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

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| TREVA THOMPSON, et. al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | CIVIL ACTION NO. |
| v. | ) | **2:16-cv-783-WKW** |
| | ) | |
| STATE OF ALABAMA, et. al., | ) | |
| | ) | |
| Defendants. | ) | |

**OPPOSITION TO MOTION TO DISMISS AND BRIEF IN SUPPORT**

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## INTRODUCTION

Despite Defendants' attempts to portray it as such, this is not a case about the abstract legality of felon disenfranchisement. Instead, this case concerns only Alabama's current regime for disenfranchising persons based on their felony convictions "involving moral turpitude." This regime is deeply rooted in the history of disenfranchisement of black citizens in Alabama. It has both the purpose and effect of continuing that pattern of disenfranchisement. Moreover, it arbitrarily and randomly disenfranchises citizens based on where they live and when they register.

Unable to justify Alabama's total failure to define its "moral turpitude" standard for disenfranchisement, or to present any uniform or adequate procedure for determining which citizens have access to the fundamental right to vote, Defendants instead rely almost solely on the Supreme Court's opinion in *Richardson v. Ramirez*, 418 U.S. 24 (1974), for their defense. They treat *Richardson* as if it creates a constitution-free zone in a voting rights case whenever a citizen has a criminal conviction. They are wrong.

First, where individuals have a right to vote under state law—such as those convicted of felonies *not* involving moral turpitude in Alabama—that right to vote is fully protected under the Constitution. Defendants can cite no precedent for their proposition that a felony conviction alone, regardless of state law, strips an

individual of all constitutional protections of the right to vote. *Richardson* says nothing whatsoever about those granted the right to vote by the state. It should go without saying that they have the same right to vote as all other eligible citizens.

Second, while the use of convictions as a factor in determining voting qualification is at least sometimes permissible under *Richardson*, the manner in which the states use convictions as a disqualifying factor is subject to constitutional scrutiny. The Supreme Court made this abundantly clear in *Richardson* itself, when it remanded for further adjudication the plaintiffs' alternative contention that California's disenfranchisement regime arbitrarily disenfranchised individuals in violation of the Equal Protection Clause (an identical claim is brought here). It did so again when it struck down Alabama's prior felon disenfranchisement regime as racially discriminatory. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Third, as the history below demonstrates, *Richardson* did not answer the question of the scope of permissible disenfranchisement under Section 2. That issue was not raised or briefed before the Supreme Court and requires this Court's careful attention on a full record. Ultimately, *Richardson* cannot save Defendants from answering the specific allegations in this case, which raise serious and unresolved factual and legal issues that cannot be resolved at the motion to dismiss stage.

## STANDARD OF REVIEW

In order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted). While the Complaint must allege "more than a sheer possibility that a defendant has acted unlawfully," it need not set out "detailed factual allegations." *Id.* In evaluating a motion to dismiss, this Court must address "the facts as alleged in the Complaint, accept them as true, and construe them in the light most favorable to Plaintiffs." *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321–22 (11th Cir. 2012).

Yet, at every turn, Defendants have disregarded this standard and asked this Court to resolve factual questions in their favor by distorting the limited doctrine of judicial notice and accepting their biased portrayal of the history of Alabama's disenfranchisement provision and its current application, all without the development of an evidentiary record. *See Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1204–05 (11th Cir. 2004) (noting that judicial notice "as a matter of evidence law, [is] a highly limited process" (internal quotation marks omitted)). The resolution of the parties' competing views of this law's history, the State's experience in developing and applying the moral turpitude standard, and Section 177(b)'s current enforcement regime are all factual

questions to be resolved on a full record. Defendants' attempt to introduce their own tailored view of the facts in their motion to dismiss demonstrates that the disputed facts in this case are essential to the resolution of the legal issues. This alone dooms Defendants' motion to dismiss. At this time, the Court must accept all Plaintiffs' allegations as true, which paint a starkly different picture than the one Defendants put forward. Plaintiffs are well-prepared to prove these facts, in due course, at trial.

## ARGUMENT

### I. Defendants Misinterpret *Richardson v. Ramirez* and Its Progeny.

#### A. A History of *Richardson* and the Limits of Its Holding.

Because Defendants rely almost exclusively on *Richardson* as the basis for most of their arguments, it is important to understand what that case did, and did not address. As it came to the Supreme Court, the sole question was whether California could ever disenfranchise individuals on the basis of *any* convictions. *Richardson* did not resolve the scope of Section 2's affirmative sanction or the question of how a state can or cannot constitutionally define the scope of disenfranchised individuals. Moreover, it did not withdraw federal constitutional protections for the right to vote as provided by state law. A brief overview of how *Richardson* came to the Court will make its limited application to this case plain.

*Richardson* was a challenge to California's disenfranchisement of those convicted of "infamous crimes." 418 U.S. at 27. In a prior challenge, the California

Supreme Court had narrowed the definition of "infamous crimes" to those "evidencing such moral corruption and dishonesty" akin to "bribery, perjury, forgery, [and] malfeasance in office" because only those crimes could "reasonably be deemed to constitute a threat to the integrity of the elective process." *Otsuka v. Hite*, 414 P.2d 412, 421 (Cal. 1966). In so doing, it rejected the defendants' argument that "infamous crimes" should encompass all felonies. *Id.* at 418.[1]

Because the California court did not issue concrete guidance as to which crimes were covered, decisions regarding disenfranchisement were left to county registrars. The result was, in the words of the California Secretary of State, "a complete lack of uniformity . . . from one county to another" that was "utterly indefensible, without regard to whether a uniform disenfranchisement of former felons would be constitutionally permissible." Br. for Sec'y of State of Cal., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (No. 72-1589), 1974 WL 185586, at *4, *6.

Therefore, the plaintiffs in *Richardson v. Ramirez* presented two theories to the state court. The first was that any criminal disenfranchisement, however defined, was impermissible under the Fourteenth Amendment. The second was that

[1] The California Supreme Court explained: "The unreasonableness of a classification disfranchising all former felons, regardless of their crime, is readily demonstrable: it raises the spectre of citizens automatically deprived of their right to vote upon conviction, for example, of seduction under promise of marriage, failure to provide family support, wife-beating, or second-offense indecent exposure," and so on. *Otsuka*, 414 P.2d at 418. (citations omitted).

the lack of uniformity in who was disenfranchised violated the Fourteenth Amendment. The California Supreme Court reached only the first question, holding that "disfranchisement by reason of conviction of crime is no longer constitutionally permissible," and never addressed the second. *Ramirez v. Brown*, 507 P.2d 1345, 1346 (Cal. 1973).

Thus, when that decision was appealed, the only question before the Supreme Court was whether the California Supreme Court was correct in its broad holding that no criminal disenfranchisement, at all, was constitutionally permissible. The briefing and opinion focused on one discrete issue: whether any disenfranchisement of individuals with criminal convictions should be subjected to strict scrutiny and disallowed under Section 1 of the Fourteenth Amendment, or whether Section 2 of the Fourteenth Amendment provided a sanction for some form of criminal disenfranchisement that would override ordinary strict scrutiny analysis under Section 1.[2]

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[2] The relevant sections of the Fourteenth Amendment are set forth in full below:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2.
>
> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding

The Court ultimately agreed with the petitioners that Section 2 permits some form of criminal disenfranchisement. It held that "Section 1 [of the Fourteenth Amendment], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which Section 2 imposed for other forms of disenfranchisement," *Richardson*, 418 U.S. at 55, and reversed the California Supreme Court's broad prohibition on any criminal disenfranchisement.

However, *Richardson* did not address the scope of Section 2's implicit sanction. The parties did not present to the Court any arguments about the breadth of Section 2 and the question did not present itself because the opinion below had broadly prohibited any and all criminal disenfranchisement. Therefore, neither the Supreme Court nor any court in this circuit has ever resolved the scope of the disenfranchisement Section 2 permits.

This is a question that will require this Court's analysis of historical documents and expert testimony on the original intent of the framers of the Fourteenth Amendment. Defendants have not proposed any meaningful definition

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> Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

of Section 2's language but instead argue that it permits disenfranchisement for "every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony." Defs.' Motion to Dismiss, ECF No. 43 (hereinafter "MTD") at 40. Defendants' proposition cannot be sustained. It would allow any state to strip the right to vote from nearly every citizen with impunity on the basis of the most minor infractions.[3]

*Richardson* is also irrelevant to the constitutional protections that evenly apply to all eligible voters under state law, regardless of convictions. Yet, Defendants repeatedly argue that, under *Richardson*, regardless of state law, "felons do not have a protectable constitutional right to vote" and "felons have no 'liberty' interest to vote under the Due Process Clause." MTD at 43, 55. This argument is demonstrably wrong. It is the states that have the power in the first instance to determine voter qualifications and extend the franchise to their citizens. *See Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise."). But "once the franchise is granted to the electorate, lines may not be

[3] A federal court in the Fifth Circuit has held that the "rebellion, or other crime" language in Section 2 "does not encompass misdemeanors." *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974 (S.D. Miss. 1995). *McLaughlin* demonstrates that the scope of Section 2 is undecided and requires this Court's attention with the aid of historical evidence and expert analysis.

drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *see also Bush v. Gore*, 531 U.S. 98, 104–05 (2000). Where states extend the right to individuals with convictions—as Alabama has—those individuals have a constitutionally protected right equal to all other eligible voters. Defendants have not and cannot provide any authority to the contrary.

Properly understood, *Richardson* simply held that criminal convictions, at least in some circumstances, are a permissible factor, like residency or citizenship, for states to consider in establishing qualifications for the franchise. 418 U.S. at 53 (quoting *Lassiter v. Northhampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) for the proposition that "[r]esidence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters" (internal quotation marks omitted)). It did not, as Defendants contend, withdraw an entire class of people from any constitutional protection in their access to the right to vote. Nor did it define the breadth of permissible criminal disenfranchisement as envisioned by the framers of Section 2 of the Fourteenth Amendment.

### B. *Richardson* Demonstrates That the Manner of Criminal Disenfranchisement Is Subject to Constitutional Scrutiny.

Finally, the manner in which the states use convictions as a disqualifying factor is still subject to constitutional scrutiny. This is clear from *Richardson* itself.

While the Supreme Court reversed the California Supreme Court's broad prohibition on criminal disenfranchisement, it remanded the issue of whether California's arbitrary system of criminal disenfranchisement, lacking in uniformity from county to county, violated the Equal Protection Clause. In so doing, the Court recognized that this was a separate constitutional question, noting:

> The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it.

*Richardson*, 418 U.S. at 56. This is precisely the claim raised by Plaintiffs in Count 10. If the Court's holding in *Richardson* resolved that issue, as Defendants suggest, there would have been no need for a remand.

In the years since *Richardson* was decided, both the Supreme Court and lower courts' rulings have repeatedly demonstrated that Section 2 of the Fourteenth Amendment does not categorically preclude constitutional scrutiny of criminal disenfranchisement. In *Hunter v. Underwood*, the Court unanimously struck down a racially discriminatory felon disenfranchisement law and forcefully rejected an argument very similar to Defendants' here:

> The single remaining question is whether § 182 is excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the "other crime" provision of § 2 of that Amendment. Without again considering the implicit authorization of § 2 to deny the vote to citizens "for participation in rebellion, or other crime," we are confident that § 2 was not designed to permit the purposeful racial

> discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary.

471 U.S. at 233.

Similarly, an Alabama court struck down part of Alabama's prior criminal disenfranchisement law because it discriminated between men and women. *See Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) ("This case does not question 'whether a State may constitutionally exclude some or all convicted felons from the franchise.' . . . No compelling, or even rational, state policy has been suggested to explain why conviction of men for assault and battery against the spouse is a cause for disqualification while the conviction of women for the same offense is not disqualifying." (internal citations omitted)).

The lesson from *Hunter* is not, as Defendants suggest, that there is a race exception to a general rule against constitutional scrutiny of felon disenfranchisement. MTD at 36 ("The Supreme Court rejected non-race-related attacks on felon disenfranchisement in *Richardson*."). Instead, the lesson is the same as the obvious implication of *Richardson*'s remand of the remaining Equal Protection question: criminal convictions are, at least sometimes, a constitutionally

permissible factor for voting qualifications, but the manner in which the state imposes those qualifications is still subject to constitutional scrutiny.[4]

For the foregoing reasons, *Richardson* may be the starting place for this Court's analysis but it cannot be the ending place. It answers none of the legal and factual questions raised in this case. The Plaintiffs in this case have sufficiently alleged that, regardless of any sanction for criminal disenfranchisement in Section 2 of the Fourteenth Amendment, Alabama's current regime flouts several basic constitutional principles without justification. Without *Richardson* as an all-powerful shield, Defendants' motion to dismiss cannot withstand scrutiny.

## II. Plaintiffs Have Pled Plausible Claims of Racial Discrimination Under the Fourteenth and Fifteenth Amendments and the Voting Rights Act (Counts 1, 2, and 3).

Plaintiffs have stated a plausible claim, under Counts 1 and 2 of the Complaint, that Amendment 579 was drafted and passed with a racially

[4] This is a point reiterated in *Williams v. Taylor*, a Fifth Circuit case heavily relied upon by Defendants, which reversed a District Court's dismissal of an Equal Protection challenge to the enforcement of Mississippi's felon disenfranchisement law and remanded for further consideration. 677 F.2d 510, 515–17 (5th Cir. 1982) ("The Election Commissioners cannot discriminate arbitrarily among felons who fall within the group classified for mandatory disenfranchisement in s 23-5-35. The Supreme Court clearly recognized this principle in *Ramirez*, *supra*, when it remanded the [separate equal protection claim.]'"); *see also Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) ("[W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote."). *Shepherd v. Trevino* was decided before the split of the Fifth Circuit and is therefore binding precedent.

discriminatory purpose. Plaintiffs have also stated a plausible claim in Count 3 of the Complaint that Alabama's enforcement of the criminal disenfranchisement provision in Section 177(b) of the Alabama Constitution results in the impermissible abridgement of the right to vote on account of race—both by its purpose and through its results—and, accordingly, violates Section 2 of the Voting Rights Act.

### A. Plaintiffs Have Stated a Plausible Claim That Amendment 579 Was Passed With Discriminatory Purpose and Thus Violates the Fourteenth and Fifteenth Amendments (Counts 1, 2).

Defendants attempt to undermine the plausibility of the allegations in the Complaint by challenging Plaintiffs' theory of discriminatory purpose with alternative facts. Alabama argues first that Amendment 579[5] was passed in 1996 "to *expand*" voting rights, not to restrict them. MTD at 26 (emphasis in original). Likewise, Defendants argue that because Amendment 579 "was supported by at least 15 black legislators,"[6] and was reenacted in 2012, it is not plausible that the language therein was motivated by a discriminatory purpose. *Id.* at 26–27. These facts, Defendants argue, exhibit the "innocuous history" of Amendment 579. *Id.* at 27. But Defendants' alternative historical narrative is inappropriate at the motion to

[5] Defendants also focus on Amendment 865, passed in 2012. But Defendants' reference to Amendment 865 is inapposite. The modification voted on in 2012 had no impact on the disenfranchisement language of Amendment 579. *See* MTD at 19.

[6] At the motion to dismiss stage, this factual assertion by the State, standing alone, cannot establish lack of discriminatory intent.

dismiss stage. The Court must accept the facts as stated in the Complaint as true at this stage of the proceedings, *Resnick*, 693 F.3d at 1321–22, even if Defendants disagree with them.

Moreover, even if it were appropriate for this Court to consider Defendants' factual challenge to Plaintiffs' allegation of discriminatory intent, the challenge lacks merit. Defendants' purported "expan[sion]" of voting rights was nothing more than a move to rid the State's Constitution of antiquated provisions[7] "in accordance with constitutional requirements." MTD at 26 (quoting Act No. 95-443 (setting forth ballot language)). This is entirely consistent with Plaintiffs' allegation that Amendment 579 was "was intended merely to simplify the [1901] language governing voting" not change it. Compl. ¶ 119.[8] Defendants also point to the absence of negative votes for Act No. 95-443, or any racist speeches made, or racial overtones communicated during the campaign to enact Amendment 579 as evidence that the amendment did not perpetuate purposeful discrimination. MTD at 27. But these additional facts are also consistent Plaintiffs' allegation that the bill was sold as legislative housekeeping—not a substantive change in the law. And

[7] The Amendment "repeal[ed] provisions that established poll taxes, that limited the right to vote to males over the age of 21, and that disenfranchised persons convicted of misdemeanor offenses." MTD at 26.

[8] Moreover, it is far from clear that the provision disenfranchising individuals convicted of "any crime punishable by imprisonment in the penitentiary" ever functioned to disenfranchise all individuals with felony convictions. Rather, the "moral turpitude" provision was intended to focus even the penitentiary provision's burdens on blacks and poor whites. This is, yet again, a factual question to be resolved at trial.

even if the amendments could reasonably be understood as an expansion of voting rights for some people, that fact would not negate the "moral turpitude" bar that perpetuated racial discrimination against others. Such discriminatory intent in the law is impermissible notwithstanding any other provisions simultaneously enacted without such intent. *Cf. Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) ("Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.").

Defendants' argument that Plaintiffs have not alleged a link between the passage of Amendment 579 in 1996 and its historical grounding in the explicitly racist passage of the 1901 Constitution is equally unavailing. The historical background of Alabama's decision is proper intent evidence along with "[t]he impact of the official action," "[t]he specific sequence of events leading up [to] the challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). The facts alleged in the Complaint not only demonstrate the explicitly racist genesis of the "moral turpitude" provision but also outline Section 177(b)'s drafting history showing Amendment 579's direct preservation of the 1901 language and its purpose (and effect).

Amendment 579 is undoubtedly infused with discriminatory purpose. Defendants do not, and could not, dispute that the 1901 Constitution included the "moral turpitude" disenfranchisement provision in order to exclude blacks.[9] Alabama's all-white 1901 Constitutional convention was "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter*, 471 U.S. at 229; Compl. ¶ 94. Indeed, "[t]he explicit purpose of the 1901 Convention, as expressed by the Convention president John Knox in his opening address, was to 'establish white supremacy' in Alabama." Compl. ¶ 95.

Amendment 579, which directly carries over the moral turpitude language, is a word-for-word adoption of a 1973 draft provision, proposed twelve years before the Supreme Court's decision in *Hunter v. Underwood*, that sought only to simplify, not change, the 1901 provision. Compl. ¶¶ 111, 117. The moral turpitude language was undeniably lifted from the 1901 Constitution because the other models the drafters cited did not include it. Compl. ¶ 110. Amendment 569 was passed in 1996 despite the fact that the Supreme Court had already held the language at issue was racially discriminatory. This is powerful direct evidence of intent. Moreover, it was passed at a time when disproportionate black incarceration rates were spiking and against the backdrop of the resurgence of another vestige of

[9] *See Hunter*, 471 U.S. at 232 ("In addition to the general catchall phrase 'crimes involving moral turpitude' the suffrage committee selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks.").

Alabama's racist history, the chain-gang. Compl. ¶¶ 122–126, 130.[10] These historical facts, accepted as true with all reasonable inferences taken in Plaintiffs' favor for the purposes of resolving the current motion, explain why the current language cannot be unmoored from its racially motivated history.

**1. Defendants' reliance on *Johnson* is misplaced.**

Defendants' effort to cast Plaintiffs' claims as the "guilty-by-history" type of argument that the Eleventh Circuit rejected in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *see* MTD at 28, fails. *Johnson* considered a discriminatory intent claim against Florida's disenfranchisement provision. Plaintiffs alleged that racially discriminatory purpose motivated the original 1868 provision, but the provision had been revised and re-passed in 1968. 405 F.3d at 1224. Beyond superficial similarities, *Johnson* bears little resemblance to this case. It was decided at the summary judgment stage on the basis of several factual findings that are starkly at odds with the allegations the Court must accept as true here, on a motion to dismiss.

[10] Defendants' statement that "the chain gang has nothing to do with voting," MTD at 28, is simply wrong. "Determining whether invidious discriminatory purpose was a motivating factor [in state action] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Concurrent intentional discrimination in the criminal justice context in Alabama is relevant circumstantial evidence.

First, the *Johnson* plaintiffs "concede[d] that the 1968 provision was not enacted with discriminatory intent." *Id.* at 1223. In contrast, Plaintiffs here have alleged that discriminatory intent infected the passage of Amendment 579.

Second, the *Johnson* plaintiffs offered no contemporaneous evidence of racial intent behind the initial 1868 disenfranchisement provision. *Id.* Here, plaintiffs have alleged a detailed account of racial intent behind the 1901 precursor to Section 177(b). Indeed, the *Johnson* court itself noted the important difference between the evidence of discrimination put forward in *Johnson* regarding the 1868 enactment and the evidence of discrimination behind the Alabama 1901 enactment. *Id.* at 1222 n.18 ("Unlike the case at bar, in *Hunter*, there was extensive evidence that racial animus motivated the 1901 disenfranchisement provision.").

Third, *Johnson*'s holding relied not only on the lack of contemporaneous evidence behind the initial 1868 disenfranchisement in Florida, but specifically on the lack of evidence available to the 1968 legislature of any racial intent behind the 1868 law. *Id.* at 1224, 1225 n.21 (finding no racial intent behind the 1968 law "particularly in light of . . . the fact that, at the time of the 1968 enactment, no one had ever alleged that the 1868 provision was motivated by racial animus") ("Prior to this case, no expert had ever suggested that the 1868 disenfranchisement provision was motivated by racial discrimination."). In contrast, *Hunter v. Underwood* very publicly laid out the abundant evidence of discriminatory intent

behind the 1901 provision and the moral turpitude language. Nonetheless, a decade later, the legislature chose to reintroduce the very language the Supreme Court found was racially discriminatory. These facts support a "healthy skepticism that the facially neutral provision was indeed neutral," *Johnson*, 405 F.3d at 1226, that was not warranted in *Johnson*.

Fourth, *Johnson*'s holding relied heavily on its factual findings that the 1968 provision went through "a deliberative process," that included hearings and consideration of motions and amendments, which resulted in "substantive" revisions and a "markedly different" law. *Id.* at 1220–21, 1224. Here, Plaintiffs have alleged that the "moral turpitude" provision was a direct continuation of the 1901 provision, that there was no meaningful debate of the provision or amendments offered in 1996, and that its stated intent was solely to simplify, not substantively change, the 1901 provision's language.

Finally, the *Johnson* court relied on the lack of contemporaneous evidence of discriminatory impact, holding that the provision "did not create a significant disparate impact along racial lines" when it was adopted. *Id.* at 1222 n.17. Plaintiffs here have alleged that the disproportionate racial impact of Section 177(b) in 1996 was even more extreme than the disproportionate impact the Supreme Court found as a matter of law in 1985. The allegations here show a state

that was on notice of both the discriminatory intent behind this law and its discriminatory impact.

Nor is this case similar in kind to *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010), in which the Second Circuit failed to find invidious intent in New York's constitutional and statutory criminal disenfranchisement provisions, even where past amendments were plausibly motivated by race. Prior to the ratification of the Fifteenth Amendment, New York had used "explicit racially discriminatory suffrage requirements" to exclude blacks from the political process. *Id.* at 159; *see generally id.* at 157–59. Applying *Iqbal*, however, the Second Circuit held that the *Hayden* plaintiffs had "fail[ed] to allege any non-conclusory facts to support a finding of discriminatory intent as to the 1894 provision or subsequent enactments" and thus they had "fail[ed] to state a claim that is plausible on its face or, stated differently, that 'nudge [ ] [their] claims of invidious discrimination across the line from conceivable to plausible.'" *Id.* at 161 (quoting *Iqbal*, 566 U.S. at 680).

In contrast, Plaintiffs in this case have provided the Court with ample direct evidence of the historical discriminatory intent behind the Alabama Constitution's criminal disenfranchisement provision as enacted in 1901, *along with* sufficient direct and circumstantial evidence of the discriminatory intent inherent in the 1996 amendment of that provision. As discussed above, Plaintiffs have pleaded facts in this case sufficient to reasonably infer that the Alabama Legislature understood the

use of the "moral turpitude" disenfranchisement provision as encompassing an explicitly racist agenda to disenfranchise blacks.

In short, Defendants' arguments relating to the purpose and process of the passage of Amendment 579 invite this Court to resolve questions of fact. But this attempt to introduce facts at the motion to dismiss stage only supports the denial of the present motion and the further development of the factual record in this case.

**2. Contrary to Defendants' Claim, Alabama's Use of the Phrase "Moral Turpitude" Does Not Undermine Plaintiffs' Claims of Purposeful Discrimination.**

Defendants next argue that the Alabama Legislature's use of the "involving moral turpitude" standard to distinguish between crimes is categorically not suspect, and so any intent claim based on that language is insufficient to state a plausible claim of racial intent. *See* MTD at 31. This argument fails.

Defendants argue, first, that "moral turpitude" was a commonly used qualification at the time Amendment 579 was passed—that the qualification could be used to impeach witnesses, sanction lawyers, and deport immigrants. Even if this was so—and in deciding a motion to dismiss, this Court cannot look at a defendant's counter-allegations on factual issues—the question in this case is whether Alabama perpetuated purposeful discrimination when it applied that standard to voting. *Cf.* MTD at 31. A more relevant (although not dispositive) question is whether that phrase was commonly used *with respect to voting*. It was

not. As of 1996 only two other states employed the "moral turpitude" standard to disenfranchise voters in their constitutions.[11]

Defendants also argue that nothing in *Hunter* casts doubt on Alabama's use of the "moral turpitude" standard. Defendants are wrong. While *Hunter* may not dispose entirely of the question, it weighs heavily on it. *Hunter* did not address Section 182's disenfranchisement on the basis of felonies because the challenge itself was limited to misdemeanors. But *Hunter*'s language is broad, holding that Section 182 "was motivated by a desire to discriminate against blacks." 471 U.S. at 233. The opinion focused on the Alabama Legislature's selection of "moral turpitude" because of its flexibility, which enabled discrimination and specifically rejected the proposition that "moral turpitude" was adopted for any neutral purpose.[12] Thus, *Hunter* speaks directly to the racial intent behind Alabama's continued use of moral turpitude to disenfranchise its citizens.

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[11] Alaska, *see* Alaska Const. art. V, § 2, and Georgia, *see* Georgia Const. art. II, §§ I, III(a).

[12] *See* 471 U.S. at 226–27 ("Various minor nonfelony offenses such as presenting a worthless check and petty larceny fall within the sweep of § 182, while more serious nonfelony offenses such as second-degree manslaughter, assault on a police officer, mailing pornography, and aiding the escape of a misdemeanant do not because they are neither enumerated in § 182 nor considered crimes involving moral turpitude. It is alleged, and the Court of Appeals found, that the crimes selected for inclusion in § 182 were believed by the delegates to be more frequently committed by blacks." (internal citations omitted)); *id.* at 232 ("Appellants contend that the State has a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude, and that § 182 should be sustained on that ground. The Court of Appeals convincingly demonstrated that *such a purpose simply was not a motivating factor* of the 1901 convention." (emphasis added)).

Even putting aside *Hunter*, plaintiffs' allegation of suspect intention is plausible. The phrase "moral turpitude" is notoriously vague. *See infra*. In case law, "the standard has come in a form that eschews analysis." Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1004. "Courts have described the standard as 'notoriously plastic,' jurisprudence on moral turpitude as an 'amorphous morass,' and its use as an 'invitation to judicial chaos.'" *Id.* As the Eleventh Circuit said in *Underwood v. Hunter*, the meaning of the phrase "will turn upon the moral standards of the judges who decide the question." 730 F.2d 614, 616 n.2 (11th Cir. 1984). "Thus does the serpent of uncertainty crawl into the Eden of trial administration." *Id.* (quoting McCormick on Evidence § 43, at 85–86 (2d ed. 1972)).

Thus, while it may be true that the "moral turpitude" standard existed in other areas of law prior to 1901, Plaintiffs have alleged (and this Court must accept as true) that it was selected for inclusion in the disenfranchisement law because its shapeless content created space for racially discriminatory enforcement. *See* Simon-Kerr, *supra*, at 1041 ("Further, because of its lack of clarity at the margins, the standard would give voting officials the discretion to read 'between the lines' for 'the intent and expectation [was] that the phrase would be used in a discriminatory manner.' It was a discretion that officials used effectively, albeit opaquely, since they were not required to provide written justifications for their

decisions.").[13] Alabama has not only maintained this vague standard but has also maintained the same opaque enforcement system criticized in *Hunter*, leaving registrars to determine eligibility under the standard without oversight or documentation. The continuation of "moral turpitude" as a means of disenfranchisement perpetuates a racially discriminatory scheme designed to invidiously enforce racial hierarchy.

Regardless of whether Amendment 579's sponsor and the legislators who enacted it acted in good faith—and again, this Court cannot determine that on a motion to dismiss in light of Plaintiffs' allegations—the Eleventh Circuit clearly declared in *Hunter* that "[n]either their impartiality nor the passage of time,

[13] The moral turpitude provision was just one part of an interconnected web of facially neutral laws passed by the Alabama Legislature aimed to circumvent the Thirteenth and Fourteenth Amendments. For example, the Alabama Legislature of 1903, composed in large part of the men who wrote the 1901 Constitution, enacted a statute declaring that a farm laborer who quit his job after receiving an advance was presumed guilty of the crime of fraud. Four years later, the Legislature enacted another statute creating a revolving system of hiring-out prisoners with ever-increasing sentences.

Despite their race-neutral language, the Supreme Court recognized that both these laws were aimed at blacks and struck them both down as violations of the Thirteenth Amendment. These were the first Supreme Court cases ever to strike down facially neutral state statutes for having a racially discriminatory intent. In the case involving the 1903 statute, the Court said "what the state may not do directly, it may not do indirectly." *Bailey v. Alabama*, 219 U.S. 219, 244 (1911). In the other, the Court described the leasing system as keeping the convict "chained to an everturning wheel of servitude." *United States v. Reynolds*, 235 U.S. 133, 146 (1915).

Ultimately, Alabama engaged in the systematic prosecution and incarceration of black citizens in order to both feed its convict-leasing system. At this time, nearly all of Alabama's prison population was black. The criminal disenfranchisement law worked hand-in-hand with convict-leasing to disenfranchise blacks and continue the exploitation of their labor. *See* Compl. ¶¶ 101–105. The moral turpitude provision, enforced without any accountability or even-handedness, still achieves that end.

however, can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today." 730 F.2d at 621.

### B. Plaintiffs Have Stated a Claim for Violation of Section 2 of the Voting Rights Act (Count 3).

Plaintiffs have stated a plausible claim that Alabama's enforcement of Section 177(b) of the Alabama Constitution results in the impermissible abridgement of the right to vote on account of race—both by its purpose and through its results—and, accordingly, violates Section 2 of the Voting Rights Act. Defendants offer two arguments as to why Plaintiffs' Section 2 claims should be dismissed. First, they argue that *Johnson* forecloses Voting Rights Act claims. Second, they argue that racial disparities in the criminal justice system cannot by themselves give rise to a Section 2 claim. Neither argument is persuasive as applied to this case.

Section 2 of the VRA prohibits both practices enacted or maintained for a racially discriminatory purpose and practices that interact with "past and present reality" to deny minority citizens an equal opportunity to participate. *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986). With respect to Section 2 purpose claims, *Johnson* is entirely irrelevant. The controlling precedent is *Hunter*. If a particular disenfranchisement regime is purposefully discriminatory, the Fourteenth and Fifteenth Amendments themselves condemn the regime, and holding it invalid under Section 2 as well cannot conceivably raise constitutional concerns.

As for Section 2 results claims, while it is true that courts have declined to find a Section 2 violation based on a simple disproportionate effect on minority citizens, this case involves more. Plaintiffs have alleged the racially discriminatory history of this law. They have laid out the disparate impact of the provision in detail in the Complaint. *See* Compl. ¶¶ 127–137. Black Alabamians are three times more likely to be disenfranchised than whites. *Id.* ¶ 136. Put another way, over half of all disenfranchised individuals are black, but black Alabamians only comprise one quarter of the total voting age population. *Id.* Further, the Complaint alleges discrimination in prosecution: "Alabama prosecutes and convicts its black citizens at substantially higher rates than its white citizens." Compl. ¶ 135. Those facts, particularly in light of the broader allegations of discrimination and its continued effects in the Complaint are sufficient, at the motion to dismiss stage, to permit an inference that the discriminatory result in this case involves more than simple disproportionality.[14]

[14] Should this Court hold that *Johnson* categorically precludes Plaintiffs' results claim, Plaintiffs preserve for appeal the argument that *Johnson* was wrongly decided. While Section 2 of the Fourteenth Amendment may sanction some form of criminal disenfranchisement, it was never intended to sanction any form of discrimination. Congress' exercise of its Section 5 powers under the Fifteenth Amendment to eliminate discrimination in voting through the Voting Rights Act is equally appropriate as applied to criminal disenfranchisement as any other voter qualification otherwise permitted under the Constitution.

## III. Plaintiffs Have Stated a Fourteenth Amendment-Based Claim for Violation of Their Constitutionally-Protected Right to Vote Under Section 177(b)'s Overbroad Scope (Counts 4 and 5).

Plaintiffs have stated valid claims for violations of their constitutionally protected fundamental right to vote under Alabama's overbroad felon disenfranchisement law.

The Supreme Court has "made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Although this right is "not absolute, . . . as a general matter, before [it] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Id.* at 337 (internal quotation marks omitted). Alabama's amorphous felon disenfranchisement provision fails this scrutiny. At the very least, substantial fact questions exist regarding the State's purported interests and tailoring choices. Such questions cannot be determined at this stage.

As discussed above, the Supreme Court's decision in *Richardson* does not, as Defendants allege, categorically foreclose Counts 4 and 5 of the Complaint. MTD at 37. To the contrary, Counts 4 and 5 present a question never addressed by either the Supreme Court or the Eleventh Circuit. The Supreme Court in *Richardson* was not presented with any argument regarding the meaning of the phrase "rebellion, or other crime" in Section 2 of the Fourteenth Amendment. The

Court has thus never decided *which* crimes fall under Section 2's "affirmative sanction" of disenfranchisement. *See Harvey v. Brewer*, 605 F.3d 1067, 1074 (9th Cir. 2010) (acknowledging that Supreme Court has not addressed scope of affirmative sanction in § 2). The Constitution's text and history dictate that the "affirmative sanction" of disenfranchisement identified by the *Richardson* Court is limited, and does not extend to the crimes for which plaintiffs were convicted.[15]

First, well-established canons of construction support a narrow interpretation of the phrase "rebellion, or other crime." Under the principle *ejusdem generis*, "[w]here general words follow specific words . . . , the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). And under the related principle *noscitur a sociis*, courts should interpret a word "by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). In *Gustafson*, the Supreme Court explained that it relies upon this rule "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* These canons strongly counsel cabining Section 2's "or other crime" language to those crimes akin to rebellion.

[15] Alabama contends that because the *Richardson* plaintiffs were convicted of robbery, heroin possession, and forgery, *Richardson* forecloses an argument that Section 2's affirmative sanction is limited to certain crimes. MTD at 40. Not so. The specific crimes were irrelevant to the Court's analysis, and are therefore irrelevant to the application of *Richardson* here.

The use of these basic interpretive principles to understand "rebellion, or other crime" in Section 2 is supported by how the word "crime" is differently defined "by its company" in other provisions in the Constitution as well. For example, the Extradition Clause of the Constitution provides that

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. Const. art IV § 2. In this clause, the phrase "or other Crime" follows a listing of two of the three broad categories of crimes in existence at the time. *See* 1 Wharton's Criminal Law § 17 (Charles E. Torcia ed. West rev. 2011) ("At common law, there were three kinds of offenses: treason, felony, and misdemeanor."). Consistent with the Extradition Clause's broad, categorical enumeration of treason and felony, the phrase "or other Crime" in the Clause has been understood to encompass the remaining broad category of crime: misdemeanors. *See Kentucky v. Dennison*, 65 U.S. (24 Haw.) 66, 76 (1860) ("Crime is synonymous with misdemeanor . . . and includes every offense below felony punished by indictment as an offence against the public . . . ."), *overruled on other grounds*, *Puerto Rico v. Branstad*, 483 U.S. 219, 230–31 (1987); *see also*

*Ex parte Reggel*, 114 U.S. 642, 650 (1885).[16] In the context of the Extradition Clause, a broad understanding of the residual phrase "or other Crimes" is consistent with the principles *ejusdem generis* and *noscitur a sociis*, because the specifically enumerated items are broad categories of crimes, rather than a narrow enumeration of a specific crime.[17]

Plaintiffs intend to present expert evidence and a historical record that demonstrate that the term "other crime" in Section 2 must be understood as limited to those crimes similar to the specifically-enumerated crime of rebellion. Black's Law Dictionary defines "rebellion" as a "[d]eliberate, organized resistance, by force and arms, to the laws or operations of the government, committed by a subject." *Black's Law Dictionary* 999 (1891). Using "rebellion" as the reference

[16] As the Court noted in *Dennison*, an earlier draft of the Extradition Clause referred to "high misdemeanor," and was stricken in favor of "other crime" to because the former was viewed as "technical and too limited." 65 U.S. at 76.

[17] The Grand Jury Clause of the Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In construing the phrase "otherwise infamous crime," the Supreme Court followed the same canons of construction, basing its interpretation of the residual phrase on the meaning of the character of the specifically-enumerated category of crime. *See Mackin v. United States*, 117 U.S. 348, 350 (1886). The only other reference to "crime" in the Constitution is in the Impeachment Clause, which provides for the removal of officers of the United States "on the Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II § 4. Although the judiciary has not spoken on the meaning of the phrase "other high Crimes or Misdemeanors," the evidence suggests the phrase should likewise be interpreted in light of the specifically-enumerated Treason and Bribery. *See, e.g.*, The Federalist No. 65, at 334 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987) ("The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.").

crime, the most sensible interpretation of "other crime" is that it refers to similar crimes against the body politic, such as treason, bribery, perjury, or perhaps election-related crimes. These crimes undermine the foundations of government and are logically connected to the act of voting, making disenfranchisement a more sensible result. Alternatively, Plaintiffs will suggest that the Court could look to the common law felonies in existence at the time the Fourteenth Amendment was adopted: murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. *See Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943). Doing so would be consistent not only with the interpretive principles laid out above but also with historical evidence of the framers' intent since the Reconstruction Act of 1867 and the Readmission Acts[18] limited disenfranchisement to common law felonies.[19]

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[18] *See* Reconstruction Act of Mar. 2, 1867, ch. CLII (1867); Act of June 22, 1868, c. 69, 15 Stat. 71; Act of June 25, 1868, c. 70, 15 Stat. 73; Act of Jan. 26, 1879, c. 10, 16 Stat. 62; Act of Feb. 1, 1870, c. 12, 16 Stat. 63; Act of Feb. 23, 1870, c. 19, 16 Stat. 7; Act of Mar. 30, 1879, c. 39, 16 Stat. 80; Act of July 15, 1870, c. 299, 16 Stat. 363.

[19] Alabama contends, citing the Ninth Circuit's decision in *Harvey*, that Congress's use of "felony at common law" in these Acts means that its use of "other crime" in Section 2 must have a different meaning, because the different wording demonstrates Congress knew how to distinguish the phrases. *See* MTD at 41. This argument gets the historical order of Congress's actions wrong. Congress passed the Reconstruction and Readmission Acts after passing the Fourteenth Amendment. It is a thin reed to claim that the subsequent use of more precise language means that the drafters intended something broader in its original phrasing. The meager analytical appeal to that argument disappears with closer scrutiny. It makes no sense to posit that Congress permitted a broad array of disenfranchisement schemes in Section 2, and then conditioned readmission of the former confederate states on their forever refraining from adopting those otherwise permitted schemes. Rather, the better conclusion is that Congress evinced its understanding of the scope of Section 2's "other crime" provision by its subsequent use of "felonies at common law" in the Reconstruction and Readmission Acts.

As another alternative, the Court could limit Section 2's reach to serious felonies, such as those classified in Alabama as Class A felonies. *See Harvey*, 605 F.3d at 1074 (suggesting that if

Alabama's position that Counts 4 and 5 are foreclosed because the plain text of Section 2 includes "every offence, from the highest to the lowest in the grade of offences," MTD at 40, leads to practically unfettered state power to disenfranchise its citizens. It is plainly wrong. The only court to address the question has rejected Defendants' reading. *See McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 974 (S.D. Miss. 1995) (holding that the Section 2 "other crime" language "does not encompass misdemeanors"). Alabama relies on the Supreme Court's decision in *Dennison*, 65 U.S. at 99, for this proposition. But Alabama's citation to *Dennison* is misplaced. In *Dennison*, the Supreme Court was interpreting the much broader Extradition Clause, as discussed above. That Clause's reference to "other crime" cannot be divorced from its context and imported into another constitutional provision with a different context. Alabama's "every offence" argument proves far too much. If *any* offense constitutes "rebellion, or other crime," then Section 2's *exception* to the fundamental right to vote protected by Section 1 will have become the *rule*. Under Alabama's proffered reading, run-of-the-mill traffic offenses could strip citizens of their constitutionally-protected right to vote. That cannot be so.[20]

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Section 2 is limited to serious crimes, courts look to "how the crime is designated by the modern-day legislature that proscribed it"). Contrary to Alabama's suggestion, *see* MTD at 41 n.12, this Court is fully empowered to interpret state law so as to avoid its invalidation under the federal constitution without running afoul of *Pennhurst*. Moreover, Alabama offers no citation for its assertion that the dividing line for the constitutionality of disenfranchisement is between felonies and misdemeanors, rather than between different types of felonies. *Id.*

[20] Moreover, if "other crime" is so broad, then it necessarily includes rebellion, making Congress's specific enumeration of rebellion in the Amendment superfluous—a result the

Plaintiffs have proffered sufficient allegations that the text and history of the Constitution support a conclusion that Section 2's affirmative sanction of disenfranchisement is limited in scope, and does not extend to the crimes for which Plaintiffs were convicted. As such, Plaintiffs have stated a claim that their constitutionally-protected fundamental right to vote has been violated and that Alabama must satisfy strict scrutiny for this Court to uphold its disenfranchisement law. Alabama cannot do so, but it suffices at this stage that the inquiry is fact-intensive and incapable of resolution without a full factual and historical record.[21]

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Supreme Court has repeatedly warned against. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (explaining that where "a general authorization and a more limited, specific authorization exist side-by-side," the specific governs the understanding of the general in order to comply with the "cardinal rule" of avoiding "the superfluity of a specific provision that is swallowed by the general one").

[21] Moreover, in *Richardson*, the Court drew no distinction between *denying* the right to vote and *abridging* the right to vote. Section 2 expressly distinguishes the two, and the exception for "participation in rebellion, or other crime" applies only to state laws *abridging* the right to vote; there is no exception to Section 2's representational punishment for state laws *denying* the right to vote. Plaintiffs' position is that while Section 2 may permit disenfranchisement while a criminal is serving his or her sentence, it does not permit disenfranchisement to continue after the sentence has been served. Such schemes constitute a denial of the right to vote, for which there is no affirmative sanction in Section 2. Yet that is exactly what the California provision did (and what Alabama's does). While this Court is bound to follow *Richardson*, Plaintiffs nonetheless note this argument for preservation purposes.

## IV. Plaintiffs Have Stated Claims for Several Constitutional Violations Based on the Amorphous "Moral Turpitude" Standard and Alabama's Failure to Apply It Fairly or Evenly.

### A. Plaintiffs Have Stated a Claim that the Moral Turpitude Provision in Section 177(b), As Applied, Is Unconstitutionally Vague (Count 9).

#### 1. The Moral Turpitude Standard Chills Constitutionally Protected Activity and Invites Arbitrary and Discriminatory Enforcement.

Plaintiffs have stated a claim that the "moral turpitude" standard is unconstitutionally vague. When a statute fails to give fair notice of the conduct prohibited under it, and is so standardless that it invites arbitrary or discriminatory enforcement, it violates due process and is void for vagueness. [22] *FCC v. Fox*

[22] Defendants argue that there is no actionable void-for-vagueness claim because there is "no threat of prosecution if someone erroneously votes based on a good faith belief that his crime is not disqualifying." MTD at 46. This argument fails for many reasons. First, Plaintiffs have not merely challenged the statute that criminalizes unqualified voting, Ala. Code § 17-17-36, but rather the constitutional provision itself that affirmatively limits voting to those not convicted of felonies involving moral turpitude. The void-for-vagueness doctrine is not limited to criminal prohibitions; it is routinely applied in the civil context, particularly where fundamental rights are at stake. *See Boyajian v. City of Atlanta*, No. 09-cv-3006, 2011 WL 1262162, at *4–5 (N.D. Ga. Mar. 31, 2011) ("A non-criminal statute is equally exposed to a vagueness challenge because the failure is not in the penalty but rather the exaction of obedience to a rule or standard ... so vague and indefinite as really to be no rule or standard at all."); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. Rev. 631, 657 n.116 (2006) (compiling cases applying the void-for-vagueness doctrine in non-criminal contexts).

However, it is relevant that this standard both governs a penalty for criminal conduct and provides a basis for additional criminal prosecution for illegal voting. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher."). Like the sentencing statute invalidated in *Johnson v. United States*, Alabama's felon disenfranchisement law attaches an additional penalty to criminal conduct based on an unconstitutionally vague standard and the statute must be subject to the same strict standards as a criminal statute. 135 S. Ct. 2551, 2557 (2015) ("These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979))). Moreover, it provides the basis for future criminal prosecution for illegal voting. The "threat of prosecution" is certainly real despite any minimal scienter requirement. After all, Defendants cite in their brief a case wherein defendants were held

*Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). The Constitution's tolerance for ambiguity in statutes is at its lowest ebb when the statute infringes upon protected constitutional rights, particularly First Amendment activity. *See Cramp v. Bd. of Pub. Instruction of Orange Cty.*, 368 U.S. 278, 287 (1961) ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432 (1963) ("For standards of permissible statutory vagueness are strict in the area of free expression."). Here, Alabama's statute infringes upon Plaintiffs' right to vote, which is a "fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), protected by both the First and Fourteenth Amendments.[23]

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criminally responsible for lying about their history of crimes "involving moral turpitude," despite their claims that the term was too vague to attach criminal responsibility and a nearly identical "knowingly" requirement in the statute at issue. *See United States v. Shahla*, No. 11-CR-98-J-32 TEM, 2013 WL 2406383, at *5 (M.D. Fla. June 3, 2013), *aff'd*, 752 F.3d 939 (11th Cir. 2014).

[23] *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7, 793 (1983) ("In this case, we base our conclusions directly on the First and Fourteenth Amendments. . . . These cases, applying the 'fundamental rights' strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests."); *Williams v. Rhodes*, 393 U.S. 23, 30, (1968) ("In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.").

The void-for-vagueness doctrine was designed to address the constitutional concerns raised in the Complaint. First, an impermissibly vague statute regulating constitutionally protected activities leads to the chilling of the exercise of those constitutional rights. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (internal quotation marks omitted)).

This is precisely the result that Plaintiffs have alleged: that the Alabama prohibition on voting for those with felony convictions "involving moral turpitude," as applied, chills the speech of many *eligible* voters, likely the vast majority of eligible Alabamians with felony convictions *not* involving moral turpitude. These voters are eligible to vote. But because Alabama has failed to define "moral turpitude" or provide voters with any guidance regarding their eligibility and threatened criminal prosecution of illegal voting, they are not likely to exercise the right because of a mistaken fear that they are ineligible.

Second, "[t]he prohibition against vague regulations of speech is [also] based in part on the need to eliminate the impermissible risk of discriminatory enforcement," particularly in the infringement on constitutionally protected

activity. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). Once again, this is precisely the danger that has come to pass in Alabama. Plaintiffs have plausibly alleged that the system for disenfranchisement in Alabama is so lacking in uniformity from county to county and registrar to registrar, with many registrars using the lack of certainty to disenfranchise all or nearly all with felony convictions, as to constitute arbitrary and discriminatory enforcement of the law. In other words, Plaintiffs have plausibly alleged a void-for-vagueness claim, raising intertwined legal and factual questions that cannot be resolved at the motion to dismiss stage. The extent of both the arbitrary enforcement of the law by registrars and its chilling of Alabama citizens' speech are both factual questions pertinent to this Court's analysis of the void-for-vagueness claim and cannot be resolved absent an evidentiary record.

**2. Despite Decades of Confusion, Alabama Still Has Not Provided Registrars With Any Meaningful Guidance on the Definition of "Moral Turpitude," Which Remains Irretrievably Subjective.**

Despite Defendants' ipse dixit statements to the contrary, the State of Alabama has not "sufficiently defined the phrase 'moral turpitude' to provide guidance of which crimes fall under the term." MTD at 48. To the contrary, the term has stubbornly elided definition and remained hopelessly subjective over decades of enforcement.

Plaintiffs' allegations regarding Alabama's failure to provide a principled and objective definition of "crimes of moral turpitude" support their claim that Section 177 is void. *See Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015) ("the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness" (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921))). In *Johnson v. United States*, the Court struck down the residual clause of the Armed Career Criminal Act ("ACCA") in part because, absent a legislative definition of the prohibited conduct, the Supreme Court and the lower federal courts had persistently struggled to establish a generally applicable test. *Id*. A similar decades-long failure to find a definition is presented here.

As early as 1979, a Morgan County registrar requested assistance in defining moral turpitude, noting: "It has always been difficult and confusing to determine those crimes involving moral turpitude which might keep someone from voting. I would especially appreciate any help or some form of a list of these crimes." 192 Ala. Op. Att'y. Gen. 16 (1979). The Attorney General's response, like the more recent opinion letter, was unavailing:

> We then reach the complicated question of which crimes are crimes involving moral turpitude. This question cannot be dispositively answered, inasmuch as the determination of what constitutes a "crime involving moral turpitude" has been addressed by the Alabama courts on a case by case basis, and often in a context other than the eligibility to vote.

*Id.* at 17.

This issue was raised in the *Hunter v. Underwood* case, where, once again, the Alabama Attorney General admitted that the standard is malleable and not susceptible to uniform definition. The Eleventh Circuit had this to say about the application of moral turpitude in voting in Alabama:

> The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; *see also infra* note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, McCormick on Evidence § 43, at 85–86 (2d ed. 1972).

*Underwood*, 730 F.2d at 616 n.2.

Despite these troubles, Alabama reintroduced "moral turpitude" into its voting laws in 1996 and its attempts at definition have had no greater success since then. The Alabama Attorney General still has provided no guidance beyond unhelpfully re-quoting the 1979 Attorney General Opinion and *Hunter*: "[A]n act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen or to society in general. An act involving moral turpitude is immoral in itself, regardless of the fact that it is punished by law." Ala. Op. Att'y. Gen. No. 2005-092 (Mar. 18, 2005) (citation and internal quotations marks omitted). This is precisely the standard that the Alabama Attorney General admitted was undeniably subjective in *Hunter*. These "general principles, such as fraud and malum in se," MTD at 48, provide no clarity. They are certainly no more specific than the "substantial risk" principle at issue in *Johnson v. United States*. In

the words of an Alabama state court judge: "To be blunt, such definitions provide no meaningful guidance on how to distinguish between those felonies that do involve moral turpitude and those that do not." *Gooden v. Worley*, No. 2005-5778-RSV, slip op. at 33 (Ala. Cir. Aug. 23, 2006), *vacated on mootness grounds sub nom. Chapman v. Gooden*, 974 So. 2d 972 (Ala. 2007) (attached as Exhibit 1).[24]

The *Johnson* court's canvass of its own "repeated failures to craft a principled and objective standard" demonstrated that ACCA's residual clause was so shapeless that it violated Constitutional due process. *Johnson*, 135 S. Ct. at 2558–60. This indeterminacy was evidenced by the Court's application of a different "ad hoc" test each time it was asked to interpret the residual clause. *Id.* Plaintiffs have alleged that Alabama has engaged in repeated attempts to define the moral turpitude standard but those attempts have resulted in a complete failure to arrive at a generally applicable test for applying that standard. Instead, Plaintiffs

[24] Decades of attempts to define moral turpitude in the immigration context have not fared much better. In *Arias v. Lynch*, Judge Posner inveighed against this phrase: "It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law. . . . The concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work." 834 F.3d 823, 830, 835 (7th Cir. 2016) (Posner, J., concurring in judgment); *see also Nunez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010) (discussing "the inherent ambiguity of the phrase 'moral turpitude' and the consistent failure of either the BIA or our own court to establish any coherent criteria for determining which crimes fall within that classification and which crimes do not"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) ("The meaning of the term falls well short of clarity. Indeed, as has been noted before, 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase."); *In re Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999) ("We have observed that the definition of a crime involving moral turpitude is nebulous."). However, this case does not require this Court to determine whether moral turpitude is constitutionally valid in the immigration context or any context other than the one presented here.

have alleged that Alabama continues to leave this decision to the "ad hoc" determinations of registrars such that a person may be allowed to vote in one county, but be barred in another. This contravenes the State's claim that it has arrived at a "settled legal meaning" for crimes of moral turpitude, which is not "wholly subjective." MTD at 48. These allegations, if proven true, validate Plaintiffs' claim that the moral turpitude standard is void for vagueness.

### 3. Defendants' Reliance on Ad Hoc Lists of Untethered Crimes Does Not Illuminate the "Moral Turpitude" Standard But Rather Undermines Its Constitutionality Under *Johnson v United States*.

In addition to "general principles" such as malum in se, Defendants rely on several available lists of untethered crimes to argue that "moral turpitude" is sufficiently defined to meet basic constitutional standards. But these lists amplify, rather than mitigate, the unconstitutional uncertainty surrounding the term. In *Johnson*, the ACCA included an enumerated list of crimes (burglary, arson, extortion, and crimes involving the use of explosives) as examples that fell within the scope of the residual clause. 135 S. Ct. at 2557. Rather than clarifying the scope of the residual clause, however, the enumerated list contributed to the statute's indeterminacy because there was no consistent or common sense conception of the relationship between the standard ("substantial risk") and the enumerated crimes. *See id.* at 2559 ("Common sense has not even produced a

consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes.").[25]

A similar problem is presented here. The lists of crimes provided from Alabama courts' ad hoc decisions are contradictory and provide no meaningful guidance for registrars in determining whether the hundreds of felonies in the Alabama code fall inside or outside moral turpitude's scope. A few examples from a state court adjudication of this issue are representative:

> Selling marijuana is a crime of moral turpitude. *Jones v. State*, 527 So. 2d 795 (Ala.Crim.App. 1988). Selling cocaine isn't, at least not according to *Pippin v. State*, 197 Ala. 613, 73 So. 340 (Ala. 1916).
>
> …
>
> In *Meriwether v. Crown Inv. Corp*., 289 Ala. 504, 268 So. 2d 780 (Ala. 1972), the Alabama Supreme Court concluded that income tax evasion was a crime of moral turpitude. That Court later held that "the failure to pay income taxes, as opposed to the failure to file an income tax return," is not a crime involving moral turpitude. *Clark v. Alabama State Bar*, 547 So.2d 461 (Ala. 1989).

*Gooden*, slip op. at 35.

The problem becomes even more severe if one broadens the scope to adjudication outside of Alabama, as Defendants argue Plaintiffs should in order to

[25] Defendants' reliance on *Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038 (D. Md. 1974), is inapposite because, inter alia, the "laundry list" of crimes at issue in that case was "all-inclusive" and did not leave discretion to registrars in its application. Defendants make no such representation in this case but rather argue that two of the Plaintiffs in this case are properly disenfranchised even though their crimes do not appear on any list.

determine the status of Mr. Giles' crime. *See* MTD at 49 (arguing that stalking is a crime of moral turpitude on the basis of a Ninth Circuit opinion):

> Contrast *Finley v. State*, 661 So. 2d 762 (Ala. Crim. App. 1995)—which held that felony DUI does not involve moral turpitude—with *Jarrard v. Clayton County Board of Registrars*, 262 Ga. 759, 425 S.E.2d 874 (1993), where the Georgia Supreme Court found that multiple convictions of felony DUI would render the crime to be one involving moral turpitude.
>
> Here in Alabama, simple possession of marijuana is not a crime of moral turpitude. *See Ex parte McIntosh*, 443 So. 2d 1283 (Ala. 1983). Conceptions of right and wrong apparently depend on where you live, however. In Oklahoma, for example, a misdemeanor charge of simple possession of marijuana is a crime of moral turpitude, at least in the context of disciplinary proceedings against an attorney. *See State ex rel. Oklahoma Bar Ass'n v. Denton*, 598 P.2d 663 (Okla. 1979).

*Gooden*, slip op. at 34–35.

Thus, just as in *Johnson*, the lists relied upon by Defendants, lacking any coherent connection among their members, actually increase the uncertainty in application. This is particularly so because, like the residual clause in *Johnson*, the Attorney General's list of crimes simply consists of broad categories of crime, without any reference to the elements of the crimes or their specific Alabama code analogs, many of which admit of varying degrees. As such, there is actual disagreement between the Attorney General's list and the AOC list. *See* Compl. ¶ 33.

Defendants' reliance on these lists is doubly problematic because their authority on the question at hand is doubtful. The lists are not provided by statute

but rather collected by the Attorney General and the AOC. But neither the Attorney General nor the AOC have the power to make law or set voter qualifications in the State of Alabama. Compl. ¶¶ 26, 34. Further, these lists are based on Alabama court decisions adjudicated in the context of witness impeachment, not access to the electoral franchise. Several courts have held that, given the different purposes the "moral turpitude" standard serves in different contexts, a ruling in one context cannot be so easily transferred to another.[26] This problem is only intensified as Defendants in this case seek to apply a ruling about a California stalking statute to the Alabama stalking statute, despite their different elements.

Finally, unlike the experienced federal judges who struggled to interpret the residual clause in formal proceedings where individuals are entitled to effective assistance of counsel, the primary persons determining whether a crime is one of

[26] *See, e.g., In re Grant*, 317 P.3d 612, 615 (Cal. 2014) ("Because *Castro* discussed moral turpitude in the context of using a felony conviction for impeachment, it is of limited relevance in attorney discipline proceedings. . . . [W]hether a conviction 'reflect[s] upon an attorney's moral fitness to practice law is a far cry from [whether] . . . such conviction has some relevance . . . on the issue of a witness' credibility.'" (citation omitted)); *Ricketts v. State*, 436 A.2d 906, 912 (Md. 1981) ("[W]e note that what constitutes a crime of moral turpitude may involve different considerations compelling different results in different circumstances. . . . In Lazzell the question was whether a dentist had violated the ethical standards of his profession. In the case sub judice the question is whether the conviction was relevant to an assessment of the credibility of a criminal defendant. Therefore, the light under which the conviction is examined as well as the effect it would produce on the examiners is drastically different. A second basic difference is that the Board of Examiners in Lazzell was apprised of the circumstances attending Lazzell's convictions. In the instant case there is no such factual background."); *Ottman v. Md. State Bd. of Physicians*, 875 A.2d 200, 216 (Md. Ct. Spec. App. 2005) ("[A] person who has credibility to testify may not have the public's confidence to practice certain professions or to serve on a governmental board.").

moral turpitude are political appointees with no apparent legal experience or training making decisions with respect to unrepresented individuals. There is no reason to expect that the Boards of Registrars can create a common sense link between a confusing list of examples and an indeterminate standard where the Supreme Court has declared it cannot be done. The enumerated lists of crimes identified by Alabama as crimes of moral turpitude enhance the inherent indeterminacy of the standard, rather than mitigate it.

#### 4. *Jordan v. De George* Does Not Control Plaintiffs' As-Applied Challenge to the Moral Turpitude Standard of Section 177(b).

Defendants rely on *Jordan v. De George*, 341 U.S. 223 (1951), in an attempt to shield the moral turpitude standard from ordinary factual development and constitutional scrutiny on a full record. But *Jordan* is inapposite. It was a case about the legality of the moral turpitude standard in the immigration context, where each individual crime was assessed individually through a hearing and appeals process, and the Court specifically limited its holding to the standard as applied to crimes involving fraud as an element. *Id.* at 232. Moreover, it is of limited relevance following *Johnson v. United States*.

In *Johnson v. United States*, the Court overruled prior holdings regarding the constitutionality of the residual clause and, in doing so, laid out two key factors that undercut the precedential value of *Jordan*. First, like the prior holdings overruled in *Johnson v. United States*, the decision in *Jordan* was made without the

benefit of full briefing or argument. *See Jordan*, 341 U.S. at 229 ("The question of vagueness was not raised by the parties nor argued before this Court."); *Johnson*, 135 S. Ct at 2562–63 ("But *James* and *Sykes* opined about vagueness without full briefing or argument on that issue—a circumstance that leaves us 'less constrained to follow precedent.'"). Second, here, like in *Johnson*, the experience of the past 65 years teaches us that the standard lacks the clarity *Jordan* hoped it would deliver, at least outside of the fraud context. *See supra* 37–45; *see Johnson*, 135 S. Ct. at 2562 ("Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast."). Thus, *Jordan v. De George* provides this Court with little to no guidance on how to resolve this case and cannot shield Defendants from the ordinary legal process of adjudicating the standard as applied here.

### B. Alabama's "Moral Turpitude" Provision Unconstitutionally Burdens Plaintiffs' Right to Vote Because It Is Impossible to Know with Certainty Which Crimes It Covers (Counts 6 and 7).

Alabama's "moral turpitude" provision also unconstitutionally burdens Plaintiffs' right to vote because there is no way a reasonable person can know with

certainty whether the provision applies to his or her convictions. Plaintiffs have thus stated valid legal claims in Counts 6 and 7.

To determine the constitutionality of a restriction on voting the Court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). When the right to vote is "subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* at 434 (internal quotation marks omitted).

Plaintiffs have plausibly alleged that Alabama's "moral turpitude" provision creates a severe and discriminatory burden on eligible Alabama voters with felony convictions *not* involving moral turpitude. First, Alabama citizens with felony convictions are dissuaded from voting by the registration forms, which do not even inform voters that the category of disqualifying felonies is limited to those "involving moral turpitude," but ask the voter simply to aver that he or she is "not barred from voting by reason of a disqualifying felony conviction." The ordinary

voter, without more information, will clearly believe that any felony is disqualifying and will take no further steps.

Next, even if a voter ascertains that "disqualifying felony" means "felony involving moral turpitude," she must determine for herself whether her felony conviction involves "moral turpitude" and attest under penalty of perjury that her conviction is not disqualifying. *See* Compl. ¶¶ 196–197, 199, 202. Yet, because the provision has no standards, and because there is no definitive source of law enumerating which felony convictions are disqualifying, there is no way for those seeking to register to know for certain whether they are eligible to vote. This system leaves eligible voters with convictions in an impossible position.[27] Because the burden imposed by Alabama's provision is severe and discriminatory, Alabama must satisfy strict scrutiny—a burden it cannot carry, particularly at the motion to dismiss stage. Alabama raises five arguments to the contrary, but none have merit.

*First*, Alabama quibbles with the fact that Plaintiffs did not seek to enjoin use of the state and federal voter registration forms, and did not sue the federal entity that promulgates and maintains the federal form. MTD at 42. But Plaintiffs

[27] Alabama courts have recognized that this is not a proper question for a layperson to be expected to answer. *See Craven v. State*, 111 So. 767 (Ala. App. 1927) (explaining that the "vice of the question" have you ever been convicted of a crime of moral turpitude is that it "call[s] for the conclusion or judgment of the witness as to what crimes involved moral turpitude, and this is a question of law not without difficulty in many instances even to the courts of the land" and holding that "the better practice would be to . . . [allow] the court itself [to] decide or determine if [the alleged offense] came within the terms of the statute").

have challenged the moral turpitude provision as enforced by Defendants. The Alabama Secretary of State is responsible for drafting both the state forms and the state instructions it asks the EAC to include on the federal form. These choices are part and parcel of its enforcement of Section 177(b). These forms are merely one manifestation of the burdens imposed by Alabama's failure to create fair, evenly applied, and transparent rules regarding who can vote.[28] Nonetheless, the Secretary of State's enforcement choices, including the purposefully opaque language on the registration forms, exacerbate those burdens.

*Second*, Alabama contends, citing *Richardson*, that Plaintiffs have no protectable constitutional right to vote, and thus Alabama may impose any burden upon felons that satisfies rational basis review. MTD at 43. For the reasons explained above, Alabama's reliance on *Richardson* is misplaced, Plaintiffs have a constitutional right to vote, and Alabama cannot satisfy its burden under strict scrutiny at the motion to dismiss stage. Moreover, even if rational basis review applied, Alabama misses the point in contending that "[o]bviously, it is rational to require someone registering to vote to aver that they are, in fact, eligible to vote." MTD at 43. The problem—which does not survive even rational basis review—is

[28] Because Plaintiffs' challenge is to Alabama's provision, and that challenge, if successful, would necessarily result in the forms being altered, it is not necessary that the forms be specifically challenged or the federal entity be joined as a defendant. The federal entity could not alter Alabama law. To the extent the Court disagrees, Plaintiffs respectfully request that they be permitted to amend their Complaint accordingly.

that it is *impossible to know* whether a particular individual who has been convicted of a felony is, in fact, eligible to vote. It is hardly rational to require someone registering to vote to risk perjury charges by hazarding a guess as to the meaning of a vague state law.

*Third*, Alabama contends that the voter registration forms pose only a minimal burden because "Plaintiffs are not penalized if they turn out to be incorrect. Perjury requires a showing that the person 'sw[o]re falsely.'" MTD at 43 (quoting Ala. Code. § 13A-10-101(a)). In support, Alabama cites *Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1043 (D. Md. 1974) (three-judge court). But in *Thiess*, the Maryland Attorney General "specifically informed" the court of his opinion that "an attempt by an ineligible convicted felon to register to vote [does not] constitute[], in and of itself, an offense." *Id.* That is not the case here. Rather, someone attempting to register to vote in Alabama may well face prosecution for perjury if the prosecutor believes that person's prior conviction was disqualifying. That the State must prove scienter at trial does not lessen the burden posed by the threat of prosecution. Being forced to prove one's good-faith intent at criminal trial—or even the possibility of having to do so—is a severe burden on the right to vote.

*Fourth*, Alabama contends again that the voter registration forms merely require "voters to affirm that they are *eligible* to vote when they *register* to vote,"

MTD at 44 (emphasis in original), and that the "penalty of perjury" requirement of federal law demonstrates the "importance of the governmental interests served by these features," *id.* at 44–45. As previously explained, the problem here is not with the National Voter Registration Act or its requirements for voter registration forms, but rather with Alabama's voter eligibility law. No doubt the federal government and Alabama have an interest in ensuring that those who register to vote are eligible—under *constitutional* eligibility criteria—to do so. Alabama has no governmental interest, however, in enforcing its unconstitutionally vague eligibility criteria and doing so in a manner that provides citizens with no reasonable guidance that can allow them to determine whether they fall in or out of those criteria.

*Fifth*, Alabama contends that the phrase "moral turpitude" is "sufficiently definite" to prevent any burden on voters. For the reasons explained above, that is not so. Plaintiffs have stated valid claims in Counts 6 and 7 for unconstitutional burdens on their First and Fourteenth Amendment right to vote.

### C. Plaintiffs Have Stated a Claim That the "Moral Turpitude" Provision, As Applied, Arbitrarily Denies Citizens the Right to Vote in Alabama (Count 10).

Plaintiffs also have stated a claim that the moral turpitude provision, as applied in Alabama to the voting rights of people with convictions, arbitrarily denies citizens the right to vote in violation of the most basic tenets of Equal

Protection. As explained in *Sunday Lake Iron Co. v. Wakefield Township*, a case relied on by Defendants, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 247 U.S. 350, 352 (1918). To be sure, "mere errors of judgment by officials will not support a claim of discrimination." *Id.* at 353. But Plaintiffs have not alleged "[m]ere error[s] or mistake[s] in judgment." MTD at 52. Nor have Plaintiffs alleged that "state officers are working to apply the law in a uniform manner." *Id.* at 53. Rather, Plaintiffs have alleged that there is a knowing complete lack of uniformity in enforcement across the 67 counties in Alabama, there has been no attempt at the creation of a uniform system of enforcement, and the Secretary of State has left registrars to their own devices in applying a standard with no meaningful guidance and internally contradictory lists of examples. Compl. ¶ 22–37, 152–160, 227–230.[29]

[29] The question presented in this claim is not, as Defendants frame it, whether it is rational "to allow some felons to vote who have committed crimes that are less serious or less likely to indicate their unfitness to participate," MTD at 51, or even whether it is rational to achieve that end through a standard like "moral turpitude," if evenly applied. Rather, the question is whether this arbitrary system of disenfranchisement—one that creates arbitrary distinctions between "the failure to pay income taxes, as opposed to the failure to file an income tax return," *Gooden*, slip op. at 35, and lacks any uniformity in application such that, as a matter of course, individuals permitted to vote in one county cannot in another—can survive constitutional scrutiny. Properly understood, Plaintiffs' allegations state a plausible claim for arbitrary disenfranchisement.

At the motion to dismiss stage, the Court must accept these allegations as true. Therefore, Plaintiffs have more than plausibly alleged that the State has made such "completely arbitrary distinction[s] between groups of felons so as to work a denial of equal protection with respect to the right to vote" by administering Section 177(b) with an unequal hand from county to county and registrar to registrar. *Williams v. Taylor*, 677 F.2d 510, 516 (5th Cir. 1982) (citing *Yick Wo*, 118 U.S. at 370–74); *see also Skinner v. Oklahoma*, 316 U.S. 535 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offenses . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment"). Defendants' motion to dismiss on this claim, which stands on a "mere error" theory contradicted by the allegations, must fail. Indeed, Plaintiffs' arbitrary disenfranchisement claim is virtually identical to the claim raised in *Richardson v. Ramirez* that the Supreme Court remanded for further consideration. *Richardson*, 418 U.S. at 57. Thus, the Supreme Court has already recognized the viability of this type of claim even in light of its limited holding in *Richardson*. *See also, e.g.*, *Williams*, 677 F.2d at 516 (reversing district court's grant of summary judgment and holding that "[w]hile equal protection does not mean that a state must treat all persons identically, it nevertheless demands that when the state draws distinctions

between similarly situated individuals it must show that the distinction is rational, not arbitrary").

Defendants' reliance on post-deprivation procedures to argue that the State provides "practical uniformity" is unpersuasive. The fact that individual deprivations can, after the fact, be challenged through a judicial process cannot save a systematically arbitrary deprivation of a fundamental right in the first instance. Citizens should not be arbitrarily subjected to deprivations based on unequal application of law that can only be corrected, if at all, through the expenditure of significant time and resources. Indeed, if this alone could save widespread arbitrary enforcement, equal protection claims for arbitrary treatment would be nonexistent wherever there is access to the courts. That is simply not the case.

Defendants' argument to the contrary is particularly problematic where all of the process available to individuals is post-deprivation. The loss of the right to vote is irreparable. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) (indicating that the threatening of "franchise-related rights" constitutes irreparable harm). The fact that a challenge to vote denial will technically be "retroactive to 'the date of his or her application to the registrars,'" MTD at 54, is cold comfort since voters cannot retroactively vote in elections that passed while their appeal was pending.

Defendants' reliance on *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir. 1987), is also unconvincing. The "unequal administration" claims that the case held require intentional discrimination come in only two varieties: (1) "misapplication (i.e., departure from or distortion of the law)" and (2) "selective enforcement (i.e., correct enforcement in only a fraction of cases)." *Id.* at 1113. Both of these involve allegations of discrete cases of unequal application, rather than allegations of a broad pattern of arbitrary enforcement. The *E & T Realty* standard relies on the "distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (cited in *E & T Realty*, 830 F.2d at 1114). Requiring proof of intentional discrimination in the latter circumstance prevents a situation in which "any departure from state law would give rise to a constitutional claim." *E & T Realty*, 830 F.2d at 1114. The cases upon which *E & T Realty* relied, *E & T Realty* itself, and the Eleventh Circuit cases using the *E & T Realty* standard involved claims by individuals that enforcement as applied in their particular cases violated their rights. The standard in *E & T Realty*, therefore, is understandably the same as for "class of one" equal protection claims. *Crystal Dunes Owners Ass'n v. City of Destin*, 476 F. App'x 180, 184 (11th Cir. 2012).

In this case, however, Plaintiffs' claim is not that they were singled out for unequal treatment. Rather, Plaintiffs claim that the state has not provided adequate standards for defining moral turpitude, and that this lack of an adequate, uniform standard has led to a pattern of arbitrary enforcement in violation of the Equal Protection Clause. This allegation lies on the other side of the *E & T Realty* divide, and forms the basis for a valid equal protection claim. *See Bush v. Gore*, 531 U.S. at 105–06 ("The recount mechanisms . . . do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. . . . The problem inheres in the absence of specific standards to ensure its equal application."); *see also Rickett v. Jones*, 901 F.2d 1058, 1060-61 (11th Cir. 1990) ("Occasional or random errors in application of state law will occur. . . . [But] if failure to apply the [the law] were to become more than occasional and random, the federal Constitution might be violated, requiring federal court intervention.").

Like in *Richardson*, Plaintiffs have alleged a complete lack of uniformity of enforcement, arising from the deputizing of individual registrars to apply a vague standard without guidance. The result both in *Richardson* and here was a situation where individuals were disenfranchised based on where they lived or when they applied to register rather than any uniform application of the law. The California Secretary of State admitted that such a lack of uniformity in enforcement was "utterly indefensible, without regard to whether a uniform disenfranchisement of

former felons would be constitutionally permissible" and that the State had "[n]o conceivable state interest, compelling or otherwise," in granting and taking away the right to vote based on the crossing of county lines. Br. for Sec'y of State of Cal., 1974 WL 185586, at *4, *7–8.[30] Likewise, the State of Alabama has no conceivable interest in the similarly haphazard and ad hoc disenfranchisement regime it currently maintains.

## V. The Complaint States a Fourteenth Amendment-Based Claim For Deprivation of Procedural Due Process (Count 8).

The right to vote is a constitutionally-protected liberty interest. Plaintiffs have plausibly alleged that Alabama does not provide for a pre-deprivation right to be heard before voters are adjudged to have committed a "felony involving moral turpitude" and either have their registration applications rejected or are removed from the voting rolls by untrained county registrars. Moreover, they have alleged that the pre-deprivation process leads to an extraordinarily high risk of erroneous deprivation that cannot be justified by any state interests. Therefore, Plaintiffs have stated a claim that Alabama's system for determining who is subject to disenfranchisement under Section 177(b) violates due process.

[30] Rather than litigate this issue again before the California courts, in 1974, California amended its constitution to restore the voting rights of former felons after the completion of any term of imprisonment and parole.

### A. Plaintiffs Have Stated A Claim for Deprivation of a Liberty Interest in the Right to Vote.

An individual has a liberty interest in the right to vote that is protected by the doctrine of procedural due process. *See, e.g.*, *Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 (11th Cir. 2009) (noting that "[t]he Constitution guarantees procedural and substantive due process when a liberty interest is at stake," including "the right to vote"); *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 n.5 (4th Cir. 2002) ("The right to vote . . . is certainly a protected liberty interest."). Defendants nonetheless contend that Plaintiffs have not been deprived of a liberty interest because, under *Richardson*, "felons have no 'liberty' interest to vote." MTD at 55. For all of the reasons set forth above, Defendants over-read *Richardson*, which does not nationally withdraw the right to vote upon felony conviction.

Moreover, Alabama has also created a state law liberty interest in the right to vote. Under the Alabama Constitution, "[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 . . . *shall* have the right to vote." Ala. Const. art. VIII, § 177(a) (emphasis added); *see Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself . . . or it may arise from an expectation or interest created by state laws or policies."). A state law creates a constitutionally-protected liberty interest subject to due process protections when the law "contain[s] substantive limitations on official discretion,

embodied in mandatory statutory . . . language," *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (internal quotation marks omitted), which most "typically finds expression in the word 'shall,'" *Doe v. District of Columbia*, No. Civ. 01-2398, -- F. Supp. 3d --, 2016 WL 4734320, at *25 (D.D.C. Sept. 9, 2016); *see also Barfield v. Brierton*, 883 F.2d 923, 935 (11th Cir. 1989). Section 177 of the Alabama Constitution is precisely such a law: It commands that all citizens over the age of 18 who reside in Alabama "*shall* have the right to vote," and excludes from that mandate *only* those persons "convicted of a felony involving moral turpitude." Ala. Const. art. VIII, § 177(a)–(b) (emphasis added). Accordingly, the Alabama Constitution mandates that all eligible persons—including felons *not* convicted of a felony involving moral turpitude—have the right to vote, which in turn creates a liberty interest in that right for all voters (including felons) until such time that a voter is deemed to have been convicted of a felony involving moral turpitude.[31] As Plaintiffs have alleged, Alabama is

[31] In a footnote, Defendants cite *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258 (11th Cir. 2003), for the proposition that a right created by state law must be "sufficiently certain" in order for it to be protected by procedural due process. But the Alabama Constitution explicitly states that all persons "shall have the right to vote." MTD at 56 n.14. By contrast, in *Greenbriar*, the purported right at issue existed nowhere in statute and only became apparent after extensive litigation before the district court over the meaning of a gap in a municipal zoning code and after that court's recognition of a "by-estoppel" property right that appeared nowhere in statutory law. *Id.* at 1264–67. To the extent that the Defendants are arguing that the moral turpitude standard's lack of clarity creates the confusion with respect to the Alabama Constitution's grant of the right to vote, the argument is unpersuasive bootstrapping.

therefore required to have constitutionally-adequate procedures for making determinations as to what persons may properly be deprived of that right.

**B. Plaintiffs Have Alleged a Failure to Provide Pre-Deprivation Notice and an Opportunity to Be Heard.**

In order to determine how much process is due in any given situation, a court must consider and balance three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). At absolute minimum, however, due process requires notice and the opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [Due Process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing.").

Absent "extraordinary situations where some valid governmental interest is at stake," a person must be afforded notice and the opportunity to be heard *prior* to the deprivation of the liberty interest at issue. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("[T]he root requirement of the Due Process Clause" is

"that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." (emphasis in original) (internal quotation marks omitted)). This is true regardless of what *post*-deprivation procedures the state provides. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("[A]bsent the necessity of quick action by the State or the impracticality of providing any predeprivation process, a post-deprivation hearing [] would be constitutionally inadequate." (internal quotation marks omitted)). Moreover, where the harm that the plaintiff may suffer from a lack of a pre-deprivation hearing is likely to be irreparable, "it is unlikely that the government will be able to demonstrate *any* public interest that will overcome the individual's interest, and some additional form of pre-deprivation process will probably be required." *Jolly v. United States*, 764 F.2d 642, 645 (9th Cir. 1985) (emphasis added).

As Plaintiffs have alleged, Alabama law places the responsibility upon individual county registrars to determine whether a voter or applicant has been convicted of a disqualifying "criminal offense." Ala. Code § 17-4-3. Plaintiffs have alleged that Alabama law does not provide first-time registrants any notice or opportunity to be heard whatsoever prior to a registrar's determination that she is ineligible due to a felony "involving moral turpitude." Compl. ¶ 211. And although Alabama law purports to require that a person be provided notice prior to being stricken from the rolls, Plaintiffs have alleged that registrars "do not uniformly

follow" this requirement,[32] and do not "uniformly provide registered voters the opportunity to respond to the registrar's determination of whether the applicant's conviction is disqualifying.[33] Compl. ¶¶ 157–158. Moreover, the Alabama Supreme Court has held that a voter's removal from the roles is effective regardless of whether he or she was provided with a notice and the opportunity to be heard. *See Williams v. Lide*, 628 So. 2d 531, 533–34 (Ala. 1993). At this stage, the Court must accept these allegations as true. Accordingly, Plaintiffs have alleged that Alabama fails to provide the absolute minimum amount of procedure required by the Due Process Clause—notice and an opportunity to be heard prior to the deprivation—and thus have stated a procedural due process claim.

Defendants argue that the State has provided sufficient procedures to comply with the Due Process Clause, both because "Plaintiffs were convicted of felonies through the criminal justice system, with all its various procedural protections," and because the State provides post-deprivation procedures. MTD at 57. The fact that Plaintiffs were afforded due process when they were convicted of felonies is

[32] One individual plaintiff has alleged that she herself never received notice of her removal from the voter rolls. *See* Compl. ¶ 43.

[33] Notably, Section 17-4-3 does not explicitly provide the voter with any right to be heard prior to being removed from the rolls: Although it requires that the notice provided to the voter set a date on which the board will "consider the case," it does not explicitly allow the voter to appear or submit anything in writing to the board of registrars, nor does it require the board of registrars to consider anything submitted by the voter. In any event, regardless of what the statute does or does not require, Plaintiffs have alleged that Alabama county registrars do not uniformly afford voters an opportunity to be heard. Compl. ¶¶ 157–158.

relevant to whether they committed a felony but irrelevant to whether that felony is a "disqualifying criminal offense." Ala. Code § 17-4-3. That determination is substantively different than the adjudication of their guilt of a crime, as it depends on resolution of the far-from-clear question as to whether their specific crime constituted a crime of "moral turpitude."[34]

Defendants' arguments that Alabama's post-deprivation procedures are sufficient to meet the requirements of the Due Process Clause are no more compelling. Post-deprivation procedures are only sufficient to satisfy due process where pre-deprivation procedures are impractical, *see Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990), and Defendants offer no reasons that is the case here. To the contrary, where, as here, the deprivation occurs due to an established state procedure, *see* Ala. Code § 17-4-3, "predeprivation process is ordinarily feasible" and the post-deprivation procedures that are offered are entirely "inapplicable" to the due process inquiry. *Lumpkin v. City of Lafayette*, 24 F. Supp. 2d 1259, 1265 (M.D. Ala. 1998); *see also Burch v. Apalachee Cmty. Mental*

[34] For this reason, Defendants' defense that "'due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme'" is disingenuous. MTD at 55 (quoting *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003)). The fact that Plaintiffs wish to have the opportunity to contest—whether their crime of conviction was a felony involving moral turpitude—is not only "material" to the statutory scheme, but is in fact the precise criteria upon which disenfranchisement is based. In *Connecticut DPS*, by contrast, the plaintiffs sought the opportunity to prove a fact that appeared nowhere in the state's statutory scheme; specifically, they sought to establish that they were not "dangerous" sex offenders for purposes of a sex-offender registration requirement that turned solely on the fact of a conviction, and not on a finding of dangerousness.

*Health Servs., Inc.*, 840 F.2d 797, 802 (11th Cir. 1988) ("[A] predeprivation hearing is practicable when officials have both the ability to predict that a hearing is required *and* the duty because of their state-clothed authority to provide a hearing." (emphasis in original)), *judgment aff'd sub nom. Zinermon v. Burch*, 494 U.S. 113 (1990). Thus, due process requires pre-deprivation notice and an opportunity to be heard before a voter is removed from the rolls or denied registration—regardless of what post-deprivation procedures might or might not exist. Further, any reasons the State might proffer regarding the burdens of pre-deprivation process must be balanced pursuant to *Mathews* in a nuanced factual inquiry that cannot be made at the motion to dismiss stage.

Even if pre-deprivation procedures impose some burdens on the State, they would nonetheless be required here due to the extraordinarily high risk of wrongful deprivation and the irreparable injury of the erroneous deprivation of the right to vote. Courts have regularly recognized that restrictions on an individual's right to vote are an irreparable injury. *See supra* at 54; *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). This is because "once the election occurs, there can be no do-over and no redress"; the person disenfranchised has forever lost his or her right to participate as an equal citizen in that election. *League of Women Voters*, 769 F.3d

at 247. Accordingly, unless Alabama's appellate process *always* allows voters an opportunity to be heard prior to the first election after they are removed from the rolls, those post-deprivation procedures are entirely incapable of providing *any* remedy to citizens wrongfully barred from voting.[35] That alone mandates pre-deprivation notice and an opportunity to be heard—procedures that Alabama currently does not provide.

### C. The *Mathews* Balancing Test Bars Dismissal of the Procedural Due Process Claim.

Finally, Plaintiffs have sufficiently pled a procedural due process claim under the *Mathews v. Eldridge* balancing test, a fact-intensive inquiry unsuitable for resolution at this stage.

*First*, there can be little question that the private interest at stake—Plaintiffs' right to vote—is a "fundamental liberty" and thus is entitled to significant weight

[35] Defendants also suggest that Alabama's provisional voting system constitutes a post-deprivation remedy available to Plaintiffs. *See* MTD at 59. But provisional ballots cannot provide a remedy in this circumstance. Casting a provisional ballot requires a voter to swear or affirm that, *inter alia*, he or she "[is] a registered voter." Ala. Code § 17-10-2(b)(2). But a person who was wrongfully struck from the rolls or whose registration application was denied because of a purportedly disqualifying felony conviction is *not* a "registered voter," and thus § 17-10-2 does not require that such a person's provisional ballot actually be counted. Section 17-10-2 does not require the board of registrars to re-evaluate whether or not a voter was properly disenfranchised under § 17-4-3 in determining whether to count a provisional ballot; rather, it only asks registrars to determine whether the ballot was cast by a "registered and qualified voter[]." Ala. Code § 17-10-2(f). Even assuming that this allows a registrar to revisit the question of whether the voter is "qualified" under Ala. Const. art. VIII § 177(b), a voter whose registration application was previously denied, or a voter who was struck from the rolls, is not "registered," and nothing in § 17-10-2 suggests that a provisional ballot submitted by an unregistered voter can be counted.

in the *Mathews* analysis. *See, e.g., Doe v. Rowe*, 156 F. Supp. 2d 35, 47–48 (D. Me. 2001).

*Second*, Alabama's procedures for determining whether a person was convicted of a "felony involving moral turpitude" allow for a very high risk of erroneous deprivation. As Plaintiffs have alleged, the determination of whether a particular crime of conviction is a "felony involving moral turpitude" is made by individual registrars in each county. Compl. ¶ 151. Registrars are not required to have any legal training whatsoever; instead, the only prerequisites are that they are a qualified elector, a resident of the county, that they possess a high school diploma, and that they possess computer and map reading skills. Compl. ¶ 152. That they are nonetheless asked to determine the extremely difficult and complex (if not impossible) legal question of whether a felony involved moral turpitude,[36] makes the risk of an erroneous decision extremely high—particularly given the conflicting and incomplete guidance on that question provided by Alabama's administrative agencies. *See* Compl. ¶¶ 23–37; *supra* 37-45.[37] At trial, Plaintiffs

[36] *See, e.g.*, *United States v. Chu Kong Yin*, 935 F.2d 990, 1003 (9th Cir. 1991) (noting that whether a conviction is of a crime of moral turpitude "is a question of law"); *see also United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (noting that the phrase moral turpitude is "so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community").

[37] Plaintiffs do not dispute that the Due Process Clause does not always require a trier of fact to be "'law trained or a judicial or administrative officer.'" MTD at 57–58 (quoting *Washington v. Harper*, 494 U.S. 210, 231 (1990)). However, where, as here, the determination to be made by the trier of fact is fundamentally a complicated question of law, the use of a decision-maker

will present evidence that many registrars do not attempt a meaningful inquiry and instead engage in overbroad disenfranchisement of all, or nearly all, individuals with felony convictions. Clearly, the risk of erroneous deprivation is high. This risk is compounded by the lack of opportunity for a voter to challenge his or her removal from the rolls prior to such removal taking place. *See* Compl. ¶ 158.

*Third*, Defendants have failed to show that there is any significant burden to the government associated with providing adequate pre-deprivation process. Defendants imply that providing a pre-deprivation right to be heard would "cost the state substantial time and money, MTD at 58, but do not explain why providing such an opportunity would be so costly—particularly given that, as Defendants themselves note, all voters already have a post-deprivation right to be heard on appeal. Moreover, because "the sliding-scale approach of *Mathews*, [] requires comparison of the costs and benefits of alternative remedial mechanisms," resolution of a procedural due process claim on a motion to dismiss is inappropriate until the Court can weigh all the facts and evidence on both sides and Plaintiffs have had the opportunity to establish through evidence what alternative mechanisms might be available and how they might or might not burden the

completely untrained in the law significantly increases the risk of an erroneous decision. *Contra Washington*, 494 U.S. at 231 (finding that it was appropriate to allow a decision "to medicate [a prisoner] to be made by medical professionals rather than a judge").

government. *Roehl v. City of Naperville*, 857 F. Supp. 2d 707, 718 (N.D. Ill. 2012).[38]

## VI. Plaintiffs Have Adequately Pled Violations of the Ex Post Facto Clause and the Eighth Amendment (Counts 11 and 12).

Plaintiffs have also adequately pled violations of the Eighth Amendment's ban on cruel and unusual punishments and the Ex Post Facto Clause. Defendants' various attacks on those claims are all meritless.

*First*, to the extent that Defendants assert that *Richardson*'s validation of felon disenfranchisement laws means that those laws can never violate the Eighth Amendment or the Ex Post Facto Clause, they are wrong for all the reasons discussed above. Once again, the fact that Section 2 of the Fourteenth Amendment and *Richardson* make it permissible for a state to withhold the right to vote on account of criminal convictions in some circumstances does *not* mean that such laws are insulated from constitutional scrutiny to the extent that they violate

[38] Plaintiffs' purported failure to "avail[] themselves of all procedures allowed in state court," MTD at 59, does not bar a procedural due process claim here. As noted above, the loss of the right to vote is an irreparable injury; accordingly, as soon as Plaintiffs were denied registration or removed from the rolls and subsequently were not able to vote in an election, there was no longer any "available [] means to remedy the deprivation" that Plaintiffs could have pursued. *McKinney v. Pate*, 20 F.3d 1550, 1563 (11th Cir. 1994). Because it is impossible that the State's appellate process could have "provide[d] a means to correct any error resulting from" the procedural due process violation, *id*., the violation is complete and Plaintiffs' decision with respect to whether to appeal is simply irrelevant. In any event, *McKinney* required recourse to further state appeals in the context of a process where pre-deprivation procedures were determined to be "impracticable," *id*. at 1562; in this case, for all the reasons discussed *supra* Part V.B, pre-deprivation procedures are entirely feasible, and thus the existence of post-deprivation procedures and the possibility that they might "cure" the injury is irrelevant. *See Logan*, 455 U.S. at 436.

another constitutional provision. Much as an Equal Protection Clause claim against a felon disenfranchisement regime can succeed if that regime discriminates against a suspect class, *see*, *e.g.*, *Hunter*, 471 U.S. at 233; *Hobson*, 434 F. Supp. at 366–67, so too can an ex post facto or Eighth Amendment claim succeed if the felon disenfranchisement law runs afoul of those separate constitutional restrictions.

*Second*, Defendants' assertion that these claims are "precluded because the Supreme Court has held that felon-disenfranchisement is not punishment," MTD at 60, is incorrect. Although the Supreme Court in *Trop v. Dulles* suggested that felon disenfranchisement provisions were "nonpenal," 356 U.S. 86, 96–97 (1958) (plurality opinion), that assertion was *dictum* and was not the statement of a Court majority. Moreover, while it noted that felon disenfranchisement provisions are "nonpenal" when passed "not to punish, but to accomplish some other legitimate government purpose," *id*. at 96, the *Trop* Court did not identify *what* legitimate purpose was further by felon disenfranchisement. Instead, it supported its conclusion by citation to two outdated nineteenth-century cases. *Id.* at 97 n.22. Those cases upheld the denial of voting rights to polygamists based on government purposes that have since been plainly rejected as invalid, namely, the state's interest in "declar[ing] that no one but a married person shall be entitled to vote" and "withdraw[ing] all political influence from those hostile to" traditional family structures. *Murphy v. Ramsey*, 114 U.S. 15, 43, 45 (1885); *see also Davis v.*

*Beason*, 133 U.S. 333, 436–47 (1890). Notably, *Murphy* and *Davis* did not address whether *criminal* disenfranchisement was punitive (none of the individuals in that case were convicted of polygamy); instead, they only held that disenfranchisement based upon the immorality of a person's conduct was a permissible "regulation" of the franchise. These cases, and other nineteenth century cases finding that restrictions on the franchise were "regulatory" rather than "punitive," were premised on a concept of the franchise that has today been roundly rejected: the notion that the franchise is an "honorable privilege," the deprivation of which does not "deny[] a personal right or attribute of personal liberty." *Washington v. State*, 75 Ala. 582, 585 (1884) (finding criminal disenfranchisement not to be punishment on such grounds). That is plainly not the law today. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that the right to vote is a fundamental right). Because *Trop*'s suggestion that criminal disenfranchisement was nonpenal was premised on this outdated conception of a state's ability to restrict the franchise, that particular dictum lacks persuasive power.

Even assuming that the *Trop* dictum bears any weight, however, that case did not state that felon disenfranchisement is *per se* nonpenal. Rather, the *Trop* court explicitly noted that whether or not a criminal disenfranchisement statute was nonpenal depended upon the purposes for which it was enacted. 356 U.S. at 96 (stating that if felon disenfranchisement was "imposed for the purpose of punishing

[criminals,] the statutes authorizing [the] disabilit[y] would be penal"). *Trop*, therefore, does not exempt felon disenfranchisement laws from the typical inquiry that applies in determining whether a statutory provision is penal. To the contrary, as with any other Eighth Amendment or ex post facto challenge, in order to determine if Alabama's felon disenfranchisement scheme is penal, this Court must (1) determine whether the "intention of the legislature" in enacting Section 177(b) "was to impose punishment," in which case "that ends the inquiry"; and (2) if the intent was to enact a nonpunitive scheme, consider further "whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it" nonpunitive. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted). This inquiry is factual and not appropriate for resolution at the motion to dismiss stage. Plaintiffs have alleged a penal purpose and the Court must accept that allegation as true. This ends the inquiry at this stage.

Moreover, the historical justifications for felon disenfranchisement laws reveal that they have been and are still widely viewed as a form of punishment for felons. The United States Congress itself has referred to felon disenfranchisement as punishment, conditioning readmission of former Confederate states to the Union on a requirement that states not deprive citizens of the right to vote "*except as a punishment* for such crimes as are now felonies at common law." *Richardson*, 418 U.S. at 51 (emphasis added) (quoting Act of June 22, 1868, 15 Stat. 72 (1868)).

Federal courts—including the Eleventh Circuit in *Johnson v. Governor*—have likewise referred to the penal intent of felon disenfranchisement laws. *See Johnson*, 405 F.3d at 1218 n.5 ("[T]hroughout history, criminal disenfranchisement provisions have existed as a punitive device."); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (felons are disenfranchised because "of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment"); *Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004) ("[T]here 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).

Moreover, it is clear that the effect of the law is punitive. In determining whether a law is punitive in nature, courts are instructed to consider:

> [(1)] Whether the sanction involves an affirmative disability or restraint, [(2)] whether it has historically been regarded as a punishment, [(3)] whether it comes into play only on a finding of scienter, [(4)] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [(5)] whether the behavior to which it applies is already a crime, [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it, and [(7)] whether it appears excessive in relation to the alternative purpose assigned . . . .

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (footnotes omitted). Nearly all of these factors weigh in favor of finding Section 177(b) punitive. Accordingly, Alabama's felon disenfranchisement scheme constitutes

"punishment" and is subject to challenge under the Eighth Amendment and Ex Post Facto Clause.

Finally, Section 177(b) is necessarily punitive because no other constitutionally permissible rationale remains for its broad disenfranchisement of those with criminal convictions. The asserted regulatory purpose behind felon disenfranchisement is the proposition that those individuals are "unfit to exercise the privilege of suffrage." MTD at 16. But the Supreme Court has unequivocally repudiated the underlying regulatory theory of *Trop v. Dulles* and its reliance on the Mormon disenfranchisement cases: "To 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). The Court held that this was the case even though the practice in *Davis* was a felonious one. Since *Carrington v. Rash*, this form of felony disenfranchisement as a means of fencing bad actors out of the electorate is simply not constitutionally viable. 380 U.S. at 94 ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). Thus, the only remaining constitutionally viable purpose behind Section 177(b) is a punitive one that must be measured against Eighth Amendment standards. *Cf.* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1155 (2004) ("In short, even if

criminal disenfranchisement statutes are presumptively constitutional because of Section 2 . . . their constitutionality is only presumptive: They still must serve some legitimate purpose, and they cannot rest on an impermissible one.").

*Third*, Defendants' substantive attack on the Eighth Amendment claim—that disenfranchisement is neither cruel nor unusual because it has been common throughout history and is common today in the United States—does not establish that Alabama's felon disenfranchisement scheme is not cruel and unusual. It only raises yet another factual question not ripe for decision. Only eight other states impose permanent disenfranchisement on any subset of citizens with felony convictions, *see* Compl. ¶ 243, rendering uncommon Alabama's scheme permanently disenfranchising broad categories of ex-felons. *See Miller v. Alabama*, 132 S. Ct. 2455, 2470–71 (2012) (rejecting argument that there was no "national consensus" against mandatory sentences of life without parole for juveniles despite fact that 29 jurisdictions allowed such sentences); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (finding "evidence of national consensus against the death penalty for juveniles" despite the fact that twenty states lacked a prohibition on executing juveniles). And to the extent that permanent disenfranchisement for entire subsets of felons was ever "common" historically, the movement away from such provisions by numerous states establishes a plain

and growing national consensus against such punishments.[39] *See Trop*, 356 U.S. at 101 ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

Defendants' alternative attack on the Eighth Amendment claim—that Alabama's felony disenfranchisement scheme does not violate the Eighth Amendment because felons' rights "may be restored when they satisfy the terms of their sentence," MTD at 61—is misleading. Alabama, of course, does not allow *all* felons' voting rights to be restored when they satisfy the terms of their sentence. To the contrary, as Defendants acknowledge, there are multiple classes of felons—including those convicted of crimes listed in Ala. Code. § 15-22-36.1(g), as well as indigent ex-felons who are unable to pay their legal financial obligations ("LFOs")—who cannot have their voting rights restored through the Section 15-22-36.1 process. The fact that *some* ex-felons may be able to have their voting rights restored does nothing to rescue the constitutionality of the felon disenfranchisement scheme as applied to the many ex-felons, including many of the Plaintiffs here, who cannot have those rights restored.[40] Moreover, felons ineligible for a Certificate of Eligibility to Register to Vote ("CERV") due to the

[39] "Since 1997, 24 states have modified felony disenfranchisement provisions to expand voter eligibility." Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (May 10 2016), http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer.

[40] Even as to those individuals who can obtain a Certificate of Eligibility to Register to Vote, however, Plaintiffs contend that Alabama's felon disenfranchisement scheme constitutes cruel and unusual punishment.

LFO requirement range from those individuals convicted of fairly minor crimes to those convicted of serious offenses. Therefore, Alabama's statutory scheme—permanently depriving individuals of the right to vote due to conviction of *any* crime of moral turpitude, regardless of how serious—violates the Eighth Amendment principle that "punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Accordingly, Defendants' argument regarding the ability of *some* felons to regain the right to vote does nothing to address the fact that Section 177(b) "imposes the same punishment on a person convicted of murder as a person convicted of a minor drug crime"—in essence, a sentence "to civil death." Compl. ¶¶ 241–242.

*Finally*, Defendants assert that Plaintiffs have not pled an Ex Post Facto Clause violation "because Alabama's 1901 Constitution already disenfranchised *all* felons," and thus "[t]he 1996 amendment *reduced* the scope of disenfranchisement." MTD at 61.[41] This argument fundamentally misconstrues Plaintiffs' ex post facto claim: Plaintiffs assert not that the enactment of Section 177(b) was itself an ex post facto violation, but instead that, because "'moral turpitude is undefined and decided on an ad hoc basis by county registrars," Compl. ¶ 238, Alabama violates the Ex Post Facto Clause every time its registrars

[41] This argument assumes that the prior regime functioned to disenfranchise all felons and did not discriminatorily apply to some felons and not others. As discussed *supra* note 8, this is a factual question to be resolved at trial.

make a determination—years after criminal conduct occurred—that the criminal conduct involves "moral turpitude," and thus subjects an individual to disenfranchisement although the individual had no notice at the time of the underlying conduct that he would be barred from voting.

It is beyond question that the Ex Post Facto Clause of the Constitution applies not only to legislative action, but also to administrative acts. *See Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991), *recognized as overruled on other grounds by Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002); *Rodriguez v. U.S. Parole Comm'n*, 594 F.2d 170, 173 (7th Cir. 1979); *Smith v. Scott*, 223 F.3d 1191, 1193–94 (10th Cir. 2000). In *Knuck v. Wainwright*, the Eleventh Circuit held that where an administrative agency issues an interpretation of an ambiguous statute, and then alters that interpretation in a manner that increases the punishment imposed on a person for a crime previously committed beyond the punishment applicable under the prior interpretation, that interpretive change violates the Ex Post Facto Clause. 759 F.2d 856, 858–89 (11th Cir. 1985) (where statute providing for good time calculation was ambiguous, change in agency interpretation that reduced good time credit violated Ex Post Facto Clause); *see Guanipa v. Holder*, 181 F. App'x 932, 934 (11th Cir. 2006) (unpublished).

As in *Knuck*, the statute subject to interpretation by Alabama's registrars—the disenfranchisement of those convicted of a "felony involving moral

turpitude"—is ambiguous. Indeed, at set forth above, it is unconstitutionally vague and susceptible to many different and conflicting interpretations. Nor has any court pronounced precisely what crimes fall within the scope of Section 177(b). Accordingly, any time that Alabama's an individual registrar makes a new interpretation or alters his or her interpretation of Section 177(b) in a manner that covers additional crimes to which that provision had previously *not* been applied, Alabama violates the Ex Post Facto Clause with respect to any individuals convicted before that expansion of crimes to which the statute is held newly applicable. Plaintiffs' allegations that the registrars interpret the term "moral turpitude" on an ad hoc basis[42] and that the sources relied upon by those registrars in making such determinations have been altered over time to place additional crimes within the definition of moral turpitude,[43] are more than sufficient to allege that Alabama's registrars have in fact, and do regularly, expand the scope of crimes punishable by disenfranchisement. Accordingly, Plaintiffs have pled that the manner in which Section 177(b) is applied by Alabama's registrars violates the Ex Post Facto Clause, and are entitled to discovery to prove the manner in which the scope of disenfranchisement has been repeatedly expanded to include crimes not previously subject to that penalty.

[42] Compl. ¶ 238.

[43] *Id*. ¶¶ 24–37 (alleging, among other things, that in 2005 the Attorney General of Alabama issued an opinion listing as crimes of "moral turpitude" several crimes not previously explicitly denoted as such).

## VII. The LFO Requirement Violates the 14th Amendment, the 24th Amendment, and Section 2 of the Voting Rights Act (Counts 13, 14, and 15).

Under Alabama Code Section 15-22-36.1, those convicted of "a felony involving moral turpitude" and thereby ineligible to vote can obtain CERVs and restore their right to vote upon meeting four statutory criteria. One of those criteria requires that "[t]he person has paid all fines, court costs, fees, and victim restitution ordered by the sentencing court at the time of sentencing." Ala. Code § 15-22-36.1(a)(3). Plaintiffs have adequately alleged that this provision, which conditions access to the franchise on a person's financial means, violates the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment's ban on poll taxes, and Section 2 of the Voting Rights Act.

### A. The Repayment Provision of Section 15-22-36.1 Is a Condition on the Franchise.

In their motion to dismiss, Defendants contend that the statute's requirement that persons "pa[y] all fines, court costs, fees, and victim restitution" prior to obtaining a CERV is not actually a "requirement" on which the right to vote is contingent. They assert that because there is another avenue through which disenfranchised felons can seek (but not necessarily obtain) re-enfranchisement—namely, a discretionary pardon from Alabama's Board of Pardons and Paroles—Section 15-22-36.1 should be immune from constitutional scrutiny even if it

withholds mandatory re-enfranchisement from indigent citizens who would otherwise qualify.

Defendants' argument ignores the determinative differences between these two re-enfranchisement procedures. It is true that pursuant to Ala. Code. § 15-22-36, certain individuals can request pardons from Alabama's Board of Pardons and Paroles, and those pardons can include a restoration of voting rights. The Board's power to grant such pardons, however, is completely discretionary, *see* Ala. Code § 15-22-36(a) (granting Board "the authority and power," but not obligation, to grant pardons)[44], and, even among those who are granted pardons, the Board has discretion with respect to the "civil and political disabilities" of which it will relieve the pardoned individual, *id.* § 15-22-36(c).[45] By contrast, where an individual meets the criteria set forth in § 15-22-36.1(a), re-enfranchisement by issuance of a CERV is mandatory. *See* Ala. Code § 15-22-36.1(b) ("The Certificate of Eligibility to Register to Vote *shall* be granted upon a determination that all of the requirements in subsection (a) are fulfilled." (emphasis added)).

The distinction between the mandatory nature of one of these processes and the discretionary nature of the other means that there is an often insuperable gulf

[44] *See also Johnson v. Price*, No. 2:14-cv-01513-CLS-JEO, 2016 WL 2909468, at *3 (N.D. Ala. May 19, 2016) (noting discretionary nature of pardon power).

[45] *See also* Alabama Board of Pardons and Paroles Rules, Regulations, and Procedures, art. 8.7, http://www.pardons.state.al.us/Rules.aspx ("If the Board grants a pardon, the Board will also decide whether to restore any or all civil and political rights lost as a result of the conviction.").

between the ability of persons convicted of a felony to have their voting rights restored under § 15-22-36.1, if they have the means, and under § 15-22-36, if they do not have the financial means. Because indigent individuals convicted of a felony have open to them *only* a (far more burdensome) discretionary avenue to re-enfranchisement, this statutory scheme "unquestionably erects a real obstacle to voting" based on their ability to pay. *Harman v. Forssenius*, 380 U.S. 528, 541 (1965) (striking down state law requiring payment of poll tax or filing of certificate of residency because it "imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax").[46]

Finally, Defendants' "alternative route" is a disingenuous red herring. Plaintiffs will demonstrate at trial that the standards used by the Board of Pardons and Paroles in evaluating pardons also require an individual to have paid her fines and fees in order to receive restoration of her voting rights. There is no viable route to rights restoration for individuals without financial means.

[46] At trial, Plaintiffs will also establish other significant hurdles imposed by the pardon process that do not apply to those seeking to obtain a CERV, including the fact that obtaining a pardon from the Board of Pardons and Paroles typically takes upwards of two years from the time of the application whereas a CERV application has a statutorily mandated timeline of less than forty-five days. *See* Ala. Code § 15-22-36.1(c)-(e). Moreover, the pardon process is far more burdensome, requiring not only a hearing but a complete investigation by a local probation officer and a full report, including letters of support, from the applicant. The discretionary standards for granting a pardon are distinct and more difficult to clear than the minimum requirements for mandatory re-enfranchisement of the CERV statute.

Notwithstanding Defendants' suggestion otherwise, the Eleventh Circuit's decision in *Johnson v. Governor* does not insulate an LFO requirement from constitutional scrutiny simply because of the availability of an alternative pardon process. Unlike here, the plaintiffs in *Johnson* did not assert that access to the franchise was different in kind (mandatory vs. discretionary) for those unable to pay LFOs; rather, they only asserted that there was an additional hurdle because the pardon process required a hearing prior to the restoration of voting rights while the alternative process available only to those who paid their LFOs did not require a hearing. *See* Complaint-Class Action at ¶¶ 82–85, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (No. 00CV3542), 2000 WL 34569743. In addressing the plaintiffs' argument, the *en banc* Eleventh Circuit explicitly acknowledged that making access to the franchise (even re-enfranchisement for those with felony convictions) dependent upon financial resources, as Alabama does, is constitutionally impermissible: "Access to the franchise cannot be made to depend on an individual's financial resources." *Johnson*, 405 F.3d at 1216 n.1. Therefore, it denied the plaintiffs' claim not because felons have no rights in this arena but rather because it held that Florida had not in fact made ability to pay a precondition to restoration of the franchise. Since "[t]he requirement of a hearing" was the sole distinction between the two schemes identified by Plaintiffs, the court held that the difference was "insufficient" to support such a claim. *Id.*

By contrast, Alabama only grants mandatory access to re-enfranchisement to one set of individuals—those with the means to pay their LFOs—and denies mandatory re-enfranchisement to those without financial means. As alleged here, the Alabama wealth restrictions on access to the right to vote are different not only in scope but also in kind from those presented in *Johnson*. The question here is not simply one of additional burdens, although indigent individuals will face many (namely, the burden of a lengthy and intrusive pardon process and hearing). Many pardons are denied. Those individuals are thus outright denied access to the right to vote solely on the basis their wealth in violation of the Equal Protection Clause. *See Harman*, 380 U.S. at 541; *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) ("[A]ny material requirement imposed upon a voter solely because of the voter's refusal to pay a poll tax violates the Twenty-fourth Amendment.").

The availability of an entirely discretionary process—a process that, Plaintiffs will demonstrate, itself hinges on financial means and involves lengthy delays that deny individuals the right to vote in all of the intervening elections—does not save Alabama's undeniable wealth restriction on the right to vote. As Plaintiffs have alleged, the discretionary pardon process at least imposes a "material" burden on the ability to access the franchise on the basis of wealth.

*Harman*, 380 U.S. at 541. Therefore, Plaintiffs have stated an adequate claim distinct from the one alleged in *Johnson.*

### B. Plaintiffs Have Stated an Equal Protection Clause Claim Based on the LFO Requirement.

#### 1. Restrictions on the Right to Vote Based Upon Wealth Must Be Analyzed Under Heightened Scrutiny.

Because Alabama Code § 15-22-36.1(a)(3) discriminates between persons not based upon their felon status but instead based upon their ability to pay LFOs, it is subject to the full force of the Equal Protection Clause.

Laws granting the right to vote to some citizens and not to others are unquestionably severe restrictions subject to strict scrutiny. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."). This is particularly true where that right is conditioned on an irrelevant qualification, such as the voter's ability to pay. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality opinion) ("[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."). In other contexts, the Supreme Court has recognized that certain fundamental rights—including "[t]he basic right to participate in political

processes as voters"—cannot, consistent with the Equal Protection Clause, be limited to those with the means to pay fees or other financial obligations. *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (invalidating on equal protection grounds a statute requiring payment of a fee prior to appealing revocation of parental rights); *see also Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (state may not imprison probationer simply due to his inability to pay a fine); *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (statute barring persons with outstanding child support from marrying could not survive strict scrutiny).[47] In short, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard," *Harper*, 383 U.S. at 666, and such classifications must be analyzed under strict scrutiny.

As in *Harper*, Alabama Code § 15-22-36.1(a)(3) conditions a person's right to vote on his or her financial means, *i.e.* their ability to pay LFOs. That law is therefore subject to strict scrutiny, and may only survive constitutional challenge if it is narrowly tailored to serve a compelling government interest. *Harper*, 383 U.S. at 669 ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

[47] *See also Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (striking down law requiring payment of trial transcripts to access appellate court review).

### 2. Alabama's LFO Requirement Is Not Narrowly Tailored to Serve a Compelling, or Even Rational, State Interest.

In their motion to dismiss, Defendants proffer four state interests that they contend justify the LFO requirement. These interests, and their weight, raise factual questions that cannot be resolved at the motion to dismiss stage. Nonetheless, upon first review, none of the four interests asserted by Defendants—(1) encouraging payment of full restitution, (2) protecting the ballot box from felons who continue to break the law by not paying restitution, (3) ensuring that only fully rehabilitated felons can vote, and (4) withholding the restoration of voting rights from felons who have not completed their sentence—even meets the low standard of rationality, much less the heightened "compelling state interest" standard it must meet.

*First*, although Plaintiffs do not dispute that the state has a legitimate interest in encouraging payment of full restitution, a law disenfranchising those who lack the ability to pay—such as these Plaintiffs—does not meaningfully further this interest. Plaintiffs would be equally unable to pay restitution regardless of whether they are able to obtain a CERV or not, and thus barring them from getting a CERV does nothing to "encourage[e]" them to pay their LFOs. In *Zablocki*, the Supreme Court recognized the fallacy of Defendants' argument on this point, holding that a purported state interest in collecting child support could not justify a law barring those in child support arrears from getting married because, "with respect to

individuals who are *unable*" to pay child support, the statute did nothing to "deliver[] any money at all into the hands of the applicant's prior children." 434 U.S. at 389 (emphasis added). Even assuming the state could permissibly use access to the franchise as a device for encouraging compliance with one's legal obligations, Alabama's LFO requirement is overbroad insofar as it disenfranchises even those who wish to pay their LFOs but are unable to so, and thus fails strict scrutiny.

The state's purported interest in encouraging payment of restitution must be weighed, on a full evidentiary record, against the numerous other means by which it could encourage payment of LFOs that do not involve the deprivation of a fundamental right. *See id.* at 389 (noting that "the State already has numerous other means for exacting compliance . . . that are at least as effective as the instant statute's and yet do not impinge upon the right to marry"); *see also, e.g.*, Ala. R. Crim. P. 26.11(h)(4) (providing for the garnishment of wages). Ultimately, "[t]he use of the franchise to compel compliance with other, independent state objectives is questionable in any context," *Hill v. Stone*, 421 U.S. 289, 299 (1975), and it is particularly problematic where, as here, the restriction of the franchise will do little to nothing to further those independent objectives and where the state has numerous other means available to accomplish the same goal. *Cf. Carrington*, 380

U.S. at 96 ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.").

*Second*, Defendants' purported desires to protect the ballot box from persons who continue to break the law by not paying LFOs and to ensure that only fully rehabilitated felons can vote are, once again, irrational as applied to indigent persons. An indigent person's failure to pay LFOs does not constitute a "continu[ed]" violation of the law. Alabama law punishes only "willful nonpayment" of fines and costs, *see* Ala. Code § 15-18-62, and Alabama's courts have recognized that an "indigent defendant cannot be incarcerated for his inability to pay a fine, court costs, or restitution," *Moses v. States*, 645 So. 2d 334, 336 n.2 (Ala. Crim. App. 1994); *see* Ala. R. Crim. P. 26.11(i)(2). For much the same reason, an indigent person's failure to pay LFOs says nothing about whether he or she has been "rehabilitated"; rather, it simply reflects that person's lack of financial means. Even assuming that these purported interests were rational with respect to a class of former felons who were actually found to have violated the law by failing to pay LFOs, they are not served when applied to individuals who have failed to pay LFOs for no reason other than their financial inability to do so. *See Harvey*, 605 F.3d at 1079–80 (accepting that state might "rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights," but expressly

noting the possibility that "withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test").

*Finally*, Defendants' remaining purported interest—"withholding the restoration of voting rights from felons who have not completed their entire sentence"—is circular. The only way in which these individuals "have not completed their entire sentence" is their inability to pay their LFOs. Thus, Defendants effectively assert that they are permitted to bar individuals who cannot pay LFOs from voting simply because the State wishes to bar individuals who cannot pay LFOs from voting. A state's otherwise-unjustified desire to withhold constitutional rights from a class of individuals is not a compelling, or even rational, interest that can justify such a deprivation.

In sum, Plaintiffs have adequately alleged that Alabama's LFO requirement makes an individual's ability to vote contingent upon his or her financial means. Absent the most compelling of justifications, which Defendants have plainly not proffered here, such a law constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. Indeed, Plaintiffs have alleged facts that adequately state a claim even under the rational basis test. The State's proffered interests, to the extent they have any weight, must be evaluated on a full evidentiary record.

### C. Plaintiffs Have Stated a Twenty-Fourth Amendment Claim Against the LFO Requirement.

Plaintiffs have also stated a claim that the LFO requirement violates the Twenty-Fourth Amendment's prohibition on laws denying or abridging the right to vote "by reason of failure to pay any poll tax or other tax." Unlike the Equal Protection Clause analysis, which requires that a court balance the severity of the restriction against the state's interests, the Twenty-Fourth Amendment's prohibition on payments constituting a "poll tax or other tax" is a blanket prohibition. *See Harman*, 380 U.S. at 542 (under the Twenty-Fourth Amendment, "the poll tax is abolished absolutely as a prerequisite to voting"). Thus, the sole question before the Court is whether the LFO requirement constitutes a "poll tax or other tax."

Defendants offer only two legal arguments to support their position that forcing Plaintiffs to make certain payments levied by the State prior to voting does not constitute a poll tax. First, they profess to be unaware of any court having "ever applied" the Twenty-Fourth Amendment "outside of the context of an explicit and unambiguous poll tax." MTD at 64–65. Even accepting Defendants' invented "explicit and unambiguous poll tax" standard, the LFO requirement meets this standard. By its very terms, Alabama Code § 15-22-36.1(a)(3) requires persons who wish to obtain the right vote to make certain payments in order to be able to register to vote. By contrast, in *Gonzalez v. Arizona*—the only case cited by

Defendants for the suggestion that only *explicit* poll taxes are barred by the Twenty-Fourth Amendment—the Ninth Circuit rejected an argument that a statute requiring proof of citizenship to vote violated the Twenty-Fourth Amendment because of peripheral costs that voters might face associated with obtaining such proof. 485 F.3d 1041, 1048–49 (9th Cir. 2007). Whatever the merits of the Ninth Circuit's ruling in that case, it is far from clear that the *Gonzalez* court would have rejected a similar challenge to a statute that, as here, *explicitly* conditioned the right to vote on the payment of a fee.

Moreover, Defendants' assertion that no court has ever applied the Twenty-Fourth Amendment to a fee not expressly denominated as a poll tax is wrong. In *Common Cause/Georgia v. Billups*, for example, the district court found a substantial likelihood of success on a claim that a Georgia voter ID law violated the Twenty-Fourth Amendment because obtaining identification required the payment of a fee. 406 F. Supp. 2d at 1369 ("Because, as a practical matter, most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote, requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote."). And in *Crawford v. Marion County Election Board*, also a challenge to a voter ID law, the Supreme Court opined that the law in question would have been unconstitutional "if the State required voters to pay a tax or a fee to obtain a new photo identification," but the law survived

because free voter IDs were available. 553 U.S. at 198. Thus, "indirect" poll taxes are not constitutionally immune from Twenty-Fourth Amendment scrutiny. *See id.*; *see also Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 274–79 (Wis. 2014) (applying a "saving construction" to a law requiring voters to pay a fee for a voter ID in order to "avoid a constitutional conflict" with *Harper* and other poll tax cases). The LFO provision challenged in this case is a far more explicit poll tax than those considered problematic in *Common Cause* or *Crawford*: rather than a fee related to another regulation that is not itself a poll tax, Section 15-22-36.1(a)(3) simply requires some citizens to make a payment as a precondition to exercising their right to vote. That is a poll tax in its plainest form.

Even if Defendants were correct in characterizing the LFO requirement as not an "explicit and unambiguous poll tax," the Twenty-Fourth Amendment plainly does not prohibit only blatant attempts to condition access to the vote of payment of a fee. Instead, by its very text it prohibits both "poll tax[es]" and "*other tax[es]*" upon which the right to vote is conditioned. U.S. Const. amend. XXIV (emphasis added); *see also Harman*, 380 U.S. at 540–41 (noting that the Twenty-Fourth Amendment was broadly written to "nullif[y] sophisticated as well as simple-minded modes of impairing the right guaranteed" (internal quotation marks omitted)); *Weinschenk v. State*, 203 S.W.3d 201, 213–14 (Mo. 2006) (en banc)

("[A]ll fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law.").

Thus, this Court must consider the scope of the phrase "other tax" under the Twenty-Fourth Amendment. This raises yet another question of constitutional interpretation—implicating constitutional history and expert evidence—that is unsuitable for resolution at this stage. Defendants offer no definition of the scope of "other tax" but rather argue that "other tax" has no content beyond the phrase "poll tax." This definition renders "other tax" superfluous in violation of "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted).

At the time that the Twenty-Fourth Amendment was passed, a tax "had the following essential components: (1) that it be levied by the government (2) for the support of the government or the general public." *Johnson v. Bredesen*, 624 F.3d 742, 769 (6th Cir. 2010) (Moore, J., dissenting) (examining in depth the definitions of "tax" that existed at the time of ratification of the Twenty-Fourth Amendment). Unquestionably, "fines, court costs, fees, and victim restitution *ordered by the sentencing court*" are "levied by the government." Ala. Code. § 15-22-36.1(a)(3) (emphasis added). And so too are they in almost all cases "for the support of the

government or the general public." Fines collected as a result of felony convictions in Alabama are remitted to the State General Fund. *See* Ala. Code § 12-19-152.[48] Court costs and fees are distributed to a number of recipients, including the State General Fund, the county general fund, and several law enforcement-related funds. *See* Ala. Code § 12-19-174. And although restitution may be paid to a private individual, the state or other governmental entities may at times be entitled to restitution for harms caused by criminal conduct. *See, e.g.*, *Wiggins v. State*, 513 So. 2d 73, 79 (Ala. Crim. App. 1987) (affirming order of restitution to municipality). Accordingly, even if the LFO requirement is not labeled a "poll tax," Plaintiffs have adequately alleged that the LFO requirement imposes an "other tax" upon citizens as a precondition to voting, and thus is barred by the Twenty-Fourth Amendment.

Defendants' second challenge to Plaintiffs' Twenty-Fourth Amendment claim is simply to reiterate their belief that *Richardson* removes from the scope of the Twenty-Fourth Amendment any laws addressing the disenfranchisement or re-enfranchisement of felons. But, as discussed above, the fact that *Richardson* sometimes allows states to withhold the franchise from individuals on the basis of convictions does not mean that laws addressing the voting rights of felons are

[48] The State General Fund revenues are used for, *inter alia*, "the ordinary expenses of the executive, legislative, and judicial departments of state government." *See* Ala. Dep't of Finance, *State General Fund – Brief Description*, http://budget.alabama.gov/pages/gfdesc.aspx (last visited Jan. 11, 2017).

immune from challenge where they violate another constitutional prohibition. Much as the Fourteenth Amendment's Equal Protection Clause would not permit a law allowing for the re-enfranchisement only of white felons, *see Hunter*, 471 U.S. at 233, and much as the Twenty-Sixth Amendment would presumably not permit a state to re-enfranchise only felons over the age of thirty, a law allowing for the re-enfranchisement of only those felons who can pay a "poll tax or other tax" is prohibited by the Twenty-Fourth Amendment.

### D. Plaintiffs Have Pled A Violation of Section 2 of the Voting Rights Act

Plaintiffs have also adequately pled a claim against the LFO requirement pursuant to Section 2 of the Voting Right Act. In order to prove a violation of Section 2, Plaintiffs must establish that the LFO requirement results in an electoral process "not equally open to participation" by minority citizens. 52 U.S.C. § 10301(b). Courts addressing vote denial claims under the Voting Rights Act have generally adopted a two part inquiry to determine whether a violation of Section 2 has occurred: (1) whether the challenged practice "'impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,'" and (2) whether that burden is "'caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.'" *See*

*Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters*, 769 F.3d at 240) (adopting this test and noting that the Fourth and Sixth Circuits have also done so).

The Complaint plainly pleads both of these elements. First, it asserts that § 15-22-36.1(a)(3) "disproportionately disenfranchises black citizens with prior disqualifying convictions compared to white citizens with prior disqualifying convictions," Compl. ¶ 258, and cites extensive statistics regarding the much higher rate of poverty among blacks in Alabama as compared to whites, *id*. ¶ 139, the much higher rate in unemployment among blacks, *id*. ¶ 140, and the resulting fact that blacks are "16% more likely to have their voting rights applications denied due to outstanding LFOs" than are whites, *id*. ¶ 143. *See Veasey*, 830 F.3d at 244 ("[C]ourts regularly utilize statistical analyses to discern whether a law has a discriminatory impact."). Second, the Complaint also explicitly pleads that the "systemic and disproportionately lower economic conditions for black in Alabama"—and thus the much higher likelihood that black will have voting rights applications denied due to outstanding LFOs—"are the result, at least in part, of a long history of state-sponsored racial discrimination in Alabama across all spectrums of society including, but not limited to, educating, voting, and employment." Compl. ¶ 141; *see generally id*. ¶¶ 82–86, 94–105 (detailing "Alabama's 'unrelenting historical agenda, spanning from the late 1800's to the

1980's, to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave'" (quoting *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986))).[49] The Complaint therefore states a claim of vote denial under Section 2 of the Voting Rights Act.

Defendants contend that, nonetheless, the Eleventh Circuit's decision in *Johnson v. Governor* bars a Voting Rights Act challenge to the LFO requirement. Even if *Johnson* bars all Voting Rights Act results-based challenges to felon disenfranchisement itself, *but see supra* Part II.B, nothing in that case suggests that the Voting Rights Act does not govern procedures for *restoring* felons' right to vote.

*Johnson* held that reading Section 2 as reaching "felon disenfranchisement provisions" would "raise grave constitutional concerns" insofar as such an interpretation would "allow[] a congressional statute to override the text of the Constitution," by invalidating the very statutes that, according to *Richardson*, are explicitly permitted by Section 2 of the Fourteenth Amendment. *Johnson*, 405 F.3d at 1229–32. But nothing in that opinion suggests that a law establishing the

[49] Plaintiffs are not relying solely on "bare statistical disparities" to support their Section 2 claim. MTD at 67. The cases cited by Defendants merely stand for the proposition that a court must also consider "historical, social and political factors" connected to the denial or dilution, *Wesley*, 791 F.2d at 1261, which Plaintiffs have alleged here. The nuanced consideration of the "totality of circumstances" is a factual issue not suitable to resolution at the motion to dismiss stage.

conditions upon which an ex-felon may *regain* the right to vote falls outside the scope of the Voting Rights Act.

To the contrary, any "grave constitutional concerns" at issue in *Johnson* are nonexistent with respect to scrutiny under Section 2 of the Voting Rights Act of the mechanisms a state chooses in re-enfranchising citizens. As noted above, *Richardson* recognized only that the Fourteenth Amendment allows states to use some criminal convictions as a basis for withholding the right to vote; it does not otherwise insulate voting laws affecting felons from constitutional limitations. To the extent that a law governs the voter qualifications or the prerequisites to voting among those with felony convictions on any basis *other* than convictions, it is possible for that law to violate the Equal Protection Clause or other constitutional prohibitions, and it is therefore well within Congress's powers to "enforce those [] substantive provisions 'by appropriate legislation.'" *Johnson*, 405 F.3d at 1230 (quoting U.S. Const. amend. XIV, § 5). Therefore, the "clear statement" rule that the *Johnson* court invoked to avoid constitutional concerns and that led it to its restrictive conclusion does not apply here. Without that rule, the opposite result is compelled.

The LFO falls within the scope of Section 2's plain language. Section 2 governs any "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). The Supreme Court has repeatedly held that, by

using this expansive language, Congress intended to give Section 2 "the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). The LFO requirement is a law setting the qualifications or prerequisites for voting among citizens, and does so on a basis other than felon status. Therefore, it raises no "grave constitutional concerns" and falls under the ordinary meaning of Section 2. Indeed, *Johnson*'s holding excluding felony disenfranchisement from the scope of Section 2 makes this Court's inclusion of re-enfranchisement procedures that much more important to ensuring that states cannot use felony disenfranchisement as a discriminatory end-run around the VRA by disenfranchising all felons but then re-enfranchising individuals on a discriminatory basis. That is precisely what has occurred here.

Accordingly, because Plaintiffs have pled that the LFO requirement has a discriminatory effect on black voters, and because they have pled that the discriminatory effect is linked to Alabama's long history of discrimination against black citizens—particularly in the voting booth—they have stated a claim against § 15-22-36.1(a)(3) pursuant to Section 2 of the Voting Rights Act.

## CONCLUSION

The Court should deny Defendants' motion to dismiss in its entirety.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 13, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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