IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Treva Thompson, *et al.*, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, *et al.*, Defendants.	Civil Action No. 2:16-cv-783-WKW-CSC

OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT 18

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Defendants' "renewed motion to dismiss" and motion to dismiss is due to be denied in its entirety. Defendants largely raise the same arguments in this motion that were unsuccessful in their prior motion. This Court does not need to revisit those issues. With respect to Plaintiffs' new claims, Defendants' arguments are similarly unavailing. In particular, with respect to Count 18, Defendants' arguments demonstrate a failure to understand the requirements of the National Voter Registration Act ("NVRA"). However, on Count 18, Plaintiff Greater Birmingham Ministries ("GBM") agrees with Defendants that the matter can be resolved on summary judgment and cross-moves for judgment in its favor.[1]

I. Defendants' "Renewed Motion to Dismiss" Counts in the Original Complaint Is Improper.

In addition to seeking to dismiss the new claims Plaintiffs submitted in their Supplemental Complaint, Defendants seek to "renew" their motion to dismiss claims from the Original Complaint. Successive motions to dismiss the same claims in the same operative complaint are not permitted under the Federal Rules. Fed. R. Civ. P. 12(g)(2)("[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."); 5C Fed. Prac. & Proc. Civ. § 1385 (3d ed.) ("[A defendant that files a 12(b) motion] is bound by the consolidation principle in Rule 12(g), which contemplates a single pre-answer motion in which the defendant asserts

[1] Defendants also submit in their brief that Plaintiffs agreed to the dismissal of Plaintiffs Giles and Corley. That is not the case. Plaintiffs indicated to counsel that they opposed dismissal of Plaintiffs Giles and Corley because they wish to preserve the issue of mootness for appeal. Nonetheless, Plaintiffs indicated they were amenable to Defendants indicating Plaintiffs' position in their filing in lieu of a separate filing by Plaintiffs.

all the Rule 12 defenses and objections that are then available to him or her. The rule generally precludes a second motion based on any Rule 12 defense or objection that the defendant could have but neglected to raise in the original motion." (footnote omitted)).

Moreover, upon inspection, Defendants' renewed motion is nothing more than a motion for this Court to reconsider its previous order denying Defendants' initial motion to dismiss the claims at issue on the same grounds. Indeed, Defendants largely "reincorporate" their prior briefing in this renewed motion to dismiss the original counts, and where Defendants provide new briefing, they do not provide any new grounds for dismissal.[2]

"A motion to reconsider is only available when a party presents the court with evidence of an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice." *Summit Med. Ctr. of Ala., Inc. v. Riley*, 284 F. Supp. 2d 1350, 1355 (M.D. Ala. 2003). None of those circumstances is present here. With respect to Counts 1, 2, and 13, Defendants rely entirely on their prior briefing to support their renewed motion. Therefore, with respect to those Counts, the renewed motion clearly does not present an intervening change in the

[2] *See* Doc. 95 at 2 (asking this Court to grant the motion to dismiss Counts 1 and 2 solely on the basis of prior unsuccessful motion to dismiss briefing); Doc. 95 at 11 (asking this Court to grant motion to dismiss Count 12 solely on the basis of prior unsuccessful motion to dismiss briefing, citing the same cases cited in initial motion to dismiss); Doc. 95 at 12 (asking this Court to grant motion to dismiss Count 13 solely on the basis of prior unsuccessful motion to dismiss briefing). *Compare* Doc. 95 at 2-9 (seeking dismissal of Count 11 on the grounds that Alabama's felony disenfranchisement scheme is neither penal nor imposes greater punishment than the law as it existed at the time of the Plaintiffs' offenses), *with* Doc. 43 at 60-62 (seeking dismissal of Count 11 on the grounds that Alabama's felony disenfranchisement scheme is neither penal nor imposes greater punishment than the law as it existed at the time of the Plaintiffs' offenses).

law or new evidence, nor does it demonstrate any clear error or manifest injustice. A motion for reconsideration "cannot be brought solely to relitigate issues already raised in an earlier motion." *Harris v. Corr. Corp. of Am.*, 433 F. App'x 824, 825 (11th Cir. 2011); *see also Gougler v. Sirius Prods., Inc.,* 370 F. Supp. 2d 1185, 1189 n.1 (S.D. Ala. 2005) ("[M]otions to reconsider are not a platform to relitigate arguments previously considered and rejected."). The motion as to these Counts is also untimely because it is not responding to any new facts alleged in the Supplemental Complaint.

With respect to Count 11, the *Ex Post Facto* claim, the renewed motion contains some additional briefing. Likewise, Defendants seek to rely on some of their new *Ex Post Facto* briefing to support their renewed motion to dismiss Count 12, the Eighth Amendment claim. But Defendants' additional briefing does not meet any of the standards for a motion to reconsider. Defendants' primary grounds for seeking dismissal—that Alabama's felony disenfranchisement scheme is not penal and does not impose any retroactive punishment—were presented to this Court in their original motion to dismiss. Defendants do not present any intervening legal authority in support of their position. While Defendants refer to the passage of Section 17-3-30.1, they do not argue that it changed the merits of Plaintiffs' *Ex Post Facto* claim. Instead, Defendants argue that the Court should grant their motion to dismiss Count 11 "based on the 'developed arguments' below that were not highlighted in [their] original motion to dismiss." Doc. 95 at 2. However, "[m]otions for reconsideration should not be used to raise legal arguments which could and should have been made" previously. *Sanderlin v. Seminole Tribe of Fla.,* 243 F.3d 1282, 1292 (11th Cir. 2001)

(citation omitted). Defendants "are expected to present their strongest case when the matter is first considered" and are not entitled to "a second bite at the apple." *State v. Spring Commc'ns Co.*, 899 F. Supp. 282, 284 (M.D. La. 1995).

II. The Court Should Not Disturb Its Denial of Defendants' Motion to Dismiss Plaintiffs' Intentional Discrimination Claims, Counts 1 and 2.

With respect to Counts 1 and 2, Defendants have not submitted any additional authority, arguments, or facts to support their renewed motion to dismiss these claims. This Court has already addressed all of Defendants' arguments in favor of their motion to dismiss in its initial motion to dismiss Opinion. The Court correctly applied the *Twombly* standard, recognized that Plaintiffs' allegations "show a connection between the past and the present," Doc. 80 at 16, and properly held that Plaintiffs' Complaint "states an actionable claim for intentional discrimination." *Id.* at 19. Nothing in Defendants' "renewed" motion provides any reason for the Court to revisit this determination. *See Jumbo v. Ala. State Univ.*, 229 F.Supp.3d 1266, 1272 (M.D. Ala. 2017) (noting that issues "such as discriminatory intent, involve fact-focused questions that 'are often unsuitable for a Rule 12(b)(6) motion to dismiss'" (quoting *Pryor v. Nat'l Collegiate Athletic Ass'n,* 288 F.3d 548, 565 (3d Cir. 2002)).

III. The Court Should Not Disturb Its Denial of Defendants' Motion to Dismiss Plaintiffs' *Ex Post Facto* Claim, Count 11.

The Court should deny Defendants' renewed request that it dismiss Plaintiffs' *Ex Post Facto* claim for several reasons. First, the Court was correct the first time when it concluded that resolution of the claim, which involves questions of intent, "is better left for another stage of this lawsuit, *on an evidentiary record* and on reasoned

arguments." Doc. 80 at 31 (emphasis added). Second, Defendants' purportedly "developed arguments," Doc. 95 at 2, proffered this time around fare no better than their previous arguments. Contrary to Defendants' position, the legal authorities, along with the text and context of Sections 177(b) and 17-3-30.1, indicate a punitive, rather than civil, purpose. Finally, because the pre-2017 felony disenfranchisement scheme also failed to provide adequate notice of disenfranchisement at the time of their convictions, Plaintiffs' have stated a proper *Ex Post Facto* claim. Defendants' motion to dismiss the *Ex Post Facto* claim should thus be denied.

A. Determination of the Legislature's Intent Is Inappropriate at the Motion to Dismiss Stage.

As this Court has already recognized, resolution of Plaintiffs' *Ex Post Facto* claim is inappropriate at the motion to dismiss stage because it turns on the legislature's intent in enacting Sections 177(b) and 17-3-30.1—a question that requires examination of "an evidentiary record." Doc. 80 at 31. Resolution of questions of intent during pretrial proceedings is almost never appropriate. *See, e.g.*, *Staren v. Am. Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1261 (7th Cir. 1976) ("[T]he questions of motivation or intent are particularly inappropriate for summary judgment."). Defendants' request that the Court dismiss the *Ex Post Facto* claim now, prior to discovery or presentation of evidence of legislative intent, is thus inappropriate for the reason this Court has already explained.

B. Sections 177(b) and 17-3-30.1 Must Be Construed as Punitive to Avoid a Finding of Preemption.

Even if it were appropriate to resolve Plaintiffs' *Ex Post Facto* claim in the absence of an evidentiary record, the relevant legal authorities, together with the text and context of Sections 177(b) and 17-3-30.1, compel the conclusion that these provisions are punitive and therefore subject to the *Ex Post Facto* Clause.

Most critically, these provisions must be considered punitive because Congress expressly limited the scope of permissible disenfranchisement to "punishment" for felony convictions. Congress provided in the Readmission Act for Alabama that its constitution "shall [n]ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote . . . *except as punishment* for such crimes as are now felonies at common law." Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (emphasis added) (attached as Exhibit 1). Thus, the only basis upon which the legislature could lawfully disenfranchise felons was as punishment for their commission of a felony. A disenfranchisement law enacted for any other non-punitive purpose would be invalid as expressly preempted by the Readmission Act. *See* U.S. Const. art. VI, cl. 2 (providing that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding"); *see also, e.g.*, *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012) ("noting that "[p]re-emption of state law [ ] occurs through the direct operation of the Supremacy Clause" and that "Congress may, of course, expressly pre-empt state law" (internal quotation marks and citation omitted)); *Teper v. Miller*, 82

F.3d 989, 993 (11th Cir. 1996) ("[W]hen state law conflicts or interferes with federal law, state law must give way.").

Because the only permissible basis upon which the legislature could have disenfranchised felons is to punish them, and not to effect some other regulatory prerogative, the Court should interpret the legislature as having intended to comply with supreme federal law limiting its authority when it enacted Sections 177(b) and 17-3-30.1. "It is [ ] axiomatic that, when a state legislature has sounded an uncertain trumpet, a federal court charged with interpreting the statute ought, if possible, choose a reading that will harmonize the statute with constitutional understandings and overriding federal law." *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 41 (1st Cir. 1993) (interpreting state law narrowly to avoid finding of preemption). And because the legislature must be presumed to have intended to impose a punitive law—so as to avoid the law's invalidity—retroactive application of that law violates the constitutional prohibition on *Ex Post Facto* laws. *See Smith v. Doe I*, 538 U.S. 84, 92 (2003) (holding that if "the intention of the legislature was to impose punishment, that ends the inquiry" and the *Ex Post Facto* Clause applies).

The Readmission Act mandates the conclusion that the legislature intended Sections 177(b) and 17-3-30.1 to be punitive.

C. The Case Law, and the Text and Context of Sections 177(b) and 17-3-30.1, Indicate Punitive Intent and Effects.

Even if the Readmission Act did not foreclose Defendants' argument at the first step of the *Smith Ex Post Facto* analysis, their argument would still be misplaced

because the case law, together with the text and context of the relevant provisions, indicate a punitive intent and effect.

First, at the very least, the Readmission Act offers substantial proof that felon disenfranchisement laws have "been regarded in our history and traditions as a punishment." *Smith*, 538 U.S. at 97. The Act, passed in 1868, expressly states that felon disenfranchisement is a punitive device (and expressly limits it to such a purpose). There could be no better indicator of whether history views felon disenfranchisement as punishment than a historical Act of Congress expressly defining it as such. Indeed, the Supreme Court relied on the text of the Readmission Act—including its restriction of disenfranchisement as exclusively "punishment"—as "convincing evidence of this historical understanding of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).

Second, Defendants inexplicably contend that "no court anywhere has ever held that felon disenfranchisement laws are punitive in nature." Doc. 95 at 3. That is plainly not true. The Eleventh Circuit, sitting *en banc*, has explained that "[f]elon disenfranchisement laws are unlike other voting qualifications. These laws . . . are a *punitive device* stemming from criminal law." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (*en banc*) (emphasis added); *see id.* at 1218 n.5 ("Indeed, throughout history, criminal disenfranchisement provisions have existed as a punitive device."). The Eleventh Circuit is not alone in this conclusion (although for purposes of this case its conclusion is binding). *See Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004) (noting "there is a longstanding practice in this country of

disenfranchising felons as a form of punishment"), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (*en banc*); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (reasoning that felons are disenfranchised "because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment").

Both the Readmission Act and the case law discussed above—particularly the binding *en banc* decision of the Eleventh Circuit—foreclose Defendants' contention that "felon disenfranchisement is a paradigmatic example of a restriction that is *not* punitive." Doc. 95 at 6 (emphasis in original). Rather than confront any of these authorities, Defendants rely (again) on dicta from the plurality opinion in *Trop v. Dulles*, 356 U.S. 86 (1958). *See* Doc. 95 at 6. In addition to being non-binding dicta, the *Trop* plurality's statement that felon disenfranchisement laws are non-punitive was premised upon two outdated nineteenth-century cases that are plainly not good law. *See Trop*, 356 U.S. at 97 n.22. Those cases upheld the denial of voting rights to polygamists based upon the state's interest in "declar[ing] that no one but a married person shall be entitled to vote," *Murphy v. Ramsey*, 114 U.S. 15, 43 (1885), and "withdraw[ing] all political influence from those who are practically hostile to" traditional family structures. *Id.* at 45; *see also Davis v. Beason*, 133 U.S. 333 (1890). Not only are these cases obviously bad law, but they do not even address whether *criminal* disenfranchisement is punitive—none of the individuals were convicted of crimes. Similarly misplaced is Defendants' reliance on the Alabama Supreme Court's 1884 decision in *Washington v. State*, 75 Ala. 582, 585 (Ala. 1884), *see* Doc. 95 at 3, which was premised on the court's conclusion that the franchise is merely an

"honorable privilege," the deprivation of which does not "deny[] a personal right or attribute of personal liberty." *Id.* at 585 (finding criminal disenfranchisement not to be punishment on those grounds). This is plainly not the law today (and has not been for at least half a century). *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that right to vote is a fundamental right). In the face of binding *en banc* Eleventh Circuit precedent concluding felon disenfranchisement laws are punitive, the outdated, abrogated, and unsupported dicta upon which Defendants rely carries no weight.[3]

Third, the text and context of the provisions indicate both punitive intent and effect. In assessing whether the legislature intended the provision to be punitive, the Court must consider "the manner of its codification or the enforcement procedures it establishes." *Smith*, 538 U.S. at 94. Defendants' contention that "felon disenfranchisement does not promote the traditional aims of punishment—

[3] Defendants' contention that the sole purpose of felon disenfranchisement is to promote "the philosophy of republican government and theory of social compact" by limiting the right to vote to those who have "lived up to certain minimum moral and legal standards," Doc. 95 at 8, is also constitutionally untenable in light of the abrogation of the cases allowing for such discrimination in voting. Defendants say its felony disenfranchisement scheme weeds out voters that are not "fit to cast a ballot," Doc. 95 at 3, and rely on the same cases discussed in the text to support that purpose. But the Supreme Court has disavowed *Davis v. Beason*'s theory of discriminatory regulation of the right to vote: "[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." *Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also Carrington v. Rash,* 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). This is not to suggest that felony disenfranchisement is necessarily constitutional, only that it must be supported by a constitutional purpose. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). A general desire to weed out the unfit is insufficient. Defendants have not proffered another proper civil purpose. Therefore, the only remaining constitutionally viable purposes are penological.

retribution and deterrence," Doc. 95 at 8, misses the mark. In seeking to downplay the harshness of disenfranchisement, Defendants note that "most disqualified felons may re-earn the right to vote by discharging their legal obligations." Doc. 95 at 7 (citing Ala. Code §§ 17-3-31, 15-22-36.1). But if paying the fines levied as part of the punishment of conviction triggers re-enfranchisement, it cannot possibly be true that the purpose of the law is to protect the democratic process from the influence of the criminal mind. Indeed, the fact that the legislature tied re-enfranchisement so closely to an aspect of the underlying criminal sentence—the payment of a fine—suggests that disenfranchisement is actually part and parcel of the punishment.

Moreover, Defendants gloss over the criminal enforcement provisions applicable to felony disenfranchisement, briefly noting in a footnote that the "overall purpose" of Title 17 is to "regulate elections," even though "[t]here are criminal provisions within Title 17." Doc. 95 at 5 n.2. But a person with a disqualifying felony who nonetheless votes is not merely subject to some civil, administrative penalty, but rather faces the potential for criminal punishment. *See* Ala. Code § 17-17-36 ("Any person who . . . knowingly attempts to vote when not entitled to do so, or is guilty of any kind of illegal or fraudulent voting, shall be guilty, upon conviction, of a Class C felony."). Although this is not dispositive, *Smith*, 538 U.S. at 96, unlike the sex offender registry statute at issue in *Smith*, the felon disenfranchisement scheme here "contain[s] [a] safeguard[] associated with the criminal process," *id.*, namely notice. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (noting that one protection

of criminal process is that laws "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits").

The legislature expressly acknowledged in 2017 that the then-existing law provided "no comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote." Ala. Code § 17-3-30.1(b)(1)(b). The legislature thus acted with the express purpose of providing notice to Alabamians, which served two functions indicating a punitive purpose: (1) it served to deter people from committing the enumerated felonies because conviction would lead to the loss of the fundamental right to vote, and (2) it provided notice to Alabamians of the conditions that could trigger prosecution for unlawful voting pursuant to § 17-17-36. Contrary to the statute at issue in *Smith*, which "contemplate[ed] distinctly civil procedures," 538 U.S. at 96 (internal quotation marks omitted), Alabama's felony disenfranchisement law was intended to provide a safeguard associated with criminal process.

Finally, Defendants' unsupported contention that losing the right to vote is "only a minor disability," less harsh than a sex offender registry and occupational debarment, is completely foreign to American jurisprudence. Doc. 95 at 7. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. Indeed, the right to vote is the most important right of citizenship. "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ." *Id.* at 562; *see also Harper*

v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (referring to right to vote as "precious"). Defendants' characterization of disenfranchisement as a "minor disability" that is less severe than a registration requirement or a debarment from certain types of careers, Doc. 95 at 7, bears no relation to how the Supreme Court has characterized the franchise.

Even if the Court changes course and decides to answer the question of legislative intent at the motion to dismiss stage, the answer, based upon the text of the Readmission Act, the case law, and the text and context of the relevant provisions, is that the provisions serve a punitive purpose and are thus subject to the *Ex Post Facto* Clause.

D. Both Sections 177(b) and 17-3-30.1 Impose a Greater Punishment than the Law as It Existed at the Time of Plaintiffs' Offenses.

Finally, the Court should reject Defendants' request that it dismiss Plaintiffs' *Ex Post Facto* claim because of its contention that the law does not impose a greater punishment than it did at the time of Plaintiffs' offenses. *See* Doc. 95 at 9-11. The premise of Defendants' position is wrong. There can really be no dispute that Plaintiffs did not have notice that their convictions were disenfranchising at the time of their crimes. The legislature essentially admitted as much. *See* Ala. Code § 17-3-30.1(b)(1)(b) ("Under 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.").

The vagueness of the pre-2017 felony disenfranchisement scheme is fatal to Defendants' argument in three respects. First, and most importantly, the legislature and this Court have recognized that the scheme did not provide Plaintiffs with notice of whether their crimes were disqualifying at the time of their conviction. *See id.*; Doc. 80 at 5-6 (recognizing the lack of clarity in the definition of "felony involving moral turpitude"); Doc. 72 at 1 ("But what does moral turpitude mean?"). Defendants do not contend that moral turpitude had a clear or stable interpretation at the time of Plaintiffs' convictions. Instead, the determination of whether a crime was disqualifying prior to the 2017 law was made at the point of voter registration by the voter registrar. The "lack of fair notice" is the crux of an *Ex Post Facto* claim. *Weaver v. Graham*, 450 U.S. 24, 30 (1981) ("Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice . . . .").

Second, Defendants simply *assume* the Plaintiffs were disenfranchised under the prior "moral turpitude" scheme. But Defendants are wrong to contend that the "remaining plaintiffs would have been disqualified from voting," Doc. 95 at 10, prior to the 2017 law and at the time of their offenses, because no one knows which felonies were previously disqualifying, *see* Ala. Code § 17-3-30.1(b)(1)(b). The mere fact that the legislature included the remaining Plaintiffs' felonies in the 2017 enumeration does not mean that their felonies were actually disqualifying under the prior law.

Finally, because the law on the books prior to 2017 was unconstitutionally vague, it was necessarily void at all times it purported to be in effect.[4] "[A]n unconstitutional law is void, and is as no law." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). Thus, because there was no constitutional law disenfranchising felons prior to 2017, the first time *any* felons were disenfranchised was with the enactment of Section 17-3-30.1. That provision, together with the Secretary of State's unilateral determination to apply the law retroactively, means that *every* person whose disqualifying felony offense occurred prior to the 2017 enactment has been subjected to greater punishment than existed at the time of his or her offense.

For that reason, Defendants' standing argument is likewise misplaced. *See* Doc. 95 at 11. Because Plaintiffs did not have notice of the disqualifying nature of their crimes under the prior system, if Plaintiffs succeed on their *Ex Post Facto* claim, their injury will be redressed because they will be eligible to vote. Plaintiffs thus have standing to challenge Alabama's law as a violation of the *Ex Post Facto* Clause.

IV. The Court Should Not Disturb Its Denial of Defendants' Motion to Dismiss Plaintiffs' Eighth Amendment Claim, Count 12.

In Defendants' renewed motion, Defendants once again assert that felony disenfranchisement is categorically not punishment and, on that basis, seek dismissal. Doc. 95 at 11. This Court was correct to conclude that the *Smith v. Doe* inquiry is best "left for another stage of this lawsuit, on an evidentiary record and on

[4] This Court held that Plaintiffs' claims regarding the constitutionality of the prior system are moot. Doc. 80. To the extent they are relevant to the *Ex Post Facto* claim, Plaintiffs maintain that the prior system was unconstitutional.

reasoned arguments." Doc. 80 at 31. For the reasons discussed above and in Plaintiffs' original opposition, Doc. 48 at 84-94, this Court should decline Defendants' invitation to reconsider its sound determination that the Eighth Amendment claim can move forward.

As Plaintiffs' alleged in their Supplemental Complaint, "[s]imilar to the registrars' prior application of Section 177(b), Section 17-3-30.1 permanently disenfranchises a broad swath of individuals convicted of vastly disparate crimes from various degrees of homicide to assault to non-violent trafficking in cannabis to simple non-violent theft of property and forgery." Doc. 93 at 14. Plaintiff Treva Thompson, for example, was convicted of a crime for which she served no time in prison and yet she has been punished with permanent exclusion from the political franchise.

Despite Defendants' assertion, this is no "minor disability . . . less harsh than the sanctions of occupation debarment." Doc. 95 at 7. Alabama's scheme permanently disenfranchises many otherwise eligible citizens of our most fundamental right, "preservative of all rights." *Reynolds*, 377 U.S. at 562. A disenfranchised citizen is "severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family." *McLaughlin v. City of Canton,* 947 F. Supp. 954, 971 (S.D. Miss. 1995).

In light of the Supreme Court's current recognition that the right to vote is a fundamental right of all citizens rather than a privilege afforded to a select few, it is unsurprising that permanent disenfranchisement is now rare, with a clear trend away from such harsh and unforgiving punishment. *See* Compl., Doc. 1 at ¶ 243 (noting that only a small minority of states impose any form of permanent disenfranchisement); *Atkins v. Virginia,* 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."). Once in the majority of states, Alabama is now an outlier in its permanent disenfranchisement of many of its citizens.

The Eighth Amendment analysis is a multi-factored inquiry and several of those factors require fact-intensive analysis. For example, "[t]he penological justifications for [the punishment] are also relevant to the analysis." *Graham v. Florida*, 560 U.S. 48, 71 (2010). Defendants appear to concede that their disenfranchisement scheme "does not promote the traditional aims of punishment," which include "retribution and deterrence." Doc. 95 at 8. Defendants assert that "[t]here is no reasonable argument that someone would be deterred from committing a felony" based on potential disenfranchisement and disclaim any reliance on a "retributive rationale." *Id.* This lack of adequate penological justification—particularly when combined with the scheme's harshness and disproportionality—may well be determinative as to Plaintiffs' Eight Amendment claim. *Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

For the reasons stated in Plaintiffs' opposition to the motion to dismiss and the reasons stated in this Court's order denying the motion to dismiss this claim, this Court should reject Defendants' renewed attempt to dismiss this claim.

V. The Court Should Not Disturb Its Denial of Defendants' Motion to Dismiss Plaintiffs' Fourteenth Amendment Claim Challenging the Legal Financial Obligations Requirement, Count 13.

With respect to Count 13, Defendants have not submitted any additional authority, arguments, or facts to support their renewed motion to dismiss this claim despite this Court's admonition that its initial motion provided "thin arguments," Doc. 80 at 35, that could not carry the day at the motion to dismiss stage. Doc. 95 at 12 ("The Defendants reincorporate their briefing on this claim from Doc. 43."). This Court has already addressed all of Defendants' arguments in favor of their motion to dismiss in its initial motion to dismiss opinion. In particular, the Court noted in its opinion that this case is distinct from others because Plaintiffs have alleged an inability to pay their fines and fees. Doc. 80 at 35. Defendants do not attempt to address this distinction in their renewed motion. They provide this Court with no reason to reconsider its original decision on this claim.

VI. Plaintiffs Have Adequately Alleged a Deprivation of the Right to Vote, as Defined by State Law, Which Rises to the Level of a Due Process Violation.

The right to vote is federally protected by the Due Process Clause but state election law necessarily defines the scope of that right, at least in part. Plaintiffs have alleged, and intend to prove, that "Defendant Merrill's unilateral determination to apply HB 282 retroactively to people with 'disqualifying convictions' entered prior to

August 1, 2017 . . . constitutes unlawful disenfranchisement in violation of state election law." Doc. 93 at 18. Therefore, Defendant Merrill's actions—which unlawfully deprive Plaintiffs of their right to vote under state law—also violate the Due Process Clause of the Fourteenth Amendment. Defendants' arguments for dismissal are unavailing.

A. Plaintiffs' Due Process Claim Properly Relies on Underlying State Election Law.

Plaintiffs' allegations fall within the well-established doctrine that state laws often create liberty interests that are entitled to the protections of the Due Process Clause of the Fourteenth Amendment. *See Vitek v. Jones*, 445 U.S. 480 (1980). This is particularly true in the area of voting rights and election law where the interplay between federal fundamental rights protection and state law is unique. While voting is a fundamental right protected by the Fourteenth Amendment, *see Reynolds*, 377 U.S. at 562, state law plays a large role in defining the scope of that fundamental right. State law establishes eligibility requirements, election schedules, forms of government, and nearly every other aspect of voting. In other words, state law impacts not only who votes but where, when, and how citizens vote. But at the same time, state election law and how it is implemented are necessarily restrained by federal protections. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983).

In *Duncan v. Poythress*, the Fifth Circuit applied precisely the type of analysis Plaintiffs suggest here. 657 F.2d 691 (5th Cir. 1981).[5] In that case, state officials had

[5] *Duncan v. Poythress* was decided before the split of the Fifth Circuit and is therefore binding precedent.

refused to call for a special election as required by state law. The Fifth Circuit held that "the due process clause of the [F]ourteenth [A]mendment to the United States Constitution protects against the disenfranchisement of a state electorate in violation of state election law." *Id.* at 693. While it is clear that not every minor error or irregularity in state elections calls for federal interference, "[i]t is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law." *Id.* at 704. As in *Duncan*, Plaintiffs have alleged that Defendant Merrill has failed to follow state law and, as a result, has completely disenfranchised them.

Courts across the country have agreed with *Duncan*'s uncontroversial proposition that when a state grants the right to vote to its citizens, that right is protected by the U.S. Constitution. *See, e.g., Bonas v. Town of N. Smithfield,* 265 F.3d 69, 75 (1st Cir. 2001) (holding that failure to conduct election required by state and local law "would constitute a violation of due process (in addition to being a violation of state law)"); *Spinka v. Brill*, 750 F. Supp. 306, 310 (N.D. Ill. 1990) ("[W]hen a state provides that an office will be filled by holding elections, the state creates a right to vote that the Constitution protects."); *see also Tatum v. Tarrant Reg'l Water Dist.*, No. 4:14-CV-24-O, 2014 WL 772602, at *2–3 (N.D. Tex. Feb. 27, 2014), aff'd, 565 F. App'x 292 (5th Cir. 2014); *ARC Students for Liberty Campaign v. Los Rios Cmty. Coll. Dist.*, 732 F. Supp. 2d 1051, 1058–59 (E.D. Cal. 2010).

Therefore, Defendants' first argument that Plaintiffs' claim is barred by *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106-07 (1984), is clearly

erroneous. *Pennhurst* bars state law claims against state officials. As the foregoing demonstrates, *Pennhurst* did not bar federal claims anytime they interact with state law. *Id.* at 105 (recognizing "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States"); *see also Pruitt v. City of Montgomery*, 771 F.2d 1475, 1484 n.19 (11th Cir. 1985) (reaffirming *Duncan v. Poythress*'s finding of federal jurisdiction to address "*substantive* due process claim that state officials disenfranchised state electorate in violation of state law").

Moreover, it is well-established that once a state law extends the right to vote to citizens—*even if it is not constitutionally required to do so by the U.S. Constitution*—that right to vote is fundamental and federally protected by the Fourteenth Amendment. In *Bush v. Gore,* the Court explained precisely this principle. *See* 531 U.S. 98, 105 (2000). While "the individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college," when "the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Id.* at 104; *see also id.* at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

Therefore, Defendants' argument that the state law right to vote is not protected by the U.S. Constitution because the citizens at issue have past felony convictions, *see* Doc. 95 at 13, misunderstands the relationship between federal

constitutional protection for the right to vote and state election law. Once the state extends the right to vote to its citizens, that right is fundamental. Thus, Defendants' reliance on *McKinney v. Pate,* a public employment case that did not involve any fundamental right, is inapposite. 20 F.3d 1550, 1556 (11th Cir. 1994). *McKinney* expressly acknowledges that fundamental rights are subject to a different analysis. *Id.*

For the foregoing reasons, Plaintiffs' Due Process claim, Count 16, properly relies on underlying Alabama election law. If Alabama law grants them the right to vote, Defendant Merrill's denial of that right violates the Due Process Clause.

B. Alabama State Law Grants Plaintiffs the Right to Vote.

Under state law, Plaintiffs with felony convictions pre-dating HB 282 are eligible to vote. This conclusion follows from a few uncontroversial facts about Alabama state election law.

First, Section 177 of the Alabama Constitution prescribes that "[e]very citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence." Ala. Const. art. VIII, § 177(a). Therefore, citizens that meet age and residency requirements, and register according to law, have an affirmative right to vote in Alabama absent any other operative provision.

Second, Section 177 *separately* provides that "[n]o person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability," *id.* § 177(b), *and*

grants the legislature the right and obligation to provide "reasonable and nondiscriminatory requirements as prerequisites to registration for voting." *Id.* § 177(a); *see also id.* § 177(c) ("The Legislature *shall* by law provide for the registration of voters . . . ." (emphasis added)).

From 1996 to 2017, it is undisputed that the Legislature did not provide any guidance to implement Section 177's disenfranchisement of any "person convicted of a felony involving moral turpitude." *Id.* § 177(b); *see* Ala. Code § 17-3-30.1(b)(1)(b)("Neither individuals with felony convictions nor election official have a comprehensive, authoritative source for determining if a felony conviction involves moral turpitude and is therefore a disqualifying felony.") In other words, for purposes of access to the right to vote, there was no conviction that was designed as "involving moral turpitude" pursuant to state law. HB 282 gave Section 177(b) effect for the first time. Ala. Code § 17-3-30.1(a)(2) ("The purpose[] of this section [is t]o give full effect to Article VIII of the Constitution of Alabama of 1901, now appearing as Section 177 . . . ."). This was precisely the holding of the state court in *Gooden v. Worley*:

> Just as this Court lacks the power to designate crimes for which disenfranchisement may properly be imposed as a punishment, so too are the Secretary of State, the Attorney General, county boards of registrars and county attorneys precluded from making such determinations – for any such governmental official or agency to do so would usurp the role of our Legislature to declare, by duly-enacted legislation, when this punishment is properly imposed.

No. 2005-5778-RSV, slip op. at 32 (Ala. Cir. Aug. 23, 2006), *vacated on mootness grounds sub nom. Chapman v. Gooden*, 974 So. 2d 972 (Ala. 2007).

Moreover, even if the Court does not delve into the question of Section 177(b)'s operation under state law from 1996 to 2017, Section 177(b)'s enforcement of the moral turpitude provision by Defendants was unlawful under the U.S. Constitution during that period. *See supra* Section III(D). Therefore, the only relevant provision lawfully in place was Section 177(a), which grants an affirmative state right to vote to citizens who meet the age and eligibility requirements.

Therefore, the final question is whether HB 282 operates retroactively to disenfranchise individuals with convictions pre-dating the Act. It does not. HB 282 is written in the present tense. It states that "a person is disqualified to vote by reason of conviction of a felony involving moral turpitude only when convicted" of the disqualifying crimes, Ala. Code § 17-3-30.1(c), and "[t]he felonies involving moral turpitude listed in subsection (c) are the only felonies for which a person, upon conviction, may be disqualified from voting." *Id.* § 17-3-30.1(e). This plain language is dispositive of the question.

Moreover, the Alabama Supreme Court has a clear and unequivocal presumption against retroactivity:

> The judiciary generally disdains retroactive application of laws because such application usually injects undue disharmony and chaos in the application of law to a given fact situation; therefore, the courts will generally indulge every presumption in favor of prospective application unless the legislature's intent to the contrary is clearly and explicitly expressed.

Lee v. Lee, 382 So. 2d 508, 509 (Ala. 1980). HB 282 does not express any intent to apply retrospectively to convictions that pre-date its passage and that intent is

certainly not "clearly and explicitly expressed." *Id*. HB 282 does not apply retrospectively.[6]

For the foregoing reasons, Defendant Merrill's unilateral enforcement of HB 282 to convictions that pre-date its passage violates both state law and Due Process.

VII. In the Alternative to the *Ex Post Facto* Claim, Count 18 States a Violation of Due Process.

For the reasons discussed above, Alabama's felony disenfranchisement scheme constitutes punishment and violates the *Ex Post Facto* Clause. *See supra* Section III. Nonetheless, the State insists that the felony disenfranchisement scheme does not constitute "punishment" for purposes of this Clause. For purposes of retroactivity analysis, Plaintiffs submit that even if the sanction is labeled as technically "civil," which it should not be, its retroactive application violates the Due Process Clause. This claim states a plausible claim for relief and should not be dismissed.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc v. Gore*, 517 U.S. 559, 574 (1996). And while "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable" in the civil context,

[6] The Court should decline Defendants' invitation to certify any questions to the Alabama Supreme Court. As discussed above, the Court need not decide the state law question of Section 177's operation between 1996 and 2017 if it agrees with Plaintiffs that its enforcement during that time violated federal law. With respect to HB 282's retrospective application, binding Alabama Supreme Court precedent already clearly guides this Court's analysis. Therefore, there is not a substantial state law question that requires certification. Moreover, this Court need not decide these state law questions at this stage. The Court should deny Defendants' motion and defer any final determination on the state law issues for later stages of litigation. If the Court rules in favor of Plaintiffs on several other claims, including the *Ex Post Facto* claim, resolution of these issues may not be necessary because relief on those claims would be the same as relief under this claim.

"the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*." *Id.* at 574 n.22 (internal citation omitted). Defendants are correct that "[r]etroactivity provisions often serve entirely benign and legitimate purposes." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 267-68 (1994). But it is also true that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Therefore, the question is whether the retroactive application of *this* provision serves benign and legitimate purposes that can justify the stripping of our most fundamental right as citizens based on actions that pre-date the legislation. *Reynolds*, 377 U.S. at 562. It does not.

First, the retroactivity and rational basis cases that Defendants cite do not involve the retroactive impairment or denial of a fundamental right. As discussed above, once a state extends the right to vote to citizens—even if it is not *required* to do so—that right is fundamental and protected by the Fourteenth Amendment. *Bush,* 531 U.S. at 104 ("When the state legislature vests the right to vote . . . the right to vote as the legislature has prescribed is fundamental."). Therefore, this is a prime case where what the state can do *prospectively* may differ from what it can do retrospectively. *See Usery,* 428 U.S. at 17-18. With respect to HB 282's retrospective application, it is cutting off vested fundamental rights and therefore must be subject to strict scrutiny. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969). It cannot pass muster under that test.

Second, a key factor in determining whether a law with retrospective application passes muster under Due Process is whether the law "share[s] key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 281. Defendants are correct that the presence of rationales such as deterrence and blameworthiness are probative in the *Ex Post Facto* analysis. Indeed, those factors coupled with other evidence should be dispositive in this case. *See supra* Section III. However, there are undoubtedly some civil laws that are not intended to punish *per se* but nonetheless are motivated by similar rationales of deterrence and blameworthiness. The most common are punitive or exemplary damages in tort law. The Supreme Court has struck down punitive damage awards that are so high that the tortfeasor could not have had reasonable notice of the potential severity of the penalty for her actions. *BMW of N. Am., Inc.*, 517 U.S. at 573-75.

Like punitive damages, felony disenfranchisement "share[s] key characteristics of criminal sanctions" and therefore retroactive application of felony disenfranchisement, at minimum, "raise[s] a serious constitutional question." *Landgraf*, 511 U.S. at 281. The Supreme Court has further explained that it "would . . . hesitate to approve the retrospective imposition of liability on any theory of . . . blameworthiness." *Usery*, 428 U.S. at 17-18 (citations omitted). By Defendants' own admissions, blameworthiness is precisely their rationale for disenfranchisement. Doc. 95 at 3 (suggesting that the law is meant to ensure "voters are fit to cast a ballot"); *id* at 8 (suggesting that the law limits voting to "those who have lived up to certain minimum moral and legal standards"); Doc. 43 at 63 (suggesting that the LFO

requirement ensures that voting rights are only restored once individuals are "sufficiently rehabilitated to be entitled to vote"). Therefore, this Court should view the retroactive imposition of HB 282 with great skepticism.

VIII. Count 18 States a Violation of the National Voter Registration Act and Plaintiff GBM Cross-Moves for Summary Judgment.

On Plaintiff's NVRA claim, the Court should reject Defendants' arguments and grant summary judgment to Plaintiff GBM.

The eligibility language related to felony convictions on the State of Alabama Mail-In Voter Registration Form ("State Form") and the state-specific Alabama instructions on the National Mail Voter Registration Form ("Federal Form") does not meet Alabama's statutory obligations under the NVRA to "inform" voters of the eligibility requirements through all avenues of registration and to "specif[y] each eligibility requirement" on all voter registration applications. Indeed, the current language on these forms runs contrary to the goals of those provisions and the Act overall.

A. The NVRA Requires that States Specify Eligibility Requirements So that Registrants Can Determine Their Eligibility Easily and Privately.

The mandate that States provide accurate and specific information to prospective voters about voter eligibility requirements runs throughout the NVRA. This fundamental prerequisite to a functional voter registration system is included in every provision related to the various avenues of registration established by the Act as well as in the general provision governing the responsibilities of states under the Act. With respect to voter registration applications completed through the DMV,

the application must "include a statement that . . . states each eligibility requirement." 52 U.S.C. § 20504(c)(2)(C). With respect to mail-in voter registration, it requires that the Federal Form and any state form[7] used for registration in federal elections "include a statement that . . . specifies each eligibility requirement (including citizenship)." *Id.* § 20508(b)(2)(A); *see also id.* § 20505(a) (requiring states to accept and use these forms for registration for Federal elections).[8] Again, with respect to voter registration at designated agencies, the forms used must "specif[y] each eligibility requirement (including citizenship." *Id.* § 20506(a)(6)(A)(i)(I); *see also id.* § 20506(a)(6)(A)(ii) (allowing use of an agency-created form so long as it meets the requirements of § 20508(b)). Finally, the NVRA restates in Section 20507 the general requirement that States "inform" applicants that apply through the various means of registration of the "voter eligibility requirements." *Id.* § 20507(a)(5)(A).

The reason for these exhaustive provisions is obvious on its face. In order to create a functional voter registration system that "promote[s] the exercise of [the

[7] In its motion to dismiss, Defendants confusingly state that it "will assume for the purposes of this motion that the NVRA imposes requirements on the state form," Doc. 95 at 20 n.7, suggesting that it may not because the state form is optional. It is true that the state is not required to develop and use its own state form. However, the same section that Defendants cite for this proposition clearly states that *if* a state develops and uses its own form, it must "meet[] all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office." 52 U.S.C. § 20505(a)(2). Since Alabama has and uses its state registration form for registration of voters in Federal elections, the NVRA is clear that it must follow the requirements of Section 20508(b).

[8] Defendants argue at length that there is a meaningful distinction between the terms "state" and "specify" as to the required level of information those terms would require. Defendants argue: "Had Congress intended the forms to 'specify' eligibility requirements, Congress would have used a word like 'describe,' 'explain,' 'detail,' or 'specify.' It did not." Doc. 95 at 21. While Plaintiffs are doubtful of this distinction in the abstract, it is not relevant here. Congress did in fact use the term specify, several times. Plaintiffs cited and quoted the relevant provision requiring states to "specif[y] each eligibility requirement" in their supplemental complaint. Doc. 93 at 21.

fundamental] right [to vote]," *id.* § 20501(a)(2), potential voters need to be able to easily assess their eligibility when using the various avenues for registration provided by the NVRA. Providing ample access to voter registration—the primary goal of the NVRA's provisions—is relatively useless if voters are not able to determine whether they are eligible to use those avenues to register.

The legislative history of the Act confirms the importance of these requirements to the overall scheme of facilitating several avenues of registration through mail-in forms and various public service agencies. In both the House and Senate reports for the NVRA, Congress noted 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. 103-6 at 24 (emphasis added); H.R. Rep. 103-9 at 7-8 (same). The reports also noted the importance of the voter eligibility specifications to maintaining accurate lists of only eligible voters and preventing fraud. S. Rep. 103-6 at 11 ("Under the provisions of this bill, *every* application for voter registration must include a statement that sets forth *all the requirements* for eligibility, including citizenship, and requires that the applicant sign an attestation clause, under penalty of perjury, that the applicant meets those requirements." (emphasis added)).

Finally, and importantly in this case, both reports note that the requirement of specific eligibility requirements on all registration forms allows the potential voter

to determine privately their eligibility without disclosing personal private information, such as past criminal convictions. H.R. Rep. 103-9 at 7-8 ("Since some of the reasons for declining to register to vote may involve matters of personal privacy, such as 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. 103-6 at 24 (same).

B. Alabama's Current Registration Forms Fail to Specify Eligibility Requirements for People with Past Convictions.

Alabama fails to meet the NVRA's requirement to inform potential voters about eligibility criteria. The State Form states that each voter must "not 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." Doc. 95-1 at 6. It then requires each voter to sign under penalty of perjury the following statement: "I am not barred from voting by reason of a disqualifying felony conviction." *Id.* This language does not provide any of the information necessary for a prospective voter with a past felony conviction to assess his or her eligibility at the point of registration, the clear purpose of the statutory requirement. To the contrary, the language, standing alone, is misleading to the voter. Without any suggestion that there is a limited list of disqualifying felony convictions, the term "disqualifying felony conviction" could be, and likely would be, interpreted by a prospective voter to mean that any felony conviction is disqualifying. In fact, most felony convictions are not disqualifying. *See* Ala. Code § 17-3-30.1(c) (providing an exclusive list of disqualifying crimes).

Likewise, the state-specific Alabama instructions to the Federal Form state that a voter must "not have been convicted of a felony involving moral turpitude (or have had [his/her] civil and political rights restored)." *See* Exhibit 2. This Court has recognized that, without more, the phrase moral turpitude is uninformative. Doc. 72 at 1 ("But what does 'moral turpitude' mean?") and (describing the standard as "nebulous"); Doc. 80 at 5-6 (noting the "unenviable task" of determining whether a felony involves "moral turpitude"). Thus, not only does neither form contain complete information about voter eligibility requirements—as required by the NVRA—neither form even directs voters to that information or explains that a list of disqualifying convictions exists. It is notable that all parties agree that HB 282 represented a sea change in voter eligibility in Alabama for people with convictions yet the state's registrations forms have not changed at all.

As demonstrated above, Congress included the numerous provisions requiring states to specify eligibility requirements on all registration forms to ease voting access by allowing voters to assess their eligibility at the point of potential registration, whether it be at a voter registration drive, a motor vehicles department, or another public interest agency. But, simply put, the current forms do not allow people with past convictions to do that. Defendants do not argue otherwise. Congress indicated that another purpose of these provisions was to ensure that only eligible voters register to vote. By failing to provide enough information for voters to assess their eligibility, the forms also undermine this goal. Finally, the legislative history indicates that Congress was sensitive to the privacy of past convictions and by

requiring written qualifications sought to avoid potential voters having to disclose that information to determine eligibility. On this count, the forms also fail.

The current instructions on the State and Federal Forms also undermine the overall goals of the NVRA:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b). By providing ambiguous and incomplete information about eligibility requirements, the instructions will both dissuade *eligible* voters from registering and undermine the effectiveness of the perjury attestation as a means to ensure that *ineligible* individuals are not registered.

For the foregoing reasons, Plaintiff GBM believes that Defendant Merrill's violation of the NVRA is plain on the face of the registration forms and may be decided on summary judgment in Plaintiff's favor. However, summary judgment is plainly inappropriate in Defendants' favor. At minimum, Plaintiff GBM should have an opportunity to gather through discovery and present evidence that the current forms fail to serve their purpose in the overall NVRA scheme.[9]

[9] Such evidence might include analysis of whether voter registration agency officials are able to assist voters with past convictions in registering to vote at the DMV or other public service agencies using the current forms. It might also include evidence of whether voters are routinely required to disclose felony convictions to registrars in order to assess their eligibility, an outcome Congress specifically sought to avoid.

C. Defendants' Counter-Arguments All Fail.

With respect to the state instructions to the Federal Form, Defendants argue that they "are not in charge of the federal voter registration form." Doc. 95 at 18. While that is true, Defendant Merrill, as Alabama's chief election official, *is* required by federal law to inform the EAC of changes in Alabama's voter registration requirements. See 11 C.F.R. § 9428.6(c) ("Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section."). He has not done so and thus the Federal Form contains inaccurate information.

While Defendants argue that Plaintiffs "cannot sue to enforce an administrative regulation," Doc. 95 at 18, it is well established that regulations that apply or enforce a statutory section "are covered by the cause of action to enforce that section." *Alexander v. Sandoval,* 532 U.S. 275, 284 (2001); *see id.* ("Such regulations, if valid and reasonable, authoritatively construe the statute itself . . . and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.") (citations omitted); *see also Global Crossing Telecomms, Inc. v. Metrophones Telecomms. Inc.*, 550 U.S. 45, 54 (2007) ("Insofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute."). Therefore, Defendants' claim that Secretary Merrill's failure to comply with this regulation is an "administrative

matter[] between the Secretary and the EAC," Doc. 95 at 19, is wrong as a matter of black letter administrative law.

Defendants also argue "it is a pure speculation" that an update from Defendant Merrill to the EAC will result in a change to the state-specific instructions because "the form will be changed only if the EAC wants to change it." Doc. 95 at 19. This argument is wrong for two primary reasons. First, Defendants do not put forward any reason to believe that the EAC would not adopt a proposed change that provides accurate information about Alabama's current eligibility requirements. After all, the EAC has a statutory obligation to create and maintain a Federal Form that complies with 52 U.S.C. § 20508's requirements. The current Federal Form includes Mississippi's list of disqualifying crimes in the state-specific instructions. There is no reason to believe the EAC would reject a similar request from Defendant Merrill. This is, at minimum, a factual question not ripe for summary judgment prior to discovery. *Snook v. Trust Co. of Bank of Savannah*, 859 F.2d 865 (11th Cir. 1988) ("This court has often noted that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery.").[10]

Defendants' citations to case law related to states' attempts to add documentary proof of citizenship requirements to the Federal Form—which would

[10] For the same reason, the Court should not consider Defendants' cherry-picked example from a 1994 FEC guide on the NVRA. Plaintiffs have not had an opportunity to conduct discovery that may uncover contrary guidance. However, the example Defendants chose is inapt. Although Washington's state form at that time referred to "infamous crime" without further definition, Washington also defined "infamous crime" at that time to include all felonies. *See Farrakhan v. Gregoire,* 623 F.3d 990 (9th Cir. 2010). Therefore, the risk of misleading eligible voters is not comparable.

fundamentally disrupt the mail-in single form system—are inapposite and irrelevant to whether an ordinary update of eligibility information would be accepted. Doc. 95 (citing several documentary proof of citizenship cases); H.R. Conf. Rep. 103-66 (rejecting an amendment allowing states to require "presentation of documentation relating to citizenship" because it would "effectively eliminate, or seriously interfere with, the mail registration program of the Act").

Second, in the unlikely case that the EAC did reject Defendant Merrill's request, Plaintiff GBM would have standing to challenge that decision under the Administrative Procedure Act, as Defendants note. Doc. 95 at 19 (citing *Kobach v. U.S. Election Assistance Comm'n,* 772 F.3d 1183, 1196 (10th Cir. 2014)). But Plaintiff GBM cannot hold the EAC responsible if Defendant Merrill does not first fulfill his responsibility to inform the EAC of the changes in eligibility requirements.

With respect to the level of specificity required by the NVRA, Defendants misread the "minimum information" standard of Section 20504(c)(2). That Section refers to the amount of information that the state can *require of* the prospective voter, not the amount of information the state should provide *to* the prospective voter. 52 U.S.C. § 20504(c)(2) ("The voter registration application portion of an application for a State motor vehicle driver's license . . . may *require* only the minimum amount of information necessary to (i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."). Meanwhile, what information must be given *to* the voter is addressed in all of the provisions requiring specific voter

qualification. *See supra.* Requiring a minimum amount of information *from* a prospective voter while providing a prospective voter with all the information necessary to assess qualifications is precisely in line with the NVRA's overall goal of facilitating easy access to voter registration.

Finally, Defendants argue that their forms meet the NVRA's requirements because other states' forms are similarly vague. It is, of course, not the case that failures in other states to live up to their NVRA's responsibilities defeat Plaintiff's claim here.[11] But it is also not the case that "plaintiffs' theory suggests that almost every state form in the country is illegal under the NVRA." Doc. 95 at 23. Many states relay the necessary information for voters with past convictions to assess their eligibility. *See, e.g.,* Exhibit 5 (State Voter Registration Forms for Colorado, Texas, and New Mexico). This is the case even in states with more complex felony

[11] Defendants point to the state registrations forms in Alaska, Arkansas, Arizona, Georgia, Missouri, and Nevada in particular. With respect to Arizona and Nevada, counsel for Plaintiffs have separately notified the chief election officials in those states of the ambiguity in their registration forms with respect to eligibility requirements for people with convictions. Both have pledged to update their respective forms to provide the necessary information to eligible voters, as have election officials in Delaware and Nebraska. *See* Exhibit 3 (collected news stories), Exhibit 4 (prior Delaware form and current Delaware form). With respect to Georgia, the form requires voters to affirm that they are "not serving a sentence for having been convicted of a felony involving moral turpitude" but the state has interpreted that to include all felonies. Secretary of State of Georgia, Elections: Voter Registration Drive FAQs, http://sos.ga.gov/index.php/elections/voter_registration_drive2. Therefore, the language on the Georgia form, while confusing, does not pose the same risk of de facto disenfranchisement of otherwise eligible voters. Similarly, it is not clear that Alaska's definition of moral turpitude excludes any felonies either. Therefore, the broad language on its registration stating that people with felony convictions cannot vote until the end of their sentence may be accurate. Finally, Arkansas does not disenfranchise a subset of people with felony convictions but instead disenfranchises all people with convictions until the end of their sentence. Therefore, its form does not suffer from the same problems as Alabama's form. Plaintiffs make no representations about the sufficiency of these forms under the NVRA but none of these examples present the same issues raised by Plaintiffs in this case.

disenfranchisement rules. *See* Exhibit 6 (South Carolina's voter registration form outlining different rules for those convicted of election law crimes and all other crimes); Exhibit 7 (Mississippi's voter registration form listing the various disqualifying convictions). The Court should therefore enter judgment for Plaintiff GBM on Count 18. In the alternative and at a minimum, the Court should reject Defendants' request to enter judgment in their favor and allow discovery to proceed on this claim.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' renewed motion to dismiss in its entirety and enter judgment for Plaintiff GBM on Count 18.

Respectfully submitted,

/s/ *Danielle Lang*
Danielle Lang (CA Bar: 304450)
J. Gerald Hebert (VA Bar: 38432)
Campaign Legal Center
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
ghebert@campaignlegalcenter.org

J. Mitch McGuire (AL Bar: ASB-8317-S69M)
McGuire & Associates LLC
31 Clayton Street
Montgomery, AL 36104
(334) 517-1000
jmcguire@mandabusinesslaw.com

James U. Blacksher (AL Bar: ASB-2381-S82J)
P.O. Box 636
Birmingham, AL 35201
(205) 591-7238
jblacksher@ns.sympatico.ca

Jessica Ring Amunson (DC Bar: 497223)
Jenner & Block LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 736-6000
jamunson@jenner.com

Pamela Karlan (NY Bar: 2116994)
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Aderson B. Francois (DC Bar: 498544)
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-6721
abf48@georgetown.edu

Armand Derfner (SC Bar: 1650)
Derfner & Altman
575 King Street, Suite B
Charleston, SC 29403
(843) 723-9804
aderfner@derfneraltman.com

Counsel for Plaintiffs and Plaintiff Class

CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Danielle Lang*
Danielle Lang
Counsel for Plaintiffs and Plaintiff Class