No. 21-10034

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TREVA THOMPSON, *et al.*,

Plaintiffs-Appellants,

v.

HON. JOHN H. MERRILL,

in his official capacity as Secretary of State of Alabama, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:16-cv-783-ECM-SMD

BRIEF OF THE STATE APPELLEES

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May 17, 2021

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, the undersigned counsel certifies that the following additional persons and entities may have an interest in the outcome of this case:

1. Bradley Arant Boult Cummings LLP;
2. Capell & Howard P.C.; and,
3. Stanford Law School.

Counsel for the State Appellees further certify that no additional publicly traded company or corporation has an interest in the outcome of this case or appeal.

Respectfully submitted this 17th day of May, 2021.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises several important issues, including at least one issue of first impression in this Circuit: whether Alabama's system of felon disenfranchisement constitutes punishment under the *Ex Post Facto* Clause. Appellees believe oral argument would assist the Court in deciding this case.

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JURISDICTIONAL STATEMENT

Alleging violations of the United States Constitution and federal statutes, Plaintiffs challenged Alabama's felon disenfranchisement laws, a statutory opportunity for re-enfranchisement, and voter registration forms. Docs. 1 & 93. The district court exercised jurisdiction pursuant to 28 U.S.C. §1331, doc. 286 at 3, and entered final judgment on December 3, 2020, docs. 286 & 287. Plaintiffs appealed on December 31, 2020. Doc. 288. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly apply the *Nunez* summary judgment framework approved by this Court?

2. Alabama's 1868 and 1875 Constitutions disenfranchised anyone convicted of a crime punishable by imprisonment in the penitentiary. In 1901, with the goal of disenfranchising African Americans, the State added numerous additional crimes, including those involving moral turpitude, to the list of disqualifying crimes. In 1996, the State replaced that provision with one that narrowed the category of people subject to disenfranchisement to those convicted of felonies involving moral turpitude. The provision passed with the overwhelming support of black and white legislators and black and white voters. Was the 1996 law intentionally racially discriminatory?

3. Is disenfranchisement "punishment" under the *Ex Post Facto* Clause? If so, have Plaintiffs suffered *ex post facto* punishment where they were convicted of felonies involving moral turpitude that were later included in a comprehensive list of disenfranchising felonies enacted by the Alabama Legislature?

4. Did Plaintiffs abandon their due process claim by failing to brief it before this Court?

5. Does Alabama's voter registration form "specif[y] each eligibility requirement" as required by the National Voter Registration Act (NVRA) when it

specifies that one must not have committed a disqualifying felony but does not list each and every disqualifying felony?

STATEMENT OF THE CASE

A. Felon Disenfranchisement Generally.

Criminal disenfranchisement "is of ancient origin" and was practiced by the Romans and Greeks. *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) (*en banc*); doc. 257-1 at 4-6. It "was a feature of American law during the colonial era" and "continued in the first century after American independence." Doc. 257-1 at 6; *see also Hayden*, 449 F.3d at 316. Felon disenfranchisement "laws are deeply rooted in this Nation's history." *Johnson v. Governor of Fla.,* 405 F.3d 1214, 1228 (11th Cir. 2005) (*en banc*) (footnote omitted). The Fourteenth Amendment even includes "an affirmative sanction" for "the exclusion of felons from the vote." *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

B. Felon Disenfranchisement in Alabama.

Alabama has always recognized this "ancient" practice, with each of the State's six constitutions providing for it. Even before African Americans obtained the franchise in the State, the 1819, 1861, and 1865 constitutions either disenfranchised some criminals or authorized the Legislature to do so. *See* Ala. Const. of 1819 art. VI, §5 (doc. 257-2 at 13); Ala. Const. of 1861 art. VI, §5 (doc. 257-3 at 14); Ala. Const. of 1865 art. VIII, §1 (doc. 257-4 at 15). Next was the 1868

Constitution. According to historian Dr. David Beito, the convention drafting it "during the Reconstruction period was dominated by Radical Republicans and African Americans." Doc. 257-1 at 11. Even so, "[t]he resulting Constitution was sweeping in felon disenfranchisement, in some ways more sweeping" than Alabama's earlier Constitutions or those of "most other States." *Id.* It disenfranchised persons for certain enumerated crimes as well as for "crimes punishable by law with imprisonment in the penitentiary." Ala. Const. of 1868 art. VII, §3 (doc. 257-5 at 13).

"The 1875 Constitution (which reflected the end of Reconstruction in Alabama) continued the all-inclusive mandate of depriving suffrage for 'treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary.'" Doc. 257-1 at 12; *see also* Ala. Const. of 1875 art. VIII, §3 (doc. 257-6 at 21). "These offenses were largely, if not entirely, felonies." *Hunter v. Underwood*, 471 U.S. 222, 226 (1985).

Alabama's 1901 Constitutional Convention intended to disenfranchise blacks and establish white supremacy. Doc. 257-1 at 12-14; *Hunter*, 471 U.S. at 228-29. A literacy requirement and poll tax were particularly effective. Doc. 257-1 at 16, 20. A committee considered options for criminal disenfranchisement and rejected a proposal by John Fielding Burns, *id.* at 14-15, who has been credited with greatly influencing the final provision, *Hunter*, 471 U.S. at 232. Ultimately, through Section

182, the 1901 Constitution disenfranchised for all felony convictions, any "crime involving moral turpitude," and a list of "enumerated crimes" that "contain[ed] … many misdemeanors" including "minor nonfelony offenses such as presenting a worthless check and petty larceny," which "were believed by the [1901 Convention] delegates to be more frequently committed by blacks." *Id.* at 226-27.[1]

Dr. Beito concluded that while racial animus motivated some suffrage provisions, "[t]here is no direct evidence in the convention debates that racial animus motivated" the decision to disenfranchise felons or use "the standard of moral turpitude when applied to felonies." Doc. 257-1 at 3. In light of Alabama's long history of felon disenfranchisement, the 1901 Constitution "would have probably included a felon disenfranchisement clause of some type even if non-racist and African American delegates had written the document." *Id.* at 17.

C. *Hunter v. Underwood*.

Section 182 was challenged many years later by two misdemeanants who were disenfranchised for presenting worthless checks. *Underwood v. Hunter*, 730 F.2d 614, 615-16 (11th Cir. 1984). The plaintiffs sued their local registrars, who

[1] Plaintiffs' expert Dr. Riser focused on larceny being a crime of moral turpitude, *see e.g.,* doc. 270-3 at 26-27, 31-33, 37, but Section 182 separately listed larceny. Plaintiffs (at 10 and n.4) likewise focus on larceny and purport to quote *Anderson v. State,* 72 Ala. 187 (1882), for the proposition that larceny stands apart from other disenfranchising crimes. But Plaintiffs quote the losing party's brief from *Anderson*, not anything the court held.

"concede[d]" "that discriminatory intent motivated section 182." *Id.* at 620 & n.12. The registrars defended the law on grounds that "the list of disqualifying offenses had been pruned"[2] and "what remained was facially constitutional." *Abbott v. Perez*, 138 S.Ct. 2305, 2325 (2018). The Supreme Court "rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted." *Id.*

Based on the claims and evidence, the *Hunter* Court's holding was limited to misdemeanants. *Hunter*, 471 U.S. at 224, 227, 233. Apparently, no challenge was brought to felon disenfranchisement under Section 182. The Supreme "Court specifically declined to address the question whether the then-existing version would have been valid if '[re]enacted today.'" *Abbott*, 138 S.Ct. at 2325 (quoting *Hunter*, 471 U.S. at 233).

D. Constitutional Revision Efforts.

In 1969, Governor Brewer announced a commission to study constitutional reform, and Dr. Samuel A. Beatty thereafter prepared a report on the Suffrage and Elections Article. Doc. 257-17 at 14-18. As to Section 182, he explained:

> ***State constitutions commonly include like provisions disqualifying mental incompetents and persons convicted of crimes.*** As statutory offenses grow or change, their inclusion or exclusion becomes a matter of constitutional interpretation or constitutional amendment. Examples: (a) possession and sale of dangerous drugs; (b)

[2] *See, e.g., Hobson v. Pow*, 434 F. Supp. 362, 367 (N.D. Ala. 1977) ("assault and battery on the wife" violates Equal Protection).

> no longer may miscegenation be a crime under the U.S. Constitution, *Loving v. Virginia*, 388 U.S. 1 (196[7]); (c) vagrancy as a disqualification may be unconstitutional, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). ***It would appear sufficient to describe such disqualifications in general terms, thus overcoming these objections and eliminating a long, scattered and redundant list of disqualifying crimes****....*

Doc. 257-19 at 10 (emphasis added); *see also* doc. 257-17 at 17-18. Dr. Beatty then discussed the provisions in Florida's, Maryland's, and Illinois' constitutions. Doc. 257-19 at 10. He concluded that felon disenfranchisement is best governed in general terms, like in other States' constitutions, and he proposed language that keyed disenfranchisement to felonies involving moral turpitude. Doc. 257-19 at 10, 16; *see also* 257-17 at 18.

The proposal was minimally revised over time and submitted to the Legislature in 1973.[3] Doc. 257-17 at 18-21. A comment explained it would replace Section 182's list of 33 crimes. *Id.* at 21-22. The proposal did not pass then or when the same or similar language was considered in 1976. *Id.* at 22-24.

In 1979, Governor James assumed office "claim[ing] for all Alabamians a *new beginning* free from racism and discrimination." Doc. 256-8 at 2, 4 (capitalization altered). A working group led by his counsel, Michael Waters, focused on revising

[3] Plaintiffs (at 29) cite to the State's briefing for the proposition that there was "no debate" of Dr. Beatty's proposal, ignoring the limitations on that quote and information in the same paragraph about revisions, doc. 261 at 43.

the 1901 Constitution. Doc. 257-17 at 25. Waters testified that they "used the '73 Constitution as a starting point,'" doc. 256-1 at 17, and "reject[ed] the 1901 Constitution" and "the principles on which it was founded," *id.* at 28.

A legislative committee held public hearings. Doc. 257-17 at 26. At a January 1979 hearing, Yetta Samford moderated the discussion of the proposed Suffrage and Elections Article. He explained the draft "eliminat[ed]" the list of crimes, replacing it with "a felony involving moral turpitude," which is a "pretty serious disqualification[]." Doc. 257-17 at 27 (footnote omitted); *see also* doc. 256-11 at 4-5.

At a February 1979 meeting, Sen. Bob Harris explained that the proposal streamlined the Article and moved away from the "rigid[]" restrictions on voting. Doc. 257-17 at 28; *see also* doc. 256-13 at 40-41. Rep. Tony Harrison praised the disqualifications proposal specifically for "chopp[ing] out some of the most unnecessary language that was in that Constitution," and asked about the definition of moral turpitude. Doc. 257-17 at 29 (footnote omitted); *see also* doc. 256-13 at 42-43. Sen. Bob Harris responded that "[i]t means doing wrong." Doc. 257-17 at 29; *see also* doc. 256-13 at 43.

Sen. Mac Parsons asked about making all felonies disenfranchising since most involve moral turpitude, and Rep. Martha Smith queried whether the provision was otherwise underinclusive. Doc. 257-17 at 32-33; *see also* doc. 256-13 at 53-55. Sen.

Bob Harris explained that the goal was to "get away from the restraints and restrictions of the 1901 Constitution as far as we could, as safely as we could, in the simplest language that we could." Doc. 257-17 at 33 (emphasis omitted); *see also* doc. 256-13 at 54-55. At a committee meeting the next day, Mr. Denson said moral turpitude "is an old phrase that has meaning. It is somewhat nebulous, but it has meaning in court cases." Doc. 256-14 at 14-15.

In February 1979, Mary Weidler of the Civil Liberties Union of Alabama urged the committee to remove the felon disenfranchisement provision because it was "derived" from an intentionally discriminatory provision. Doc. 257-17 at 35; *see also* doc. 256-16 at 4-7. She did not offer evidence or explanation. Her comments "comprised less than three pages ... of the more than 2,000 pages of total transcript for these efforts." Doc. 257-17 at 35-36.

In March 1979, a GBM representative said felon disenfranchisement was "an additional badge of inferiority" and punishment. Doc. 257-17 at 36; *see also* doc. 256-19 at 22-27. Other members of the public, including the League of Women Voters, supported the proposed revisions to the Suffrage and Elections Article and considered them less controversial. Doc. 257-17 at 36-37. Rep. Mary Zoghby proposed striking the moral turpitude language, which would extend disenfranchisement to all felonies. Her amendment passed in the House, but the overall proposal died. *Id.* at 39; doc. 270-6 at 6.

Revision efforts were next led by Lieutenant Governor Baxley, who had reopened the Sixteenth Street Baptist Church bombing case and prosecuted "Dynamite Bob" Chambliss. *Cf. Chambliss v. State*, 373 So.2d 1185 (Ala. Crim. App. 1979). Baxley "worked with Legislators and community stakeholders to organize a special committee to draft a new constitution." Doc. 257-17 at 41. Sen. Ryan deGraffenreid and Rep. Jack Venable were heavily involved. *Id.* at 40-41. The committee's proposed Suffrage and Elections Article matched the Brewer and James proposals. *Id.* at 42. A draft memo by deGraffenreid explained that the proposal "completely" rewrote the 1901 provisions, which were "designed to prevent blacks [and others] from voting" and "have been held to be unconstitutional." *Id.*

Portions of the proposed constitution drew support and opposition, but the felon disenfranchisement provision does not appear to have been controversial. Doc. 257-17 at 42-47. When Weidler testified at a March 1983 hearing, she focused on sexual equality, doc. 257-22.[4] The Legislature passed the proposed constitution, but the Alabama Supreme Court held a new constitution could not be adopted by the electorate as an amendment, thus ending the Baxley efforts. *State v. Manley*, 441 So.2d 864 (Ala. 1983); doc. 257-23 at 2-3.

[4] Plaintiffs challenge the district court's treatment of Weidler's comments in 1979 and 1983, Brief at 30 & n.8, but there is no dispute about what she said.

In 1995, Rep. Venable introduced a proposed constitutional amendment to repeal and replace the Suffrage and Elections Article. Doc. 257-17 at 49-50. The bill was uncontroversial, and it passed the House 79-0 and the Senate 27-0. *Id.* at 50-51; *see also* doc. 257-24 at 18-19; doc. 257-25 at 24. To take effect, the voters would have to ratify it. Ala. Const. art. XVIII, §284 & §285.

In the lead up to the election, the *Montgomery Advertiser* supported the amendment with an editorial and ran a story by Phillip Rawls. Doc. 257-17 at 51-53. Rawls explained that the 1901 Constitution contained superseded language and the amendment "'would make Alabama's voting requirements match reality.'" *Id.* at 52. Rawls quoted Venable as saying "'It's strictly housekeeping. It reflects the voting requirements of the state today, rather than in 1901 when the constitution was written.'" *Id.* (footnote omitted).

At the June 1996 election, the new Suffrage and Elections Article passed with nearly 76% of the vote. Doc. 257-8 at 2. It was rejected only in two counties, where it still carried at least 45% of the vote. Doc. 257-17 at 53. It passed in the majority black counties (other than Lowndes), as well as in the State's largest and most diverse counties. *Id.* at 54-56. Dr. Owen concluded "[t]here is no relationship between the racial composition of a county and the degree of support" for the amendment. *Id.* at 57.

The amendment became Ala. Const. art. VIII, §177. Section 177(b) provides "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability."[5] Nearby, Section 177(a) provides, in part, "The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting."

Before the amendment could take effect, preclearance under the Voting Rights Act was required. *See* 52 U.S.C. §10304. To facilitate the preclearance request, Venable wrote an April 1996 letter to the Alabama Attorney General explaining, "The proposed Article has been a part of the last three Constitutional Revision efforts. There [were] numerous public hearings held during the 1973, 1979 and 1983 efforts, and I recall no opposition to this Article from any group. There were no public hearings when the Article passed the legislature in 1995, and I do not recall any opposition." Doc. 257-26. In June 1996, the U.S. Department of Justice granted the State preclearance. Doc. 257-9.

In 2000, Senator Bedford proposed a constitution that continued Section 177. The proposal included a comment explaining that the 1996 Amendment had

[5] Restoration may be available through a pardon, Ala. Code §15-22-36(a), or a streamlined certificate procedure, Ala. Code §15-22-36.1.

"removed outdated, unlawful and offensive provisions." Doc. 256-20 at 1, 43-44 (emphasis omitted); *see also* doc. 256-1 at 62-63.

Subsequent constitutional reform efforts have not focused on the Suffrage and Elections Article, doc. 256-1 at 62, with two exceptions. In 2012 and in 2020, minor changes were made to Section 177, but the felon disenfranchisement provision was unaltered. Act Nos. 2011-656 & 2019-330.

E. The Moral Turpitude Standard.

"The term 'moral turpitude' has deep roots in the law." *Jordan v. De George*, 341 U.S. 223, 227 (1951). *The Law of Libel and Slander*, a "widely cited legal guide" published in 1898, "defined moral turpitude as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-men or to society in general.'" Doc. 257-1 at 17 (footnote omitted). Similar language is used in court decisions in Alabama and elsewhere. *E.g., Fort v. Brinkley*, 112 S.W. 1084, 1084 (Ark. 1908); *Pippin v. State*, 73 So. 340, 342 (Ala. 1916); *Sims v. Callahan*, 112 So.2d 776, 785 (Ala. 1959); *see also* Charles Gamble, *McElroy's Alabama Evidence*, §145.01(7) (4th ed. 1991).

"The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses. Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses ...." *Jordan*, 341 U.S. at

227 (footnotes omitted). The district court below uses the moral turpitude standard in attorney discipline, M.D. Ala. LR 83.1(k)(1), and the standard is used in federal law, *e.g.*, 8 U.S.C. §1227; 8 U.S.C. §1182; 21 U.S.C. §206; U.S. Vet. App. R. Admis & Prac, Rule 7.

Moral turpitude is used in a variety of Alabama laws, most often concerning competence to hold certain offices and in statutes governing licensure. *E.g.,* Ala. Const. art. VII, §173(a); Ala. Code §5-17-55(c)(1), *id.* §34-8A-16(a)(1); *see also* doc. 261 at 33-34 n.10 (providing more statutes and details). Some provisions that predate the 1996 Amendment include a moral turpitude standard for juror qualifications, Ala Code §12-16-60(a)(4), witness credibility, *id.* §12-21-162(b), and an attorney's ability to practice, *id.* §34-3-86(1).[6]

For voter registration, each county's Board of Registrars enforces the moral turpitude provision. Registrars are judicial officers who are generally appointed by three State officials. Ala. Code §17-3-2; *id.* §17-3-6. Registrars were, and are, legally obligated to "faithfully and honestly discharge the duties of the[ir] office[s] ... to the best of [their] ability." Ala. Const. art. XVI, §279; *see also* Ala. Code §17-3-6. Applicants denied registration and voters removed from the rolls

[6] Plaintiffs cite a law review article for the author's thoughts on the moral turpitude standard beyond Alabama's borders. Brief at 3 n.1. The article is hearsay being untimely offered as expert testimony. *See* doc. 274 at 6.

may appeal to the courts. Ala. Code §17-3-55; *id.* §17-4-3(b)-(c); *id.* §17-4-124 (1995) (earlier appeal provision for denied felons); *id.* §17-4-132 (1995) (earlier appeal provision for removed felons).

Despite these provisions, implementation of the moral turpitude standard for disenfranchisement was imperfect. Different counties could reach different decisions about whether a conviction was disqualifying. But an employee of the Secretary's office testified he was not aware of different decisions being reached based on race and that he would recommend a registrar be removed from office if the registrar were making disenfranchisement decisions based on race. Doc. 269-4 at 231, 284-85. He also agreed that registrars were required to make a good-faith attempt to determine whether a felony involved moral turpitude and that the Secretary's office provided guidance through an Administrative Office of Courts list and Attorney General Opinions. *Id.* at 56-59, 62, 310-11.[7] Plaintiffs do not argue that the registrars applied Section 177(b) in a racially discriminatory manner. *Cf.*

[7] Plaintiffs emphasize a Wikipedia list in Board of Registrars Handbooks. Brief at 35-36. The 201**4** Handbook was prepared by Secretary Merrill's campaign staff while he was running for office, doc. 269-6 at 26, and is dated before he took (or even won) office, *id.* at 32, 186, *see also* doc. 269-7 at 2. It was "at that time" that the staffer said he "didn't know a lot about moral turpitude." Doc. 269-6 at 31. He also did not know if that 2014 Handbook was circulated to the registrars. *Id.* at 32. Assuming the 201**5** Handbook was circulated, it would have been quickly superseded by the 2017 Act, *id.* at 35, discussed below.

Underwood, 730 F.2d at 621 ("We recognize the registrars' good faith in administering the statute without reference to race.").

In 2017, recognizing the value in a "comprehensive, authoritative" list, Alabama enacted a statute listing which felonies involve moral turpitude for voting purposes. Act No. 2017-378 (doc. 257-12). In 2019, Alabama created a new felony and added it to the list. Act No. 2019-513 (doc. 257-13 at 2, 11, 18). The list identifies Alabama offenses, Ala. Code §17-3-30.1(c)(1)-(47), and includes crimes committed in other jurisdictions "which, if committed in this state, would constitute one of the offenses listed," Ala. Code §17-3-30.1(c)(48).

F. The NVRA and Alabama's Mail-in Voter Registration Form.

The NVRA "requires States to provide simplified systems for registering to vote in federal elections." *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 5 (2013) (cleaned up). "The Act requires each State to permit prospective voters to register to vote in elections for Federal office by any of three methods: simultaneously with a driver's license application, in person, or by mail." *Id.* (internal citations and quotation marks omitted). It is mail-in registration that is pertinent here.

The NVRA provides, *inter alia*, that the Election Assistance Commission (a federal agency), "in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office,"

52 U.S.C. §20508(a)(2), *i.e.,* the Federal Form, *see Inter Tribal Council*, 570 U.S. at 4. To promote "simplified systems for registering to vote," *id.* at 5, the NVRA provides that the form "require only such … information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. §20508(b)(1). The form must include "a statement that--(A) specifies each eligibility requirement (including citizenship); (B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant, under penalty of perjury." 52 U.S.C. §20508(b)(2). The States must "accept and use" the Federal Form, 52 U.S.C. §20505(a)(1), and the States may develop a form of their own that meets the same requirements, 52 U.S.C. §20505(a)(2).

The State mail-in form "specifies each eligibility requirement" for applicants on one simple page. The applicant must be (1) a United States citizen, (2) who lives in Alabama, (3) who will be 18 years old by Election Day, (4) who has not been adjudged incompetent, and (5) who has not been convicted of a disqualifying felony. Doc. 257-35 at 3.[8] Since mid-2019, the form's Voter Declaration box has referred

[8] The current form is available at www.sos.alabama.gov/alabama-votes/voter/register-to-vote (last accessed May 2, 2021). It has been modified since the 2019 version, doc. 257-35 at 19-20, but not in a way that matters here.

applicants to the Secretary's website for the list of disqualifying felonies; the list is derived from Ala. Code §17-3-30.1. The form also includes contact information for the Secretary's Elections Division and for the Boards of Registrars.

G. Procedural Background.

Ten individuals and GBM sued the State and State officials challenging Section 177(b)'s felon disenfranchisement provision and a statutory opportunity for re-enfranchisement. Doc. 1. Some counts challenged using the moral turpitude standard without an authoritative, comprehensive list of disenfranchising felonies. Doc. 1 at 45-51. While moral turpitude standard "has deep roots in the law," *Jordan*, 341 U.S. at 227, the Secretary of State had advocated for a list, and the Legislature delivered in 2017. *See* Act No. 2017-378; doc. 269-6 at 61, 85, 89-90; doc. 63-3 at 2.

On Defendants' motion, the court dismissed ten counts; counts 1, 2, 11, 12, and 13 survived. Doc. 80. Plaintiffs filed a supplemental complaint which, *inter alia*, added a Plaintiff and three counts. Doc. 93. Defendants moved to dismiss, and alternatively, as to count 18, which alleged that federal and State voter registration forms violate the NVRA, for summary judgment. Doc. 95. Plaintiffs opposed, and they cross-moved for summary judgment on count 18. Doc. 97. The court dismissed count 18 as to the Federal Form; the other counts survived. Doc. 179-1 at 25.

Over time, some Plaintiffs and the State were dismissed from the case. Docs. 96, 179-1 at 25, & 180. Counts 1, 2, 11-13, and 16-18 remained pending at summary judgment. The remaining Plaintiffs were:

(1) Thompson, who was convicted of theft of property (1st degree) in 2005, doc. 1 at 9;

(2) Lanier, who was convicted of burglary (1st degree), based on conduct occurring in January 1995, doc. 1 at 14; doc. 257-28 at 4;

(3) King, who was convicted of murder in 1995, doc. 1 at 14;

(4) Gamble, who in 2006 was caught with $10,000 in cash and a pistol with 30 pounds of cannabis in the mail for delivery to his house, doc. 222-6 at 5-9, and was subsequently convicted of trafficking in cannabis, doc. 93 at 6-7; and,

(5) GBM, which helps felons determine their eligibility to vote and register, doc. 1 at 18.

The court granted Defendants summary judgment. Doc. 286.

The above-named Plaintiffs "filed a general notice of appeal," *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 (11th Cir. 1987), "from the final judgment" and prior, adverse "rulings, opinions, and orders," doc. 288. On appeal, Plaintiffs press only their racial intent and *ex post facto* claims (counts 1, 2, and 11), which are brought against the Secretary and the Chair of the Montgomery County Board of Registrars, and their NVRA claim (count 18), which is brought against the

Secretary. Plaintiffs abandoned their claims against the State and the Chair of the Board of Pardons and Paroles. Plaintiffs purport to preserve a due process claim (count 17), but have not briefed it.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Fla. Int'l Univ. Bd. of Tr. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1251 (11th Cir. 2016). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For a dispute to be genuine, there must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986) (internal citations omitted). Disputes about *im*material facts do not preclude summary judgment. *Id.* at 248.

SUMMARY OF THE ARGUMENT

This Court has recognized that, when there are no issues of witness credibility, the district court may conclude that there are no genuine issues of material fact and grant summary judgment even though its decision may depend on inferences to be drawn from what has been incontrovertibly proved. The district court followed that settled precedent in granting summary judgment here. In arguing that the district court applied the wrong standard, Plaintiffs misunderstand this Court's precedent.

Plaintiffs' fare no better on their merits arguments. Their main claim is that racial animus infected Section 177(b), a 1996 revision to the Alabama Constitution that (1) narrowed the category of people subject to disenfranchisement and (2) was passed with the overwhelming support of black and white legislators and voters. Plaintiffs don't point to evidence that those legislators or voters were motivated by bias, which is reason enough to reject their claim. Instead, they point to the racist intent of the framers of the materially broader 1901 provision that Section 177(b) replaced. This claim fails under this Court's *en banc Johnson* decision because felon disenfranchisement itself was not tainted in 1901, because Section 177(b) is substantively different from the provision it replaced, and because Section 177(b) was enacted through a deliberative process. And even if Plaintiffs could meet their burden of showing racial intent behind the 1996 law, Defendants have demonstrated that Section 177(b) would have been enacted without racial intent because the State has long disenfranchised felons, has broadly relied on the moral turpitude standard, and reenacted Section 177(b) in 2012 and 2020.

Plaintiffs' *ex post facto* claims are similarly flawed, as they are based on the notion that the "moral turpitude" standard is so hopelessly vague that the Constitution would not allow any felon to have been disenfranchised under Section 177(b) until the Legislature provided a comprehensive list of felonies involving moral turpitude in 2017. The problem with that argument is that the moral turpitude

standard "has deep roots in the law," *Jordan*, 341 U.S. at 227, has long been applied by state and federal courts, and is still being applied today. In any event, Alabama's disenfranchisement provision is not punishment under the *Ex Post Facto* Clause, another reason Plaintiffs' claim fails.

Plaintiffs' attempt to preserve an alternative due process claim fails, as they did not brief the argument.

Finally, Alabama's mail-in voter registration form "specifies each eligibility requirement": the applicant must be (1) a U.S. citizen, (2) who lives in Alabama, (3) who will be 18 by Election Day, (4) who has not been adjudged incompetent, and (5) who has not been convicted of a disqualifying felony. The federal agency tasked with working with the State to develop the form agreed that it satisfied the NVRA. GBM argues the State could always be more specific, and that Alabama must print on the form each disqualifying felony listed in Ala. Code §17-3-30.1(c), though not the equivalent felonies of other jurisdictions. That interpretation leads to absurd results and is internally inconsistent. It should again be rejected.

ARGUMENT

I. The District Court correctly applied the summary judgment standard.

The district court carefully set out (Doc. 286 at 4-7) and then properly applied the summary judgment standard. The court repeatedly noted the summary judgment posture of the litigation. *See e.g., id.* at 23, 34, & 37 n.11. The court explained that

in cases where there are no issues of witness credibility and the case will be tried to the bench, "the court may conclude ... that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved." *Id.* at 6 (internal citation and formatting omitted). This is because "[a] trial on the merits would reveal no additional data" and so "[t]he judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expense of trial." *Id.* (internal citation and formatting omitted). Plaintiffs take issue with this last proposition. Brief at 15, 18-20.

The proposition can be traced to *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978). The *Nunez* approach for summary judgment has been repeatedly "approved" by this Court. *Fla. Int'l Univ. Bd. of Tr. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016) (citing *Useden v. Acker*, 947 F.2d 1563, 1572–73 (11th Cir. 1991)). The district court thus correctly followed this Court's precedent.

Plaintiffs argue (at 18-20) that the district court was not authorized to conduct a bench trial on a stipulated record because, for instance, the parties had not agreed to that procedure. But a bench trial on a stipulated record is a different procedure from a grant of summary judgment under the *Nunez* framework. *See FIU*, 830 F.3d at 1252-53. That the prerequisites for a bench trial were not met is thus irrelevant.

Which of the two procedures had been followed was important in *FIU* because it impacted the standard of review. *FIU*, 830 F.3d at 1251. Here, Plaintiffs and

Defendants agree that this Court should review the district court's summary judgment decision de novo. Thus, Plaintiffs' argument makes no difference to this appeal.

To the extent Plaintiffs' argument is atmospheric, it is unpersuasive. Plaintiffs claim (at 19) that "the district court ignored Plaintiffs' historical expert reports entirely," but they do not note what in those reports created a "*genuine* issue of *material* fact," *Anderson*, 477 U.S. at 248.

II. Section 177(b) is not intentionally discriminatory.

Plaintiffs' lead claim is that Section 177(b)—a provision that narrowed the category of people subject to disenfranchisement and passed in 1996 with overwhelming support of black and white legislators and black and white voters—is intentionally racially discriminatory. But "[w]henever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott*, 138 S.Ct. at 2324. Plaintiffs have failed to carry their burden here.[9]

"Proving the motivation behind official action is often a problematic undertaking," and the difficulty increases with the size of the decision-making body.

[9] Plaintiffs contend (at 20) that summary judgment is rarely appropriate on intent claims, but this Court has "firmly resist[ed] any inducement to establish a category of claims (*e.g.*, ... constitutional challenges to laws affecting voting) that can never succeed ... summary judgment," *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1318 (11th Cir. 2021).

Hunter, 471 U.S. at 228. As to Congress, the Supreme Court has explained that it "will look to statements by legislators for guidance" when interpreting a statute, but '[i]t is entirely a different matter when" the Court is asked to invalidate a statute "on the basis of what fewer than a handful of Congressmen said about it." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). That is because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384; *see also Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is ... almost always an impossible task."). *Hunter* was the exception that proves the rule. The 1901 Convention left extensive documentation about the delegates' intent, *Hunter*, 471 U.S. at 228-32, and the registrar defendants in the case "conceded" "that discriminatory intent motivated section 182," *Underwood*, 730 F.2d at 620 & n.12.

"The *Hunter* Court articulated a two-step test to analyze whether a criminal disenfranchisement provision" is intentionally discriminatory. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1222 (11th Cir. 2005) (*en banc*). First, through "a sensitive inquiry into" the available evidence, including, *inter alia*, impact, historical background, "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," and "legislative or administrative history," the Court ascertains "whether invidious discriminatory

purpose was a motivating factor." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). If it is shown to be, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228 (citation omitted).

Johnson elaborated on the *Hunter* test in circumstances like those here. The *Johnson* Plaintiffs brought an Equal Protection challenge to Florida's 1968 criminal disenfranchisement provision on the theory that it was tainted by the 1868 provision it replaced. *Johnson*, 405 F.3d at 1217. At the first step of *Hunter's* two-step test, the Court assumed the 1868 provision was tainted but then, guided by *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), looked to whether the 1968 revision had eliminated that taint. *Johnson*, 405 F.3d at 1223-24. The *Johnson* Court's analysis focused on the "deliberative process" that resulted in the adoption of the 1968 provision, *id.* at 1224, which was substantively different from the 1868 provision, *id.* at 1220-21.

Though the *Johnson* plaintiffs failed at the first step, the Court continued the analysis and recognized that Florida would have adopted its felon disenfranchisement provision without any discriminatory motive. *Johnson*, 405 F.3d at 1224. The Court rejected the plaintiffs' attempt to impose "an insurmountable burden" on the State, *id.* at 1224-25 & n.21, and recognized the "valid public policy reason for disenfranchising felons," *id.* at 1225.

A. Felon disenfranchisement was not tainted in 1901.

Plaintiffs say they "established" that "the use of moral turpitude in the context of felony disenfranchisement" "is rooted in intentional discrimination." Brief at 25 (emphasis omitted). They cite nowhere in the record or their brief where they did so. *Id*. Defendants established otherwise.[10]

Dr. Beito concluded "[t]here is no direct evidence in the convention debates that racial animus motivated" felon disenfranchisement "or the standard of moral turpitude when applied to felonies." Doc. 257-1 at 3. Further, "[g]iven the precedent of earlier constitutions," *id.* at 17, which included the 1868 Constitution that had been "sweeping in felon disenfranchisement," *id.* at 11, and the 1875 Constitution that had disenfranchised *all* felons, *id.* at 12, "any constitution [written in 1901] would have probably included a felon disenfranchisement clause of some type even if non-racist and African American delegates had written the document," *id.* at 17.

Defendants accept that the misdemeanor portions of Section 182 were tainted by intentional discrimination, but that ought not condemn the *felon* disenfranchisement portion of that provision. *Cf. Johnson*, 405 F.3d at 1219 ("The existence of racial discrimination behind some provisions of Florida's 1868 Constitution does not, however, establish that racial animus motivated the criminal

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[10] The district court thought taint was conceded. Doc. 286 at 23. Defendants said only that Dr. Riser's "testimony is immaterial" and unchallenged at summary judgment. Doc. 274 at 5-7.

disenfranchisement provision, particularly given Florida's long-standing tradition of criminal disenfranchisement."). And even if the Court assumed that felon disenfranchisement was tainted in 1901, it should still affirm for the reasons that follow.

B. Section 177(b) is substantively different from Section 182.

Though "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *Abbott*, 138 S.Ct. at 2324, Plaintiffs' challenge to 1996 amendment turns almost entirely on the history of the 1901 provision it replaced. That challenge falters from the start for the simple reason that the provisions are markedly different, with Section 177(b) disenfranchising a narrower swath of the population than Section 182. A simple side-by-side helps illustrate the point:

Section 182 (from 1901)	Section 177(b) (from 1996)
All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.	No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.

Thus, "there can be no doubt about what matters: It is the intent of the [1996] Legislature" and voters who approved Section 177, *Abbott*, 138 S.Ct. at 2325, including the majority of voters in nearly every majority black county. Doc. 286 at

29; doc. 257-17 at 54-56. Plaintiffs don't argue that they can meet this burden based solely on events related to Section 177's passage.

Instead, Plaintiffs contend that Section 182's history still sticks to Section 177 because both provisions use the phrase "moral turpitude." But Section 182 disenfranchised for *all* felony convictions, a long list of specified crimes, and "any infamous crime or crime involving moral turpitude"—i.e., any *misdemeanor* involving moral turpitude, as all felonies would be covered even without any moral turpitude provision. *Hunter*, 471 U.S. at 223 n.**. By contrast, Section 177(b) disenfranchises only for "a felony involving moral turpitude." The differences are obvious and fatal to Plaintiffs' challenge.

Plaintiffs respond that there is no difference because registrars had the discretion to determine *every* felony is disenfranchising. Brief at 24. The *Underwood* and *Hunter* Courts, however, recognized that registrars followed the law. *See Underwood*, 730 F.2d at 616 n.2, 621; *Hunter*, 471 U.S. at 224. Plaintiffs nonetheless assume the worst about registrars from 1996 to present, despite the registrars' oath to perform "to the best of [their] ability," Ala. Const. art. XVI, §279; *see also* Ala. Code §17-3-6, and testimony that they were obliged to make a good-faith attempt to determine whether a felony involved moral turpitude. Doc. 269-4 at 310-11. An employee of the Secretary's office further testified that he was not aware

of any counties where the practice was to disenfranchise all felons. Doc. 269-4 at 212. And, again, appeals to the courts were available.

To be sure, the 1996 change appears to have been missed by registrars who mistakenly deemed all felonies to be disenfranchising until the Attorney General issued a 2005 opinion clarifying that only felonies involving moral turpitude are disenfranchising. A.G. No. 2005-092 (doc. 257-18). Litigation followed, *Chapman v. Gooden*, 974 So.2d 972 (Ala. 2007), during which the Alabama Supreme Court made clear that registration cannot be denied "simply because [an applicant] has been convicted of *some* felony; denial of voter registration based on a felony conviction is appropriate only if the felony involved moral turpitude." Order, *Worley v. Gooden*, Case No. 1051712 (Ala. Oct. 25, 2006), doc. 257-30 at 2. Thus, as a matter of State law, Section 177(b) set a different standard which the registrars were obliged to follow.

In any event, Plaintiffs use the wrong benchmark, for even if all felonies involved moral turpitude, Section 182 disenfranchised for several misdemeanors, like those committed by the *Hunter* plaintiffs. Section 177(b) does not. Because "the [1901] provision[] disenfranchised persons convicted of certain misdemeanors," while the 1996 provision disenfranchises "only those persons convicted of felonies," the provisions are "markedly different." *Johnson*, 405 F.3d at 1221-22.

Any suggestion that Alabama is due no credit for removing the offending language from the 1901 Constitution after *Hunter* is "heads Plaintiffs win, tails the State loses" thinking and must be rejected. Even the Supreme Court could not erase Section 182 from the pages of the Alabama Constitution; that took an Amendment.

Relatedly, Plaintiffs assert that "the *Hunter* Court held[] the flexible 'moral turpitude' standard was the chief tool of the law's racially discriminatory purpose." Brief at 24. Plaintiffs offer no citation for this proposition, *id.*, and *Hunter* does not support it, 471 U.S. at 222-33.

Moreover, since 2017, there has been a "comprehensive list of acts that constitute moral turpitude" for purposes of voting in Alabama. Ala. Code §17-3-30.1(b)(2)(c). Plaintiffs (at 26) note that Section 17-3-30.1 was intended "[t]o give full effect" to Section 177, but they do not challenge the intent behind the 2017 law. They assert that the law has a disparate impact and note some overlap between crimes covered in 1901 and crimes covered in 2017. That evidence, however, sheds no light on the intent of the legislators and voters from 1996. *Cf. Johnson*, 405 F.3d at 1222 n.17 (refusing to consider present impact data where the challenged provision was passed in 1968).

Plaintiffs next appear to argue that while Section 177 effected a substantive change from Section 182, no such change was intended. Brief at 26. But the substantive changes between Section 182 and Section 177(b) are the best evidence

of what the Legislature and voters intended in 1996. *See NFIB v. Sebelius*, 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text.").

And even if legislative history could somehow trump the text, Plaintiffs' argument still fails, as it is based on a misreading of Dr. Beatty's report from the Brewer reform efforts. *Id.* Dr. Beatty explained that Section 182 contained a lengthy list of crimes while other States addressed "disqualifying mental incompetents and persons convicted of crimes" "in general terms," like Florida, Maryland, and Illinois did, and he suggested a provision more like those of the other States. *See* doc. 257-19 at 10.[11] And even if Plaintiffs were right about Dr. Beatty's intent, his was the first voice, not the last. There were specific discussions over the years about eliminating the list and narrowing who would be disenfranchised and Sen. deGraffenreid, a leader of the Baxley efforts, said they were completely rewriting the Suffrage and Elections Article. *See supra* pp. 5-11.

Finally, Plaintiffs assert that the 1996 Legislature (and voters) must have continued past discrimination because (1) no change is intended when new language "fairly admits of a construction which makes it consistent with the" old language and (2) the Alabama Legislature is presumed to know how courts have interpreted statutes so their "substantial re-enactment" of a statute "is a legislative adoption of

[11] *See also Nunez*, 572 F.2d at 1127 n.15 ("construction of a clear and unambiguous written statement" was for the court); doc. 274-1 (Beatty is deceased).

that construction." Brief at 27 (internal quotation marks and citation omitted). Both assertions fail because Section 182 disenfranchised all felons and some misdemeanants while Section 177(b) disenfranchises some felons. Text that is "markedly different," *Johnson*, 405 F.3d at 1220-21, should not be read to have identical meaning or construction. Additionally, there is an important difference between adopting the construction of a statute and adopting someone else's racial intent from nearly a century before.

C. Section 177(b) was adopted through a deliberative process.

The district court correctly held that Section 177(b) was adopted through a deliberative process, doc. 286 at 26-30, and Plaintiffs' arguments to the contrary rely upon misreading the facts and failing to consult the law.

In *Cotton*, the Fifth Circuit explained that amending Mississippi's Constitution "was a deliberative process" that required passage in both chambers of the Legislature by a 2/3 vote, publication for at least two weeks, and a majority vote of the electorate. *Cotton*, 157 F.3d at 391 (internal citations omitted). In *Johnson*, a commission charged with considering constitutional revision created a suffrage and elections committee. *Johnson*, 405 F.3d at 1220. The committee made a proposal to the commission which "submitted a draft to the legislature." *Id.* at 1222. The legislature and then the voters "approved the new Constitution." *Id.* at 1224.

Here, there was an abundance of deliberative process. To start, the process for amending the Alabama Constitution is more than sufficient. Ala. Const. art. XVIII, §284 requires three readings in each Chamber and passage by at least a 3/5 vote in each Chamber, publication for at least four weeks, and a majority vote of the electorate. This is as much, or more, process as *Cotton* held sufficient.

Johnson involved additional steps, 405 F.3d at 1220-22, 1224, and Alabama has those in the Brewer, James and Baxley efforts. Dr. Beatty prepared a proposal, doc. 257-19 at 16, which went through multiple drafts including a change specifically to the felon disenfranchisement provision, doc. 257-17 at 20. During the James efforts, that provision was specifically discussed at hearings. *See supra* pp. 6-8. During the Baxley efforts, the Legislature passed the proposed constitution, including the felon disenfranchisement provision, before the *Manley* Court's ruling. *See supra* p. 9. Finally, Rep. Venable proposed a new Suffrage and Elections Article in a bill that passed the Legislature unanimously and the proposed Amendment was adopted by the electorate with huge support. *See supra* pp. 10-11.

Plaintiffs critique the quality of these discussions, Brief at 28-31, but neither *Cotton* nor *Johnson* required more deliberation. Plaintiffs claim "there was no legislative debate" during the Venable efforts because "[t]here were no public hearings," Brief at 29, but there were multiple readings in the Legislature and an affirmative vote by the electorate. Plaintiffs also complain that the Venable efforts

did not start with the Zoghby proposal that had passed the House in 1979, Brief at 30, but the House is only one Chamber and Venable reasonably started with the proposal that had passed the entire Legislature more recently during the Baxley efforts. The process of adopting Section 177(b) was deliberative.

D. If the burden shifts, Defendants have carried their burden.

If Plaintiffs had demonstrated that racial intent motivated the adoption of Section 177(b), the burden would shift to Defendants to show that it "would have been enacted without this factor." *Hunter*, 471 U.S. at 228. Though Plaintiffs brief only step one, Defendants can defeat Plaintiffs' claims at both steps one and two.

Alabama "properly has an interest in [disenfranchising] persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies." *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978); *see also Washington v. State*, 75 Ala. 582, 585 (1884); *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 451-52 (2d Cir. 1967) (Friendly, J.). Alabama elects its legislators, Ala. Const. art. IV, §46, the Governor and Attorney General, *id.* art. V, §114, sheriffs, *id*. art. V, §138, district attorneys, *id*. art. VI, §160(a), and judges, *id*. art. VI, §152. Alabama has long disenfranchised felons, *see supra* pp. 2-4.

As for the moral turpitude standard, it refers to "'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-men or

to society in general,'" and thus is a reasonable standard for disenfranchising felons. Additionally, Alabama has used the standard in a wide variety of situations. *See supra* pp. 12-14.

Not only was it sensible for Alabama to disenfranchise for felonies involving moral turpitude in 1996, but Alabama re-enacted Section 177(b) without change and without racial animus in 2012 and in 2020, Act Nos. 2011-656 & 2019-330. If the burden shifts, Defendants have carried it.

Quoting from a concurring opinion in *United States v. Fordice*, 505 U.S. 717 (1992), Plaintiffs try to put a heavier burden on the State. Brief at 21-22. The *Johnson* Court rejected applying *Fordice* for four reasons, at least three of which are applicable here. First, Alabama "has a valid public policy reason for disenfranchising felons." *Johnson*, 405 F.3d at 1225. Second, the challenged provision was passed approximately a century after the allegedly tainted action. *Id.* at 1225-26. And, third, *Fordice* is a school desegregation case; "this circuit has been reluctant to extend the education line of cases to other areas," especially where there is "specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement." *Id.* at 1226. *Johnson* itself became another piece of that precedent. Moreover, the Supreme Court recently clarified that "[w]henever a challenger claims that a state law was enacted with discriminatory intent, the burden

of proof lies with the challenger, not the State," whose "good faith ... must be presumed." *Abbott*, 138 S.Ct. at 2324.

III. Plaintiffs have suffered no *ex post facto* violation.

A. Felon disenfranchisement is not punishment.

Plaintiffs' *Ex Post Facto* claim fails because that clause regulates only "'punishment' in the constitutional sense," *Flemming v. Nestor*, 363 U.S. 603, 613 (1960), and, in Alabama, like in many other States, "[d]epriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise,'" *Green*, 380 F.2d at 450 (quoting *Trop v. Dulles*, 356 U.S at 97 (plurality opinion)). Multiple courts of appeals have held that "disenfranchisement statutes do not violate the Ex Post Facto Clause of the U.S. Constitution." *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010); *see also Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009) (rejecting an *ex post facto* challenge to a felon disenfranchisement law). This Court should hold the same.

To be sure, in prior decisions involving different constitutional claims and a different State's disenfranchisement laws, this Court has referred to disenfranchisement as punitive. *See Johnson*, 405 F.3d at 1218 n.5; *Jones v. Governor of Fla.,* 950 F.3d 795, 819 (11th Cir. 2020) (*Jones I*); *Jones v. Governor of Fla.,* 975 F.3d 1016, 1032 (11th Cir. 2020) (*en banc*) (*Jones II*). But Florida views disenfranchisement that way, *Jones I*, 950 F.3d at 810-12, and the Court did not

address the *Ex Post Facto* Clause. The question here is whether Alabama intended felon disenfranchisement to be punishment and then whether Alabama's civil intent is overcome. *United States v. Ursery*, 518 U.S. 267, 288 (1996); *Smith v. Doe*, 538 U.S. 84, 92 (2003).

First, the Court considers "the statute's text and its structure"; "[o]ther formal attributes" like "the manner of its codification or the enforcement procedures it establishes" may be probative. *Doe*, 538 U.S. at 92, 94.

Despite some expressions that felon disenfranchisement is punitive, the constitutional revision efforts show it was part of revising the Suffrage and Elections Article. *See* doc. 257-7 at 2 (ballot language); *cf. Simmons,* 575 F.3d at 44 (voter guide). That Article limits voting to U.S. citizens who are residents of Alabama aged 18 or older, and requires the Legislature take steps to regulate elections. Ala. Const. art. VIII, §177. Section 177(b) addresses the "mentally incompetent," in addition to felons. The mentally incompetent, non-citizens, non-residents, and children are not disenfranchised as punishment, and neither are felons. *Washington,* 75 Ala. at 585; *see also Simmons*, 575 F.3d at 44.

Critically, Section 177(b) disenfranchises all "person[s] convicted of a felony involving moral turpitude," irrespective of which sovereign secured the conviction, *see also* Ala. Code §17-3-30.1(c)(48). Alabama has no interest in punishing—and no authority to punish—a felon convicted by a different sovereign.

Further, the statutes that implement Section 177(b) are part of Title 17, which regulates elections. *See* Ala. Code §17-3-30 (qualifications), *id.* §17-3-30.1 (disenfranchising felonies), *id.* §17-3-31 (restoration of voting rights). There are criminal provisions within Title 17, and it is a crime to lie on the voter registration form, but the overall purpose of Title 17 is to regulate elections. Alabama's intent is to regulate the franchise, not punish.[12]

At step two, the Court considers the seven factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). "[T]hese factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (cleaned up).

(1) Felon disenfranchisement "does not impose any affirmative disability or restraint, physical or otherwise." *Simmons*, 575 F.3d at 44.

(2) While some have historically viewed disenfranchisement as punitive, others have recognized it as a paradigmatic example of a non-punitive restriction. *See Trop*, 356 U.S. at 96-97 (plurality opinion); *Washington*, 75 Ala. at 585. The

[12] Alabama's Readmission Act does not establish otherwise. The Act says Alabama's constitution cannot "be so amended or changed as to deprive" U.S. citizens "of the right to vote in said State, *who are entitled to vote by the constitution thereof herein recognized*, except as punishment for such crimes as are now felonies at common law ...." Doc. 97-1 at 2 (emphasis added). Alabama's 1868 Reconstruction Constitution made clear that *no* felons were "entitled to vote." *See* doc. 257-1 at 11.

only binding precedent *Jones I* cited for its view was *Johnson*. *Jones*, 950 F.3d at 819. *Johnson* relied on *Richardson v. Ramirez* to say these laws are uniquely "rooted in this Nation's history and are a punitive device stemming from criminal law," *Johnson*, 405 F.3d at 1228, but *Richardson* was focused on the former point, not the latter, *Richardson*, 418 U.S. at 48-52; *compare Simmons*, 575 F.3d at 45. The language in *Richardson* and *Johnson* was *dicta*.

(3) & (5) Felon disenfranchisement "is effective regardless of a finding of scienter or the type of crime so long as it is a felony." *Simmons*, 575 F.3d at 45; *see also Doe,* 538 U.S. at 105.

(4) Disenfranchisement does not promote the traditional aims of punishment; it is "unlikely, in the best of circumstances" that "losing the right to vote is a punishment that could give a would-be criminal pause." *Jones I*, 950 F.3d at 812. Moreover, the language put before the voters did not speak to punishment, doc. 257-7 at 2; *cf. Simmons,* 575 U.S. at 45.

(6) Alabama has an undeniable interest in disenfranchising those convicted of felonies of moral turpitude. *See* doc. 257-27 at 4-10. The "rational connection" of felon disenfranchisement "to a nonpunitive purpose is a '[m]ost significant' factor'" in the analysis. *Doe*, 538 U.S. at 102 (*quoting Ursery*, 518 U.S. at 290; alteration by the Court).

(7) It is well established Alabama may disenfranchise all felons for life, *Richardson*, 418 U.S. at 54; *Jones I*, 950 F.3d at 801, thus doing so cannot be excessive in relation to the State's interest.

B. Plaintiffs' *ex post facto* claims are properly rejected on the merits.

Even if felon disenfranchisement constitutes punishment under the *Ex Post Facto* Clause, Plaintiffs' claims fail.

Plaintiffs start by swinging for the fences, arguing that the "moral turpitude" standard itself is void for vagueness. *See* Brief at 37. Plaintiffs miss badly, as "[t]he term 'moral turpitude' has deep roots in the law," and "[t]he presence of moral turpitude has been used as a test in a variety of situations" by "federal and state courts." *Jordan*, 341 U.S. at 227. These courts haven't just been missing the obvious for more than a century. Rather, the moral turpitude standard is a familiar standard that gave Plaintiffs fair notice that their felonies would be disenfranchising.

To the extent Plaintiffs argue (at 38) that courts must look to the "standard of punishment," rather than the sentence imposed, Alabama's standard is, and has been, lifetime disenfranchisement. Plaintiffs try to bootstrap this jurisprudence into a command that caselaw concerning the moral turpitude standard is irrelevant, Brief at 38-39, but that is not what those cases are about and would make no sense. Caselaw originating in contexts other than voting has long guided Alabama officials in the voting context. *See Underwood*, 730 F.2d at 616 n.2. (citing *Pippin v. State*

and saying that "the registrars follow Alabama case law and," absent that, "opinions of the state attorney general"); *Hunter*, 471 U.S. at 226 (citing *Pippin v. State*); doc. 257-18. When the 2017 Act created a statutory list, it explicitly stated that "[n]othing in this section shall be interpreted as determining moral turpitude for any purpose other than" voting, Ala. Code §17-3-30.1(d), because there was previously no distinction.

Moving away from the standard set out in Section 177(b), Plaintiffs focus on how it has been implemented. They contend the moral turpitude standard "had no fixed meaning" before the 2017 Act and registrars had "unfettered discretion." Brief at 33. But as explained above, "[t]he term moral turpitude has deep roots in the law," *Jordan v. De George*, 341 U.S. 223, 227 (1951), and those roots are also wide as moral turpitude continues to be used in many Alabama laws, *see supra* pp. 12-14. Further, the registrars are obligated to follow the law, Ala. Const. art. XVI, §279; *see also* Ala. Code §17-3-6, which includes implementing Section 177(b) according to its terms, as the Alabama Supreme Court explained in the *Gooden* litigation, doc. 257-30. And, under the plain terms of Section 177(b), there is no discretion about whether a felon should be disenfranchised or for how long; there is only the question of whether a felony involves moral turpitude. If a Board of Registrars improperly denies registration or removes a voter, the felon can appeal to the courts. And if a Board improperly allows a felon to register or stay on the rolls, that error did not

make Section 177(b) any less mandatory.[13] Ala. Code §17-3-30.1 promotes consistency, but it does not disenfranchise anyone. That work is done by Section 177(b), which has read the same since 1996.

Accordingly, Section 177(b) put Plaintiffs on notice. It so happens there was also precedent concerning their specific felonies. Plaintiff Thompson was convicted of theft of property (1st degree) in 2005, doc. 1 at 9, after the Alabama Supreme Court said theft involves moral turpitude, *see Stahlman v. Griffith*, 456 So.2d 287, 290-91 (Ala. 1984). Plaintiffs' argument that Thompson could not know what the Attorney General did not know, *id.* at 44-45, fails because this opinion pre-dates *Stahlman.* Opinion to Hon. Jenny C. Knight, dated August 10, 1979, A.G. No. 79-00268 (doc. 66-1 at 51-57).

After the DEA caught Plaintiff Gamble in 2006 with cash, a pistol, and 30 pounds of cannabis on the way to this house, doc. 222-6 at 5-9, Gamble was convicted, pursuant to Ala. Code §13A-12-231, of trafficking in cannabis, doc. 93 at 6-7. He was removed from the voter rolls in 2010. Doc. 222-6 at 24. It does not

[13] Plaintiffs' mandatory/discretionary theory of liability was not raised below and should not be considered for the first time on appeal. *Irving v. Mazda Motor Corp*., 136 F.3d 764, 769 (11th Cir. 1998); *but see Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984); *Yee v. Escondido*, 503 U.S. 519, 534-35 (1992).

appear that he ever availed himself of State processes to challenge that determination.

In 1983, the Alabama Supreme Court explained that there is a difference between possession for one's own use *and* possession for resale or trafficking, with the latter involving moral turpitude. *See Ex parte McIntosh*, 443 So.2d 1283, 1286 (Ala. 1983). Plaintiffs argue that *Ex parte McIntosh* used the term trafficking "colloquially," but one could be convicted under the statute for "mere" possession, even if it is for personal use. Brief at 41-43. It is true that intent is not an element of a trafficking conviction, but that is because the Legislature has concluded that anyone possessing such large quantities of illegal drugs is "trafficking" as a matter of law and should be treated as such "to curb the apparent widespread distribution and sale of [marijuana] in the State." *Fowler v. State*, 440 So.2d 1195, 1197 (Ala. Crim. App. 1983); *see also Insley v. State*, 591 So.2d 589, 590 (Ala. Crim. App. 1991).

Plaintiff Lanier was convicted of burglary (1st degree), based on conduct in 1995, doc. 1 at 14; doc. 257-28 at 4, and Plaintiff King was convicted of murder in 1995, doc. 1 at 14. Section 182 was operative, and all felonies were disenfranchising. Additionally, the courts had said that burglary and murder involve moral turpitude, *see Ex parte McIntosh*, 443 So.2d at 1285; *Matthews v. State*, 286 So.2d 91, 94 (Ala. Crim. App. 1973). Plaintiffs contend (at 45-46) that Lanier's and

King's rights were violated by the "retroactive application" of the 2017 Act to them, but §17-3-30.1 does not disenfranchise anyone. Since conviction, these Plaintiffs have been continuously disenfranchised by Section 182 and then by Section 177(b).

Though Plaintiffs raised GBM's standing in their briefing, doc. 268 at 46 n.14, they complain that the district court ruled against GBM on standing grounds without putting them on notice, Brief at 47. The court did not rule on standing grounds: it accepted Defendants' argument that that GBM is limited to a facial claim, which failed when the claims of the individual Plaintiffs failed. Doc. 286 at 42-43. Plaintiffs—despite their implementation arguments—contend that "*ex post facto* claims *are* facial; they compare an earlier and a later statute," and thus they could not understand Defendants' point, Brief at 46. The point was that GBM must not be allowed to bring a challenge to felon disenfranchisement based on *any* felony conviction GBM might select. *Ex post facto* challenges should be specific to the crime and punishment of the criminal pursuing the claim, and GBM has no conviction. Put differently, GBM is limited to a *global* challenge, which fails when any part does. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The individual Plaintiffs have suffered no ex post facto violation and neither has GBM.

IV. Plaintiffs have abandoned their due process claim.

Plaintiffs say the district court "did not decide [their] alternative due process claim, which would apply had the court found disenfranchisement nonpunitive," and

they "preserve that claim" to "press it on remand[.]" Brief at 33. Plaintiffs misstate the proceedings and fail to preserve the claim.

Procedurally, the district court recognized Count 17 as an alternative to the e*x post facto* claim, doc. 286 at 2, and ruled against Plaintiffs, *id.* at 37 n.11. The claim failed because "the Eleventh Circuit considers felon disenfranchisement to be punitive, undermining a claim based on the civil sanction," or, alternatively, because "Plaintiffs have not created a question of fact as to reasonable notice of the potential severity of the penalty." *Id.* The court granted Defendants summary judgment. *Id.* at 57. It did not fail to decide the claim.

If Plaintiffs wanted to pursue the claim on appeal, they were obliged to brief it. "[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed." *Access Now, Inc. v. Sw. Airlines Co.,* 385 F.3d 1324, 1330 (11th Cir. 2004). Here, Plaintiffs made *no* argument in support of their due process claim in count 17. They abandoned it. The Court should affirm on count 17, as well as on the other counts Plaintiffs abandoned on appeal, *i.e.,* counts 3 through 10 and 12 through 17, as well as the federal form portion of count 18. *See Haralson*, 813 F.2d at 373.

V. Alabama's mail-in form complies with the NVRA.

The NVRA requires the federal Election Assistance Commission (EAC) to "develop a mail voter registration application form" in consultation with the States. 52 U.S.C. §20508(a)(2). The Federal Form must include, *inter alia*, "a statement that--(A) specifies each eligibility requirement (including citizenship)," 52 U.S.C. §20508(b)(2)(A). The States must "accept and use" the Federal Form and may develop forms that meet the same requirements, *id*. §20505(a)(1)-(2).

Alabama's mail-in form "specifies each eligibility requirement": the applicant must be (1) a U.S. citizen, (2) who lives in Alabama, (3) who will be 18 by Election Day, (4) who has not been adjudged incompetent, and (5) who has not been convicted of a disqualifying felony. While this is all the NVRA requires, in 2019 the Secretary amended the State form so that the Voter Declaration section alerts applicants that the list of disqualifying felonies is available on his website; the list is derived from Ala. Code §17-3-30.1.

GBM argues that the form does not "specif[y] each eligibility requirement" because it could be even *more* specific. In GBM's view, the NVRA requires Secretary Merrill to list each disqualifying felony on the voter registration form itself, as if not committing each disqualifying felony is a separate eligibility requirement (i.e., "You must be someone (1) who is a U.S. citizen, (2) who lives in Alabama, (3) who will be 18 by Election Day, (4) who is not incompetent, and (5)

who has not been convicted of murder, and (6) who has not been convicted of terrorism, and (7) who has not been convicted of kidnapping, etc."). No principle of statutory interpretation demands that unnatural reading. The Secretary's reading of the Act is the more natural reading of "specifies each eligibility requirement." *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("[W]e must give words their 'ordinary or natural' meaning."). GBM's you-can-always-be-more-specific reading would lead to absurd results, and it was properly rejected by the district court.

GBM first argues that upon reading the form's reference to "a disqualifying felony conviction," registrants "could reasonably interpret the word 'disqualifying' to be describing felonies as disqualifying rather than modifying the term" to limit it. Brief at 51. That is an unreasonable reading of the form, for if all felonies were disenfranchising, there would be no reason to modify felonies (*disqualifying*) or point to a list on the Secretary's website.

GBM next argues that the form cannot "specify eligibility requirements" without including each of the crimes currently listed in §17-3-30.1(c). But this reading leads to absurd results. First, the list is lengthy. Subsection (c) contains 48 paragraphs of disenfranchising felonies. Some of the descriptions are wordy, *e.g.*, "Possession, manufacture, transport, or distribution of a destructive device or bacteriological or biological weapon as defined in Section 13A-10-193," Ala. Code §17-3-30.1(c)(21). The list also includes Code sections. These require more space,

but at least some of them provide important information that would need to be conveyed in some way, *e.g.*, only 1st and 2nd degree forgery are disenfranchising, *see id.* §17-3-30.1(c)(47). The list GBM proposes Alabama print would be longer than any list included in the Federal Form's State-specific instructions.[14]

Second, GBM's analysis rejects the possibility that *any* list could be too long to be printed on the State form.

Third, the list Alabama adopted is not static. It was already amended once to include a new felony, *see* Ala. Act No. 2019-513, §2, and there is always the possibility that a disenfranchising felony could be held unconstitutional or repealed. Under GBM's analysis, the State would immediately be out of compliance if these scenarios arose, and it would have to reprint thousands of forms at substantial cost (doc. 257-35 at 4) to come back into compliance.

GBM's argument is further flawed because it is internally inconsistent. After listing 47 paragraphs worth of felonies, the 48th paragraph of §17-3-30.1(c) makes disqualifying "[a]ny crime as defined by the laws of the United States or by the laws of another state, territory, country, or other jurisdiction, which, if committed in this state, would constitute one of the offenses listed in this subsection." GBM's super-specific reading of the statute should, if principled, require Alabama to list the

[14] The current form is available at www.eac.gov/voters/national-mail-voter-registration-form (last visited May 3, 2021).

equivalent felonies of every other sovereign. This would also be consistent with GBM's policy argument that Congress wanted applicants to have all their questions answered by the voter registration form itself. The Secretary's office gave no serious consideration to attempting this feat, doc. 257-35 at 3, and GBM itself would give the Secretary a pass.[15]

As the district court recognized, doc. 286 at 54, if the Secretary can satisfy the NVRA by treating all out-of-State disqualifying convictions as part of one eligibility requirement, then he can satisfy it by treating all in-State and out-of-State disqualifying convictions as part of one eligibility requirement—namely, to be free "of a disqualifying felony conviction." This is especially true since, in at least some cases, it will be easier for an Alabama-convicted felon to check the Secretary's website than it will be for someone convicted by another jurisdiction to determine whether he is disenfranchised in Alabama. *Cf. Mathis v. United States*, 136 S.Ct. 2243, 2250-51 (2016) (comparing elements of Iowa burglary to elements of generic burglary).

[15] Requiring the Secretary to print (and maintain) a lengthy list of felonies on the State form covering at least 47 paragraphs of Alabama felonies and, potentially, the equivalent felonies of other jurisdictions would be impractical. *See* doc. 257-35 at 3. The difficulty of doing so could "frustrate [Alabama's] ability to enforce its voter qualifications" and thus "be constitutionally suspect." *Arizona*, 570 U.S. at 43 (Alito, J., dissenting). Thus, the constitutional avoidance canon also favors Defendants' reading of the NVRA. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

GBM says this argument is a strawman and that the form need only be as specific as §17-3-30.1(c) is. Brief at 54-55. That would be convenient for GBM, but GBM offers no viable explanation for why this would be the case. Indeed, Section 177(b) is the controlling constitutional provision, but GBM does not suggest it provides sufficient information, *i.e.,* that the State form could swap "disenfranchising felonies" for "felonies involving moral turpitude." At bottom, faced with the daunting prospect of listing the equivalent felonies for hundreds of jurisdictions, GBM balked at the absurdity of its own argument and opted for internal inconsistency.

GBM's position demonstrates why "[c]ourts should avoid slicing a single word from a sentence, mounting it on a definitional slide, and putting it under a microscope in an attempt to discern the meaning of an entire statutory provision." *Wachovia Bank, N.A. v. U.S.*, 455 F.3d. 1261, 1267 (11th Cir. 2006); *see also* A. Scalia & B. Garner, *Reading Law* 356 (2012). "A word in a statute may or may not extend to the outer limits of its definitional possibilities." *Wachovia Bank*, 455 F.3d. at 1267 (*quoting Dolan v. U.S. Postal Serv.,* 546 U.S. 481, 486 (2006)). Looking to the broader phrase—"a statement that [] specifies each eligibility requirement"—and "giv[ing] words their 'ordinary or natural' meaning" *Leocal*, 543 U.S. at 9, confirms the State form provides a statement that specifies each eligibility requirement when it lists the five basic requirements.

Further, other provisions of the NVRA suggest that something less than outer limits of specification is appropriate. *Cf. Ark. Games & Fish Com'n v. United States,* 568 U.S. 23, 36 (2012) ("But the first rule of case law as well as statutory interpretation is: Read on."); *Wachovia Bank*, 455 F.3d. at 1267 ("[C]ontext is king."). For instance, nearby §20507(a)(5) provides that the States shall "inform applicants under" the motor voter, mail registration, and voter registration agencies provisions of "voter eligibility requirements." 52 U.S.C. §20507(a)(5)(A).[16] *Informing applicants* sounds a lot less onerous than specifying them to the n^{th} degree.

And, while the provisions related to the mail-in form and voter registration agencies use the "specify" language, §20508(b)(2)(A) & §20506(A)(i)(I), the motor voter provision says that form "shall include a statement that—*states* each eligibility requirement ...," §20504(c)(2)(C)(i) (emphasis added). Insofar as GBM believes the NVRA means for potential applicants to have all questions answered on the face of the voter registration form, GBM does not explain why Congress would have had

[16] The NVRA also addresses voter registration simultaneous with a driver's license application and registration. *Inter Tribal Council*, 570 U.S. at 5. The U.S. threatened suit against Alabama and State officials concerning the motor voter provision, and the resulting agreement demanded "an NVRA-compliant voter registration application." *E.g.*, doc. 257-33 at 5-7; doc. 257-34 at 1. That litigation threat has been resolved, and the motor voter provision is not the subject of GBM's challenge.

that concern for the mail-in forms, but not the motor voter form. Instead, this language reinforces the principle that specification is a matter of degree.

Context matters in another way. The Federal Form must meet all the requirements set out in §20508(b), and, by cross-reference, §20507(a)(5)(A)-(B). There is more to it than the requirement to specify eligibility requirements, and there are more eligibility requirements than avoiding a disqualifying felony conviction. For instance, residency can sometimes be complicated, *see Horwitz v. Kirby*, 197 So.3d 943 (Ala. 2015), but neither the Federal Form's Alabama-specific instructions nor the State form go into great detail. *Cf. Hernández v. Mesa*, 140 S.Ct. 735, 741-42 (2020) ("No law pursues its purposes at all costs.") (internal citations and quotation marks omitted).

"The State mail-in form is a one-page form designed to be easily completed and mailed .... The application itself is on the front, while the back contains contact information" for election officials. Doc. 257-35 at 3. "The Secretary's office decided it was not practical to list all of the Alabama felonies on the State mail-in form while maintaining that form's structure. No serious consideration was given to researching and listing the felonies of other jurisdictions ...." *Id.*

The Secretary's approach to compliance with §20508(b)(2)(A) is consistent with the EAC's approach, to which the district court properly deferred, doc. 286 at 56-57. The EAC revised the Alabama-specific instructions on the Federal Form in

consultation with the Secretary's office. Doc. 257-35 at 1-2, 6-14; *Arizona*, 570 U.S. at 5 ("Each state specific instruction must be approved by the EAC before it is included on the Federal Form."). Those instructions now refer applicants to the Secretary's website for the list of felonies involving moral turpitude. Similarly, the EAC's State-specific instructions for Tennessee inform felons how they can follow up on their eligibility. *See supra* n.8.

This Court should defer to the Commission's interpretation because Congress has not "directly spoken to the precise question at issue," *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The EAC is charged with developing the Federal Form, §20508(a)(2), including prescribing any necessary regulations, §20508(a)(1); *see also* 11 C.F.R. §§9428.3 *et seq*., and that requires making policy judgments about, *inter alia*, just how specific "specifies" should be. "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (internal citation and quotation marks omitted; first alteration by the Court).

Alternatively, if *Chevron* deference does not apply, a lesser deference does. "[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered." *United*

States v. Mead Corp., 533 U.S. 218, 227 (2001). "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* at 228 (footnotes and citations omitted).

Deference is appropriate here because there is necessarily room for discretion in how specifically the eligibility requirements must be listed, and the EAC is charged with working through those details in consultation with the States, 52 U.S.C. §20508(a)(2).

Importantly, it was *after* the EAC amended the Federal Form that the Secretary changed the State form. Doc. 257-35 at 1-3. "[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts *and litigants* may properly resort for guidance." *Mead Corp.,* 533 U.S. at 227 (cleaned up).

CONCLUSION

The Court should affirm.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). The brief contains 12,940 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

2. In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on May 17, 2021, I electronically filed this document using the Court's CM/ECF system, which will electronically serve a copy of this document to all counsel of record electronically registered with the Clerk.

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