiffs had not shown a disputed fact about whether the "moral turpitude" law provided them fair warning, citing 1980s state court

decisions about Alabama's witness character impeachment statute. *Id.* at 40-42. The court thus concluded Plaintiffs had not suffered *ex post facto* punishment by the 2017 enactment of HB282. *Id.* And the district court concluded that because the federal Election Assistance Commission had published the registration instructions provided by the Secretary, this administrative "decision" warranted "deference" that the NVRA's requirement to "specify" eligibility criteria was satisfied. *Id.* at 57. Plaintiffs timely appealed.

## IV. Standard of Review

"[A] district court may grant summary judgment only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). A genuine issue of material fact exists where there is sufficient evidence for a rational factfinder to find for the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). At summary judgment, the non-movant's evidence "must be believed and all justified inferences are to be drawn in his favor." *Id*. at 255. The district court misapplied the summary judgment standard and rested its conclusions on erroneous legal interpretations; its decision should be reversed.

## SUMMARY OF ARGUMENT

The district court erred in granting summary judgment for Defendants on Plaintiffs' intentional racial discrimination, *ex post facto*, and National Voter Registration Act ("NVRA") claims. The district court's judgment should be reversed.

*First*, the district court erred by concluding that the ordinary summary judgment rules—requiring denial in the face of factual disputes and inferences to be drawn in favor of the non-movant—do not apply because this was not a jury case. This Court has held that the ordinary summary judgment standard is only loosened for bench trial cases when it is clear all parties intended the case to be resolved on the papers—such as through cross-motions and the submission of stipulated facts—and when a hearing is conducted to ensure a full opportunity to present facts. These circumstances were not present here; Plaintiffs only cross-moved on a single claim, there was no set of agreed facts, and no hearing was conducted. The district court was required to draw inferences in *Plaintiffs'* favor and was not authorized to resolve factual disputes on the papers.

*Second*, the district court erred by granting Defendants summary judgment on Plaintiffs' intentional discrimination claim. The district court concluded that the 1901 Constitution's "moral turpitude" standard for disenfranchisement was intended to discriminate against Blacks, but that the 1996 amendment re-adopting that

standard involved a substantive change and deliberative process that cleansed the discriminatory intent. This was error. The 1996 process was merely a housekeeping process designed to eliminate *other* voter qualifications previously deemed unconstitutional, and no substantive change was made to the "moral turpitude" provision. And the record evidence shows there was no deliberation whatsoever over that provision. The district court ignored Plaintiffs' expert testimony entirely in order to grant Defendants summary judgment.

*Third*, the district court erred in granting Defendants summary judgment on Plaintiffs' *ex post facto* claim. The court acknowledged, as the legislature did in 2017, that the prior "moral turpitude" law did not notify people which crimes were disenfranchising, leaving that determination to local registrars' discretion. But the court concluded that *these* Plaintiffs nevertheless were fairly warned at the time of their offenses because state officials could have determined their particular offenses involved moral turpitude by applying judicial decisions interpreting that phrase in a different, irrelevant legal context. This was error.

The district court contravened Supreme Court precedent by considering the existence of attenuated judicial decisions that *might* have persuaded officials to disenfranchise these particular Plaintiffs, rather than whether the moral turpitude law itself provided notice. The legislature's 2017 declaration and the record evidence prove that the "moral turpitude" law, arbitrarily applied from county to county, fairly

warned *no one* of disenfranchisement. Moreover, HB282 increased punishment by converting disenfranchisement from a discretionary to a mandatory punishment.

The district court likewise erred in its individual-level analysis. Plaintiffs Gamble's and Thompson's convictions were *excluded* from the state-published lists of disenfranchising crimes available at the time of their offenses; indeed, the record reflects that the Secretary would have advised that Mr. Gamble was eligible to vote. Plaintiffs Lanier and King have improperly been subjected to increased mandatory disenfranchisement. And the district court erroneously inverted the summary judgment burdens and conflated the merits with standing to reject Plaintiff GBM's *ex post facto* claim. It likewise erred in resting upon the same flawed merits analysis it applied to the individual Plaintiffs to dismiss GBM's claim. Plaintiffs proved the absence of fair warning under the "moral turpitude" law, precluding retroactive application of HB282 and foreclosing summary judgment for Defendants.

*Fourth*, the district court erred in granting Defendants, rather than Plaintiffs, summary judgment on Plaintiffs' NVRA claim. The NVRA requires Alabama to "specify" its voter eligibility requirements on its voter registration form. Instead of enumerating which felony convictions are disqualifying, the Alabama's form links to a website listing those offenses. This violates the NVRA's plain text. The district court erred by rejecting the NVRA's plain meaning because it would lead to an "odd result" and "deferring" to an Election Assistance Commission email accepting the

Secretary's proposed language for the federal form's instructions. Informal emails by federal agencies that fail to address the statutory language are not a proper basis to disregard a statute's plain command.

The district court misapplied the summary judgment standards, disregarded the record evidence proffered by Plaintiffs, improperly drew inferences in the movant's favor, and misapplied the facts and law. Its order should be reversed.

## ARGUMENT

### I. The District Court Applied the Wrong Legal Standard.

The district court applied the wrong standard in granting Defendants summary judgment, disregarding its obligation to view evidence and draw inferences in favor of Plaintiffs. *See Anderson*, 477 U.S. at 255. Instead, the court concluded that because this case was set for a bench trial, it was "in a position to and ought to draw [its] inferences without resort to trial." Doc.286:P.6. In so doing, the court denied Plaintiffs their right to trial, including their right to cross-examination, and committed reversible error.

In a case set for a bench trial, a court may resolve fact disputes and draw inferences against the non-movant on summary judgment only in "limited circumstances" when "it appears that the parties intended to submit the case to the court for final resolution, not for summary judgment." *Fla. Int'l Univ.*, 830 F.3d at 1252-53. Resolving such a case may be appropriate where the parties cross-moved

for summary judgment, "the district court held a hearing on the motions for summary judgment in which the facts were fully developed," "the parties stipulated to an agreed set of facts," and "the record reflects that the parties had in effect submitted the case for trial on an agreed statement of facts embodied in a limited written record, which would have enabled the [district] court to decide all issues and resolve all factual disputes." *Id*. (internal quotation marks omitted).

None of those circumstances exist here. Plaintiffs only cross-moved on a single claim. As to the other claims, Plaintiffs asserted that factual disputes made summary judgment inappropriate. No hearing was held. The parties did not stipulate to any set of agreed facts. To the contrary, the parties maintained disputes as to "the 'undisputed facts,' added 'material facts' of their own," objected to the other parties' facts, "disputed which facts were legally relevant to the success or failure" of Plaintiffs' claims, and argued inconsistent legal theories in support of their respective positions. *Ga. State. Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015). Indeed, in its haste to resolve the case without trial, the district court ignored Plaintiffs' historical expert reports entirely. As such, "it was improper for the district court to resolve the case on the merits at summary judgment." *Ga. State Conf. of NAACP*, 775 F.3d at 1345-46.

This Court must review the district court's decision *de novo*, "unaffected by any inferential conclusions reached below," and must "review the evidence and all

factual inferences arising from the evidence in the light most favorable" to Plaintiffs. *Useden v. Acker*, 947 F.2d 1563, 1572-73 (11th Cir. 1991).

## II. The District Court Erred in Granting Defendants Summary Judgment on Plaintiffs' Intent Claims.

"[S]ummary judgment is rarely proper" on intent claims, *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996), and it was not proper here.[5] A State violates the Fourteenth and Fifteenth Amendments when it enacts a felony disenfranchisement law "with the intent to deprive one racial group of its right to participate in the political process." *Johnson v. Governor*, 405 F.3d 1214, 1218 (11th Cir. 2005) (en banc). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. This inquiry is guided by the *Arlington Heights* factors, which include *inter alia*, discriminatory impact, historical background, legislative history, and substantive departures from the normal process. *See id.* at 265-68. Courts must consider whether racially discriminatory intent was a "substantial or motivating factor" in the enactment. *Hunter*, 471 U.S. at 227. If so, the burden shifts to defendants "to demonstrate that the law would have been enacted

[5] *See also Doe v. City of Memphis*, 928 F.3d 481 493, n.5 (6th Cir. 2019); *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Friedel v. City of Madison*, 832 F.2d 965, 972 (7th Cir. 1987). As a general rule, summary judgment is only proper in intent cases where Plaintiffs "set forth no indications of motive and intent supportive of [their] position." *Friedel*, 832 F.2d at 972 (citation omitted).

without this factor." *Id.* at 228. The passage of time and modifications will not erase the violation where the law "continues to this day to have [a racially discriminatory] effect." *Id*.

Plaintiffs claim that the entire 1901 criminal disenfranchisement scheme—and in particular the moral turpitude provision—was intentionally racially discriminatory. Plaintiffs further claim that Amendment 579 was a "strictly housekeeping" bill, *see* Doc.261:P.53, 61, which did nothing to remove the underlying racially discriminatory purpose and impact of that scheme. Thus, Plaintiffs' burden is to show that: (1) the criminal disenfranchisement provision was adopted in 1901 for a racially discriminatory purpose; and (2) that the Amendment 579 provision maintained that racially discriminatory purpose. *See Johnson,* 405 F.3d at 1223-24.

The Supreme Court has explained how to weigh the discriminatory history of a policy in analyzing discriminatory intent:

> [G]iven an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time. Although we do not formulate our standard in terms of a burden shift with respect to intent, the factors we do consider-the historical background of the policy, the degree of its

> adverse impact, and the plausibility of any justification asserted in its defense-are precisely those factors that go into determining intent[.]

*United States v. Fordice*, 505 U.S. 717, 746-47 (1992) (citations omitted). Thus, the historical background of Alabama's criminal disenfranchisement policy must weigh heavily in this Court's analysis. A State may overcome the racially discriminatory history of a law only by reenacting it through a "deliberative process." *Johnson,* 405 F.3d at 1223-4; *see also Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). But a State cannot maintain a law that was designed to discriminate and maintains that impact merely by laundering the bill through subsequent reenactments that do not meaningfully alter the law's purpose or effect.

The district court properly concluded that the enactment of the moral turpitude standard in 1901 was racially discriminatory. Doc.286:P.23. The district court also properly recognized that the key issues on Plaintiffs' intent claims are (1) whether there was sufficient deliberation prior to the re-enactment of the moral turpitude standard, and (2) whether the re-enactment made a sufficiently substantive change to the provisions, such that the taint of racial discrimination was eliminated. *Id.* at 24-25 (citing *Cotton*, 157 F.3d 388; *Johnson*, 405 F.3d at 1217; *Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010)). But the district court erred by failing to properly consider Plaintiffs' evidence that neither the nature of the process nor changes made to the suffrage provision in 1996 were sufficient to cleanse its discriminatory intent. *Cf.* Doc.286:P.25. Indeed, in light of the substantial disputed facts and conflicting

evidence on these issues, the district court could only reach its result by doing precisely what is forbidden at the summary judgment stage: crediting Defendants' evidence, ignoring Plaintiffs' evidence, and drawing inferences against Plaintiffs. This Court should reverse and remand for trial.

### A. The 1996 Amendment Preserved the 1901 Moral Turpitude Provision's Intentionally Discriminatory Substance.

The district court concluded that the 1996 Amendment was substantive because it narrowed the category of disenfranchising crimes relative to the 1901 Constitution. *Id*. The court ignored substantial evidence that the moral turpitude standard itself gave substance to the 1901 framers' discriminatory intent. The district court failed to engage with the reports of Plaintiffs' intent experts *at all*,[6] and disregarded the vast majority of Plaintiffs' evidence in support of their intent claim. Instead, the court relied almost entirely on evidence proffered by Defendants and drew all inferences in Defendants' favor. The district court failed to apply the correct standard for summary judgment.

*First,* the 1996 Amendment's re-enactment of the moral turpitude standard carried forward the crucial substance of the discriminatory 1901 provision: the amorphous moral turpitude standard and the "breathtaking latitude afforded the

[6] The district court failed to even mention the report of Plaintiffs' expert Dr. Riser, and only cited the report of Plaintiffs' expert Dr. McCrary once—in a footnote about an evidentiary dispute.

board of registrars," which was "the crux" of the 1901 framers' plan to disenfranchise Black citizens and perpetuate white supremacy. Doc.270-3:P.46; Statement of Case, Part I.A. Indeed, until 2017, county registrars had broad discretion to decide whether a particular conviction was disqualifying, producing disparate determinations for the same felony across Alabama's counties. *See, e.g.*, Doc.269-4:P.97, 204, 209, 221-22, 284; *see also* Doc.269-5:P.33-34.

Thus, the district court erred in concluding that the 1996 Amendment narrowed the number of disenfranchising crimes, ameliorating the discrimination of the 1901 provision. Because the determination of whether a crime involved moral turpitude was left entirely to the registrars' discretion, *any felony* could be deemed disenfranchising. The fact that the legislature eliminated the provision that specifically disenfranchised everyone committed of a crime punishable by a year in the penitentiary (*i.e.*, all felonies) is irrelevant because, as the *Hunter* Court held, the flexible "moral turpitude" standard was the chief tool of the law's racially discriminatory purpose. The 1996 amendment did *nothing* to alter that standard. Narrowing the scope from "all felonies" to only those felonies historically considered to be committed by Black citizens does not evince an effort to purge the law's discriminatory taint. *Cf. Cotton*, 157 F.3d at 391 (finding that a change to a disenfranchisement law cleansed the taint of discrimination where it added to the list

of disenfranchising crimes two crimes previously excluded because they were not thought to be "black" crimes).

The district court disregarded the substantial evidence that the flexibility of the moral turpitude standard was a feature, not a bug, of the 1901 provision. Only by ignoring Plaintiffs' historical experts could the district court reach the puzzling conclusion that the arbitrary application of the moral turpitude standard was disconnected from the discriminatory intent behind its design: "This Court agrees that evidence of the difficulty of implementing the 'moral turpitude' standard in the years following the adoption of the standard, without more, is not evidence probative of any racially discriminatory intent of the legislature at the time the standard was adopted." Doc.286:P.32.

The district court's blinders to the evidence connecting the moral turpitude standard to the 1901 framers' discriminatory designs led it to repeatedly treat that standard as self-evidently neutral. For example, the district court adopted Defendants' expert Dr. Owen's facile logic that the legislature's continued use of the term "moral turpitude" does not support a finding of intentional discrimination because that term exists in other legal contexts. Doc.286:P.27. But, at issue here is the use of moral turpitude *in the context of felony disenfranchisement*, which Plaintiffs established is rooted in intentional discrimination. Furthermore, many of those other contexts are also rooted in race discrimination. Doc.259:P.6-9

(describing the use of moral turpitude in discriminating against Chinese immigrants in the 1800s, the history of race discrimination in professional licensing, and the unreliability of the "frequency-of-use" test for determining whether moral turpitude is discriminatory in the voting context). The district court failed to address this evidence.

*Second,* Plaintiffs provided substantial evidence that the re-enactment of the moral turpitude provision was explicitly intended *not* to change its substance. As Defendants acknowledged below, the criminal disenfranchisement language that now appears in Section 177 was prepared by Dr. Beatty for the 1973 constitutional revision commission. Doc.261:P.52. Dr. Beatty made clear that his goal was *not* to transform the criminal disenfranchisement provision or its purposes, but to simplify and restate the existing terms of Section 182. *Id*. at 42. Eliminating redundancies and restating the provision in "general terms," *see* Doc.257-19:P.10, did not change the underlying discriminatory purpose of the moral turpitude standard.

Nor did the Legislature cure this discriminatory intent in 2017 when it adopted HB282 for the express purpose of giving "*full effect* to Article VII of the *Constitution of 1901*." Ala. Code § 17-3-30.1(a)(2)(a) (emphasis added). The undisputed record below demonstrates that the 1901 framers intended to discriminate against Black

Alabamians, and that the crimes[7] chosen by the 2017 Legislature continue to have a discriminatory effect. Statement of Case, Part I.D.

*Third*, Alabama's re-enactment of the 1901 Constitution's "moral turpitude" language without any deliberative process, *see infra*, or consideration of alternative rationales—even after the Supreme Court's decision in *Hunter*—strongly suggests a continuation of past discrimination. Indeed, "[i]t is a settled rule that in the adoption of the Code the Legislature is presumed to have known the fixed judicial construction pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction." *Ex parte Fontaine Trailer Co.*, 854 So. 2d 71, 83 (Ala. 2003) (citations and internal quotation marks omitted); *see W. Union Tel. Co. v. S. & N.A.R. Co.* 62 So. 788, 794 (1913) ("Reviewers of statutes are presumed not to change the law if the language which they use fairly admits of a construction which makes it consistent with the former statutes …." (citation and internal quotation marks omitted); *accord, e.g., Rodgers v. Meredith*,

[7] There is substantial similarity between the specified crimes included in the initial 1901 disenfranchising provision—chosen because, alongside the moral turpitude provision, they were believed to be likely to target Black citizens, *Hunter*, 471 U.S. at 232—and those included in the 2017 list of felonies involving moral turpitude. For example, Section 182 of the 1901 constitution specified larceny, robbery, burglary, forgery, bigamy, living in adultery, sodomy, and incest as disqualifying; HB282 likewise specifies theft of property, robbery, burglary, forgery, bigamy, sodomy, and other sexual crimes as disqualifying. Conversely, HB282 omits crimes historically linked to disenfranchisement, including crimes involving public corruption. *See supra* Part I.D.

146 So. 2d 308, 312–13 (Ala. 1962); *City of Birmingham v. Hendrix*, 58 So. 2d 626, 637 (Ala. 1952).

As the district court correctly noted, the "historical context" of Alabama's criminal disenfranchisement scheme "cannot be ignored." Doc.80:P.15. Unfortunately, it did just that. While this history does not mean that "Alabama is [] forever forbidden from disenfranchising felons," Doc.261:P.39, Alabama *is* forbidden from continuing to disenfranchise only those citizens excluded from the electorate on a racially discriminatory basis by the 1901 Constitution. The State cannot maintain this intentionally racially discriminatory system merely by pointing to the passage of time. *See Hunter*, 471 U.S. at 233; *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000) ("The mere passage of time cannot extinguish entirely the taint of racial discrimination."). Plaintiffs submitted significant evidence demonstrating that the 1995-1996 Amendment did not remove the discriminatory defects of the 1901 disenfranchisement provision, and instead perpetuated its racially discriminatory substance. At the very least, material questions of fact exist as to this issue. The district court's grant of summary judgment was improper.

### B. The Process by Which Alabama Re-Enacted the Moral Turpitude Provision Was Not Deliberative.

The district court also erred in concluding that Alabama's process for re-enacting the moral turpitude provision was deliberative. The district court determined that the 1995-1996 amendment to the suffrage article resulted from

"efforts over time," which "considered past reform attempts and built on them." Doc.286:P.28. But the record directly contradicts that conclusion.

The district court concluded that the 1995-1996 amendment was the culmination of decades of attempts to modify Alabama's Constitution. *Id*. But there is no evidence that the criminal disenfranchisement provision was deliberated *at all* by the 1973 Commission, the 1979 working group, the 1983 effort, or—crucially—by the Legislature in 1995. Indeed, the evidence shows the opposite. The 1973 Commission adopted Dr. Beatty's proposal with "no debate." Doc.261:P.43. The 1979 working group did not deliberate or engage with the criminal disenfranchisement provision, but merely adopted Dr. Beatty's language from 1973. Doc.269-3:P.93, 97, 104-05, 130-31, 137. The 1983 effort again replicated Dr. Beatty's language, without deliberation. Doc.261:P.42-43, 51-52. Finally, there was no legislative debate regarding the criminal disenfranchisement provision during the 1995-1996 Amendment effort. Doc.269-2:P.46; *accord* Doc.257-26:P.1 ("There were no public hearings when the Article passed the legislature in 1995"). Indeed, the 1995-96 effort was described to the public as "strictly housekeeping." Doc.261:P.53, 61. But somehow this fact did not compel the district court to draw an *inference* that the measure was in fact strictly housekeeping. Doc.286:P-25.

Furthermore, the record shows that rather than "building on" past reform efforts, the 1995-1996 Amendment ignored them entirely. After the 1979 working

group made its recommendations to the Legislature, the Joint Interim Committee to Study the New Constitution deliberated—for the only time—on the criminal disenfranchisement provision. Tony Harrison, a Black legislator from Birmingham, described the standard as "nebulous" and objected to continuing disenfranchisement for criminal convictions after Alabamians completed their sentences. Doc.256-14:P.10. A representative of Plaintiff GBM likewise objected to the continuance of criminal disenfranchisement after completion of sentence. Doc.256-19:P.22-25. And Mary Weidler expressed similar concerns on behalf of the Civil Liberties Union of Alabama: "Furthermore, the phrase 'moral turpitude' is vague and indefinite, and, when added to the disability of being a convicted felon, appears unwarranted and discriminatory." Doc.256-16:P.4.[8] After hearing this testimony, the Alabama House struck the moral turpitude provision from the proposed bill by a unanimous vote. Doc.270-6:P.6. Despite this, the 1995-1996 Amendment simply re-enacted the language first proposed by Dr. Beatty in 1973. Doc.261:P.42-43.

This evidence is sufficient to allow a rational finder of fact to conclude that the 1995-1996 process was not deliberative. The district court reached the opposite conclusion by focusing on the wrong factors and ignoring contradictory evidence.

[8] The district court dismissed this testimony because "although Mary Weidler again testified in March 1983, at that time she said nothing about the disenfranchisement provision." Doc.286:P.29. Again, this is precisely the weighing of conflicting evidence—and drawing inferences against the nonmovant—that is not permitted at this stage.

For example, the court focused on the number of attempts to change the Constitution, Doc.286:P.30, rather than the nature of the deliberations—or lack thereof—on the criminal disenfranchisement provision. The district court's grant of summary judgment should be reversed.

## III. The District Court Erred in Granting Summary Judgment for Defendants on Plaintiffs' *Ex Post Facto* Claim.

The district court also wrongly granted summary judgment for Defendants on Plaintiffs' *ex post facto* claim. "The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1866)). To violate the *Ex Post Facto* Clause, a law "must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29 (footnote omitted). A law may violate the *Ex Post Facto* Clause "even if it alters punitive conditions outside the sentence," *id.* at 32, and if it increases the potential punishment by changing it from "discretionary to mandatory," *id.* at 32 n.17.

The *Ex Post Facto* Clause seeks "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.* at 28-29 (citations omitted). "Critical to relief under the *Ex Post Facto*

Clause is not an individual's right to less punishment, but the lack of fair notice …." *Id.* at 30; *Hock v. Singletary*, 41 F.3d 1470, 1471-72 (11th Cir. 1995).

The district court correctly ruled that disenfranchisement is punishment that may not be applied retroactively under the *Ex Post Facto* Clause. But the district court erred in its analysis of the *ex post facto* claim as applied to the individual Plaintiffs and GBM.

### A. This Court's Binding Precedent Compelled the District Court's Conclusion that Disenfranchisement Is Punishment.

The district court correctly ruled that disenfranchisement is punishment. This Court has said so at least three times—twice en banc. *See Johnson*, 405 F.3d at 1228. ("Felon disenfranchisement laws … are a punitive device stemming from criminal law."); *Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020) ("*Jones I*") ("Disenfranchisement is punishment. We have said so clearly …."); *id.* (noting that Readmission Act "authorized felon disenfranchisement *only* as punishment"); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1032 (11th Cir. 2020) (en banc) ("*Jones II*") ("Florida automatically disenfranchises all felons upon conviction, and the challenged laws only lift that *punishment* for felons who have completed all terms

of their sentences." (emphasis added)); *id.* at 1039 ("Some punishments, like disenfranchisement, ….").[9]

### B. Alabama's "Moral Turpitude" Law Provided No One Fair Warning of Disenfranchisement.

Prior to HB282, Alabama's "moral turpitude" standard for disenfranchisement had no fixed meaning, was arbitrarily applied from county to county, and thus provided *no one* with fair warning of potential disenfranchisement. Laws are impermissibly vague if they either "fail[] to give ordinary people fair notice of the conduct [they] punish[]," or are "so standardless that [they] invite[] arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring). Alabama's vague law provided no notice of the crimes to which it applied and permitted county registrars unfettered discretion to impose—or not impose—disenfranchisement person by person, without regard to statewide uniformity. The law thus provided *no one* with fair notice of disenfranchisement. Its application was itself an *ex post facto* violation, as Plaintiffs pled in their initial complaint prior to the passage of HB282, Doc.1:P.52. The retroactive application of HB282 to convictions that occurred under the prior regime doubles the violation.

[9] The district court did not decide Plaintiffs' alternative due process claim, which would apply had the court found disenfranchisement nonpunitive. Doc.286:P.37. Plaintiffs preserve that claim, and would press it on remand if necessary.

When the Alabama legislature enumerated a list of disenfranchising felonies for the first time in 2017, it codified the fact that Plaintiffs received no fair warning:

> The Legislature finds and declares that … [u]nder general law, there is no comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote. Neither individuals with felony convictions nor election officials have a comprehensive, authoritative source for determining if a felony conviction involves moral turpitude and is therefore a disqualifying felony.

Ala. Code § 17-3-30.1(b)(1)(b). This should end the inquiry on whether the "moral turpitude" law provided fair warning of disenfranchisement.

The record evidence punctuates the legislature's declaration. Clay Helms, then Alabama's Director of Voter Registration, testified that although the Secretary provided lists of proposed moral turpitude felonies, registrars could "disregard[] the fact that a conviction is listed and nonetheless register[] the voter," and determine that unlisted felonies involved moral turpitude. Doc.269:P.68-69. Further, Mr. Helms testified that registrars could reach different conclusions; that the Secretary lacked the authority to ensure a uniform meaning of "moral turpitude" among counties; and that HB282 was the first "binding list of convictions that are disqualifying in Alabama." *Id.* at 97, 21-22, 204. Moreover, Mr. Helms confirmed that prior to HB282, registrars were confused by the law, which "probably" led registrars to "reach[ ] different decisions about which felonies involved moral turpitude." *Id.* at 209, 284.

Ed Packard, Alabama's Administrator of Elections, likewise testified that registrars could disregard the Attorney General's advice about which convictions involved moral turpitude and "didn't necessarily have to agree with [the guidance and advice]." Doc.269-5:P.33-34. Perrion Roberts, an Alabama voter with a drug-related conviction, testified that her conviction was not disqualifying in Jefferson County but was deemed disqualifying when she moved to Madison County. Doc.271-14:P.2.

A series of contradictory guidance documents published by state officials only made this standardless and arbitrary system worse. State officials published multiple conflicting lists of "moral turpitude" felonies. One list developed by the AOC in 2007 included 70 felonies that "an Alabama appellate court opinion, a state statute or opinion of the Attorney General ha[d] specifically by name determined to involve moral turpitude." Doc.269-10:P.6.[10] The AOC list was not binding, but the Secretary's office encouraged its use. Doc.269:P.68-69; *id.* at 63-64, 66-67.

The Secretary published a second non-binding list in the 2014 and 2015 Board of Registrars Handbooks. Doc.269-7:P.10; Doc.269-8:P.10. John Bennett, the

[10] This list was not based on court opinions or other authority on moral turpitude in the context of disenfranchisement. Instead, it primarily relied on court opinions related to an evidentiary statute about character impeachment, which was superseded in 1996. Doc.269-10:P.4; *See* Ala. Rules of Evid. Advisory Comm. Notes (recognizing that Rule 609 eliminated the "moral turpitude" standard for impeachment testimony).

Secretary's Deputy Chief of Staff, was tasked with creating the Handbooks' list, and testified that "the Secretary and I had a conversation about – that this seemed very arbitrary. The ability for the registrars to make that determination seemed arbitrary and it seemed like there was a need, a desperate need, for uniform guidance across the state." Doc.269-6:P.48.

To address these concerns, Mr. Bennett *copied a list from Wikipedia* related to federal immigration law and published it in the registrar handbooks. *Id.* at 31 ("I personally did not write it. It's from Wikipedia."). Mr. Bennett testified that he copied the list "as a placeholder" without determining whether it had any relevance to Alabama law, because he "didn't know a lot about moral turpitude at the time." *Id.* at 31-33. Nevertheless, the Handbook advised registrars that the included list was "[a] chart of felonies that meet th[e] qualification" of "felonies … involving moral turpitude" for purposes of voter eligibility. Doc.269-7:P.6; Doc.269-8:P.6; Doc.269-4:P.246.

The Handbooks contradicted the AOC list. For example, neither theft nor any drug crime is included in the Handbooks. Doc.269-7:P.10; Doc.269-9:P.10. These lists were further confused by the multiple Attorney General opinions asserting that no definitive list was possible and a separate list created by Governor Riley that contradicted the AOC list. Doc.269-10:P.11-12; Ala. Op. Atty. Gen. No. 2005-092, 2005 WL 1121853 (Mar. 18, 2005) (Ala. A.G.) ("[T]his Office cannot provide an

exhaustive list of every felony involving moral turpitude ….”); Doc.66-1:P.51-57 (1985 Attorney General Opinion compiling “non-exhaustive” list of moral turpitude crimes). And none of these lists actually determined whether someone would be disenfranchised; that choice was left to the registrars. Doc.269-4:P.67, 96.

Alabama’s “moral turpitude” standard for disenfranchisement was unconstitutional in at least two related ways. First, it was impermissibly vague because it “fail[ed] to give ordinary people fair notice of the conduct it punishe[d]” and was “so standardless that it invite[d] arbitrary enforcement.” *Johnson*, 576 U.S. at 595. Second, any effort to disenfranchise a person based upon the law was itself an *ex post facto* violation because the then-extant law gave no one “fair warning” that they would be disenfranchised if convicted and it served as “arbitrary and potentially vindictive legislation.” *Weaver*, 450 U.S. at 28-29. Because the law failed to provide *anyone* fair warning that they would be disenfranchised, instead leaving that choice to registrars’ arbitrary whims, the existence of the “moral turpitude” disenfranchising provision did not and does not provide “fair warning” necessary to permit retroactive application of HB282.

The district court nevertheless concluded that Plaintiffs had fair warning of their disenfranchisement. The court acknowledged the legislature’s declaration that the prior law failed to give notice, *see* Ala. Code § 17-3-30.1(b)(1)(b), but concluded that this “does not mean that there were no determinations about what constituted

moral turpitude." Doc.286:P.41. In the district court's view, election officials could have cited court decisions interpreting the character evidence impeachment statute, which was superseded the same year that Alabama re-enacted the moral turpitude standard, to disenfranchise Plaintiffs based on their particular felonies such that the "moral turpitude" disenfranchisement provision fairly warned them of disenfranchisement, and the retroactive application HB282 does not comparatively disadvantage them. *Id.* at 40.

This was error. As the Supreme Court has explained, an *ex post facto* "inquiry looks to the challenged provision, and not any special circumstances that may mitigate its effect on the particular individual." *Weaver*, 450 U.S. at 33. Whether Plaintiffs were actually deemed disenfranchised by registrars' attempt to enforce the undefined "moral turpitude" law (or could have been, based on some officials' practice at the time) is irrelevant. *See Peugh v. United* States, 569 U.S. 530, 562 (2013) ("[T]he *ex post facto* [C]lause looks to the *standard of punishment* prescribed by a statute, rather than to the sentence actually imposed." (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (emphasis added)).

The district court undertook the precise analysis deemed improper by the Supreme Court. Rather than assess the "moral turpitude" law itself to determine if it gave fair warning of disenfranchisement to those contemplating an offense, the district court assessed whether *judicial decisions* about *a different, superseded law*

governing trial evidence could have persuaded registrars to disenfranchise Plaintiffs, notwithstanding the failure of the law itself to provide notice. The district court's observation that determinations to impose punishment *were made* and some source—no matter how attenuated—was relied upon by officials to make those decisions—contravenes Supreme Court precedent. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Peugh*, 569 U.S. at 562. The "moral turpitude" standard fails both the "fair" and the "warning" prongs of the Supreme Court's test, as the legislature's declaration and the record evidence illustrate.

HB282 also categorically increases punishment by making mandatory what was previously discretionary. A law may impose *ex post facto* punishment "if it changes the maximum sentence from discretionary to mandatory." *Weaver*, 450 U.S. at 32 n.17. For example, in *Lindsey*, the Supreme Court held that a state law converting a maximum penalty of 15 years imprisonment to a mandatory penalty of 15 years imprisonment was an *ex post facto* law. 301 U.S. at 400-01. The Court reasoned that it was irrelevant that the same punishment was *possible* under both laws because "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Id.* at 401. "Removal of the possibility of a sentence less than fifteen years," the Court explained, "operates to [a person's] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old." *Id.* The Court noted that "[w]e

need not inquire whether this is technically an increase in the punishment annexed to the crime," because it was "plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom … prior to the expiration of the fifteen-year term." *Id.* at 401-02.

Here, HB282 replaced a system whereby registrars, in their discretion, *might* deem a particular conviction disqualifying with a system of *mandatory* disenfranchisement. Doc.269-4:P.67, 76, 204. By making compulsory what was previously discretionary, HB282 increased the severity of the punishment and thus may not be applied retroactively.

The district court sidestepped analysis of the "standard of punishment," *Peugh*, 569 U.S. at 562, and thus applied the wrong inquiry. Worse yet, it incorrectly applied the wrong inquiry; even under its erroneous framework, the district court mistakenly concluded Plaintiffs were fairly warned.

### C. Plaintiff Gamble Lacked Fair Warning He Would Be Punished with Disenfranchisement.

Plaintiff Gamble lacked fair warning he would be punished with disenfranchisement. He was convicted in 2008 of trafficking in cannabis under Ala. Code § 13A-12-231. Doc.215-6:P.2. This particular felony was excluded from the 2007 AOC list that the Secretary advised registrars to follow at the time of Mr. Gamble's offense; thus, registrars following the Secretary's advice would have permitted him to vote. Nor was Mr. Gamble's felony—or any other drug-related

felony—included in the subsequent Wikipedia-derived list in the Registrars' Handbooks. Doc.269-7:P.10; Doc.269-8:P.10. Neither the "moral turpitude" law nor the Secretary's published guidance gave Mr. Gamble *any* warning, fair or not, that he would be punished with disenfranchisement.

The district court nevertheless concluded that Mr. Gamble had fair warning of his potential disenfranchisement, citing *Ex Parte McIntosh*, 443 So. 2d 1283 (Ala. 1983). In *McIntosh*, the court considered Alabama Code § 12-21-162(b), which provided that "[a]s affecting his credibility, a witness may be examined touching his conviction for a crime involving moral turpitude." *Id.* The *McIntosh* court held that felony possession of marijuana was not a crime of moral turpitude for purposes of the witness impeachment statute, in contrast with "possession for resale," while colloquially referring to the latter as "trafficking" twice. 443 So. 2d at 1286.

In the district court's view, a judicial decision about whether a *different* felony can be the topic of cross-examination impeachment pursuant to a *different* statute somehow fairly warned Mr. Gamble he would be disenfranchised. To reach this startling conclusion, the district court cited the 2007 AOC list, noting it was "unrefuted" that the list was derived in part from such caselaw, and that "no evidence" before the court contradicted its conclusion that this caselaw was determinatively used by registrars. Doc.286:P.41. This was wrong in several ways.

*First*, the 2007 AOC memorandum—which the district court cited—excludes Mr. Gamble's crime from the list of felonies involving moral turpitude. Doc.269-10:P.8-9. The AOC surveyed the caselaw regarding character impeachment, *id.* at 6-7, and produced a list of felonies by Code citation entitled "Alabama felony offenses which have been declared or determined by an Alabama appellate court … to 'involve moral turpitude.'" *Id.* at 8. Reflecting *McIntosh*, the AOC list includes the Code citation for "Sale Marijuana," Ala. Code. § 13A-012-211. *Id.* at 9. It does not, however, include the Code citation for the felony for which Mr. Gamble was convicted—trafficking in cannabis. Ala. Code § 13A-12-231. The AOC was not alone in this view. The Attorney General noted in a 2005 opinion that *McIntosh* announced that "possession of marijuana for resale" involved moral turpitude, but did not identify "trafficking in cannabis" as a felony involving moral turpitude. Ala. Op. Atty. Gen. No. 2005-092, 2005 WL 1121853. If the AOC Legal Director and Attorney General read *McIntosh* and determined that it failed to give notice that Mr. Gamble's felony involved moral turpitude, and the Secretary advised registrars to follow that determination, then *McIntosh* could not conceivably have given *Mr. Gamble* "fair warning" that he could be disenfranchised.

*Second*, the AOC and Attorney General correctly read *McIntosh* to not reach Mr. Gamble's conviction. A trafficking in cannabis conviction under Alabama Code § 13A-12-231 does not require proof of resale or attempted resale; rather, the mere

"actual or constructive possession" of marijuana in excess of 2.2 pounds is a violation. *Id.* § 13A-12-231(1). So a person accumulating marijuana for personal use is just as guilty of "trafficking in cannabis" as a person who "knowingly sells, manufactures, [or] delivers" that same amount of marijuana. *Id.* Only the weight of the marijuana matters; not the violator's purpose. But under *McIntosh*, possession of *any amount* of marijuana for personal use does not involve moral turpitude. *McIntosh* therefore did not provide fair warning that a trafficking conviction under Alabama Code § 13A-12-231 would be disenfranchising; that statute proscribes conduct that the *McIntosh* court concluded did *not* involve moral turpitude.[11]

*Third*, the idea that a twenty-five-year-old case interpreting a defunct statute about witness impeachment could plausibly provide *fair warning* that Mr. Gamble would be punished with disenfranchisement is absurd. Whether a law violates the *Ex Post Facto* Clause is judged by "the standard of punishment prescribed by [that] statute," *Lindsey*, 301 U.S. at 400, not by judicial decisions interpreting a *different*, superseded statute. This is especially so when elections officials published lists *about the felony disenfranchisement law* informing Mr. Gamble he would not be disenfranchised.

[11] The district court's focus on the colloquial use of "trafficking" in *McIntosh* is thus misplaced, as demonstrated by the AOC's specification of exact Code citations in its list—a list based upon *McIntosh* and other caselaw.

### D. Plaintiff Thompson Lacked Fair Warning She Would Be Punished with Disenfranchisement.

Plaintiff Thompson lacked fair warning she would be punished with disenfranchisement. Ms. Thompson was convicted of theft in 2005 for conduct that occurred in 2004. Doc.215-4:P.2. The district court concluded that Ms. Thompson had fair warning that her conviction would result in disenfranchisement, citing *Stahlman v. Griffith*, 456 So. 2d 287 (Ala. 1984), which announced that misdemeanor theft involved moral turpitude under the witness impeachment statute. Doc.286:P.40-42. This was error.

*First*, the district court erred by concluding that Ms. Thompson had fair warning at the time of her offense in 2004 that, in 2007, election officials would borrow caselaw from the evidentiary context to list theft as a potentially disenfranchising felony. *Id.* at 41. "At the time of [Ms. Thompson's] offense," *Peugh*, 569 U.S. at 533, she could not have been aware of a determination that the AOC would make three years later. Indeed, the Attorney General's Opinion in existence at the time of Ms. Thompson's offense *excluded theft* from the list of crimes of moral turpitude. In 1985—one year after *Stahlman*—the Attorney General explained that he "attempted to collect the existing cases on this subject" to assemble a list of crimes that did (or did not) involve moral turpitude. Doc.66-1:P.54. He listed fourteen crimes involving moral turpitude with supporting case citations, noting that those cases were "in a context other than the eligibility to vote." *Id.* at 54-55. Neither

theft nor *Stahlman* were included. *Id. Stahlman* could not plausibly have provided Ms. Thompson with fair warning of a conclusion the Attorney General did not reach.

*Second*, the district court erred—as with Mr. Gamble—by concluding that judicial decisions about a different, superseded law provided the type of fair warning that the *Ex Post Facto* Clause demands. *See Lindsey*, 301 U.S. at 400 (directing comparison of the prior statute and the new statute).[12]

*Third*, although not yet published at the time of her offense, the Secretary took the position in his 2014 and 2015 registrar handbooks that theft was *not* a disqualifying moral turpitude felony and advised registrars that the handbooks' enumerated felonies that "qualify as involving moral turpitude." Doc.269-7:P.6; Doc.269-8:P.6. The disenfranchisement provision did not change between 2004 and 2014; if the Secretary concluded theft did not involve moral turpitude, how could Ms. Thompson have been fairly warned otherwise?

### E. Retroactive Application of HB282 to Plaintiffs Lanier and King Is an *Ex Post Facto* Violation.

The district court also erred in determining that retroactive application of HB282 to Plaintiffs Lanier and King was not an *ex post facto* violation. As the district court noted, both were convicted before 1996, when the Secretary interpreted

[12] Notably, in enacting HB282, the Legislature was explicit that the definition of moral turpitude in the voting context is not applicable to other contexts. *See* Ala. Code § 17-3-30.1(d).

Alabama law to make *all* felonies disenfranchising. Doc.286:P.39. But, as this Court has observed, "disenfranchisement is a *continuing* form of punishment…. The sanction of disenfranchisement cannot be described merely as a one-time revocation of the right to vote; rather, the punishment visits the felon at each and every election." *Jones I*, 950 F.3d at 819-20. In this unique context, it is appropriate to review the standard of punishment Alabama law applied not only at the time of Mr. Lanier's and Ms. King's offenses, but also when the punishment "visits the felon at each [subsequent] election." *Id.* For Plaintiffs Lanier and King, the standard of punishment changed from mandatory to discretionary and back to mandatory. This retroactive re-imposition of a greater sentence—untethered to any new criminal conduct—is an unlawful retroactive increase in the quantum of punishment they face. *See supra* Part III.B.

### F. The District Court Erred by Concluding GBM Lacked Standing for its *Ex Post Facto* Claim.

Finally, the district court erred by concluding GBM lacked standing for its *ex post facto* claim. Defendants' only argument in favor of summary judgment as to GBM was that, as an organization, it cannot vote and thus its *ex post facto* claim "should be treated as facial and should fall along with those of the individual Plaintiffs." Doc.261:P.74, 79. Unsure what this even meant (*ex post facto* claims *are* facial; they compare an earlier and a later statute), Plaintiffs responded with evidence that GBM had diverted resources assisting people to apply for CERVs—people

"who would be eligible to register without restoration but for [the *ex post facto*] violation." Doc.286:P.46.

Observing that "the parties' arguments with respect to an ex post facto claim by GBM are not well-developed and are included only in footnotes in their voluminous briefs," the district court nevertheless granted summary judgment for Defendants on standing grounds. *Id.* at 42-43. It committed several errors.

*First*, the court erred by inverting the summary judgment burden. The district court correctly observed that Defendants had not developed their argument, but erroneously punished Plaintiffs—the non-movants—for that fact. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

*Second*, the district court erred by *sua sponte* rejecting GBM's standing—unchallenged by Defendants—without prior notice that the issue would be finally decided at summary judgment. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015) ("[E]lementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the [Plaintiff] an opportunity to provide evidence" to establish standing.).

*Third*, the district court erred by conflating standing with its erroneous merits analysis. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1202 (11th Cir. 1989) ("When considering standing …. we must [] accept the validity of plaintiff's theory of a cause

of action ….”). The district court reasoned that to show standing, GBM needed to prove that each person it assisted lacked fair warning under the “moral turpitude” law, rather than that the law itself failed to provide fair warning. Doc.286:P.41-42. But that is a merits question; GBM claims that the prior law *itself* failed to provide fair warning of the punishment imposed by HB282, and that HB282 increased punishment for everyone by making mandatory what was previously discretionary. *See supra* Part III.B. The district court erred by conflating the merits with standing.

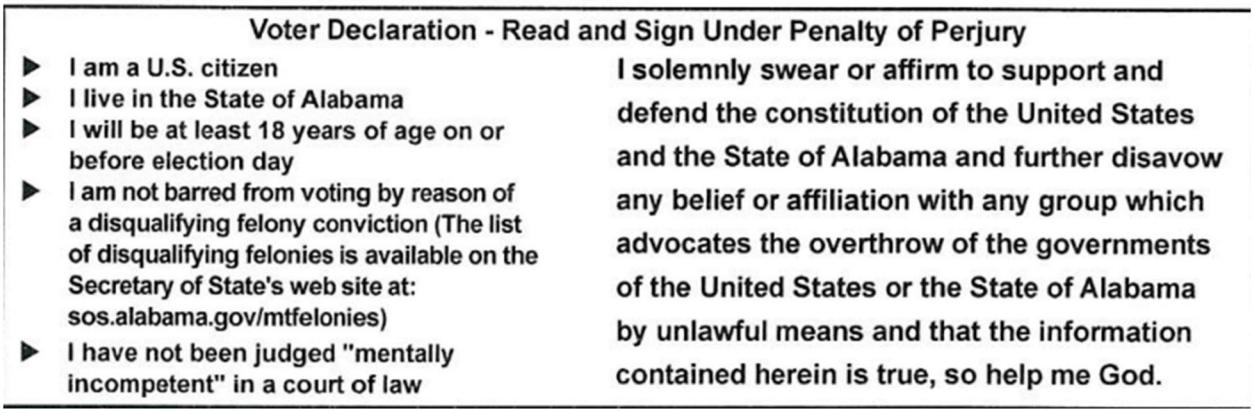
*Fourth*, the district court’s merits analysis was erroneous, for the same reasons its analysis of Plaintiffs Gamble’s and Thompson’s claims was erroneous. *See supra* Parts III.C & D. The court’s focus on whether election officials might have (in their discretion) *decided* the moral turpitude law applied to disenfranchise any particular person GBM assisted is irrelevant; the questions are whether the moral turpitude law *itself* provided fair warning to a person contemplating an offense, *see Weaver*, 450 U.S. at 33; *Peugh*, 569 U.S. at 562, and whether HB282 categorically increased punishment from discretionary to mandatory, *see supra* Part III.B. The district court compounded its error by applying the wrong merits analysis to GBM’s claim.

These errors led the district court to conclude that GBM lacked standing. But GBM proffered evidence that easily satisfies this Court’s standing jurisprudence. *See, e.g.*, *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (noting that “divert[ing] personnel and time to educating potential voters … and assisting

voters" to overcome an alleged impermissible election law establishes standing). As the district court acknowledged, Doc.286:P.9, 42, GBM proved that it redirected resources assisting people to seek CERVs who, but for the *ex post facto* violation, could simply register to vote. Doc.215-12:P.2-3 (GBM representative testifying regarding GBM's efforts to research whether convictions are disqualifying); *see also* Doc.257-31:P.4; Doc.271-15:P.35, 41-59. The district court's judgment against GBM was erroneous.

## IV. The District Court Erroneously Granted Summary Judgment to Defendants on GBM's NVRA Claim.

GBM's NVRA claim raises a straightforward question of statutory interpretation. Under the NVRA, Alabama's State Form (the "Form") must "*specif[y]* each eligibility requirement (including citizenship)." 52 U.S.C. § 20508(b)(2) (emphasis added). The word "specify" means "to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or to distinguish by words one thing from another." *Black's Law Dictionary* (6th ed. 1990). But Alabama's Form does not "state in full and explicit terms" its eligibility requirement related to felony convictions. The Form mentions "disqualifying felonies," but does not state that only certain felonies are disqualifying, nor does it specify which felonies. Instead, it refers the reader elsewhere:



Voter Declaration - Read and Sign Under Penalty of Perjury

- I am a U.S. citizen
- I live in the State of Alabama
- I will be at least 18 years of age on or before election day
- I am not barred from voting by reason of a disqualifying felony conviction (The list of disqualifying felonies is available on the Secretary of State's web site at: sos.alabama.gov/mtfelonies)
- I have not been judged "mentally incompetent" in a court of law

I solemnly swear or affirm to support and defend the constitution of the United States and the State of Alabama and further disavow any belief or affiliation with any group which advocates the overthrow of the governments of the United States or the State of Alabama by unlawful means and that the information contained herein is true, so help me God.

Doc.260-7:P.2.[13]

Statutory context and legislative history confirm that Alabama's Form does not meet the NVRA's textual mandate. This Court should reverse and direct entry of summary judgment to Plaintiff GBM.

### A. Alabama's Vague Reference to "Disqualifying Felonies" Does Not Satisfy the Plain Language of the Statute.

"It is well established that, when … statutory language is plain, [federal courts] must enforce it according to its terms." *Jimenez v. Quarterman,* 555 U.S. 113, 118 (2009); *see Nat'l Ass'n of Mfrs. v. Dep't of Def.,* 138 S. Ct. 617, 631 (2018). And "[i]n interpreting the language of a statute, [courts] generally give the words used their ordinary meaning."' *In re Griffith*, 206 F.3d 1389, 1393 (11th Cir. 2000)

[13] Prior to 2019, the State Form only stated that each voter must "[n]ot have been convicted of a disqualifying felony, or if [s/he has] been convicted, [s/he] must have had [his or her] civil rights restored," and included no reference to a website. Doc.95-1:P.6.

(internal quotation marks omitted); *see also Bostock v. Clayton Cty., Ga.,* 140 S. Ct. 1731, 1738-39, 1754 (2020).

The NVRA provides that state-issued mail-in forms used to register voters for federal elections "shall include a statement that … specifies each eligibility requirement (including citizenship)." 52 U.S.C. § 20508(b)(2)(A). This command is unambiguous. It requires States to not merely reference the existence of eligibility requirements—*e.g.,* "disqualifying felonies" or "disqualifying age"—but inform the reader of the *specific* eligibility requirements that apply. When Congress uses the word "specify," it means "to name or state explicitly or in detail." *Kucana v. Holder,* 558 U.S. 233, 243 n.10 (2010).

The Form does not "specify" the voter eligibility requirement related to felony convictions in Alabama. Instead, it obliquely refers to "disqualifying felon[ies]" without identifying which felonies *are* disqualifying or even acknowledging that some felonies are *not* disqualifying. "[M]arginally ambiguous" language does not suffice to "specify" something. *Kucana*, 558 U.S. at 243 n.10. And "disqualifying felonies" is wholly, not just "marginally," ambiguous. A registrant could reasonably interpret the word "disqualifying" to be *describing* felonies as disqualifying rather than *modifying* the term to indicate that only a discrete set of felonies is disqualifying. This point is not marginal: most felony convictions in Alabama are not disqualifying, *see* Ala. Code § 17-3-30.1(c), and most people with felony

convictions in Alabama are not disqualified on that basis, *see* Doc.260-8:P.23. And even if a registrant with a felony conviction understands that only certain felonies are disqualifying, they cannot ascertain their eligibility by reading the Form.

At most, the Form provides notice that an eligibility requirement related to felony conviction exists. This stands in contrast to the Form's specification of other eligibility requirements, providing that one must "[b]e a citizen of the United States," "[l]ive in Alabama," and "[b]e at least 18 years of age on or before election day." Doc.260-7:P.2. The Form would violate the NVRA if it provided that one must "not be disqualified by reason of country of citizenship," "not be disqualified by reason of state of residency," or "not be of a disqualifying age."[14] So too, it violates the NVRA by failing to specify the eligibility requirement based on felony conviction.

### B. The NVRA's Structure, Legislative History, and Purpose Compel the Same Result.

The plain language of 52 U.S.C. § 20508(b)(2)(A) is reinforced by its structure, purpose, and legislative history.

The mandate that States provide accurate and specific information about voter eligibility requirements runs throughout the NVRA. Indeed, this fundamental

[14] Notably, before the State realized that the NVRA actually uses the term "specify," it contended that if "Congress intended the forms to 'specify' eligibility requirements, Congress would have used a world like 'describe,' 'explain,' 'detail,' or 'specify.'" Doc.95:P.21. The State's initial understanding of "specify" "supports the Plaintiffs' interpretation that specify means more than what the State has included on its form." Doc.178:P.21.

prerequisite to a functional voter registration system is included in every provision related to the various avenues of registration established by the Act. *See* 52 U.S.C. § 20504(c)(2)(C); *id.* § 20506(a)(6)(A)(i)(I); *see also id.* § 20507(a)(5).

The legislative history also confirms this requirement's importance to the NVRA's overall purpose. First, Congress stressed the importance that every applicant "be advised of the voting requirements and the need to decline to register if he or she does not meet the requirements," and explained that "[t]he bill provides that all registration requirements should be set forth in the application to register to vote so that they will be readily available for each applicant to review during the application process." S. Rep. No. 103-6, at 24 (1993); H.R. Rep. No. 103-9, at 7-8 (1993) (similar).[15] Second, Congress noted the importance of these specifications to maintaining accurate lists of only eligible voters and preventing ineligible voters from registering. S. Rep. No. 103-6, at 11; H.R. Rep. No. 103-9, at 8. Third, and importantly here, Congress noted that requiring specific eligibility requirements on registration forms would allow potential voters to determine their eligibility from the application's face without disclosing personal or private information, such as past criminal convictions. H.R. Rep. No. 103-9, at 7-8 ("Since some of the reasons for declining to register to vote may involve matters of personal privacy, such as

[15] Including a link to the State's website does not satisfy the NVRA. Registrants at a motor vehicle or other government agency may not have access to the Internet, defeating the purpose of promoting on-site registration.

ineligibility under State law due to mental incompetence or a criminal conviction, an individual who declines to register to vote shall not be questioned as to the reasons for such action."); S. Rep. No. 103-6, at 24 (same). Thus, Congress sought to ensure voters can assess their eligibility at the point of potential registration. Alabama's Form prevents people with past convictions from doing that.[16]

### C. The District Court's Contrary Reasoning Fails.

The district court's decision rests on three fallacious rationales.

*First*, the district court adopted Defendant Merrill's strawman argument that under a plain language reading of the NVRA, the State would have to list every out-of-state or federal conviction that falls under the Felony Voter Disqualification Act's catchall provision for cognates to the disqualifying felonies listed in the Act. Doc.286:P.54.

This reasoning fails basic scrutiny. A plain language reading of the NVRA only requires Defendant Merrill to specify the eligibility requirements related to felony convictions as set forth in Alabama law. Thus, the Form must include the disqualifying convictions specified by statute, and the catchall encompassing

[16] Furthermore, promoting voter registration without providing accurate and specific eligibility information can lead to the registration of ineligible voters. Thus, failure to comply with the specificity requirement undermines the twin goals of the NVRA: enhanced voter participation and accurate voter registration lists. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018).

convictions from other jurisdictions "which, if committed in [Alabama] would constitute" one of the specified convictions. Ala. Code. § 17-3-30.1(c)(48).

*Second*, the fact that *other provisions* of the NVRA purportedly require less specificity in eligibility requirements does not mean that the plain meaning of the term "specify" in the mail-registration form provision should be interpreted as less demanding to avoid "an odd result." Doc.286:P.55.

The "odd results" canon the district court invoked is really the rule against absurdities. *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996). And this Court "rarely invokes such a test to override unambiguous legislation." *United States v. Crape*, 603 F.3d 1237, 1245 (11th Cir. 2010). Even if a statute leads to "strict" or "harsh results in some cases," courts "are not free to rewrite the statute that Congress has enacted" absent absurdity. *Dodd v. United States*, 545 U.S. 353, 359 (2005). And "[t]he absurdity must consist of a disposition that no reasonable person could intend." Antonin Scalia & Bryan A. Garner, *Reading Law* 237 (2012). The "odd result" of slightly different registration forms for different venues is not the type of absurdity this limited canon is intended to prevent.

Moreover, nothing about the NVRA's statutory structure subjects all registration forms to the same exact requirements. The district court read into the statute an "an intent to inform voters of eligibility requirements in the same manner with respect to motor, mail-in, and agency registration" based on 52 U.S.C.

§ 20507(a)(5). Doc.286:P.55. That provision states that all registration forms, whether submitted at a DMV, another state agency, or by mail, must "inform applicants of--(A) voter eligibility requirements; and (B) penalties provided by law for submission of a false voter registration application." 52 U.S.C. § 20507(a)(5).

But this provision does not bar Congress from using more demanding language with respect to specific voter registration avenues, which is precisely what Congress did here. Indeed, the mail-registration form provision at issue in this case takes account of § 20507(a)(5)(A)'s "inform" requirement in paragraph 52 U.S.C. § 20508(b)(4), but also directs that forms "specif[y] each eligibility requirement" within a separate paragraph. *Id.* § 50208(b)(2)(A). The district court's reading would thus render Subparagraph (b)(2) superfluous, a highly disfavored outcome. *See Clark v. Rameker*, 573 U.S. 122, 131 (2014).

*Third*, the district court "[found] it appropriate to give deference" to the EAC's publication of Defendant Merrill's proposed language for the Federal Form. Doc.286:P.57. The EAC's emails, which are devoid of analysis, warrant no deference.

To start, deference to an agency's interpretation of a statute only applies if the statutory language is ambiguous. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) (holding deference applies "if the statute is silent or ambiguous with respect to the specific issue"). Nothing about this text is ambiguous.

*See supra* Parts IV.A-B. The "statutory provision[] before" this Court "deliver[s an] unmistakable command[]," and thus no deference is due. *Id.*

Regardless, the EAC's acceptance of the language drafted by Defendant Merrill's office reflected in email correspondence does not constitute reasoned decision-making warranting deference. Certainly, it is not entitled to *Chevron* deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). As a basis for interpreting the NVRA, the EAC's emails are "beyond the *Chevron* pale." *United States v. Mead Corp.,* 533 U.S. 218, 234 (2001).

Less formal interpretations *may* be "'entitled to respect' under … *Skidmore*" deference, but "only to the extent that those interpretations have the 'power to persuade[.]'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). But the "interpretation" by the EAC the district court deferred to was no interpretation at all. The record merely shows that the EAC allowed Defendant Merrill to dictate the substance of the state-specific instructions he submitted for inclusion in the Federal Form. Nothing in the record suggests that the EAC made any assessment of the instructions' compliance with the statute. The EAC asked the Secretary of State's office to write revised instructions for the Federal

Form, which it did; the EAC then revised that language according to the Secretary's instruction. Doc.260:P.2-3. The EAC's emails have no "power to persuade." *Christensen*, 529 U.S. at 587.

Because the district court flouted the NVRA's plain text and applied substantial agency deference to analysis-free emails, this Court should reverse its grant of summary judgment to Defendants on GBM's NVRA claim and direct summary judgment to Plaintiff GBM.

## CONCLUSION

The district court opinion should be reversed and the Court should remand this case for further proceedings.

March 18, 2021

Respectfully submitted,

/s/ Mark P. Gaber
Mark P. Gaber
Danielle M. Lang
J. Gerald Hebert
Molly E. Danahy
Jonathan M. Diaz
Caleb Jackson
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2202
mgaber@campaignlegal.org
dlang@campaignlegal.org
ghebert@campaignlegal.org
mdanahy@campaignlegal.org
jdiaz@campaignlegal.org
cjackson@campaignlegal.org

Jessica Ring Amunson
Noah B. Bokat-Lindell
Jenner & Block LLP
1099 New York Ave. NW, Ste. 900
Washington, DC 20001
jamunson@jenner.com
nbokat-lindell@jenner.com

Jason Hipp
Jenner & Block LLP
919 Third Ave.
New York, NY 10022
jhipp@jenner.com

James U. Blacksher
825 Linwood Rd.
Birmingham, AL 35222
205-612-3752
jublacksher@gmail.com

Joseph Mitchell McGuire
McGuire & Associates LLC
31 Clayton St.
Montgomery, AL 36104
jmcguire@mandabusinesslaw.com

*Counsel for Appellants*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 32-4 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,945 words, as counted by the word-processing system used to prepare it.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

March 18, 2021

/s/ Mark P. Gaber
Mark P. Gaber

*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on March 18, 2021. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 18, 2021

/s/ Mark P. Gaber
Mark P. Gaber

*Counsel for Appellants*