**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

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| TATI ABU KING, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia, et al.,<br><br>Defendants. | ) | Civil Action No. 3:23-cv-408-JAG |

**DEFENDANTS' MEMORANDUM IN OPPOSITION**
**TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**



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## INTRODUCTION

Plaintiffs largely ignore the critical legal question in this case: the meaning of the word "felony" in Virginia's 1869 Constitution. Because "felony" does not mean "felony at common law," Plaintiffs' claim that Virginia is violating the Virginia Readmission Act fails. That Act provided that the 1869 Constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the [1869] Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law." 16 Stat. 63. The 1869 Constitution disenfranchised all "[p]ersons convicted of . . . felony," Va. Const. art. III, § 1 (1869), as does Virginia's current 1971 Constitution. The 1971 Constitution therefore does not deprive felons of a right to vote to which they were entitled under the 1869 Constitution. Virginia is complying with the Virginia Readmission Act.

Plaintiffs cannot get around this straightforward reading of the clear text. They cite no dictionaries, treatises, statutes, or cases showing that "felony," as used in the 1869 Constitution, meant "felony at common law." To the contrary, contemporaneous sources demonstrate that the term "felony" was well understood to encompass statutory felonies in Virginia at the time. Plaintiffs attempt to change the question to what members of Congress allegedly *thought* the 1869 Constitution meant when they approved it in the Readmission Act. But both this question and Plaintiffs' answer to it are wrong. "[W]hat Congress (possibly) expected matters much less than what it (certainly) enacted." *Stanley v. City of Sanford*, 145 S. Ct. 2058, 2067 (2025). If Congress misunderstood the 1869 Constitution when approving it, then it was up to Congress to fix that mistake by amending the Readmission Act. But Congress has not done so in the 150-year history of that statute, even though Virginia has disenfranchised all felons, not just common-law felons, during that entire period.

In any event, Plaintiffs' claim that members of Congress believed the 1869 Constitution only disenfranchised common-law felons is also erroneous. Plaintiffs assert that the Readmission Act's purpose of preventing racially discriminatory disenfranchisement supports their interpretation, but they do not show that the law pursued that purpose by prohibiting the disenfranchisement of statutory felons. Rather, the law used other means, including its express requirement that criminal laws used in disenfranchisement had to be equally applied. The Military Reconstruction Acts also do not support Plaintiffs' atextual interpretation. By their own terms, those Acts became inoperable when Congress approved the 1869 Constitution in the Readmission Act, and there is no plausible argument that Congress used them as any sort of template when approving state constitutions.

Plaintiffs cannot overcome the weakness of their legal arguments by invoking historical examples of egregious racial discrimination, including under Virginia's 1902 Constitution. It is no longer 1902. Despite insinuating that Virginia's current Constitution is racially discriminatory, Plaintiffs tellingly bring no racial-discrimination claim—even though the Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act all bar racial discrimination in voting rights. Nor could they: the central goal of Virginia's 1971 Constitution was to put "opposition to civil rights behind" Virginia. A.E. Dick Howard & William Antholis, *The Virginia Constitution of 1971*, 129 Virg. Mag. of Hist. & Bio. 346, 356 (2021).

Plaintiffs' proposed interpretation would also create severe problems. They argue that Virginia may disenfranchise only those who committed "felonies at common law." Yet this category is so amorphous that Plaintiffs' own expert was unable to classify hundreds of Virginia offenses—and did not even attempt to classify many other offenses. Their requested injunction would thus require this Court to act as a *de facto* Board of Elections, faced with a never-ending

list of thorny questions about which offenses would qualify as "felonies at common law." Congress did not impose this ill-defined standard on Virginia. Plaintiffs' motion for summary judgment should be denied.

**RESPONSE TO STATEMENT OF MATERIAL FACTS**

Local Rule 56(B) requires that "[e]ach brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed." L. Civ. R. 56(B). Plaintiffs have flouted this rule. Instead of "includ[ing] a specifically captioned section" in their "brief in support of a motion for summary judgment," *ibid.*, Plaintiffs have filed a separate 17-page document with their purported list of "material facts." See ECF No. 152-1. Local Rule 56(B), by its plain text, does not allow for a statement of undisputed material facts to be contained in a separate document. See *Western Insulation, L.P. v. Moore*, No. 305CV602-JRS, 2006 WL 208590, at *5 n.4 (E.D. Va. Jan. 25, 2006) (explaining that a litigant who filed a separate statement of facts had "fail[ed] to fully comply with Local Rule 56(B)"); *Waag v. Sotera Def. Sols., Inc.*, No. 1:14-CV-1715, 2015 WL 13544756, at *1 n.2 (E.D. Va. Nov. 5, 2015), aff'd, 857 F.3d 179 (4th Cir. 2017) (similar).



Plaintiffs' failure to comply with the Local Rules is significant. "A movant's compliance with Local Rule 56(B) is critical for a court—and opposing parties—to assess the merits of the movant's summary judgment motion." *Certus Technologies, LLC v. S & N Locating Servs., Inc.*, No. 2:13cv346, 2015 WL 4717256, at *5 (E.D. Va. Aug. 7, 2015). And combining their two filings, Plaintiffs have exceeded the 30-page limit on summary-judgment briefs by 12 pages. L. Civ. R. 7(F)(3). In addition, nearly all of the "material facts" contained in Plaintiffs' statement are neither facts nor material. Most are legislative history rather than adjudicative facts, are irrelevant to deciding this motion, or are simply legal arguments. Summary judgment can be decided on the

handful of actual material facts set forth in Defendants' motion for summary judgment. See Memo. in Support of Defs.' Mot. for Summ. J. (Defs.' MSJ Mem.) at 5–6 (ECF No. 148).

Defendants further note that they dispute the following facts listed in Plaintiffs' improperly filed Statement of Undisputed Material Facts:

Paragraphs 22 through 46 consist of legal conclusions and legislative facts that are not "necessary to be litigated" in this case. L. Civ. R. 56(B). To the extent that Plaintiffs attempt to impose their own characterization on the sources cited therein, Defendants state that those sources speak for themselves.

Paragraph 47 asserts that Defendants "strictly enforce" the Virginia Constitution's Felony Disenfranchisement Provision, but the Request for Admission cited says nothing about how "strictly" the provision is enforced. See Defendants' Responses to Requests For Admission Nos. 38–69 (June 30, 2025) (ECF No. 153-5).

Paragraphs 47, 48, 50, 54, 55, and 56 state that Defendants "enforce" the Felony Disenfranchisement Provision. Defendants have admitted that the "Felony Voting Provision is enforced," but they have not admitted to enforcing it themselves. See Defendants' Responses to Requests For Admission Nos. 38–69 (June 30, 2025) (ECF No. 153-5). In any event, the question of who "enforce[s]" the Felony Disenfranchisement Provision is legal in nature and is thus not properly asserted in a statement of undisputed material *facts*. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

In short, summary judgment can be decided on the handful of undisputed material facts set forth in Defendants' motion for summary judgment. See Defs.' MSJ Mem. 5–6.

**LEGAL STANDARD**

A party is entitled to summary judgment if the movant shows that 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). When reviewing a motion for summary judgment, the Court must "resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing th[e] motion." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks omitted).

## ARGUMENT

### I. The 1971 Constitution does not violate the Virginia Readmission Act because the 1869 Constitution also disenfranchised all felons

#### A. Plaintiffs' contention that the word "felony" in the 1869 Constitution meant only common-law felony is erroneous

There is no support for Plaintiffs' assertion that "felony" in the 1869 Constitution meant "felony at common law." Rather, contemporaneous sources and the tools of statutory interpretation demonstrate that the term covered all felonies, which are crimes punishable by death or confinement in a penitentiary. Because the Virginia Readmission Act permits the Commonwealth to disenfranchise the same class of persons disenfranchised by the 1869 Constitution, Virginia may continue to disenfranchise all felons today.[1]



As this Court noted, Plaintiffs' sole remaining claim is premised on an allegation "that Virginia's Constitution has been amended to disenfranchise persons who could have voted under the 1869 Constitution, and that the defendants' ongoing enforcement of Article II, Section 1 of Virginia's Constitution thus violates" the Virginia Readmission Act. See Opinion at 18 (ECF No. 88). Plaintiffs focus on the Act's "except" clause and its reference to "crimes as are now felonies at common law." See, *e.g.*, Memo. in Supp. of Pls.' Mot. for Summ. J. (Pls.' MSJ Mem.) at 13–15

[1] This case is also not justiciable for the reasons discussed in Defendants' motion for summary judgment. See Defs.' MSJ Mem. 6-13. Plaintiffs do not address the justiciability of their claim in their motion for summary judgment, but it provides another reason that their motion fails, without the need to reach the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 92 (1998).

(ECF No. 152) (quoting 16 Stat. 62). But the Act's text makes clear that it prohibits amending the Virginia Constitution only if the amendment disenfranchises persons "who [we]re entitled to vote by the [1869] Constitution" in the first place. 16 Stat. 63. Virginia's 1869 Constitution disenfranchised all "[p]ersons convicted of bribery in any election, embezzlement of public funds, treason or felony." Va. Const. art. III, § 1 (1869). Therefore, as Plaintiffs themselves acknowledge, this case turns on whether the word "felony" in the 1869 Constitution includes statutory felonies. Pls.' MSJ Mem. 15–16.

Yet Plaintiffs barely address the textual interpretation of that key term. They offer no support for their bare contention that "felony" in the 1869 Constitution meant "felony at common law." And they provide nothing to dispute that contemporaneous sources, such as statutory definitions, dictionaries, treatises, and common usage at the time, uniformly show that the term "felony" included statutory felonies. See Defs.' MSJ Mem. 13–21 (collecting sources). In Virginia in 1869, the term "felony" meant "[a]n offence punishable by death, or by imprisonment in a state prison." 2 Alexander Burrill, A NEW LAW DICTIONARY AND GLOSSARY 478 (1850); BLACK'S LAW DICTIONARY 483 (1st ed. 1891) (listing States, including Virginia, that defined "felony as any public offense on conviction of which the offender is liable to be sentenced to death or to imprisonment in a penitentiary or state prison"). From the time the Commonwealth first codified its criminal law in 1848 through the ratification of the 1869 Constitution, it defined "felonies" as crimes "which are punishable with death or confinement in the penitentiary." Defs.' MSJ Mem. 16–17 (collecting sources). That understanding is further confirmed in the legislative history of the 1869 Constitution. See *id.* at 18. Thus, when the 1869 Constitution disenfranchised persons convicted of any "felony," it disenfranchised anyone convicted of a crime punishable by death or confinement in the penitentiary. See *id.* at 14–17. The Virginia Readmission Act's approval of this

1869 Constitution authorized Virginia to continue disenfranchising those convicted of any felony. As more fully explained in Defendants' memorandum in support of their motion for summary judgment, text and history thus make clear that Virginia may disenfranchise persons convicted of any felony under the Readmission Act.

With no plain-meaning arguments on their side, Plaintiffs attempt to rely on the contextual canon of surplusage. But that canon does not apply, and in any event would only further support Defendants' interpretation. The canon against surplusage applies only if there is an identified ambiguity in the statute. See Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). When "'the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,' the Court's analysis must also end with the text." Pls.' MSJ Mem. 13 (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012)). No ambiguity exists in the 1869 Constitution's disenfranchisement provision. See Defs.' MSJ Mem. 15–16. Even if the surplusage canon applied, however, it would favor *Defendants'* interpretation. Interpreting "felony" to mean all crimes punishable by death or incarceration in the penitentiary does not render any term in the 1869 Constitution superfluous. By contrast, Plaintiffs' atextual reading would make language in both the 1869 Constitution and the Virginia Readmission Act superfluous.



Specifically, Plaintiffs contend that interpreting "felony" in the 1869 Constitution to include statutory felonies would render the other crimes in the disenfranchisement provision—"bribery in any election," "embezzlement of public funds," and "treason"— redundant. See Pls.' MSJ Mem. 20–21. But each of these terms covered offenses that would not have been captured by the term "felony." Va. Const Art. III, § 1 (1869). Thus, none of them was rendered "completely superfluous" by the inclusion of "felony," and the presumption against surplusage does not support

Plaintiffs. *Commonwealth v. Virginia Elec. & Power Co.*, 214 Va. 457, 465 (1974); see *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

First, "bribery in any election" was not a felony in Virginia in the mid-19th century. As Plaintiffs themselves admit, bribery was a misdemeanor. Pls.' MSJ Mem. 21 ("'Bribery in any election' was neither a common-law felony nor a statutory felony in Virginia in 1869."); 1860 Code of Virginia Title 54 Ch. 198 § 40 (establishing a fine, not imprisonment, as punishment for bribery in an election); see also Transcript of Deposition of Carissa Hessick (Hessick Dep. Tr.) at 53:18–54:1 (ECF No. 144-2) (admitting that no form of bribery, other than bribing a judge, was a felony at common law). Thus, that crime had to be enumerated separately from "felony" for the provision to apply to it.

Second, "embezzlement of public funds," depending on the amount stolen, was sometimes a misdemeanor under Virginia law, so it also had meaning independent of "felony." As Plaintiffs have explained, "[e]mbezzlement of public funds" was a species of larceny under Virginia law at the time. See Pls.' Opp. to Mot. to Dismiss (Pls.' MTD Opp.), at 12 (ECF No. 78) (quoting 1860 Code of Virginia Title 54 Ch. 192 §§ 21–22). Larceny itself was divided into two classes: grand larceny and petit larceny. Although both were felonies at common law, Report of Carissa Hessick (Hessick Report) at ¶¶ 31 & n.64, 44 (ECF No. 148-2), only grand larceny was a felony in Virginia. Virginia made petit larceny a misdemeanor, punishable by less than a year in the local jail. See 1860 Va. Code Ch. 192, § 14 ("If a free person commit simple larceny of goods or chattels, he shall, if they be of the value of twenty dollars or more, be deemed guilty of grand larceny, and be confined in the penitentiary not less than one nor more than five years; and if they be of less value, be deemed guilty of petit larceny, and be confined in jail not exceeding one year, and at the discretion of the court, may be punished with stripes."). Because not all cases of embezzlement

were felonies, if "[e]mbezzlement of public funds" had not been enumerated, the clause would not have applied to persons who stole a small amount of money from the public treasury. *Ibid.*

Plaintiffs contend that "embezzlement of public funds . . . w[as] [a] statutory felon[y] in Virginia in 1869," Pls.' MSJ Mem. 21, but that assertion is disproven by their own sources. Plaintiffs cite the Virginia codification of criminal law from 1860, *ibid.*, but the portion on which they rely merely states that embezzlement is to be treated as larceny, see 1860 Code of Virginia Title 54 Ch. 192 §§ 21–22. Defendants agree that embezzlement was treated as a form of larceny. But, as explained above, petit larceny was not a felony under Virginia law. Thus, listing embezzlement of public funds was necessary to disenfranchise misdemeanant embezzlers.

By contrast, *Plaintiffs'* interpretation of "felony" to mean "felony at common law" would make "embezzlement of public funds" surplusage. See Defs.' MSJ Mem. 26. Embezzlement was a form of larceny, and both grand and petit larceny were felonies at common law. See Hessick Report ¶¶ 31 & n.64, 44. The phrase "embezzlement of public funds" would thus serve no purpose in the constitutional provision. To the extent the surplusage canon applies, it therefore weighs against Plaintiffs' interpretation.



The only remaining crime enumerated in the constitutional provision is "treason." Precisely because of treason's seriousness, it was historically considered a class of crime unto itself, above even felony. *Harvey v. Brewer*, 605 F.3d 1067, 1073 (9th Cir. 2010). As one prominent treatise writer explained the year before the 1869 Virginia Constitution was drafted, "[a]n old and technical division of crime is into treason, felony, and misdemeanor. Though this division is, as we have seen, technical, it seems to rest substantially on the idea of classifying crime according to its turpitude. Thus, the most heinous is called treason; the very heinous, yet not the most heinous, is called felony." 1 Prentiss Bishop, Commentaries on the Criminal Law, at § 577 (1868); see also 1

Wharton's Criminal Law § 17 (Torcia ed., 2009) ("At common law, there were three kinds of offenses: treason, felony, and misdemeanor."); see also Hessick Report ¶ 22 (describing Wharton's treatise as a "leading contemporaneous source[] on the common law"). Plaintiffs' own expert admits that "the long-standing convention was to distinguish between treason and felony." Hessick Report ¶ 33.

Indeed, eighteenth- and nineteenth-century legal authorities routinely distinguished between treason and felony. The United States Constitution itself distinguishes between "treason" and "felony" multiple times. See U.S. Const. art. I, § 6 (privileging senators and representatives from arrest "in all Cases, except Treason, Felony and Breach of the Peace"); U.S. Const. art. IV, § 2 (requiring States that arrest any person "charged in any state with Treason, Felony, or other Crime" to turn such person over to the State where he is a wanted man). The 1869 Virginia Constitution also distinguished between "treason" and "felony" in multiple provisions. See Va. Const. art. V, § 11 (1869) ("The members of the General Assembly shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the sessions of their respective Houses[.]"). Far from indicating that "felony" carries an unusually narrow meaning in the 1869 Constitution, the inclusion of both treason and felony was a standard practice of the day—as Plaintiffs' own expert admitted. Hessick Dep. Tr. 60:20–61:2 ("[I]f you look at legal sources from the time, they would often say things along the line of '[C]rimes are divided into three categories, treason, felony, and misdemeanors.'").



Plaintiffs also briefly contend that Virginia made "treason" a statutory felony in its 1860 Code, because treason was punishable by death. See Pls.' MSJ Mem. 21. But nothing in the 1860 Code specifically addressed the status of treason. Title 54 Ch. 190 § 1; see *id.*, Ch. 199 § 1. Given the long history of categorizing treason separately from felony, the Framers of the 1869

Constitution could very well have decided to list treason separately to remove any doubt that the provision applied to convicted traitors. Scalia & Garner, *supra*, at 177–79 (discussing examples of drafters using a belt-and-suspenders approach). And even if "treason" were arguably a statutory felony under Virginia's 1860 Code, the term would still not be superfluous. The disenfranchisement clause's plain terms encompass not only those convicted under Virginia law, but also those convicted under federal law or the law of other States. Treason was also a federal offense at the time. *See*, *e.g.*, An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, 12 Stat. 589 (1862) (establishing the punishment for treason during the Civil War). And federal law treated treason and felony as two separate categories of crime, consistent with the traditional classification. See U.S. Const. art. I, § 6, art. IV, § 2; cf. *United States v. Shackleford*, 59 U.S. 588, 590 (1855) (describing how Congress created different procedures in the Crimes Act of 1790 for selecting a jury depending whether the defendant was accused of "treason" or "felony"). The term "treason" is therefore not surplusage under Defendants' interpretation of the 1869 Constitution.



While Defendants' interpretation does not create surplusage, Plaintiffs' interpretation does. In addition to rendering "embezzlement of public funds" in the 1869 Constitution surplusage, see pp.8–9, *supra*, Plaintiffs' interpretation would also create surplusage in the Virginia Readmission Act. While Plaintiffs repeatedly cite the Act's "except" clause in contending that it allowed disenfranchisement only for "felonies at common law," Pls.' MSJ Mem. 12–15, their interpretation makes that clause entirely meaningless. The "except" clause permits amendments to the 1869 Constitution to broaden the scope of disenfranchisement, but only "for such crimes as are now felonies at common law." 16 Stat. 63; see Defs.' MSJ Mem. 14. But under Plaintiffs' interpretation of the 1869 Constitution, it already disenfranchised anyone convicted of a "felony at common

law." Pls.' MSJ Mem. 12–15. It would be impossible to *amend* the 1869 Constitution to add a provision that was already there. The interpretation thus renders the "except" clause superfluous. Under Defendants' interpretation, by contrast, Virginia could amend the 1869 Constitution to disenfranchise those convicted of offenses that were felonies at common law, but misdemeanors by statute. Indeed, Virginia did precisely that in 1876, when it added petit larceny. See Defs.' MSJ Mem. 25–26. That Plaintiffs' interpretation creates surplusage further shows that "felony" does not mean "felony at common law."

**B. Plaintiffs' argument that members of Congress would have thought "felony" meant "felony at common law" fails**

Lacking any textual support for their interpretation of Virginia's 1869 Constitution, Plaintiffs instead focus on arguing that members of Congress, when they passed the Readmission Act, "'likely would have interpreted the reference to felony' in the 1869 Constitution 'to mean a felony at common law.'" Pls.' MSJ Mem. 16 (quoting Ex. C ¶ 15). This argument fails twice over: first, Plaintiffs' contention that members of Congress thought the 1869 Constitution only disenfranchised common-law felons is erroneous. And second, even if members of Congress misunderstood the 1869 Constitution when they approved it, that would not change its meaning.



First, Plaintiffs' argument that members of Congress thought that the 1869 Constitution disenfranchised only common-law felons fails on its own terms. As Defendants' motion for summary judgment explained, all the publicly available materials that could have informed Congress' view of what "felony" meant indicated that it covered both statutory and common-law felonies. Defs.' MSJ Mem. 13–21. And immediately following the adoption of the Readmission Act, Virginia disenfranchised persons convicted of statutory felonies, such as bigamy and forgery. Defs.' MSJ Mem. 20. It has consistently done so in the 150 years since. Yet Congress has never found that Virginia is violating the Readmission Act; indeed, Plaintiffs point to no statements from

any members of Congress even suggesting that Virginia's disenfranchisement of statutory felons violated the Act. That history severely undermines Plaintiffs' contention that Congress believed it had prohibited the disenfranchisement of statutory felons.

Other contemporaneous Readmission Acts likewise undermine Plaintiffs' argument. The Virginia Readmission Act was one of five congressional acts to restore ten States formerly in rebellion to representation in Congress, "with only slight variations in language." *Richardson v. Ramirez*, 418 U.S. 24, 52 (1974).[2] Each Readmission Act had "substantively the same language as to disenfranchisement," and shared the same purpose. *Hopkins v. Watson*, 108 F.4th 371, 380 (5th Cir. 2024) (en banc); see 15 Stat. 72 (1868) (Arkansas); 15 Stat. 73 (1868) (North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida); 16 Stat. 62 (1870) (Virginia); 16 Stat. 67 (1870) (Mississippi); 16 Stat. 80 (1870) (Texas). Yet four of the state constitutions that those Acts approved explicitly disenfranchised individuals convicted of crimes punishable with imprisonment in the penitentiary. See Defs.' MSJ Mem. 18–19. The constitutions of Arkansas, Georgia, and Alabama all disenfranchised those convicted of "treason, embezzlement of public funds, malfeasance in office, *crimes punishable by law with imprisonment in the penitentiary*, or bribery." FRANCIS THORPE, THE FEDERAL AND STATE CONSTITUTIONS, at 145, 321, 825 (1909) (emphasis added) (containing copies of each constitution). The Louisiana Constitution similarly disenfranchised "[a]ll persons who shall have been convicted of treason, perjury, forgery, bribery, or other *crime punishable in the penitentiary*." La. Const Title VI, art. 99 (1868). Even Plaintiffs cannot contest that these provisions disenfranchised statutory felons, and Congress could not have



[2] Tennessee underwent a more voluntary reconstruction process than other States. Mark Wahlgreen Summers, THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION 21–22 (Univ. of N.C. Press, 2014). It was thus unconditionally readmitted to representation in Congress through a joint declaration instead of a Readmission Act. See 14 Stat. 364 (1866).

mistakenly believed otherwise. Yet Congress approved these constitutions in materially identical Readmission Acts. *Richardson*, 418 U.S. at 52. Those approvals demonstrate that Congress did not intend the Readmission Acts to prohibit the disenfranchisement of statutory felons.

Against these strong indications that Congress understood that "felony" did not mean "felony at common law," Plaintiffs offer no evidence to the contrary. Instead, they parrot their proposed expert witness's bare assertion that members of Congress, to extent that they were "aware of this specific language," "'likely would have interpreted the reference to felony' in the 1869 Constitution 'to mean a felony at common law, rather than any crime that had been deemed a felony by the Virginia legislature.'" Pls.' MSJ Mem. 16 (quoting Ex. C ¶ 15). But Professor Hessick offers no reasoning and cites *nothing* to support this assertion. Hessick Report ¶ 15. And it is inconsistent with her own analysis elsewhere: Professor Hessick opines that the term "felonies at common law" would have been understood as a "distinct" category of crimes in 1870. *Id.* ¶ 20. This distinction only confirms that Virginia's use of the more general term "felony" did *not* limit disenfranchisement to "felony at common law," and that Congress would have understood that "the two phrases have different meanings." *Harvey*, 605 F.3d at 1077. Plaintiffs' citation of their own expert's unsupported contrary assertion is no substitute for statutory interpretation. See *United States v. McIver*, 470 F.3d 550, 561–62 (4th Cir. 2006).[3]



Plaintiffs also attempt to rely on the Military Reconstruction Acts. See Pls.' MSJ Mem. 18–20. But those Acts, by their own terms, became inoperative in Virginia when Congress passed

[3] Plaintiffs' brief also misleadingly quotes Professor Hessick for the proposition that "[t]he term 'felony' in the 1869 Constitution 'certainly would not have been understood to track the modern definition[]' to encompass any crime, statutory or not, that is 'punishable by a year or more in prison' today." Pls.' MSJ Mem. 16 (quoting Hessick Report ¶ 20). In the quoted statement, Professor Hessick was not defining the term "felony"; she was defining the term "common law felonies." Hessick Report ¶ 20. That Plaintiffs must alter Professor Hessick's assertion to fit their own theory of the case further demonstrates their lack of textual support.

the Virginia Readmission Act approving Virginia's 1869 Constitution, and they cannot control the meaning of that later, separate statute. Nor does the evidence show that Congress viewed itself as following the letter of those Acts when it readmitted States after the Civil War.

The Military Reconstruction Acts "purported to provide for the more efficient government of the Rebel States" as to the "registration of voters, election of delegates to constitutional conventions, the framing of constitutions in conformity with the provisions of these Reconstruction Acts, and submission of the constitutions to the people of those States for their ratification and approval—all under the supervision and control of commanding generals." *United States v. States of La., Tex., Miss., Ala. and Fla.*, 363 U.S. 121, 124 (1960). Plaintiffs contend that because the Military Reconstruction Acts required States to extend the franchise to all males over the age of 21 who met residency requirements, except those "disfranchised for participation in the rebellion or for felony at common law," 14 Stat. 429 (1867), Congress would have rejected the 1869 Constitution for failing to comply with the Military Reconstruction Acts if it understood the Constitution to disenfranchise statutory felons. This convoluted argument fails for several reasons.



At the outset, Plaintiffs claim that Virginia's current Constitution violates the Virginia Readmission Act, not the Military Reconstruction Acts. Second Amended Class Action Complaint at ¶ 112 (ECF No. 96). It is therefore the unambiguous meaning of the Virginia Readmission Act that controls here. Indeed, Plaintiffs do not appear to argue that the Military Reconstruction Acts apply of their own force. Nor could they. The Military Reconstruction Acts were extraordinary measures for an extraordinary, and limited, time; they authorized federal military rule in the former rebel States after the Civil War. 14 Stat. 429. They were always intended to be temporary measures, until the States could re-establish republican governments and resume civilian control. *Ibid*. By the Acts' own terms, once Congress approved the constitution of any State that was subject to the

Military Reconstruction Acts, the Acts "shall be inoperative in said State." *Ibid*. Thus, once Congress approved Virginia's 1869 Constitution as republican and readmitted Virginia, the terms of the Readmission Act, not the Military Reconstruction Acts, governed. *Ibid* (declaring the Military Reconstruction Acts "inoperable" upon readmission). And to the extent any requirements of the Military Reconstruction Acts conflict with the Virginia Readmission Act, it is black-letter law that "statutes enacted by one Congress cannot bind a later Congress." *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

The basis of Plaintiffs' argument also rests on a misreading of the Virginia Readmission Act. Plaintiffs appear to argue that the preamble of the Readmission Act "declared that 'the people of Virginia' . . . complied with the Military Reconstruction Act's requirements." Pls.' MSJ Mem. 5 (quoting 16 Stat. 62). But the preamble said no such thing. The Readmission Act instead declared that "the people of Virginia have framed and adopted a constitution of State government which is republican," and that the Virginia General Assembly "ratified the fourteenth and fifteenth amendments" to the United States Constitution. 16 Stat. 62. The Act states that "the performance of these several acts in good faith"—*i.e.*, adopting a republican constitution and ratifying the Amendments—was the "condition precedent to the representation of the State in Congress." *Ibid.* No text in the Readmission Act states that Virginia had perfectly complied with the Military Readmission Acts.



In addition, Congress could not have believed that the 1869 Constitution was consistent with the franchise provisions of the Military Reconstruction Acts, because the 1869 Constitution on its face disenfranchised a broader class, as Plaintiffs' own expert concedes. The Military Reconstruction Acts permitted disenfranchisement only of those who engaged in "rebellion" or committed a "felony at common law." 14 Stat. 429. But the 1869 Constitution also disenfranchised

"lunatics," "[i]diots," those who committed "bribery in an election," and those who "fought a duel with a deadly weapon" or accepted a challenge to do so. Va. Const. art. III, § 1 (1869). Plaintiffs concede that "bribery in an election" was not a felony at common law. Pls.' MSJ Mem. 21. And although dueling was a crime, it was not a felony unless one of the duelists was mortally wounded. 1860 Code of Virginia Title 54 Ch. 191 §§ 19, 22. Congress thus could not have read the disenfranchisement provision of the 1869 Constitution and concluded that it covered only the classes authorized by the Military Reconstruction Acts. Indeed, even Plaintiffs' proposed historical expert conceded "that the Virginia Constitution of 1869 disenfranchised a broader class of persons than the Military Reconstruction Act." Transcript of Deposition of Edward Ayers (Ayers Dep. Tr.) at 99:3–10 (ECF No. 146-2). The Virginia Readmission Act approved it nonetheless. Plaintiffs' theory therefore fails.

The constitutions of the other Readmission Act States that Congress approved further refutes Plaintiffs' argument. Again, four other State constitutions that Congress approved expressly disenfranchised those who committed crimes punishable by imprisonment in the penitentiary. See p.13, *supra*. Those disenfranchisement provisions obviously apply to statutory as well as common-law felonies. Each of these States was subject to the Military Reconstruction Acts in the exact same manner and degree as Virginia. See 14 Stat. 429 ("[N]o legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas."). Congress nonetheless approved those constitutions and readmitted the States' congressional delegations in materially identical Readmission Acts. See p.14, *supra*.

Thus, it is clear that Congress decided to alter the Military Reconstruction Acts' temporary franchise requirements when it enacted the Readmission Acts and approved state constitutions.

Indeed, the historical record shows that the readmission of the former rebel States was the result of a complex and hotly debated political compromise, not the rote application of provisions in the Military Reconstruction Acts. As Plaintiffs' proposed historical expert acknowledged, when deciding whether to readmit Virginia to Congress, members of Congress were not having a "legal discussion"; they were engaged in "a political discussion." Ayers Dep. Tr. 119:11–19. It is thus unsurprising that Congress elected to readmit States without requiring full compliance with every aspect of the Military Reconstruction Acts. To be sure, some Senators argued that Virginia was in full compliance with the Military Reconstruction Acts during the debates over the readmission of Virginia. See Report of Edward Ayers at ¶ 43 & nn. 46–47 (ECF No. 146-1) (discussing statements from Senators Stewart and Axtell). But other Senators disagreed, arguing, for example, that Virginia's legislature was "overwhelmingly rebel" and thus unconstitutionally composed and in violation of the Military Reconstruction Acts. Congressional Globe, 41st Cong., 2nd Sess., Jan. 10, 1870, p. 328–30 (Statements of Senators Howard, Edmunds, and Pomeroy). And the legislative debate shows that Senators considered "substantial compliance" (as opposed to perfect compliance) with the Military Reconstruction Acts to be sufficient. See *ibid.* (Statement of Sen. Howard). Even the Senators that expressed reservations about Virginia's compliance ultimately voted for the Readmission Act, further undercutting the assertion that Congress viewed Virginia's 1869 Constitution as complying with the Military Reconstruction Acts. *Id.* at 644.



In short, the Military Reconstruction Acts provide no basis to conclude that Congress thought the 1869 Constitution disenfranchised only common-law felons. The 1869 Constitution indisputably disenfranchised a broader class of persons than authorized by the Military Reconstruction Acts. In any event, the Virginia Readmission Act approved the 1869 Constitution, and that Constitution disenfranchised all felons, not just common-law felons.

Second, even if Plaintiffs could show that members of Congress misunderstood the 1869 Constitution, their claim would still fail. The Virginia Readmission Act permits Virginia to continue disenfranchising any class of persons disenfranchised under the 1869 Constitution it approved; the meaning of "felony" in that Constitution is not limited to "felony at common law." See pp.6–7, *supra*. If members of Congress thought the 1869 Constitution only disenfranchised common-law felons, they were mistaken. And as the Supreme Court has "emphasized many times," "what Congress (possibly) expected matters much less than what it (certainly) enacted." *Stanley*, 145 S. Ct. at 2067 (quoting *Patel v. Garland*, 596 U.S. 328, 346 (2022)). Even when there is reason to believe that Congress "labored under [a] misapprehension" when it passed a statute, it "transcends the judicial function" for a court to rewrite the statute to correct Congress' apparent mistake. *Logan v. United States*, 552 U.S. 23, 35 & n.6 (2007) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). Instead, Congress must fix its own mistakes by amending the statute. *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.").

*United States v. Wells*, 519 U.S. 482 (1997), is instructive. That case concerned a provision of federal law prohibiting certain false statements. *Id.* at 492. The statute did not mention materiality, and the Court had held that predecessor statutes that lacked "materiality" language contained no materiality element. *Id.* at 494–95. The "staff of experts who prepared the legislation," however, had given advice that may have led Congress to mistake prior law. *Id.* at 496–97. The Court refused to rewrite the "unambiguous provision of the statute as enacted by Congress" on the basis of Congress' alleged mistake. *Id.* at 485. Thus, even if Plaintiffs and their

proposed experts were correct about the subjective beliefs of the members of Congress who enacted the Virginia Readmission Act, Plaintiffs' argument still fails as a matter of law.

### C. Plaintiffs may not elevate their purported purpose of the Readmission Act over the relevant statutory and constitutional text

Plaintiffs' arguments regarding the purpose of the Virginia Readmission Act also fail. The purported purpose of a statute cannot be used to override its text, and Plaintiffs' understanding of its purpose is mistaken. Statutory purpose in fact favors Defendants' interpretation over Plaintiffs' amorphous and unworkable rule.

Plaintiffs contend that the "avowed purpose" of the Virginia Readmission Act was to "plant barriers against . . . using ingeniously prepared laws to exclude a very large proportion of Black men from voting." Pls.' MSJ Mem. 18. From that premise, they conclude that the Virginia Readmission Act must "prohibit Virginia from disenfranchising voters on the basis of statutory felonies that the General Assembly might create after the state's readmission," because such felonies could potentially be used as tool of racially discriminatory disenfranchisement. *Id.* at 17.

This argument is deeply flawed. It is "quite mistaken to assume . . . that any interpretation of a law that does more to advance a statute's putative goal must be the law." *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (quotation marks omitted). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs" or by all means. *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (cleaned up). Thus, the Supreme Court "has long recognized that the 'textual limitations upon a law's scope' must be understood as 'no less a part of its purpose than its substantive authorizations.'" *Stanley*, 145 S. Ct. at 2067 (quoting *Kucana v. Holder*, 558 U.S. 233, 252 (2010)).

While the Readmission Acts were intended to protect against racially discriminatory disenfranchisement, it does not follow that they did so by prohibiting disenfranchisement of statutory felons. Both the text and legislative history demonstrate the contrary. See pp.6–7, *supra*; Defs.' MSJ Mem. 14–19. Again, among other things, Readmission Acts for four other States approved constitutions that explicitly allowed the state legislature to decide which crimes would result in "imprisonment in the penitentiary," and to disenfranchise anyone convicted of those crimes. See p.13, *supra*. Yet all the Readmission Acts shared the same text and the same purpose. Cf. *Richardson*, 418 U.S. at 52. There is no basis to conclude that Congress was concerned about discriminatory disenfranchisement of statutory felons in Virginia, but that concern somehow did not extend to these other former rebel States. Indeed, the other former rebel States were facing much the same evils of racial discrimination and oppression. It is not the "purpose" of the Virginia Readmission Act to ban what these other Readmission Acts explicitly allow.

Instead, the Readmission Acts pursued other means to protect against racially discriminatory disenfranchisement. For example, the Readmission Act requires that any disenfranchisement result from a conviction "under laws equally applicable to all the inhabitants of said State." 16 Stat. 63. That provision directly prohibits Virginia from creating new statutory felonies, then applying them unequally to "Black men" to disenfranchise them. Pls.' MSJ Mem. 18. The Readmission Acts also required the former rebel States, including Virginia, to ratify the Fourteenth and Fifteenth Amendments to qualify for readmission. 16 Stat. 62. Those amendments prohibit States from denying the right to vote based on race. U.S. Const. Amends. XIV, XV. And they authorize Congress to pass laws to enforce that prohibition. U.S. Const. Amends. XIV, § 5, XV, § 2. Congress did so, including the Voting Rights Act. 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq*.

Despite Plaintiffs' frequent insinuations that the current Virginia Constitution's disenfranchisement of felons is racially discriminatory, see, *e.g.*, Pls.' MSJ Mem. 2, 11, they bring no claim under the Fourteenth Amendment, Fifteenth Amendment, or the Voting Rights Act. Nor could they. Virginia's current Constitution was ratified in 1971 without a shred of discriminatory intent. Indeed, the Commonwealth adopted the 1971 Constitution to purge the prior version of racial animus, and "define the political community to make fairness, justice, and inclusiveness signposts on the path to achieving a government 'for the common benefit.'" A.E. Dick Howard, *Who Belongs: The Constitution of Virginia and the Political Community*, 37 J. L. & Politics 99, 113 (2022); see, *e.g.*, A.E. Dick Howard & William Antholis, *The Virginia Constitution of 1971*, 129 Virg. Mag. of Hist. & Bio. 346, 356 (2021) (The 1971 Constitution's "aim was to put . . . opposition to civil rights behind us as Virginians.").[4]

In fact, considerations of statutory purpose weigh in favor of Defendants' interpretation, because Plaintiffs' proposed standard would be completely unworkable. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *Becerra v. Empire Health Foundation*, 597 U.S. 424, 439 (2022) (rejecting a "reading [that] would render" the statute "unworkable or unthinkable or both"). Under Plaintiffs' interpretation, Virginia may



[4] As explained in Defendants' motion for summary judgment, for similar reasons Plaintiffs' contention that the Virginia Readmission Act imposes permanent judicially enforceable restrictions on Virginia's Constitution should be rejected under the canon of constitutional avoidance, because it would render the Act unconstitutional, including under the equal footing doctrine. Defs.' MSJ 11; see Defs.' Mot. to Dismiss at 8–18 (ECF No. 54). The equal footing doctrine is based on the "fundamental principle of equal sovereignty among the States." *Shelby County v. Holder*, 570 U.S. 529, 544 (2013). It provides that Congress cannot constitutionally subject a subset of States to significant limits in perpetuity, while exempting others. Rather, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions," and "cannot rely simply on the past." *Id.* at 553. The Supreme Court's finding in *Shelby County* that the nation has "changed dramatically" since Congress passed the Voting Rights Act in 1965, *id*. at 547, applies with even more force to the Readmission Acts that Congress passed a century earlier.

disenfranchise felons only for offenses that would have been considered a "felony at common law" in 1870. But Plaintiffs' own expert admits that it is extremely difficult to discern which felonies satisfy this standard. See Deposition of Carissa Hessick at 43:9–14 (ECF No. 144-2). Professor Hessick was unable to categorize more than 200 crimes under Virginia law. See Pls.' MSJ Mem. 10 n.4; see also Memo. in Support of Motion to Exclude Testimony of Professor Carissa Byrne Hessick at 10–14 (ECF No. 144). In addition, she did not even attempt to categorize felonies under federal law and under the laws of the other 49 States, even though Virginia's constitutional provision also applies to these offenses. ECF No. 152-1 ¶¶ 47, 53.[5]

Thus, Plaintiffs' interpretation would require Virginia officials to guess at which crimes qualify as "felonies at common law" before being able to ascertain whether an individual could vote. This amorphous standard would lead to a never-ending stream of disputes over whether particular offenses qualify, resembling the Byzantine task of applying the categorical approach under the Armed Career Criminal Act. See Defs.' Memo. in Opp. to Pls. Mot. for Class Certification (Class Cert. Opp.) at 7 (ECF No. 161); see, *e.g., United States v. Scott*, 990 F.3d 94, 125–26 (2d Cir. 2021) (Park, J., concurring) ("As a growing number of judges across the country have explained, the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice."). Congress and the ratifiers of the Virginia Constitution did not intend to adopt such an unworkable test for allocating the Commonwealth's franchise. See, *e.g.*, *Becerra*, 597 U.S. at 439.



[5] Plaintiffs confusingly attempt to shift the burden onto Defendants to prove that crimes were *not* felonies at common law. See Pls.' MSJ Mem. 10 n.4 ("Plaintiffs maintain that none of these 238 Virginia statutory felonies nor any other uncategorized offense under federal law or the law of another state can serve as a lawful basis of disenfranchisement unless Defendants can establish it would have been recognized as a felony at common law in 1870."). But state laws are assumed to be valid, and Plaintiffs bear the burden of proving otherwise. See, *e.g.*, *Bond v. United States*, 572 U.S. 844, 858 (2014); *Calder v. Bull*, 3 U.S. 386, 394 (1798).

Plaintiffs' proposed standard is also highly anomalous. Disenfranchisement would have nothing to do with the seriousness of the offense, or the length of the sentence that a judge or jury found to be warranted. See Defs.' MSJ Mem. 21–22. Instead, it would turn only on the classification of the crime under the "common law" circa 1870. As Justice O'Connor explained in rejecting a similar argument that the Fourteenth Amendment only permits disenfranchisement for "common law felonies," "a far better reference point for determining whether a crime is serious is to look at how the crime is designated by the modern-day legislature that proscribed it, rather than indulging the anachronisms of the common law." *Harvey*, 605 F.3d at 1074. Plaintiffs point to no State that has ever adopted a provision disenfranchising "common law" but not "statutory" felons. And Defendants are aware of none—including none of the other States subject to Readmission Acts.[6] This "lack of historical precedent" is a "telling indication" that Plaintiffs' interpretation of the 150-year-old text is incorrect. *Trump v. Anderson*, 601 U.S. 100, 113–14 (2024) (quoting *United States v. Texas*, 599 U.S. 670, 677 (2023)).



[6] Nearly every State disenfranchises some felons. *Jones v. Governor of Fla.*, 950 F.3d 795, 801 n.3 (11th Cir. 2020). To the extent that Plaintiffs argue Virginia disenfranchises felons for longer than other States, see Pls.' MSJ Mem. 11, the Governor has discretion to restore voting rights, *Howell v. McAuliffe*, 292 Va. 320 (2016). Further, as previously noted, the Virginia General Assembly recently approved a constitutional amendment providing for automatic re-enfranchisement of felons upon their release from incarceration. Defs.' MSJ Mem. 5. If this amendment is again approved by the legislature in 2026, it will appear on the November 2026 ballot. Va. Const. art. XII, § 1. If a majority of voters then vote in favor of it, the Virginia Constitution will be amended accordingly. *Ibid.* Dozens of other States have similar provisions, disenfranchising felons during their period of incarceration. Restoration of Voting Rights for Felons, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/felon-voting-rights (Last visited Aug. 8, 2025) (cataloguing state policies). But under Plaintiffs' interpretation, this amended provision would likewise violate the Readmission Act, because it would disenfranchise felons based on their period of incarceration, rather than the classification of their offense at common law. See Defs.' MSJ Mem. 22 n.5.

**D. Plaintiffs' alternate statutory interpretation also fails**

Plaintiffs' alternative statutory interpretation fares no better. Plaintiffs raise an alternate position that "felony" in Virginia's 1869 Constitution should be limited to felonies that existed in 1869, arguing that "even under Defendants' (erroneous) reading of the Virginia Readmission Act, those 'entitled to vote by the Constitution herein recognized,' 16. Stat. 62, would at most have excluded those convicted of one of the 'only 60 felonies' in the state's then-operative criminal code—a similarly limited list." Pls.' MSJ Mem. 21–22. They offer no authority, or analysis, to support this naked assertion. And there is none. See Defs.' MSJ Mem. 27–29.

The Supreme Court has made clear that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." *Jam v. International Finance Corp.*, 586 U.S. 199, 209 (2019). "Federal courts have often relied on" this principle, called "the reference canon[,] . . . to harmonize a statute with an external body of law that the statute refers to generally." *Id.* at 210. Here, the term "felony" refers to an external body of law: crimes deemed by the legislature to be serious enough to deserve death or punishment in the penitentiary. Thus, whether an offense is a "felony" depends upon the law "as it exists" today. *Id.* at 209; see *Harvey*, 605 F.3d at 1074 (classification of crimes under the Fourteenth Amendment turns upon how "the crime is designated by the modern-day legislature that proscribed it"). The idea that a legal classification which references another body of law adopts that body of law as it "exists whenever a question under the statute arises" was familiar to lawyers in the mid-19th century. *Jam*, 586 U.S. at 209. The Civil Rights Act of 1866, for example, declared that all persons shall have the "same right" to make and enforce contracts and to buy and sell property "as is enjoyed by white citizens." 42 U.S.C. §§ 1981(a), 1982. As the Supreme Court has explained, "[t]hat provision is of course understood to guarantee *continuous* equality" and not just give nonwhite persons the same contractual rights that white citizens held back in 1866 when the statute

was passed. *Jam*, 586 U.S. at 208 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427–430 (1968)).

Plaintiffs' own interpretation of Virginia's current Constitution further demonstrates the fallacy of their argument. As Plaintiffs themselves repeatedly argue, the current Constitution disenfranchises "all felon[s]." Pls.' MSJ Mem. 9. Yet Virginia's current Constitution was adopted more than 50 years ago, in 1971. Under Plaintiffs' proposed method of constitutional interpretation, there is no apparent reason why "felony" in the 1971 Constitution would apply to felonies created since 1971, such as manufacturing fentanyl with a minor present, Va. Code § 18.2-248.02 (2005), possession of a weapon of terrorism, Va. Code § 18.2-46.6 (2002), or possession of child pornography, Va. Code § 18.2-374.1:1 (1992). Plaintiffs never engage with the basic principles of statutory interpretation that refute their argument. Indeed, Plaintiffs offer no analysis at all. Their contention that the 1869 Constitution applies only to felonies that existed in 1869 should be rejected.



## II. Plaintiffs are not entitled to injunctive relief

Finally, Plaintiffs are not entitled to their requested injunction. Even if the Court were to rule in their favor, any injunction should not apply to the upcoming 2025 election, and should be limited only to the named Plaintiffs.

First, any injunction should not apply to the upcoming election in November 2025. It is "a bedrock tenet of election law" that federal courts should not issue injunctions altering the election process when an election is impending. See *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). This rule, often called the *Purcell* principle, see *Purcell v. Gonzales*, 549 U.S. 1 (2006), applies to avoid "unanticipated and unfair consequences for candidates, political parties, and voters, among others" that may be caused by late-stage judicial intervention. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J.). With Virginia's general

election only three months away, the *Purcell* principle is in full effect. See *id.* at 879 (granting a stay in February when the primary elections were in May and the final elections were in November); *Beals v. Virginia Coalition for Immigrant Rights*, __ U.S. __, No. 24A407, 2024 WL 4608863 (Mem) (Oct. 30, 2024).

Injunctive relief should not issue before an election unless plaintiffs have demonstrated "at least the following": "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J.). At least two factors are missing here.

The "underlying merits are [not] entirely clearcut in favor of the plaintiff[s]." *Ibid.* For all of the reasons explained in Defendants' motion for summary judgment and in this brief, the merits are entirely clearcut for the Defendants. But even if this Court were to conclude otherwise, it cannot reasonably be said that the merits are *clearcut* in Plaintiffs' favor. *Ibid.* Indeed, if it were truly "clearcut" that Virginia has been violating the statute for over a century and a half, surely *someone* would have raised the issue before the early 2020s. See *Trump v. Anderson*, 601 U.S. at 114.



Second, whether before or after the November election, any injunction should be limited only to the named Plaintiffs. Unless it certifies a class, the Court may not provide the statewide permanent injunction Plaintiffs seek. *Trump v. CASA*, 145 S. Ct. 2540, 2560, 2555–56, 2563 (2025). As explained in Defendants' opposition to Plaintiffs' class certification motion, the class should not be certified, due to the inability to determine what offenses constitute felonies at common law. Class Cert. Opp. 4–13. Plaintiffs' requested injunction would require this Court to categorize *thousands* of different felonies, raising a multitude of thorny questions under Plaintiffs'

proposed test. See *id.* at 12. Again, Plaintiffs' own expert was unable to classify hundreds of Virginia felonies under Plaintiffs' test, and did not even attempt to categorize federal felonies or those of the 49 other States, even though Virginia's constitutional provision applies to those convictions. See p.23, *supra*; see Class Cert. Opp. 7–8. Were this Court to enter Plaintiffs' requested injunction, Defendants would be required—under threat of contempt—to answer thousands of variations of questions about the common law that not even Plaintiffs' proposed expert can answer. Thus, Plaintiffs' requested injunction is "too vague to satisfy Rule 65." *Shook v. Bd. of Cnty. Comm'n of Cnty of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J. for the panel) (quotation marks omitted); *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013), abrogated on other grounds by *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

It would be yet more improper to enter the requested injunction before the 2025 election. It would cause "significant cost, confusion, or hardship" to change Virginia's system a few months before a general election, particularly given the lack of clarity as to which felonies would qualify. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J.). Virginia has disenfranchised all felons for centuries. Switching gears to disenfranchise only common-law felons would create an administrative nightmare. Plaintiffs' own expert says that the first step of the analysis to determine whether a crime is a felony at common law is to spend ten to fifteen years studying the common law. Hessick Dep. Tr. 103:11–13. Virginia registrars cannot do that in a few months.



## CONCLUSION

For the foregoing reasons and those explained in Defendants' memorandum in support of their motion for summary judgment, the Court should deny Plaintiffs' motion for summary judgment and grant Defendants' motion for summary judgment.

Dated: August 8, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on August 8, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

*Erika L. Maley*
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