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

REPLY 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 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, the undersigned counsel certifies that all persons with an interest in the outcome of this case have been previously identified in Plaintiffs-Appellants' opening brief and Defendants-Appellees' response brief. Counsel for Plaintiffs-Appellants certifies that no additional publicly traded company or corporation has an interest in the outcome of this case or appeal.

June 7, 2021

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Plaintiffs-Appellants

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I. The District Court Failed to Apply the Correct Standard.

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts must view "the evidence and all inferences drawn therefrom . . . in the light most favorable to the [non-movant]." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

The district court failed to apply this standard. Its opinion "does not reflect any inferences drawn in Appellants' favor," *Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1347 (11th Cir. 2015), nor does it reflect any determination whether, accepting Plaintiffs' evidence as true, "reasonable minds might differ on the inferences" arising therefrom, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999).

This is not the "rare" circumstance where a district court may draw inferences against the non-moving party on summary judgment. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978). The parties did not agree on the facts and indeed raised "issues of credibility [and] controversies with respect to the substance of the proposed testimony." *Id.* Defendants have offered one version of the facts and Plaintiffs have proffered specific conflicting evidence that, taken as true and in the light most favorable to Plaintiffs, is sufficient to create a material dispute of fact.

See, e.g., Blue-Br.[1] 23-25, 34-36, Parts III.C-F. Furthermore, the parties have not only proffered conflicting expert testimony, but also disputed the credibility and the substance of that testimony. *See, e.g.*, Doc.286:P.17-20.

The district court was obligated to deny summary judgment and proceed to trial to permit live testimony and cross examination. *Ga. State Conference of NAACP*, 775 F.3d at 1348 ("[A] bench trial, with the benefit of live testimony and cross examination, offers more than can be elucidated simply from discovery in the form of deposition testimony.").

II. The District Court Erred by Granting Summary Judgment on Plaintiffs' Intent Claim.

The district court erred by granting summary judgment on Plaintiffs' intent claim. The district court gave no weight to Plaintiffs' expert testimony and improperly resolved disputed facts in Defendants' favor.

Defendants first contend that the Supreme Court's intentional discrimination holding in *Hunter v. Underwood*, 471 U.S. 222 (1985), was about Section 182's inclusion of misdemeanors, not its "moral turpitude" standard. Red-Br. 5, 29-31. Not so. The *Hunter* plaintiffs were disenfranchised solely by the "moral turpitude" standard—their offense was not among the enumerated misdemeanors in Section 182. *Hunter*, 471 U.S. at 224. So the only thing the Supreme Court *could* have

[1] Plaintiffs cite to their opening brief as "Blue-Br." and Defendants' brief as "Red-Br."

invalidated as purposefully discriminatory was Section 182's use of "moral turpitude" as a standard of disenfranchisement. The first sentence of *Hunter* illustrates this: "We are required to decide the constitutionality of Art. VIII, § 182, of the Alabama Constitution of 1901, which provides for the disenfranchisement of persons convicted of, among other offenses, "any crime . . . involving moral turpitude." 471 U.S. at 223-24. Likewise, this Court characterized the moral turpitude standard as a "serpent of uncertainty." *Underwood v. Hunter*, 730 F.2d 614, 616 n.2 (11th Cir. 1984) (internal quotations and citations omitted). The fact that this standard was applied to misdemeanants in *Hunter* does not mean the standard loses its discriminatory purpose when applied to people with felony convictions.[2] "Misdemeanor" and "felony" were not purposefully employed to advance intentional discrimination—"moral turpitude" was.

The evidence Plaintiffs proffered below proves—and at the very least creates a dispute of fact precluding summary judgment—that the moral turpitude standard, and not the level of offenses chosen, was the chief tool of the Framers' discriminatory intent. As Plaintiffs' history expert testified, citing a newspaper owned by Alabama Governor William Dorsey Jelks, the discretion Section 182 gave

[2] Defendants are correct that the *Hunter* plaintiffs brought an as-applied claim based on their misdemeanor conviction status. But *Hunter*'s and *Underwood*'s reasoning was about the purposeful discrimination motivating the adoption of "moral turpitude" as the standard.

voter registrars was "the milk in the cocoanut" of the State's plan to intentionally discriminate against Black voters, and "moral turpitude" was the chief instrument that enabled that discretion. Doc.270-3:P.43.

Defendants claim that Plaintiffs "cite nowhere in the record" to establish that the moral turpitude standard is rooted in intentional discrimination in the context of felony disenfranchisement. Red-Br. 26. The district court similarly concluded that "the Plaintiffs in this case have not provided other evidence of intent." Doc.286:P.34. But the Supreme Court has already addressed this issue, finding "conclusively that § 182 was enacted with the intent of disenfranchising blacks," and that "*[i]n addition* to the general catchall phrase 'crimes of moral turpitude' the suffrage committee selected such crimes . . . that were thought to be more commonly committed by blacks." *Hunter*, 471 U.S. at 229, 232 (emphasis added). And Plaintiffs' expert Dr. Riser's report, though ignored by the district court and Defendants, explains at length how the concept of crimes involving moral turpitude was inextricably linked to the notoriously racist system of convict leasing in the years leading up to the 1901 Constitution:

> [F]or a white supremacist society that criminalized African American life, [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, namely, to petty and grand larceny.

Doc.270-3:P.33-39.

As Dr. Riser explained, "registrars could, and were expected to, decide for themselves what . . . moral turpitude meant." Doc.270-3:P.44. A newspaper editor stated at the time in plainly racist terms that "the new boards of registrars could soon be counted upon to decide 'whether the unlawful appropriation of a chicken or a ripe watermelon is an infamous crime involving moral turpitude.'" Doc 270-3:P.45.

This was an intentional reversal of the political progress Black Alabamians made during Reconstruction. Just over 30 years after the constitutional convention was "dominated by Radical Republicans and African Americans," as Defendants' own expert explained, registrars used the flexible moral turpitude standard to lock Black Alabamians out of the political process and establish white supremacy. Doc.257-1:P.11. It was not the difference between misdemeanor and felony that tainted Alabama's criminal disenfranchisement provision with racially discriminatory intent, but rather the moral turpitude standard, which allowed registrars to selectively disenfranchise Black voters.

The 1996 amendment preserved the heart of the intentionally discriminatory 1901 law: an undefined moral turpitude standard combined with unfettered discretion that was intended to—and did—allow registrars to preserve a white polity.

The district court failed to take these disputed facts into consideration and improperly construed this factual conflict in favor of Defendants.[3]

A. The 1996 Amendment Process Was Not Deliberative.

Defendants contend that Section 177(b) was "enacted through a deliberative process" that eliminated the taint of racially discriminatory intent from Alabama's disenfranchisement provision. Red-Br. 20. In support, they cite *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc), to argue that Alabama overcame the racially-discriminatory history behind the moral turpitude standard when the criminal disenfranchisement provision was reenacted in 1996. Not so.

In *Johnson*, this Court held that Florida was only able to overcome the racially discriminatory taint of its disenfranchisement statute because the provision "was *substantively* altered and reenacted in 1968 in the absence of any evidence of racial bias." *Johnson*, 405 F.3d at 1225 (emphasis added). Alabama's enactment of Section 177(b) neither was substantive nor occurred "in the absence of any evidence of racial bias."

As Plaintiffs explained in their brief, Blue-Br. 5, the moral turpitude standard as it currently appears in Section 177(b) was prepared by Dr. Beatty in 1973. Dr.

[3] Defendants' discussion of *Hunter*'s burden-shifting steps, Br. at 23-24, is misplaced because Plaintiffs' sole burden as the non-movants was to show the presence of disputed material facts at step one as to discriminatory intent, which they did. *See supra*.

Beatty explained that Section 177(b) restated the 1901 felony disenfranchisement provision in "general terms," and when that language was finally passed in 1995, it was described to voters as "strictly housekeeping," not as a *substantive* change to the provision. Doc.257-17:P.52.

Moreover, the *Johnson* Court explained that Florida's reenactment of its felony disenfranchisement provision eliminated the racially discriminatory taint because "at the time of the . . . reenactment, no one had ever alleged that the . . . provision was motivated by racial animus." 405 F.3d at 1224. Alabama's 1995-96 reenactment efforts, on the other hand, came just ten years after the Supreme Court declared that the "moral turpitude" standard was intentionally discriminatory and that it "continue[d]" to "discriminate against blacks on account of race." *Hunter*, 471 U.S. at 233.[4] Defendants' reliance on *Johnson* is misguided.

Likewise, Defendants' contention that Section 177(b) involved "as much, or more, process" as the Fifth Circuit approved in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1988), is incorrect. Red-Br. 34. In *Cotton*, two sets of deliberations led to two substantive amendments to Mississippi's disenfranchisement provision. *Cotton*, 157

[4] Defendants tout the fact that the 1996 Amendment was pre-cleared by the DOJ as evidence of its lack of discriminatory intent. Red-Br. 9. But the preclearance letter sent to DOJ omitted the fact that multiple people had testified in opposition to the moral turpitude provision during the 1979 revision process, and did not address *Hunter* or explain why moral turpitude was included in the Amendment despite *Hunter*'s holding. *See id*.

F.3d at 391. That deliberative process cannot be squared with Defendants' and the district court's characterization of the *failed* 1973, 1979, and 1983 efforts to amend Alabama's Constitution, none of which had the benefit of *Hunter*'s finding that the moral turpitude standard was racially discriminatory, and none of which resulted in a substantive amendment of the moral turpitude provision. The only successful attempt to amend the disenfranchisement provision occurred in 1995-96, during which the legislature re-adopted a standard that had been declared racially discriminatory ten years earlier, without any public hearings, debate, testimony, or deliberation—something Defendants do not dispute. Red-Br. 20.

Even assuming the failed 1973, 1979, and 1983 efforts were part of a deliberative process, the district court still erred because it improperly weighed the evidence from those efforts in Defendants' favor. For example, the district court improperly discounted Mary Weidler's 1979 testimony on the moral turpitude standard's intentionally discriminatory impact on Black voters:

> The Civil Liberties Union further believes that disenfranchising a person for conviction of a crime of "moral turpitude" denies that person the right to vote and violates the U.S. Constitution. *It was clear from the legislative history of the 1901 Alabama Constitution that the section from which 7.02 is derived was specifically adopted because of a supposed disparate impact on black citizens, with the intent to disenfranchise blacks*. A continuation of that thinking today is clearly unacceptable. I urge you to delete persons convicted of a felony involving moral turpitude from Section 7.02.

Doc.256-16:P5. (emphasis added). Instead, the district court relied on Ms. Weidler's purported failure to raise this issue again in 1983 when she submitted testimony on an entirely different issue related to entirely different provisions in the Alabama Constitution. Doc.257-22 ("I wish to make comments on only two sections: 1.01, The Equality and Rights of Man, and 1.03, Due Process and Equal Protection."). This weighing of the evidence and drawing inferences against Plaintiffs to resolve disputed issues of fact is improper at summary judgment.

Defendants also wrongly contend that the 1983 revision effort "completely" cleansed the 1901 Constitution; for that proposition they cite a *draft* memorandum by Senator DeGraffenreid disapproving of the 1901 Constitution as "designed to prevent blacks [and others] from voting." Red-Br. 9. DeGraffenreid's personal, unpublished memo does not mention the moral turpitude standard or criminal disenfranchisement provision, and instead refers to "voting and elections" generally. Doc. 257-17:P.41–42. His draft, which was never part of the legislative record, does not prove that the failed 1983 efforts were intended to remove the discriminatory taint from the criminal disenfranchisement provision. Nor does it prove that the 1983 effort involved "completely rew[riting]" the felony disenfranchisement provision. Red-Br. at 32. Rather, the evidence shows that the 1983 effort simply re-inserted, without deliberation, the moral turpitude provision that was carried forward from the 1901 Constitution in every successive revision effort except 1979, when it was

successfully removed after Ms. Weidler testified that it was racially discriminatory. Red-Br. 8.

B. The 1996 Constitutional Amendment and its Enabling Legislation Perpetuate the Taint of Racial Discrimination.

Defendants similarly contend that Alabama "narrowed the category of people subject to disenfranchisement" with the passage of the 1996 Amendment, neutralizing the discriminatory intent. Red-Br. 39. But Plaintiffs provided specific evidence that the 1996 amendment did *not* narrow the category of people subject to disenfranchisement. The district court's failure to credit that evidence and draw inferences in support of Plaintiffs was inappropriate at summary judgment.

First, Defendants take credit for eliminating the misdemeanors by adopting a provision that only disenfranchised those convicted of moral turpitude felonies. *See* Red-Br. at 28. But this purported narrowing was accomplished by the Supreme Court striking down the 1901 provision as racially discriminatory in *Hunter*, not by the state. This type of "judicial pruning" is "not sufficient to remove a taint of discrimination." Doc.286:P.26 (citing *Harness v. Hosemann*, 2019 WL 8113392 at *8 (S.D. Miss. 2019)).

Second, Defendants assert that the 1996 Amendment narrowed the definition of disenfranchising crimes from all felonies to only moral turpitude felonies, and that this substantive change cleanses the taint of racial discrimination. But Plaintiffs have put forth substantial evidence that it was the moral turpitude standard *itself* that

was racially discriminatory, and that it was adopted precisely because it afforded registrars discretion to selectively disenfranchise Black Alabamians. Thus, to the extent the 1996 amendment narrowed the category of disenfranchising crimes, it *eliminated* a broader standard—all felonies—that Defendants assert had no racial motivation, and adopted one that was intentionally designed to discriminate. This is precisely the opposite of the type of substantive change courts have found to cleanse past discriminatory intent. *See Johnson*, 405 F.3d at 1224 (finding that intent to discriminate can be cleansed by expanding criminal disenfranchisement to include crimes that had been "historically excluded because they were not considered 'black' crimes.") (quoting *Cotton*, 157 F.3d at 391).

Third, Defendants themselves admit that the 1996 Amendment did *not* narrow which crimes were disenfranchising. Red-Br. at 30. Indeed, because of the purposeful vagueness of the moral turpitude standard, and the discretion afforded to the registrars in interpreting it, the registrars continued to disenfranchise voters on the basis of *any* felony conviction for nearly a decade after the so-called narrowing amendment was passed, and only stopped doing so after the Alabama Supreme Court intervened. *Id.* The state is due no credit for adopting a "narrowing" standard so indefinite that registrars were empowered to continue implementing it as if no change had occurred for nearly ten years.

Finally, Defendants' overall portrayal of the progression of events from 1901 to today blinks reality. The 1901 Framers sought, as one historical writing noted, to "register powerful few n****rs[, b]ut all the white men." Doc. 270-3:P.52. Defendants cite three subsequent events as curing this evil: (1) decades of *failed* constitutional reform efforts that nonetheless carried forward the heart of the 1901 Framers' discriminatory intent, (2) the 1996 Amendment "narrowing" the scope to felonies involving "moral turpitude," and (3) HB282's enumeration of disenfranchising felonies in 2017. First, there is considerable irony in citing *failed* reform efforts as evidence of cured discriminatory taint. Second, the 1996 Amendment carried forward the precise tool of discretion—the moral turpitude standard—that the 1901 Framers devised and that Defendants admit was unlawfully applied by registrars to all felonies until 2005. Red-Br. 30. Third, even when the state *did* finally narrow the list of disqualifying felonies in 2017, it perpetuated *nearly perfectly* the 1901 Framers' racially discriminatory design. HB282 includes all the Section 182 crimes that this Court concluded were intended to remove Black Alabamians from the electorate, *e.g.*, larceny, bigamy, incest, rape, burglary, and forgery. *Underwood*, 730 F.2d at 619-20; Ala Code § 17-3-30.1. And it excludes the Section 182 crimes that disproportionately are committed by white offenders, *e.g.*, embezzlement, malfeasance in office, perjury, bribery, altering ballots, making false

election returns, and suborning voter registrars.[5] So, the net result of the "narrowing" lauded by Defendants is a *more targeted* discriminatory definition of "moral turpitude" than even the 1901 Framers achieved.

Taking the evidence in the light most favorable to Plaintiffs, it is entirely reasonable to infer that the 1996 amendment failed to cleanse the taint of discrimination. The district court erred in granting summary judgment to Defendants.

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

A. Felony Disenfranchisement Is Punishment.

This Court has held, three times, that felony disenfranchisement is punishment. First, the en banc Court explained in *Johnson* that "[f]elon disenfranchisement laws . . . are a *punitive device* stemming from criminal law." 405 F.3d at 1228 (emphasis added). Second, a panel of this Court held as much again: "Disenfranchisement is punishment. We have said so clearly." *Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020) ("*Jones I*"). Third, this Court, sitting en banc, reiterated this point yet again. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1032, 1039 (11th Cir. 2020) (en banc) ("*Jones II*") (twice referring to disenfranchisement as "punishment").

[5] Remarkably, these are precisely the types of crimes Defendants' expert identified as the historical basis for "moral turpitude" disenfranchisement. Doc.257-1:P.4, 8.

Indeed, as this Court explained in *Jones I*, the Readmission Act that permitted Florida, Alabama, and other states to rejoin the Union "authorized felon disenfranchisement *only* as punishment." 950 F.3d at 819 (emphasis in original). "The Act prohibited any change to the state constitution that 'deprive[d] any citizen or class of citizens of the United States of the right to vote … *except as punishment* for such crimes as [were then] felonies at common law.'" *Id.* (quoting Act of June 25, 1868, ch. 70, 15 Stat. 73, 73) (emphasis and alterations in original). This federal command means that if Alabama's disenfranchisement scheme were enacted for a non-punitive purpose, it would be invalid as expressly preempted by the Readmission Act. *See* U.S. Const. art. VI, cl. 2. Alabama's felony disenfranchisement laws must therefore be interpreted as having a punitive purpose in order to avoid their wholesale preemption. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005) (stating that courts "must choose the interpretation . . . that has a chance of avoiding federal preemption"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 41-42 (1st Cir. 1993) (same).[6]

Defendants invite this Court to disregard its precedent as "dicta," Red-Br. 40, or as involving "different constitutional claims" regarding a "different State's disenfranchisement laws." *Id.* at 37. This invitation is foreclosed by this Circuit's

[6] Defendants dismiss the Readmission Act's constraints by noting that its 1868 Constitution made all felonies disqualifying. Red-Br. 39. This misses the point; the Readmission Act limits the *purpose* as being punitive.

strict prior-panel-precedent rule. *See In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (noting that prior panel decisions are binding and that "we have categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule"). Moreover, this Court's punishment conclusion was about disenfranchisement *generally*, not anything Florida-specific. And this Court's en banc conclusion in *Johnson* was not dicta, as Defendants suggest, *see* Red-Br. 40; rather it formed a link in the Court's holding rejecting plaintiffs' Section 2 claim. *See Johnson*, 405 F.3d at 1228, 1232.

Unhappy with *this* Circuit's precedent, Defendants cite that of the First and Sixth Circuits. Red-Br. 37. Neither aids Defendants. In *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), the court concluded that Tennessee did not violate its state-law *ex post facto* prohibition by conditioning voting rights restoration on payment of child support and restitution. *Id.* at 752. In doing so, the court explained that it was Tennessee's "disenfranchisement statute [that] must take the blame" for imposing a punitive affirmative disability, not its conditional *restoration* statute. *Id.* at 753. Thus, *Bredesen* undermines Defendants' position.[7] So does the First Circuit's

[7] *Bredesen* also cited dicta from *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (plurality opinion). The *Trop* plurality discussed felony disenfranchisement in a two-sentence hypothetical and acknowledged a potential punitive purpose for disenfranchisement. It cited two cases, neither of which dealt with criminal disenfranchisement, and neither of which remains good law. *Id.* at 97 n.22; *e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 43 (1885) (concluding that "[i]t would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote").

decision in *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009). In *Simmons*, the law at issue prevented "currently incarcerated felons" from voting. *Id.* at 45. The *Simmons* court focused its *ex post facto* holding on the fact that the law "does not involve a more general period of disenfranchisement . . . rather [it] is limited to the period of incarceration. [It] thus creates a temporary qualification on the right to vote coincident with imprisonment, rather than a long-term consequence for the commission of a crime." *Id.* at 44. The *Simmons* court's reasoning contradicts Defendants' position; Alabama imposes lifetime disenfranchisement well beyond the term of imprisonment.

Defendants acknowledge "some expressions that felon disenfranchisement is punitive" from the "constitutional revision efforts." Red-Br. 38. In fact, the *only expressions* were that it was intended as punitive; *no one* expressed a non-punitive purpose. Doc.257-17:P.27 (Secretary's expert characterizing Sen. Waters' concern with punitive nature of disenfranchisement); Doc.257-17:P31 (Secretary's expert characterizing Rep. Harrison's "significant concern" with "additional punishment" section imposed); Doc.257-17:P.34 (Secretary's expert characterizing further concerns of Rep. Harrison regarding "double punishment"); Doc.257-17:P.36 (Secretary's expert recounting testimony from GBM during constitutional revision process characterizing disenfranchisement as punishment); Doc. 269-2:P.35-36 (Secretary's expert testifying that legislators were concerned with punishment

imposed by disenfranchisement); Doc.270-8:P.4 (Secretary agreeing in news interview that disenfranchisement can be punishment); Doc.269-5:P.171-72 (Secretary's employee describing view of Committee that drafted HB282 as believing that "loss of voting rights should be lifted when the punishment is complete").

Moreover, it is irrelevant that Section 177(b) is in the Suffrage and Elections Article of the state constitution, that its implementing statutes are in the election regulation portion of the Alabama Code, and that it coexists with other qualifications unrelated to punishment. *Cf.* Red-Br. 38-39. As this Court explained, "[f]elon disenfranchisement laws are unlike other voting qualifications" and "are a punitive device stemming from criminal law." *Johnson*, 405 F.3d at 1228. And, as Defendants acknowledge, the same Code section includes a host of criminal provisions. Red-Br. 39.[8]

Defendants next discuss the *Kennedy v. Mendoza-Martinez* seven-factor test for determining whether an otherwise non-penal law functions as punitive. 372 U.S. 144 (1963); Red-Br. 39. For the reasons discussed above, the Court need not reach this test. But if it does, the *Mendoza* factors suggest a punitive purpose.

[8] Defendants' contention that Alabama cannot punish those convicted in other jurisdictions, Red-Br. 39, is not evidence that its disenfranchisement laws are non-punitive; it merely raises doubt regarding the lawfulness of its foreign conviction disenfranchisement law.

(1) For the first factor—imposition of affirmative disability—Defendants cite *Simmons*. Red-Br. 39. But *Simmons* compels the conclusion that non-temporary disenfranchisement (like Alabama's lifetime imposition) is a punitive, affirmative disability. *See supra*.

(2) Defendants say that "some have historically viewed disenfranchisement as punitive" but "others" have not. Red-Br. 39. Both this Court and the Supreme Court are among the "some" who view disenfranchisement as punitive. *See, e.g.*, *Johnson*, 405 F.3d at 1228; *Richardson v. Ramirez*, 418 U.S. 24, 51-52, 53 (1974) (relying on the Readmission Act and quoting its limitation on disenfranchisement *only* as punishment). Similarly, during the congressional debate over the Fourteenth Amendment, the "principal draftsman of § 1," *McDonald v. City of Chicago*, 561 U.S. 742, 829 (2010) (Thomas, J., concurring), stated that disenfranchisement was permissible only as punishment: "I do not admit and never have admitted that any State has a right to disenfranchise any portion of the citizens of the United States, resident therein, entitled to vote . . . except as punishment for their own crime." CONG. GLOBE, 39th Cong., 1st Sess., app. at 57 (Jan. 29, 1866) (Bingham).[9]

[9] Defendants dismiss *Johnson* and *Richardson* as "dicta" (they are not), but cite the *Trop* plurality's dicta, *see supra* note 7, and an 1884 case describing voting as an "honorable privilege" rather than a fundamental right. Red-Br. 40; *Washington v. State*, 75 Ala. 582, 585 (Ala. 1884).

(3) Defendants say factor three (whether the sanction requires "a finding of scienter") is not satisfied because Alabama disqualifies felonies without scienter requirements. *Mendoza-Martinez*, 372 U.S. at 168; Red-Br. 40. This misses the point of the exercise, which is to determine the magnitude of a sanction's relationship to criminal law. No one would conclude that imprisonment for non-scienter felonies is a non-punitive civil sanction. The third factor is not relevant where the crime at issue has no scienter requirement.

(4) For the fourth factor (retributive or deterrent purpose), Defendants cite *Jones I*, in which this Court doubted that "losing the right to vote is a punishment that could give a would-be criminal pause." 950 F.3d at 812; Red-Br. at 40. Quoting this Court's conclusion that disenfranchisement is "punishment" is a peculiar way to contend that it is not.

(5) Defendants ignore the fifth factor (whether the behavior to which sanction applies is a crime). Red-Br. at 40. Felony disenfranchisement obviously applies to criminal behavior.

(6) Defendants contend that Alabama "undeniabl[y]" has a rational, non-punitive interest in disenfranchisement, the "[m]ost significant' [*Mendoza*] factor." Red-Br. 40 (first bracket in original). But Defendants fail to *identify* that interest on appeal, instead citing their own interrogatory responses. *Id.*; *see Novero v. Duke Energy*, 753 F. App'x 759, 764 (11th Cir. 2018) (noting that this Court "will not []

consider [a party's] arguments contained only in district court filings"). In the six pages of interrogatory responses Defendants cite, two statements stand out: (1) that those convicted of "moral turpitude" felonies are "unfit to exercise the privilege of suffrage," Doc.257-27:P.5-6 (internal quotation marks omitted), and (2) that "Alabama disenfranchises persons who have self-selected to become felons and who are convicted of their felonious conduct, and, even then, only when the felony involves moral turpitude," a "standard [that] reflects Alabama's interest in excluding from the franchise those felons whose criminal conduct is particularly reprehensible." Doc.257-27:P.8-10.

The first—excluding those unfit to vote—is not an "alternative purpose" that can "rationally be connected" to Alabama's disenfranchisement law. *Mendoza-Martinez*, 372 U.S. at 168-69. Alabama's conception of "moral turpitude" disenfranchises someone like Plaintiff Thompson, who was convicted of theft of property, but does not disenfranchise a person convicted of the following felonies: bribery of public servants, Ala. Code § 13A-10-61; perjury, Ala. Code § 13A-10-101; deceiving an elector in preparation of their ballot, Ala. Code § 17-17-19; altering another person's ballot, Ala. Code § 17-17-24(a); failing to count legally-cast absentee votes, Ala. Code § 17-17-27; illegally voting more than once in an election (second violation), Ala. Code § 17-17-36; and willfully and intentionally signing the name of another elector in a poll book, Ala. Code § 17-17-15. Defendants

cannot plausibly contend that Alabama's law rationally advances a non-punitive interest in excluding those unfit to vote.

The second interest posited in Alabama's interrogatory responses—excluding those who "self-selected to become felons" and whose crimes are "particularly reprehensible," Doc.257-27:P.8-10—sounds a lot like punishment.

(7) Defendants' contention that disenfranchisement cannot be punishment because *Richardson* permitted lifetime disenfranchisement, Red-Br. 41, is a non-sequitur. *Richardson*, which relied upon Congress's law limiting Alabama to a punitive purpose, does not help Defendants.

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

Alabama's "moral turpitude" law provided no one with "fair warning" of disenfranchisement, *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981), and thus cannot excuse Alabama's retroactive application of HB282. As Plaintiffs explained in their opening brief, the legislature *codified* this fact. *See* Blue-Br. 34; Ala. Code § 17-3-30.1(b)(1)(b). A mountain of record evidence—including the testimony of the Secretary's staff—proves it. *See* Blue-Br. 34-37. Yet Defendants contend that Plaintiffs "swing[] for the fences" and "miss badly" because moral turpitude is used in other legal contexts. Red-Br. 41.

Imagine if Alabama law said this: "It shall be a felony, punishable by ten years imprisonment, to commit an act of moral turpitude." Would anyone know what that

meant? If twenty years passed before the legislature enumerated the offending conduct, would anyone think the punishment could then be retroactively applied to decades-old conduct?

No.

In fact, this Court has already rejected Defendants' assertion. The last time Alabama touted the legal roots of "moral turpitude," this Court responded: "Thus does the serpent of uncertainty crawl into the Eden of trial administration." *Underwood*, 730 F.2d at 616 n.2 (quotation marks omitted).

Defendants' only response is to say that the phrase "moral turpitude" has "deep roots" in other contexts, Red-Br. 42, including juror qualifications and attorney admission. Red-Br. 12-14. But those roots fail to satisfy the *Ex Post Facto* Clause.[10]

Moreover, as Plaintiffs explained, Blue-Br. 38-39, the district court erred by examining whether unrelated and outdated state caselaw about character impeachment provided each Plaintiff with notice of disenfranchisement; the

[10] Defendants repeatedly cite *Jordan v. De George* to highlight the prevalence of "moral turpitude" in the law, Red-Br. 12, 17, 21, 41, 42, but omit *Jordan*'s main conclusion: "[w]ithout exception . . . a crime in which fraud is an ingredient involves moral turpitude." 341 U.S. 223, 227 (1951). Except not in Alabama. *See supra* note 5. The fact that Alabama has a wildly different meaning of "moral turpitude" highlights both its vagueness and its racially discriminatory purpose. In any event, it is unlikely that *Jordan* survives the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015).

Supreme Court has held that the *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. Defendants' only defense is this: "Alabama's standard is, and has been, lifetime disenfranchisement." Red-Br. 41. Not so; the standard was "moral turpitude," and the punishment was lifetime disenfranchisement.

Moreover, the *Ex Post Facto* Clause is violated if punishment changes from "discretionary to mandatory" *Weaver*, 450 U.S. at 32 n.17. Defendants' sole response to Plaintiffs' argument that Alabama's transition from a discretionary to a mandatory system of disenfranchisement increased punishment is that Plaintiffs did not raise this "theory of liability" below. Red-Br. 43. But this was not a new "theory of liability," *id.*, but rather an *argument* in support of Plaintiffs' *Ex Post Facto* claim.[11] *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) ("Although new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal.") (emphasis in original). In fact, by failing to offer any

[11] It was sufficiently raised below. *See* Doc.268:P.41 (citing *Weaver*); Doc.268:P.43 (discussing discretion of registrars); Doc.268:P.48-50 (describing how discretion would have enfranchised Plaintiffs Thompson and Gamble).

substantive response in their brief, *Defendants* have waived any contrary argument. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012).

Regarding Ms. Thompson, Defendants contend only that *Stahlman* postdated the 1979 Attorney General Opinion. Red-Br. 43. But that Opinion was updated in 1985—the year *after Stahlman*—and neither theft nor *Stahlman* were added. Doc.66-1:P.54. Moreover, Defendants never explain how Ms. Thompson could have known in 2004 that the Secretary would deem her conviction disqualifying in 2007, but not disqualifying in 2014 and 2015. *See* Blue-Br. 44-45.

Defendants offer only innuendo[12] to explain how Mr. Gamble should have known his crime would be disenfranchising, notwithstanding its exclusion from every list ever published by the Secretary or the Attorney General. *See* Blue-Br. 40-43.

Finally, Defendants offer no response to the district court's errors in granting Defendants summary judgment on Plaintiff GBM's *Ex Post Facto* claim, *see* Blue-Br. 46-49, other than to reassert their misguided "global challenge" notion. Plaintiffs have proven a facial *ex post facto* violation regarding the moral turpitude standard.

[12] Defendants say Mr. Gamble was "caught . . . in 2006 with cash, a [registered] pistol, and 30 pounds of cannabis on the way to his house." Red-Br. 43. Cash and registered pistols are legal things. Doc.226-1:P.5-9.

Indeed, Defendants have waived any contrary argument as to the "global" increase from discretionary to mandatory punishment. *See supra.*

IV. Plaintiffs Did Not Forfeit Their Alternative Due Process Claim.

Plaintiffs did not forfeit their alternative due process claim, but rather followed a well-worn path for seeking remand of an unaddressed claim when a decision on appeal gives new life to the issues involved. *See, e.g.*, *Strickland v. Alexander*, 772 F.3d 876, 888–89 (11th Cir. 2014) (applying *Singleton v. Wulff*, 428 U.S. 106, 119–21 (1976)); *Gonzales v. Rivkind*, 858 F.2d 657, 664 (11th Cir. 1988).

The district court dispensed with Plaintiffs' alternative due process claim in a conclusory footnote, observing that the claim need not be decided. Doc.286:P.37. This summary treatment of Plaintiffs' alternative claim is insufficient to have resolved it. *See, e.g.*, *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283 (11th Cir. 2000); *accord Progressive Mountain Ins. Co. v. Middlebrooks*, 805 F. App'x 731, 737 (11th Cir. 2020).

V. Alabama's State Voter Registration Form Violates the NVRA.

Finally, the district court erred in granting Defendants summary judgment on GBM's NVRA claim. The NVRA requires Alabama's State Form (the "Form") to "*specif[y]* each eligibility requirement." §§ 20508(b)(2) (emphasis added). Thus, the Form must "name or state explicitly or in detail" each eligibility requirement, including its felony conviction condition. *Kucana v. Holder*, 558 U.S. 233, 243 n.10

(2010). The Form states only that those with "disqualifying felonies" may not register.

Defendants do not debate the basic meaning of "specify." Red-Br. 49-52. Nor do Defendants dispute that the phrase "disqualifying felonies" provides insufficient information to determine eligibility. *Id.* at 51-52. And Defendants do not counter the legislative and statutory evidence that confirms that the NVRA was designed to let voters verify their eligibility at the point of registration. *Id.* at 52-54.

Instead, much of Defendants' argument boils down to one of inconvenience. *See* Red-Br. 48-53. Defendants contend they cannot specify the disqualifying felonies because "the list is lengthy" and "not static," *id.* at 48-49, making it "impractical" to list them on one page, *id.* at 50 n.15, 53. But a court's "task is to discern and apply the law's plain meaning as faithfully as [it] can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (internal citation omitted). Defendants' complaints that their eligibility requirements are unwieldy do not override the NVRA's plain text.[13]

[13] Defendants' constitutional avoidance argument falls flat. Red-Br. 50 n.15. Requiring Defendants to specify the crimes that render voters ineligible is not "impractical." *Id.* Even if it were, providing voters with sufficient information to accurately determine their eligibility would not "frustrate" Defendants' efforts to enforce Alabama's voter qualifications. *Id.* Indeed, Plaintiffs' interpretation would aid Defendants in "obtaining information necessary for enforcement," and thus

Defendants' concerns are also overstated. Mississippi, for instance, lists each of its twenty-two disqualifying crimes on its mail-in registration form. *See* Doc.268:P.77; Doc.268-11. Alternatively, Alabama could include the disqualifying crimes on an attached information sheet. *See* Del. Sec'y of State, *State of Delaware All-In-One Form to Register to Vote or Update Your Information*, https://eforms.com/images/2017/10/Delaware-Voter-Registration-Form.pdf (last visited May 23, 2021) ("Delaware Form").

Defendants next quibble over whether the Form could reasonably be read to imply that all felonies are "disqualifying." Red-Br. 48. But even "marginally ambiguous" language can fall short of the NVRA's mandate to "specify" Alabama's eligibility requirements. *Kucana*, 558 U.S. at 243 n.10. The plain meaning of "specify" is to "state" a "requirement clearly and precisely." *United States v. Ross*, 848 F.3d 1129, 1143 n.5 (D.C. Cir. 2017). Alabama's Form provides neither clear nor precise information on its conviction requirement.

Next, Defendants contend that if the NVRA does not require the State to list every out-of-state or federal conviction that would disqualify a voter, the NVRA must not require the State to list any crime at all. Red-Br. 50-51. Not so. Alabama law *itself* makes this distinction: it specifies the disqualifying in-state felonies, while

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supports its "power to establish voting requirements." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18 (2013).

including out-of-state felonies through a catchall. Ala. Code § 17-3-30.1(c). Whether that is impermissibly vague is a question for another day; it *is* Alabama's law and that is what the NVRA requires it to specify. *See supra* Delaware Form (following each disqualifying crime with out-of-state catchall phrase).

Defendants also suggest that GBM's reading cannot distinguish between Alabama's general constitutional standard and its statutory list of disqualifying crimes. Red-Br. 51. Again, however, Alabama's *own* actions require the distinction. Alabama intentionally chose the "moral turpitude" standard for disqualification because of its vagueness. *See supra* Part II. Later, to alleviate this vagueness, Alabama chose to codify a particular set of felonies that would disqualify voters. Given these choices, the NVRA's mandate to "specif[y]" this "eligibility requirement" requires Defendants to list the disqualifying felonies so voters can determine their eligibility. 52 U.S.C. § 20508(b)(2)(A).

Defendants point to other NVRA provisions that only require states to "inform" voters of, or "state," certain information. Red-Br. 52-53. Plaintiffs already addressed this issue, Blue-Br. 55-56, and Defendants offer no response to Plaintiffs' arguments.

Finally, the district court's purported deference to the EAC is inappropriate, under *Chevron* or otherwise. Red-Br. 54-55. The NVRA's language is unambiguous, precluding agency deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*,

467 U.S. 837, 843 (1984). Nor is there anything to which a court can defer. The EAC engaged in no "notice-and-comment practice," and its email acceptance of Alabama's State Form "stops short of [binding] third parties." *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001). Deference to email correspondence is "beyond the *Chevron* pale." *Id.* at 234. And the emails themselves lack the necessary "care," "formality," or "persuasiveness" to warrant deference under *Skidmore*. *Id.* at 228; *see* Blue-Br. 57-58.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to Defendants should be reversed. The district court should be ordered to enter judgment for Plaintiffs on their NVRA claim.

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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)(ii) and 11th Cir. R. 32-4 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,483 words, as counted by the word-processing system used to prepare it.

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June 7, 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 June 7, 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.

June 7, 2021

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellants