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

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

OPPOSITION TO MOTION TO DISMISS AND BRIEF IN SUPPORT

J. MITCH MCGUIRE (ASB-8317-S69M)
MCGUIRE & ASSOCIATES, LLC
31 Clayton Street
Montgomery, AL 36104
(334) 517-1000
jmcguire@mandabusinesslaw.com

DANIELLE LANG (CA Bar No: 304450)
J. GERALD HEBERT (VA Bar No: 38432)
CAMPAIGN LEGAL CENTER
1411 K Street NW Suite 1400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
ghebert@campaignlegalcenter.org

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

(additional counsel on next page)

JESSICA RING AMUNSON (DC Bar No: 497223)
JENNER & BLOCK LLP
1099 New York Ave. NW, Ste. 900
Washington, DC 20001
(202) 736-6000
jamunson@jenner.com

PAMELA KARLAN (NY Bar No: 2116994)
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

ADERSON B. FRANCOIS (DC Bar No: 498544)
PATRICK LLEWELLYN (DC Bar No: 1033296)
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-6721
abf48@georgetown.edu

ARMAND G. DERFNER (SC Bar No: 1650)
DERFNER & ALTMAN
575 King Street, Suite B
Charleston, S.C. 29403
(843) 723-9804
aderfner@derfneraltman.com

Counsel for Plaintiffs and Plaintiff Class

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INTRODUCTION

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

471 U.S. at 233.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

Gooden, slip op. at 35.

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

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

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

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

Gooden, slip op. at 34–35.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, Alabama has also created a state law liberty interest in the right to vote. Under the Alabama Constitution, "[e]very citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law . . . *shall* have the right to vote." Ala. Const. art. VIII, § 177(a) (emphasis added); *see Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself . . . or it may arise from an expectation or interest created by state laws or policies."). A state law creates a constitutionally-protected liberty interest subject to due process protections when the law "contain[s] substantive limitations on official discretion,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Federal courts—including the Eleventh Circuit in *Johnson v. Governor*—have likewise referred to the penal intent of felon disenfranchisement laws. *See Johnson*, 405 F.3d at 1218 n.5 ("[T]hroughout history, criminal disenfranchisement provisions have existed as a punitive device."); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (felons are disenfranchised because "of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment"); *Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004) ("[T]here is a longstanding practice in this country of disenfranchising felons as a form of punishment."), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (en banc).

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

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

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

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

Finally, Section 177(b) is necessarily punitive because no other constitutionally permissible rationale remains for its broad disenfranchisement of those with criminal convictions. The asserted regulatory purpose behind felon disenfranchisement is the proposition that those individuals are "unfit to exercise the privilege of suffrage." MTD at 16. But the Supreme Court has unequivocally repudiated the underlying regulatory theory of *Trop v. Dulles* and its reliance on the Mormon disenfranchisement cases: "To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." *Romer v. Evans*, 517 U.S. 620, 634 (1996). The Court held that this was the case even though the practice in *Davis* was a felonious one. Since *Carrington v. Rash*, this form of felony disenfranchisement as a means of fencing bad actors out of the electorate is simply not constitutionally viable. 380 U.S. at 94 ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). Thus, the only remaining constitutionally viable purpose behind Section 177(b) is a punitive one that must be measured against Eighth Amendment standards. *Cf.* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1155 (2004) ("In short, even if

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

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

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

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

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

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

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

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

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

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

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

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

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

[42] Compl. ¶ 238.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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

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

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

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

Pamela Karlan (NY Bar No: 2116994)
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Aderson B. Francois (DC Bar No: 498544)
Patrick Llewelyn (DC Bar No: 1033296)
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 662-6721
abf48@georgetown.edu

Armand Derfner (SC Bar No: 1650)
Derfner & Altman
575 King Street, Suite B
Charleston, S.C. 29403
(843) 723-9804
aderfner@derfneraltman.com

Counsel for Plaintiffs and Plaintiff Class

CERTIFICATE OF SERVICE

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

Andrew L Brasher
Office of the Attorney General
501 Washington Ave
Montgomery, AL 36130
334-353-2609
Fax: 334-242-4891
Email: abrasher@ago.state.al.us

James William Davis
State of Alabama
Office of the Attorney General
P O Box 300152
Montgomery, AL 36130-0152
334-353-1356
Fax: 334-353-8440
Email: jimdavis@ago.state.al.us

Misty Shawn Fairbanks Messick
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
334-353-8674
Fax: 334-353-8440
Email: mmessick@ago.state.al.us

/s/ *Danielle Lang*
Danielle Lang

EXHIBIT 1

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Richard Gooden, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. CV-2005-5778-RSV**
	)	
	)	
Nancy Worley, et al,	)	
	)	
Defendants.	)	

CLASS CERTIFICATION ORDER AND FINAL ORDER ON ALL PENDING ISSUES

I. Introduction

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964).

Yet the power of a state to generally restrict felons' right to vote has withstood constitutional challenge. In *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S. Ct. 2655, 2671 (1974), the Supreme Court held that Section 2 of the Fourteenth Amendment allows states to "exclude from the franchise convicted felons. . . ."[1]

There are limitations to the State's ability to restrict felons' voting rights, however, as shown by *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916 (1985). There, the Supreme Court affirmed the Eleventh Circuit's opinion striking down the former Article

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[1] Alabama has historically employed one of the nation's strictest disenfranchisement regimes and has a correspondingly high disenfranchisement rate. Note, Developments in the Law (Part VI): One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939, 1943 (May 2002). According to one commentator, 6.75% of Alabama's voting-age population cannot vote. *Id*. at 1943-44, *citing* Christopher Uggen & Jeff Manza, The Political Consequences of Felon Disenfranchisement Laws in the United States 23 (Aug. 31, 2001) (unpublished manuscript, on file with the Harvard Law School Library).

VIII, § 182, of the Alabama Constitution of 1901. That constitutional provision had provided for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, as well as "any . . . · crime involving moral turpitude." The basis for the holding in *Hunter v. Underwood* was that racial discrimination was a substantial or motivating factor in the adoption of Section 182.

In so holding, the Supreme Court affirmed the Eleventh Circuit's opinion of *Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984). The Eleventh Circuit's opinion included some facts similar to those of this case, which led to a pointed observation by that court:

> In determining whether an offense is a crime of moral turpitude, the registrars follow Alabama case law and, in the absence of judicial decision, opinions of the state attorney general. The registrars' actions in this case were based on opinions of the attorney general. In *Pippin v. State*, 197 Ala. 613, 73 So. 340 (1916), the Alabama Supreme Court defined a crime of moral turpitude as an act that is "immoral itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude." *Id.* at 616, 73 So. at 342 (quoting *Fort v. City of Brinkley*, 87 Ark. 400, 112 S.W. 1084 (1908)). The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; see also infra note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, McCormick on Evidence § 43, at 85-86 (2d ed. 1972).

730 F.2d at 616 n. 2.

The State of Alabama responded to *Hunter v. Underwood* by passing Amendment 579 to the Alabama Constitution in 1996. This amendment provides the following:

> Article VIII of the Constitution of Alabama of 1901 is hereby repealed and in lieu thereof the following article shall be adopted.
>
> (a) Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county

> thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting. The Legislature shall, by statute, prescribe a procedure by which eligible citizens can register to vote.
>
> (b) 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.
>
> (c) The Legislature shall by law provide for the registration of voters, absentee voting, secrecy in voting, the administration of elections, and the nomination of candidates.

The term "moral turpitude" is nowhere defined in that amendment.

The plaintiffs here have brought suit challenging certain practices that have arisen since passage of Amendment 579. There is no challenge here like that of the *Hunter v. Underwood* case. The plaintiffs raise no claim of racial discrimination surrounding the passage of that amendment, nor do they claim that there exists an impermissible discriminatory impact.

Instead, this suit initially focused on the fact that state and county officials have used an overly expansive interpretation of Amendment 579 to bar *all* felons – and not just those convicted of crimes involving moral turpitude – from registering to vote. On behalf of a putative class comprising "all unregistered persons otherwise eligible to register to vote in Alabama who have been convicted of one or more felonies but who have not been convicted of any felonies involving moral turpitude," the named plaintiffs have now raised the following causes of action, as found in their *Fourth Amended Complaint*:

1. The defendants' alleged refusal to register class members violates the rights of each class member under Amendment 579 and *Ala. Code* §17-3-9;

2. The Alabama Secretary of State has also allegedly violated the class members' rights under Amendment 579 and *Ala. Code* § 17-3-9 by misrepresenting to county registrars what the voting rights of these members are;

3. Plaintiffs Richard Gooden and Angela Thomas appeal from the registrars' refusal to register them under *Ala. Code* §17-4-124;

4. The defendants have allegedly violated the rights of all class members under 42 U.S.C. § 1971(a)(2)(B); and

5. Defendant Worley has allegedly violated the class members' due process and equal protection rights by promulgating voter registration forms that fail to comply with Amendment 579.

The *Fourth Amended Complaint* names Nancy Worley, in her official capacity as Alabama's Secretary of State, and Nell Hunter, in her official capacity as Jefferson County Registrar, as defendants. Defendant Hunter is further named as a representative of a defendant class defined as all voter registrars in the State of Alabama.[2]

On April 28, 2006, a hearing was held in this matter. The primary focus of the hearing was to determine whether this Court may properly certify the classes alleged by the plaintiffs, as must be decided under *Ala. Code* § 6-5-641. The Court took the opportunity to hear from the parties on other pending matters, moreover. This order comes from the Court's consideration of all pending filings and of the arguments made at that hearing.

The Court now faces a situation different from what existed at the time this action commenced. At the April 28 hearing, all parties agreed that a blanket refusal to register a citizen convicted of any felony was contrary to law. Instead, the current procedure is as described by counsel for defendant Worley:

> MS. FLEMING: Under Alabama law, discretion is vested with the County Board of Registrars to accept and reject applications and to determine which voter applications meet the requirements of the law. It's -- the statute that speaks to this says that the registrars are responsible for determining whether the applicant has satisfied the registrars that they in fact meet the qualifications for voting. And so what you have is really a statutory framework that puts the burden, in the first place, on the voter to demonstrate to the County Board of Registrars, in this case, Ms. Hunter, that the voter meets the relevant

[2] At the time of the April 28, 2006 hearing, the plaintiffs were traveling under the allegations of the *First Amended Complaint.* In that pleading, Ekeyesto Doss, a resident of Houston County, was also a named plaintiff, with the three Houston County registrars named as defendants. The Court regards the *Fourth Amended Complaint* as superseding prior amendments. Because neither Mr. Doss nor the Houston County registrars are identified as parties in the *Fourth Amended Complaint*, they must be dismissed from this action.

qualifications.

* * *

> MS. FLEMING: The way the statutory scheme is set out, the Board of Registrars makes the initial determination and then if the application *[sic]* is dissatisfied with that, he has an automatic right to appeal that decision to this case *[sic]*. And matter of fact, Mr. Gooden did exactly that in the case, he disagreed with the registrars decision, appealed to this Court, and although I wasn't involved, I understand Your Honor immediately had a conference call with the relevant parties and said it appears this is not a crime involving moral turpitude, can we agree that this man should be registered to vote, and that was done. That's how the statutes sets the process up in more difficult cases.

(Transcript of April 28, 2006 hearing, at pp. 12-14).

II. Undisputed Facts

A. The Parties' Stipulated Facts

At the April 28 hearing, the parties presented a *"Stipulation of Undisputed Facts*," which identified the following as undisputed:

1. Each county in Alabama has a board of three voter registrars, except Jefferson, Barbour, and Talladega counties. Jefferson County has one registrar, while Talladega County and Barbour County each has four.

2. In 1995-1996, the Alabama Legislature proposed, and the people ratified, Act 95-443, which proposed a constitutional amendment (ultimately, Amendment 579) repealing Article VIII of the Constitution of Alabama of 1901 regarding voting.

3. Plaintiff Richard Gooden is a 64-year-old African American of lawful voting age, a citizen of the United States and a lifetime resident of Birmingham, Alabama. Plaintiff Gooden was registered to vote from the mid-1960s until 2000, when he was convicted of felony driving under the influence of alcohol (DUI).

4. Plaintiff Andrew Jones is a 47-year-old African American of lawful voting age,

a citizen of the United States and a resident of Birmingham, Alabama. Mr. Jones was registered to vote from the mid-1970s until the early 1990s, when he was convicted of felony possession of drugs.

5. *Ala. Code* § 17-4-136 provides as follows: "The Secretary of State may promulgate rules for the receipt of applications for registration and the expedient administration of those applications, but no person shall be registered until a majority of the board of registrars has passed favorably upon the person's qualifications."

6. Defendant Nell Hunter, the Jefferson County Voter Registrar, is vested with the authority under *Ala. Code* § 17-4-136 to grant or refuse an individual's application to register to vote in Jefferson County.

7. No authority is given to the Secretary of State under Alabama law either to register voters or to direct county boards of registrars with respect to the registration of particular voters. Pursuant to the Administrative Code of Alabama, however, the Secretary of State has removal power over members of boards of registrars.

8. By order of the Alabama Supreme Court, dated October 22, 1999, two voter registration forms were approved pursuant to *Ala. Code* § 17-4-22, as set out in the Alabama Code Commissioner's Notes following that section. The first form is entitled "State of Alabama Agency-Based Voter Registration Form" and is known at "NVRA-1." The second form is entitled "State of Alabama Postcard Voter Registration Form" and is known as "NVRA-2."

9. The Secretary of State makes available Form NVRA-1 (A/B) for use by the "voter registration agencies." The Secretary of State makes Form NVRA-2 available for printing and use as a mail-in application for voter registration.

10. Forms NVRA-1 and NVRA-2 are voter registration applications containing this statement: "to register to vote in the State of Alabama, you must: . . . have not been convicted of a felony, or if you have been convicted, you must have had your civil rights restored."

11. Registrars throughout the State use Forms NVRA-1 and NVRA-2, or forms substantially similar, containing the statement that to be eligible to vote, the applicant must not have been convicted of a felony.

12. The Secretary of State adopted regulations on January 10, 2001, regulating voter registration. See Ala. Admin. Code, Chapter 820-2-2. Section 820-2-2-.05 provides

that the "voter registration agencies" shall use the voter registration forms prescribed by the Secretary of State.

13. The term "voter registration agencies" refers to those agencies listed in *Ala. Code* § 17-4-250.

14. For years prior to 2005, the Jefferson County Registrar had a practice of denying the voting application of every person convicted of a felony, without first seeking to determine whether such felony had been determined by Alabama courts to "involve moral turpitude," and instructed every felon who sought to register to vote in Alabama to seek a Certificate of Eligibility from the Alabama Board of Pardons and Paroles.

15. It is the current practice of the Jefferson County Registrar to permit felons whose only felony convictions are for crimes that do not involve moral turpitude, as that phrase is defined by the appellate courts of Alabama, to register to vote. To determine whether particular felonies involve moral turpitude under Alabama case law, the Registrar consults both Attorney General's Opinion 2005-092, and attorneys, including staff attorneys employed as Assistant Attorneys General in the Office of the Attorney General, as needed. The Registrar does not consult the Secretary of State, who is not an attorney and who is not qualified to render legal advice.

16. On March 18, 2005, the Alabama Attorney General issued Opinion 2005-092 which explained that a person convicted of a felony not involving moral turpitude remains eligible to vote and is therefore ineligible to apply to the Alabama Board of Pardons and Paroles for a Certificate of Eligibility.

17. After the issuance of Attorney General's opinion 2005-092, the Alabama Board of Pardons and Paroles (hereafter the “Board”) refused to issue certificates of eligibility to persons who had been convicted of felonies that were specifically identified in Attorney General's opinion 2005-092 as crimes not involving moral turpitude.

18. In a press release dated May 17, 2005, the Board stated that individuals convicted of felony offenses not involving “moral turpitude,” such as felony driving under the influence and felony possession of drugs, need not (and, in fact, cannot) apply for a Certificate of Eligibility since such individuals never lost their right to vote.

19. After Attorney General's opinion 2005-092 was issued, in response to questions from various boards of registrars, the Secretary of State advised the registrars to continue their long-standing practices and not to make any changes to their practices until the Attorney General issued a response to legal questions posed by the Secretary of State and all the legal

and administrative issues were properly resolved.

20. On January 10, 2006, Alabama Attorney General's opinion 2005-092 was distributed by the office of the Attorney General to all the county boards of registrars in Alabama by facsimile and by U.S. Mail, and county boards of registrars were invited to seek the opinion of the Alabama Attorney General if they needed legal assistance in determining whether a particular felony involved moral turpitude.

21. From the time Act 95-443 was enacted until June 2003, the Office of Voter Registration was a separate and distinct state agency that was not under the umbrella of the Office of Secretary of State. After June 2003, when the Office of Voter Registration was merged into the Office of Secretary of State, until her resignation in 2004, Anita Tatum, the former Director of the Alabama Office of Voter Registration, served as the Supervisor of the Voter Registration Division of the Office of Secretary of State. From 1996 through 2004, Ms. Tatum and her staff provided all training to the county boards of registrars. No other training was provided by the Office of Secretary of State.

22. Notwithstanding the ratification by the people of Alabama of the constitutional amendment narrowing the scope of the State's felon disfranchisement law to those who had been convicted of crimes of moral turpitude, the Attorney General's Opinion, and the press release issued by the Board, the office of Defendant Hunter instructed plaintiff Gooden to apply to the Board for a Certificate of Eligibility.

23. An employee of the Board telephoned the office of Defendant Hunter on September 21, 2005, to explain that Plaintiff Gooden was not disqualified from voting, since his felony conviction did not involve moral turpitude, and that a Certificate of Eligibility was thus unnecessary to enable his registration.

24. The office of Defendant Hunter informed the Board that the office of the Secretary of State had advised them not to register individuals with felony convictions who had not obtained a Certificate of Eligibility, without regard to whether or not such felony convictions involved moral turpitude.

25. In a June 20, 2005 letter to Plaintiff Jones, the Board explained that after reviewing his "application for a Certificate of Eligibility to Register to Vote, we have determined that you were convicted of possession of a controlled substance," which is a felony "that does not appear to this agency to involve moral turpitude." The Board determined that, according to Amendment 579 of the Alabama Constitution, Mr. Jones' "conviction does not disqualify [him] from voting." The Board therefore concluded that "we are closing our file on your application, as you do not need a certificate in order to be eligible

to register."

26. In a June 30, 2005 letter to Plaintiff Jones, the office of Defendant Hunter stated that his Voter Registration Form could not be processed because "a person convicted of a felony offense is barred from voting, unless there has been a reinstatement of voting rights." The office of Defendant Hunter referred Plaintiff Jones to the Board to "get [his] voting rights restored."

27. The preceding paragraph notwithstanding, and before his filing this lawsuit on December 19, 2005, Plaintiff Jones received a Voter Registration Card. The card instructed Jones as to his polling place for "all elections — except municipal." The card Jones received was a standard card issued by the Jefferson County Registrar to all voters. The "except municipal" designation did not limit Jones' right to vote but was instead intended to alert Jones that his polling place for municipal elections was in a different location from that shown on the card.

28. Act No. 78-584, codified at *Ala. Code* § 17-4-124, provides, in pertinent part, the following:

> Any person to whom [voter] registration is denied shall have the right of appeal, without giving security for costs, within 30 days after such denial, by filing a petition in the circuit court in the county in which he or she seeks to register, alleging that he or she is a citizen of the United States over the age of 18 years having the qualifications as to residence prescribed by law and entitled to register to vote under the provisions of the Constitution of Alabama, as amended. Upon the filing of the petition, the clerk of the court shall give notice thereof to the district attorney authorized to represent the state in said county, who shall appear and defend against the petition on behalf of the state. The issues shall be tried in the same manner and under the same rules that other cases are tried in such court and by a jury, if the petitioner demands it. The registrars shall not be made parties and shall not be liable for costs. An appeal will lie to the Supreme Court in favor of the petitioner if taken within 42 days from the date of the judgment. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars.

29. The docket fee for a complaint or petition in the Circuit Court under *Ala. Code* § 17-4-124 is set by *Ala. Code* § 12-19-71. Pursuant to *Ala. Code* § 12-19-70, moreover, the docket fee set by *Ala. Code* § 12-19-71 "may be waived initially and taxed as costs at the conclusion of the case if the court finds that payment of the fee will constitute a substantial hardship."

30. According to the Fiscal Year 2004-2005 Annual Report (page 35) of the Alabama Board of Pardons and Paroles, there were 469 "pardons w/ restoration of civil & political rights granted" and 1,233 "voters [sic] rights restored."

31. Alabama statutes require that the Board receive applications for Certificates of Restoration of Voter Registration Rights and either issue the certificate or inform the applicant why the certificate cannot be issued. The Board conducts an investigation concerning each application to determine if the applicant is eligible under the law to receive the certificate. If so, the certificate is issued. If the applicant is ineligible to receive the certificate, a letter is sent to the applicant stating the reasons for the Board's decision. If the applicant's conviction is not one that disenfranchises the applicant from voting, a letter is issued to the applicant so stating.

32. The Board has mailed approximately 330 letters declining to restore rights.

33. On March 29, 2006, the Secretary of State issued a letter to Alabama Voter Registrars that included the following statement: "The felon voter registration case is currently in Federal Court; therefore, our office cannot comment on this issue other than to say we continue to await guidance from the Courts or the Attorney General's Office on this matter before we give you any further information or advice."

34. The Secretary of State submitted proposed voter registration forms to the Alabama Supreme Court on March 15, 2006. The proposed forms contain language stating that citizens are eligible so long as they have not been convicted of a "disqualifying felony," which is a new term replacing the broader language used in the earlier forms.

35. In response to the Secretary of State's request, the Alabama Supreme Court issued an order on April 19, 2006, advising that the Secretary of State (rather than the Court) has the authority to proscribe the form and contents of applications for voter registration pursuant to more recent legislation that supersedes *Ala. Code* §17-4-122.

B. Additional, Undisputed Evidence Received at the April 28 Hearing

In addition to the parties' stipulations, the Court received sworn and undisputed testimony from two witnesses at the April 28 hearing.

The plaintiffs first called Tonya Colvin, who is the administrative assistant for the Jefferson County Board of Registrars. Ms. Colvin testified about the current practice used to decide who should be purged from the Jefferson County voter rolls.[3] She receives a monthly list of all convictions from the Jefferson County Circuit Court.[4] She identifies those on the list who are currently registered to vote in Jefferson County and highlights their names. She initially referred the list to the District Attorney's office, but now sends it to the office of the County Attorney for Jefferson County. According to Ms. Colvin, the assistant county attorney would identify who on the list was convicted of a felony involving moral turpitude. Ms. Colvin thereafter purges those individuals from the voter rolls.

The second witness was Theo Lawson, an assistant county attorney for Jefferson County. Mr. Lawson testified that he has recently assumed the task of reviewing the list received from Ms. Colvin and determining which of those voters on the list have been convicted of crimes involving moral turpitude. To the extent he can, he relies on published appellate decisions that explicitly determine whether a particular crime is of that nature. If the crime at issue does not fall within that category – and most do not – Mr. Lawson then reviews the elements of the crime at issue, comparing them to the elements of those crimes that have been determined to involve moral turpitude. Mr. Lawson determines whether, by analogy, the felon should be disqualified from voting.

Having the opportunity to personally observe these witnesses as they testified, the Court has no doubt about their sincerity. The Court also does not question their good faith and their earnest desire to do the right thing under the law as they know it. Both Ms. Colvin and Mr. Lawson are conscientious and dedicated public servants. In making his decisions, moreover, Mr. Lawson draws upon considerable experience, having served for a number of years as an assistant district attorney and with numerous criminal convictions under his belt.

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[3] The removal of disqualified individuals from voter lists is pursuant to *Ala. Code* §17-4-132 (although that section still refers to the former Section 182 of the Alabama Constitution, which was repealed by Amendment 579).

[4] Ms. Colvin further testified that she receives a similar list from the federal district court every month or two, and that at least every year, she receives lists of Jefferson County residents who have been convicted of felonies in other counties in Alabama.

There is no evidence before the Court addressing how any other county in this State is addressing this issue.

C. Undisputed Evidence Received after the April 28 Hearing

Added in the *Fourth Amended Complaint* was plaintiff Angela Thomas. In support of the plaintiffs' summary judgment motion, plaintiff Thomas filed an affidavit, which has not been disputed. There, she testified that she was removed from the Jefferson County list of registered voters in August 2003 because of her conviction for felony possession of marijuana. She further testified that in 2005, she applied to the Board for the restoration of her voting rights, only to have her request denied because of the Board's determination that her crime was not one involving moral turpitude. To date, plaintiff Thomas is not registered.

Defendant Nell Hunter has filed a list of all citizens who have been removed from Jefferson County's voter rolls since 1996. The list spans 329 pages and identifies thousands of individuals.

III. Legal Analysis

A. Issues Raised by the Defendants' Pending Motions.

This Court would ordinarily begin with a Rule 23 analysis since class allegations have been raised. In this case, however, there are some other issues that are properly addressed before turning to that of class certification.

(1). Defendants' motion to dismiss under Ala. Code § 17-4-124

Pending is defendant Worley's motion to dismiss under Rule 12(b)(6). In this motion, Worley argues that Count Three of the *First Amended Complaint* constitutes an appeal of defendants' refusal to register the named plaintiffs, brought under *Ala. Code* § 17-4-124. (Counts Three and Four of the recently-filed *Fourth Amended Complaint* reiterate this claim.)

That statute expressly provides that in any such appeal, "[t]he registrars shall not be made parties. . . ." Instead, the statute provides for the State of Alabama to serve as the proper defendant. For that reason, this Court dismisses the claims brought under Counts Three and Four of the *Fourth Amended Complaint* to the extent that they are asserted against defendant Hunter or the putative defendant class. The Court instead recognizes the State of Alabama as the proper defendant under these Counts, and the State's pending motion to

intervene is therefore GRANTED. The Clerk of the Court is directed to add the State of Alabama as an additional defendant in this action. No additional service need be perfected with this substitution, given that the Alabama Attorney General's office has already appeared on behalf of defendant Worley (the State of Alabama and defendant Worley may sometimes be referred to hereafter as the "State defendants").

(2). State Defendants' Motions to Dismiss Based the Sovereign Immunity Doctrine.

In both their motion to dismiss and their summary judgment motion, the State defendants raise the sovereign immunity defense to argue that no claims in this action may properly lie against them.

Guidance comes from *Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002). The Supreme Court there recognized that the sovereign immunity doctrine bars any claim seeking monetary relief against the coffers of this State. *Id.* at 142, *quoting State Docks Comm'n v. Barnes*, 225 Ala. 403, 405, 143 So. 581, 582 (1932); *see also Alabama Agr. & Mech. Univ. v. Jones*, 895 So.2d 867, 873 (Ala. 2004)("an action is one against the State when a favorable result for the plaintiff would directly affect a contract or property right of the State, or would result in the plaintiff's recovery of money from the State")(citations omitted).

The *Patterson* court also recognized exceptions to the bar of sovereign immunity. Actions brought to compel state officials to perform their legal duties, actions to preclude state officials from enforcing unconstitutional laws, and declaratory judgment actions seeking the construction of a statute all fall outside the bar of the sovereign immunity doctrine. *Patterson*, 835 So.2d at 142.

The Court agrees with the plaintiffs that the sovereign immunity doctrine is inapplicable here. The plaintiffs have asserted no claims for money damages. They are instead seeking an order directing the Secretary of State to perform her legal duties. By law, the Secretary of State is the chief elections official and "shall provide uniform guidance for election activities." *Ala. Code* §17-1-8. Further, the Secretary of State "may promulgate rules for the receipt of applications for voter registration and the expedient administration of those applications. . . ." *Ala. Code* § 17-4-136. Finally, and pursuant to the Alabama Supreme Court's order of April 19, 2006, the Secretary of State now has the statutory authority to determine the form and contents of voter registration applications.

The evidence presented at the April 28 hearing, moreover, confirms that in practice, the Secretary of State exerts considerable authority over the State's voter registrars in an

effort to promote a uniform administration of the State's voting laws. Ms. Colvin testified about a conference last November at which Secretary of State Worley addressed this very issue before an audience of personnel from the State's registrar offices. A transcript of that meeting, admitted into evidence, shows that Ms. Worley instructed those in attendance to maintain the *status quo* until clear guidance is received from the Attorney General's office or from the courts.

As the State defendants point out, *Ala. Code* § 17-4-136 does provide that any voter registration must be based on a board of registrars' favorable determination of that voter's qualifications. It is nonetheless clear from both the facts and the law that the Secretary of State plays an authoritative role in promulgating the general policies and procedures employed by the voting registrars of this State to decide voter qualifications.

The Court also agrees that the claims seeking declaratory judgment pertaining to the class members' voting rights fall outside of the sovereign immunity bar. The defendants do not really contend to the contrary.

This Court thus concludes that the State defendants' pending motions are due to be denied to the extent they are based on the sovereign immunity doctrine.

(3). Mootness as to the Claims of the Named Plaintiffs.

In their pending motions, the defendants also raise a mootness argument with regard to the named plaintiffs. This argument bears some scrutiny.

At the time this action was first filed, plaintiff Gooden had live claims against the defendants. After the suit was filed, this Court entered an order on September 30, 2005, directing the office of the Jefferson County registrar to permit his registration pursuant to an agreement of the parties. Compliance with that order has led to plaintiff Gooden's registration. Moreover, defendant State of Alabama has confessed judgment with regard to Count Three of the *First Amended Complaint*. In view of these developments, occurring *after* the filing of this action, the defendants now argue that plaintiff Gooden's claims are

moot and he may not serve as the class representative.[5]

While plaintiff Gooden is currently registered in accordance with this Court's prior order, that order is conditional in nature, subject to rescission or alteration at any time before a final judgment is entered. Indeed, that order expressly recognizes that "[t]his relief is interim relief only, does not constitute final relief in the case, and shall be without prejudice to any other claims made in the complaint or any defenses to those claims that may be duly raised." In a hypothetical situation, a court could later determine that an order requiring the registration of a felon was erroneous and subsequently direct the registrar to remove that individual from the voting list. The Court thus does not regard its order of September 30, 2005, as constituting the kind of final relief that could moot Gooden's claims.

Nor may the defendants seek to preclude adjudication on a classwide basis by the State's confessing judgment on a designated representative's individual claim. In *Jones v. Southern United Life Ins. Co.*, 392 So.2d 822 (Ala.1981), the named plaintiff filed an action seeking monetary relief for herself and certification of a class action. Before any class-certification determination, the defendant tendered payment to plaintiff Jones of the monetary amounts she was claiming, which she accepted. The trial court thereafter granted the defendant's summary judgment motion on the plaintiff's individual claim and dismissed the remaining portions of the action.

On appeal, the Supreme Court in *Jones* identified the issue as "whether Mary Jones, whose claim is rendered moot through satisfaction, prior to certifying the class, may be permitted to have the class certified, and proceed to represent that class, even though she no longer has a real interest in the right to be protected." *Id.* at 823. The Court ultimately concluded that satisfaction of the plaintiff's individual claim did not prevent certification of the class. Further, "[n]otwithstanding the mootness of the suit as to Mary Jones, it is not moot as to other members of the class, and she can continue to litigate the issues as a representative of the class. . . . [S]he was not ousted as a representative of the class when her individual claim was mooted by payment of her claim. . . ." *Id.*

Jones v. Southern United Life Ins. Co. is clear authority for the proposition that a settlement by a class representative of individual claims does not moot the claims of the

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[5] The Court regards this mootness argument as distinct from the analysis used to decide whether a class is properly certified under Rule 23 of the Alabama Rules of Civil Procedure. The U. S. Supreme Court has before recognized that the related requirement of standing is a prerequisite to be addressed before one even considers the Rule 23 factors. See, e.g., *Sosna v. Iowa*, 419 U. S. 393, 402-03, 95 S. Ct. 553, 558-59 (1975); *Allee v. Medrano*, 416 U. S. 802, 828-29, 94 S. Ct. 2191, 2206-07 (1974).

class. Its holding is not undercut by the later decision of *Pharmacia Corp. v. Suggs*, 932 So.2d 95 (Ala. 2005), even though the Supreme Court there held that settlement of the named plaintiffs' claims, before certification of the class as alleged in the complaint, divested the trial court from considering the class claims and mandated dismissal of the entire action. The difference is that in *Suggs*, the plaintiffs apparently declined to serve as class representatives once their claims had been settled, instead filing a motion to substitute new representatives in their place. The Court expressly distinguished *Jones*, instead of overruling it, stating that "[i]n *Jones*, the class representative sought to remain in the action and to proceed on behalf of the other class members. Here, the named plaintiffs are completely abandoning the action after unequivocally accepting a settlement and then trying to name new class representatives to take their place." 932 So.2d at 99.

The *Jones* decision, moreover, is in accord with the weight of authority to the effect that while a defendant's voluntary actions may moot individual claims, the claims of absent class members remain and the named plaintiffs, if so desiring, may continue to serve as class representatives. See, e.g., *United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975).

Because plaintiff Gooden desires to continue serving as a class representative, *Jones* rather than *Suggs* appears on point and permits him to do so. This Court further determines that the claims of plaintiff Thomas are not moot, given that she was removed from Jefferson County's voter rolls for a felony conviction and is currently not registered to vote.

Plaintiff Jones stands in a different light, however. According to the parties' stipulated facts, described above, plaintiff Jones was registered to vote even before this action was commenced. Although there had been some question about whether he would be permitted to register, that question was apparently resolved in his favor. At the time this action was filed, no live dispute existed between plaintiff Jones and any of the defendants. His motion to intervene as an additional plaintiff is therefore denied, and he may not serve as a representative of the proposed plaintiff class.

B. Class Certification Issues

Having resolved the preliminary motions, the Court now turns to the plaintiffs' request to certify plaintiff and defendant classes. In considering this request, this Court is mindful of its obligations as defined by the Supreme Court of Alabama:

> The trial judge is directed to conduct such proceedings as he deems necessary to determine whether the proponents of class

> certification have met their burden of proving each of the four elements of Rule 23(a) and at least one element of Rule 23(b). Any future order of the trial court certifying a class must identify each of the four elements of Rule 23(a), Ala. R. Civ. P., and must provide a written rigorous analysis of how the proponents of class certification have met their burden of proving these elements. A certification order must also include a written rigorous analysis of how the proponents of class certification have met their burden of proving one of those elements of Rule 23(b), Ala. R. Civ. P.

Ex parte Mayflower Nat. Life Ins. Co., 771 So.2d 459, 462 (Ala. 2000).

In the *Fourth Amended Complaint*, the proposed plaintiff class is defined as "[a]ll unregistered persons otherwise eligible to vote in Alabama who have been convicted of one or more felonies, but who have not been convicted of any felonies involving moral turpitude." Given the nature of the injunctive and declaratory relief sought, which would apply to all individuals convicted of any felonies, the Court instead regards as appropriate the following putative plaintiff class:

> Every citizen of the United States, currently residing in this State and 18 years of age or older, who has at any time been convicted of a felony in any jurisdiction and who is not, as of the date of this order, registered to vote in this State.

The following analysis addresses whether this proposed plaintiff class may properly be certified.

(1). Rule 23(a)-- Requirement of Numerosity

The first requirement under Rule 23(a) is numerosity. More specifically, there must be substantial evidence that the class is "so numerous that joinder of all members is impracticable." For purposes of Rule 23(a)(1), impracticability does not require a showing of impossibility, but instead relates to the difficulty or inconvenience in joining all class members. See *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1179 (Ala. 2000)(quoting and approving trial court's certification order). Indeed, one noted commentator has observed that Rule 23(a)(1) establishes not a requirement of numerosity so much as a requirement that joinder be impractical, which requirement is to be evaluated based on the circumstances of every particular case. 1 Conte & Newberg, Newberg on Class Actions, § 3:3 (4th ed. 2002); *see also Cheminova*, 779 So.2d at 1179, *quoting, inter alia,*

General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 100 S.Ct. 1698 (1980).

This Court does not have specific information regarding the size of the putative class; however, "[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." 1 Conte & Newberg, *supra*, at § 3:3; *see also Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993).

The evidence before this Court suggests that the class would be a huge one. Defendant Hunter has filed with the Court a 379-page list of all convicted felons who have been removed from Jefferson County's voting rolls since 1996. Thousands of individuals appear on this list. While there is no similar information regarding any of Alabama's other 66 counties, there is also no doubt that the members of the proposed class number in the thousands, if not tens of thousands, scattered throughout the State.

With these considerations in mind, the Court concludes that the requirement of Rule 23(a)(1) has easily been met.

(2). Rule 23(a) – Requirement of Commonality

Commonality, the second requirement under Rule 23, requires the plaintiffs to show that there exist common issues of law or of fact. The Alabama Supreme Court has recognized that a "common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Cheminova*, 779 So. 2d at 1180.

In the *Fourth Amended Complaint*, the following issues are asserted to be common:

1. Whether defendant Worley instructed voter registrars to refuse, and whether voter registrars in fact refused, to register members of the plaintiff class to vote;

2. Whether the defendants' actions violated the rights guaranteed to the plaintiff class by Alabama's constitution and laws;

3. Whether the defendants violated the rights guaranteed to the plaintiff class by federal laws; and

4. Whether members of the plaintiff class are entitled to declaratory and injunctive relief.

On reflection, this Court concludes that the overriding legal issues common to all members of the putative plaintiff class can be summarized by asking two questions: first, how should "moral turpitude," as that term is found in Amendment 579 to the Alabama Constitution, be defined; and second, who has the constitutional authority to establish such a definition? Because the answers to these questions will impact on the ability of all class members to register to vote, the commonality requirement is easily satisfied.

(3). Rule 23(a) – Requirement of Typicality

Typicality, the third requirement under Rule 23(a), "focuses on the interests of the class representatives." *Ex parte Government Employees Ins. Co.*, 729 So. 2d 299, 304 (Ala. 1999); *see also Warehouse Home Furnishing Distrib., Inc. v. Whitson*, 709 So. 2d 1144, 1149 (Ala. 1997)("[t]ypicality exists when a plaintiff/class representative's injury arises from or is directly related to a wrong to a class and that wrong to the class includes the wrong to the plaintiff").

The common issues in this action confront plaintiffs Gooden and Thomas just as they confront the members of the class they seek to represent. When he filed this action, Gooden stood in the same position as the class members, and he shared claims with the class members that raise such common issues. Plaintiff Thomas still shares such claims. By bringing this action to pursue their own self-interest, plaintiffs Gooden and Thomas are also pursuing the interests of the absent class members. If Gooden and Thomas have suffered legal injury, it was as a result of a generally, if not universally, observed policy at the time of refusing to register any convicted felon in this State. Even with recent developments that have modified the practice of voter registration, the interests of the named plaintiffs in clarifying and enforcing their civil rights are identical to the interests of the class members.

For these reasons, the typicality requirement of Rule 23(a) is satisfied.

(4). Rule 23(a)–Requirement of Adequacy

The Alabama Supreme Court has explained the "adequacy-of-representation" requirement of Rule 23(a) as follows:

> The adequacy-of-representation requirement "is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." *General Tel. Co. v. EEOC*, 446 U.S. at 331, 100

> S. Ct. 1698. It also involves questions regarding whether the attorneys representing the class are "qualified, experienced, and generally able to conduct the proposed litigation." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir.1985). Adequacy of representation requires that the class representative "have common interests with unnamed members of the class" and that the representative "will vigorously prosecute the interests of the class through qualified counsel." *American Med. Sys.*, 75 F.3d at 1083 (*quoting Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.1976)); *see also General Tel. Co. v. Falcon*, 457 U.S. at 157, 102 S. Ct. 2364.

Cutler v. Orkin Exterminating Co., Inc., 770 So. 2d 67, 71 (Ala. 2000).

No conflict of interest appears -- plaintiffs Gooden and Thomas share with other class members the interest in having their civil rights clarified so that they may know whether they can properly be registered to vote. Further, counsel for the plaintiffs possess the needed skill and expertise to vigorously prosecute the interests of the proposed class, as made clear by the history of their legal practice described in the plaintiffs' *Submission of Additional Evidence*, filed on May 8, 2006.

The adequacy requirement of Rule 23(a) has been met.

(5). Rule 23(b)(2) -- the Appropriateness of Injunctive or Declaratory Relief

In addition to meeting the elements of Rule 23(a), the plaintiffs must meet one of the prongs of Rule 23(b) before certification is proper. The plaintiffs here base their class action on Rule 23(b)(2), which "was drafted specifically to facilitate relief in civil rights suits." 8 Conte & Newberg, *supra*, § 25:20. Especially since the plaintiff class would seek only declaratory and injunctive relief, rather than money damages, this action is well-suited for class treatment under Rule 23(b)(2).

(6). Considerations Involving the Proposed Defendant Class

The plaintiffs seek certification of not only a plaintiff class but a defendant class as well. Defendant Hunter does not oppose certification of a defendant class of voting registrars, but this Court must still undertake a "rigorous analysis" to decide whether

certification is proper.

The propriety of certifying a defendant class in litigation similar to this one is discussed in 8 Conte & Newberg, *supra*, § 25:30:

> Defendant classes in criminal justice class action suits are an appropriate means of enhancing the effectiveness of a judgment and facilitating the administration of class relief when a practice is found to violate the civil and constitutional rights of a class of persons. When the attorney for a class is confronted with a practice that has many administrative facets . . . a defendant class may be necessary to ensure the cooperation of all responsible officials in the implementation of a plan to eliminate the practice. Likewise, in a situation which many autonomous bodies such as courts or municipalities are engaged in administering a statutory scheme violative of constitutionally protected rights, a defendant class may be useful, depending on the degree of coordination and cohesiveness of the agencies involved.

One example of a case involving plaintiff and defendant classes is *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655 (1974), as described by the syllabus found at the beginning of the Supreme Court's decision:

> After the three individual respondents, who had been convicted of felonies and had completed their sentences and paroles, were refused registration to vote in three different California counties respectively because of their felony convictions, they brought a class petition, on behalf of themselves and all other ex-felons similarly situated, for a writ of mandate in the California Supreme Court, naming as defendants the Secretary of State and the three county election officials who had denied them registration "individually and as representatives of the class of all other" county election officials in the State, and challenging the constitutionality of respondents' disenfranchisement on the ground, *inter alia*, that provisions of the California Constitution and the implementing statutes that disenfranchised ex-felons denied them equal protection.

418 U.S. at 24, 94 S.Ct. at 2656; *see also Callahan v. Wallace,* 466 F.2d 59 (5th Cir.

1972)(involving plaintiff class against defendant class to end practice of adjudicating traffic violations before magistrates who have a financial interest in the outcome by recovering a portion of fines as compensation); *McKay v. County Election Com'rs for Pulaski County*, 158 F.R.D. 620 (E.D. Ark.1994)(in a suit against county election commissioners in Arkansas alleging violations of state and federal statutes concerning accessibility to polling places for disabled voters, the district court concluded that both plaintiff and defendant classes were properly certified).

Thoughtful analysis of the issues raised by certifying a defendant class is found in *Redhail v. Zablocki*, 418 F.Supp. 1061 (D.C.Wis. 1976), *aff'd*, 434 U. S. 374, 98 S.Ct. 673 (1978). A plaintiff class in that action challenged the constitutionality of a Wisconsin statute that required certain residents to obtain court permission before they could marry. The relief sought included a declaratory judgment that the statute was unconstitutional and an injunction restraining its enforcement. Having determined by prior order that a plaintiff class was proper, the court turned to whether the claims could be maintained against a defendant class:

> Plaintiffs seek to have this action maintained as a class action as to defendants under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The defendant class is defined in the complaint as "all county clerks of counties within the State of Wisconsin, all of whom are required by § 245.10(1) Wis.Stats. (1971) to refuse to issue marriage licenses to members of the class of plaintiffs without a court order." . . .
>
> Rule 23(a) prescribes the essential prerequisites that must be satisfied for any class action. They are satisfied here. First, the class of defendants, consisting of the seventy-two county clerks in Wisconsin, is "so numerous that joinder of all members is impracticable."Rule 23(a)(1). Next, there is a question of law common to all the members of the class the constitutionality of the challenged statute. Thirdly, the claims and defenses of the representative party, defendant Zablocki, are "typical of the claims or defenses of the class," Rule 23(a)(3), since Zablocki's contention that his action in refusing a marriage license to Redhail was justified by the statute would undoubtedly be asserted by the other county clerks. Finally, defendant Zablocki is a representative party who "will fairly and adequately protect the interests of the class," Rule 23(a)(4). Not only is defendant Zablocki's interest identical to that of the other county clerks,

> but the attorney representing him is from the Milwaukee County Corporation Counsel's office which is experienced in conducting federal litigation. Furthermore, the Attorney General of Wisconsin has taken an active part in this action, urging that the challenged statute be upheld.

Id. at 1065-66. The *Redhail* court then proceeded to analyze the circumstances under Fed.R.Civ.P. 23(b)(2):

> A Rule 23(b)(2) class action is particularly appropriate in civil rights cases, although the rule is not so limited. 3B Moore's Federal Practice ¶ 23.40, at 23-651 23-654 (2d ed. 1974); C. Wright, Law of Federal Courts, § 72, at 312 (2d ed. 1970); Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 102 (1966). While the language of Rule 23(b)(2) does not expressly provide for its use where declaratory or injunctive relief is sought against a class, such class actions have been ordered. *Danforth v. Christian*, 351 F.Supp. 287 (W.D. Mo.1972); *Rakes v. Coleman*, 318 F.Supp. 181 (E.D. Va.1970); *Washington v. Lee*, 263 F.Supp. 327 (M.D. Ala.1966), *aff'd sub nom. Lee v. Washington*, 390 U.S. 333, 88 S.Ct. 994, 19 L. Ed.2d 1212 (1968). *See*, 3B Moore's Federal Practice ¶ 23.40, 1974 Supplement, at 86. Where, as here, a statute with statewide application is challenged on the ground of its unconstitutionality, allowing the action to proceed against the class of officials charged with its enforcement is in accordance with the interests of judicial administration and justice which Rule 23 is meant to further.

Id. at 1066.

This Court recognizes that the adequacy-of-representation requirement of Rule 23(a) is designed to guarantee due process for members of the class, who are absent from the court but whose interests are at issue. The adequacy-of-representation requirement is especially important in defendant class actions because of the potential liability of all members of the class. Here, however, the members of the defendant class do not face any personal liability because the plaintiffs seek only a declaration of legal rights and injunctive relief to protect those rights.

Defendant Hunter is represented by experienced, capable counsel from the office of

the county attorney for Jefferson County. Further, counsel from the Alabama Attorney General's office, representing the State defendants, have been diligent in defending against the plaintiffs' claims here. There is no indication that defendant Hunter has interests contrary to those of absent class members or that she would be less than diligent in defending those interests. There is not even a suggestion that the plaintiffs have selected a weak or ill-suited representative to stand for the interests of the defendant class.

The Court here finds that the requirements of Rule 23, as it pertains to the proposed defendant class, are met. With regard to numerosity, it appears that the proposed defendant class would comprise approximately 200 individuals, working in every county of the State.[6] The common issues identified earlier would apply equally to how every member of the defendant class performs his or her official duties. Defendant Hunter's position appears no different from that of any other voter registrar, and no conflict is evident.

The requirements of Rule 23 have been met with regard to the proposed defendant class, which may be properly certified.

C. The Merits of this Action

(1). Introductory Analysis

Having addressed class certification, the Court now turns to the merits of this litigation. With cross motions for summary judgment pending, the parties' stipulations and the other evidence before the Court demonstrate that no dispute of material fact exists in this matter. Having reviewed the parties' filings and having considered the evidence carefully, this Court concludes that it may proceed to a final adjudication of this dispute.

The starting point is Amendment 579 to the Alabama Constitution. Sub-paragraph (a) of that Amendment begins with the following sentence:

> Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her

[6] Reiterating one of the parties' stipulations, "[e]ach county in Alabama has a board of three voter registrars, except Jefferson, Barbour, and Talladega counties. Jefferson County has one registrar, and both Talladega County and Barbour County have four." There are a total of 67 counties, meaning that the total number of registrars (assuming no vacancies) is 201.

> residence.

This establishes the general right to vote for every United States citizen over 18 years of age who resides in the county in which he or she seeks to register. Sub-paragraph (b) of Amendment 579 qualifies this right:

> 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.

Provisions in both sub-paragraphs (a) and (c) of Amendment 579 provide the Alabama Legislature with the authority to regulate voter registration:

> The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting. The Legislature shall, by statute, prescribe a procedure by which eligible citizens can register to vote.
>
> * * *
>
> The Legislature shall by law provide for the registration of voters, absentee voting, secrecy in voting, the administration of elections, and the nomination of candidates.

Pursuant to such authority (or to that of predecessor provisions), the Legislature has enacted laws regarding the voter registration process. Absent, however, is any legislation that provides guidance as to what constitutes a crime involving moral turpitude. This Court has been unable to locate any statute in which the Legislature expressly defines or categorizes such crimes.[7] Instead, the Legislature has left the matter to the individual voter registrars of this State, who must each make independent decisions about which crimes involve moral

[7] Fairly read, *Ala. Code* §15-22-36(e)(1) might be regarded as specifically identifying crimes involving moral turpitude, although it does not purport to expressly make that determination and appears limited to the purposes of that statute.

turpitude.[8]

(2). Separation of Powers Concerns

Rather than trying to answer the question of what is moral turpitude, this Court perceives that the proper starting point is to determine who has the authority to define "a felony involving moral turpitude." At the April 28 hearing, the State defendants argued for a process by which the voting registrars would assume the role of gatekeeper to decide whether a felon may properly register to vote. A citizen disappointed with a registrar's determination could then file an appeal to the circuit court under *Ala. Code* §17-4-124; in that situation, a circuit judge would then decide whether the crime involved moral turpitude.[9]

Secretary of State Worley understandably has taken the position that she lacks the authority to determine which crimes involve moral turpitude. As evidenced by Exhibit 11 to the *Stipulation of Undisputed Facts*, the Secretary of State sought guidance from the Alabama Attorney General's office in 2005, including a request for a list specifying which felonies involve moral turpitude.

Defendant Hunter does not contend that her office has the ability to categorize which crimes involve moral turpitude, as confirmed by the testimony of Ms. Colvin and Attorney Lawson that the county attorney for Jefferson County is currently being asked to make such determinations.

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[8] At the April 28 hearing, counsel for the State defendants discussed this situation:

> The way this has been set up in Alabama's legislature is the decision initially rests with the Board of Registrars who are, with all due respect, probably very unqualified given that their only qualification is a high school education to make a determination of a matter of law.

(Transcript of April 28, 2006 hearing at p. 15). This Court agrees with that characterization of the situation. The registrars of this State are presumably diligent and conscientious public servants, but they are not required to have the legal education needed to make fine-line judgments about felony classifications.

[9] In *Defendants' Supplemental Brief*, the State defendants advise the Court of recent legislation, Act 2006-570, which becomes effective on January 1, 2007, assuming that Justice Department pre-clearance is obtained. This Act would revise what is now §17-4-124 (re-codifying it as §17-3-55) to provide that an appeal would initially lie with the probate court in the county where the petitioner resides, with further rights of appeal to the circuit court and the Alabama Supreme Court. The reason for this change is not obvious, especially since under *Ala. Code* §12-13-31, a probate judge need not have a law license. *See also* Amendment 328 to the Alabama Constitution of 1901, § 6.07 (By local law, however, the probate judges in Jefferson and Mobile counties are required to hold law licenses).

In its March 18, 2005 letter to the executive director of the Board of Pardons and Paroles, the Office of the Attorney General acknowledged that it "cannot provide an exhaustive list of every felony involving moral turpitude. . . ." (*Stipulation of Undisputed Facts*, Ex. 9). The letter did recognize prior court decisions in which particular crimes have been deemed to involve moral turpitude. According to the letter, there are approximately 15 felonies that have been declared to involve moral turpitude, including murder, rape, burglary, theft, and bigamy. The Attorney General's letter also specifies a handful of felonies that do not involve moral turpitude, such as assault, aiding a prisoner to escape, simple possession of marijuana and felony driving under the influence. It does not identify any decisions addressing how federal crimes or felonies from other jurisdictions are to be regarded.

From these facts, the defendants apparently perceive the State's courts as the proper authority to decide which crimes involve moral turpitude, notwithstanding the reliance on *post hoc*, subjective determinations to answer the question. If the defendants are correct, then -- given that this is a class action of all felons who are not registered to vote, and given the declaratory and injunctive relief that the class is seeking -- this Court could conceivably address the situation by promulgating an authoritative, exhaustive list of crimes involving moral turpitude. For the reasons that follow, this Court may not do so.

This conclusion results from the premise that disenfranchisement is a criminal penalty. The reality of the situation suggests that a deprivation of a right otherwise afforded to citizens of this State, solely and directly as a result of a criminal conviction, can only be a penalty for that conviction. This premise is not without challenge, however, as some have contended that such disenfranchisement statutes are non-penal in nature, instead serving as a means of civil regulation of the voting process.

A precedent for that stance is *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (1958). In *dicta* found in a plurality opinion, Chief Justice Warren described disenfranchisement statutes as an example of "a nonpenal exercise of the power to regulate the franchise." 356 U.S. at 97, 78 S.Ct. at 596. His view was that "a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." 356 U.S. at 96, 78 S.Ct. at 595-96.

The idea that disenfranchisement is a method of regulating the franchise rather than punishing convicted criminals has been criticized by several commentators, however, as exemplified by the following analysis in Shapiro, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L. J. 537, 561 (1993).

> Disenfranchisement is most often defined as one of a number of nonpunitive civil disabilities that accompany a criminal

> conviction. Proponents of this view claim that criminal disenfranchisement protects "the purity of the ballot box" in two ways. First, it prevents offenders from voting retributively against the criminal justice officials who prosecuted and convicted them. However, the Supreme Court has stated that it is unconstitutional for a state to fence out a class of voters because of the way they might vote [*citing Carrington v. Rash*, 380 U.S. 89, 94 (1965)]. Second, defenders of the nonpunitive view claim that offenders are more likely to commit election crimes than are other citizens and that disenfranchisement of offenders is necessary, therefore, to safeguard the integrity of voting. But courts have noted that states already have more effective ways of deterring election fraud, including penal codes against these offenses.

See also Ewald, Civil Death: The Ideological Paradox of Criminal Disenfrnachisement Law in the United States, 2002 Wis. L. Rev. 1045, 1058-59 (2002); Karlan, Ballots and Bullets: the Exceptional History of the Right to Vote, 71 U. Cin. L. Rev. 1345, 1367-68 & n. 136 (2003).

Since the *Trop* decision, moreover, the U.S. Supreme Court has paid considerably less deference to similar kinds of rationales for restricting registration in other contexts. *See Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972)(state laws requiring would-be voters to comply with residency requirements do not further any compelling state interest and violate the equal protection clause of the Fourteenth Amendment, notwithstanding a "purity of the ballot box" rationale); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 631-32, 89 S.ct. 1886, 1892 (1969) (despite a purported state interest in limiting school district elections to interested parties who are directly affected, a law restricting the right to vote in local school board elections was not narrowly tailored to serve that interest).

The "purity of the ballot box" view appears to have been first articulated in *Washington v. State*, 75 Ala. 582 (1884), where the Alabama Supreme Court held that disenfranchising those convicted of certain felonies, in accordance with a provision of the Alabama Constitution of 1875, was not a penalty so as to implicate the federal constitution's prohibition of *ex post facto* laws. The rationale for the decision was the court's conclusion that voting was a privilege rather than a right. This concept of voting was subsequently established by the Alabama Constitution of 1901, at Article I, Section 33. The constitutionality of this provision, while never before considered, is called into doubt given the motivations surrounding many of the provisions of the 1901 Constitution. *See generally*

Underwood v. Hunter, 730 F.2d 614 (11th Cir. 1984).[10] In any event, this interpretation of voting can no longer be good law in light of sub-paragraph (a) of Amendment 579, which provides the right to vote to all adult citizens residing in this State. *See also Reynolds v. Sims*, 377 U.S. at 562, 84 S.Ct. at 1381("since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

In short, this Court regards the whole "purity of the ballot box" rationale as nothing more than a contrived rationalization to cover up efforts to prevent black citizens from voting, as poll taxes and literacy tests once did. It thus may not be regarded as a legitimate basis for disenfranchising convicted felons. This Court also rejects any argument that such disenfranchisement would prevent voter fraud, agreeing with the commentary that the "[p]revious commission of a felony does not logically lead to future commission of electoral fraud, nor does previous non-commission of a felony rule out the possibility of future electoral fraud; one has no bearing on the other." Note, Voting – Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws, 89 Minn. L. Rev. 231, 261 (2004). No rational or legitimate state interest is served by disenfranchising convicted felons other than as a form of punishment for the commission of certain crimes.

Observing *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, this Court does not take issue with a penal view of a disenfranchisement law such as that found in sub-paragraph (b) of Amendment 579. That being so, however, this Court must hold that it lacks the constitutional authority to decide which crimes involve moral turpitude. Because disenfranchisement is a criminal penalty, flowing directly and solely from a conviction, only the Alabama Legislature may determine the crimes to which this penalty attaches.

Section 43 of the Alabama Constitution of 1901 establishes the separation-of-powers doctrine in our state government:

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never

[10] The president of the 1901 Alabama constitutional convention declared to his fellow delegates: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, vol. 1, at p. 8 (1901)(statement of John B. Knox).

> exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

The Alabama Supreme Court recently recognized that the courts must not only exercise care to avoid usurping the functions of the other branches of government but also assume primary responsibility for protecting the autonomy of each branch. *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*, 912 So.2d 204, 212 (Ala. 2005), *quoting Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907, 911 (Ala.1992).

It is axiomatic in our modern American jurisprudence that the Legislature alone has the authority to "define crime and fix the punishment for the commission thereof. . . ." *Woco Pep Company v. City of Montgomery*, 213 Ala. 452, 454, 105 So. 214, 215 (Ala. 1925); *accord McDavid v. State*, 439 So. 2d 750, 751 (Ala. Cr. App. 1983); *State v. Campbell*, 21 Ala. App. 303, 304, 107 So. 788, 789 (Ala. App. 1926). The U.S. Supreme Court, for example, has before recognized that "defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486-87, 68 S. Ct. 634, 636 (1948); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 486, 113 S. Ct. 2194, 2200 (1993)("the primary responsibility for fixing criminal penalties lies with the legislature"), *citing Rummel v. Estelle*, 445 U.S. 263, 274, 100 S. Ct. 1133, 1139 (1980); *Gore v. United States*, 357 U.S. 386, 393, 78 S. Ct. 1280, 1284 (1958).

This view has been codified at *Ala. Code* § 13A-1-4, which provides that "[n]o act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance." Further, while under *Ala. Code* §13A-5-2(e), a court may exercise its authority to "forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt or impose any other lawful civil penalty" by including an order to such effect as a part of a convicted defendant's sentence, the commentary to that statute emphasizes that "[s]uch penalty could be part of the judgment only where the statute that authorizes the penalty permits the procedure." It is the Legislature's prerogative to determine the penalties for every crime. This Court would usurp that constitutional authority if it were to catalogue those crimes for which disenfranchisement may properly be imposed.

Our Supreme Court has made clear that such judicial activism has no place in our judicial system. The "equity funding cases" exemplify the kind of judicial restraint that is instead mandated here. In *Ex parte James*, 713 So. 2d 869 (Ala. 1997), a plurality opined that while the judiciary held an abstract authority to remedy unconstitutional deficiencies in Alabama's schools, it would not attempt this task, instead recognizing that "the legislature . . . bears the primary responsibility for devising a constitutionally valid public school

system." *Id.* at 882 (quotations omitted). Accordingly, the opinion vacated the trial court's remedial plan and originally directed the Alabama Legislature to formulate a constitutional education system. *Id.* at 882. That order was later vacated, and ultimately in *Ex parte James*, 836 So. 2d 813 (Ala. 2002), a plurality of the Court found that the issues pertaining to school financing were non-justiciable, thereby precluding continued court oversight:

> Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly, compelled by the authorities discussed above -- primarily by our duty under § 43 of the Alabama Constitution of 1901 -- we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we "never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const.1901, § 43 (emphasis added).

Id. at 819. Any remedy that this Court might fashion – in the exercise of deciding which crimes involve moral turpitude – would similarly "involve a usurpation of that power entrusted exclusively to the Legislature."

Although Alabama's appellate courts have before addressed cases that raise the issue of which crimes involve moral turpitude, a review of these cases – as identified in the exhibit to the plaintiffs' *Submission of Additional Evidence* – reveals that in none did a party raise a separation-of-powers argument in an effort to preclude such a judicial determination. With this issue as the foremost concern here, however, this Court declines to engage in the kind of judicial activism required to comprehensively answer the question posed in this case. This Court must instead defer to the other branches of our state government to enact whatever legislation they deem proper to effectuate the mandate of sub-paragraph (b) of Amendment 579 to the Alabama Constitution.

This conclusion is supported by explicit provisions of Amendment 579 recognizing the Legislature's suzerainty to implement its terms. Again quoting from sub-paragraph (a) thereof, "[t]he *Legislature* may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting" (emphasis added). That constitutional grant of authority is precisely what is at issue here.

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

(3). Due Process Issues

Even were the separation-of-powers doctrine of no concern, the current situation raises a second constitutional infirmity. The impossibility of defining -- with any reasonable precision -- the term "moral turpitude," as found in Amendment 579, gives rise to significant due process concerns.

At the time Amendment 579 was enacted, Alabama's appellate courts had made several efforts to define this term. For example, in *Ex parte McIntosh*, 443 So.2d 1283, 1284 (Ala. 1983), the Supreme Court relied on the following definition found in C. Gamble, McElroy's Alabama Evidence, § 145.01(7) (3d ed. 1977):

> The Supreme Court of Alabama has defined the term "moral turpitude" on many occasions and the following are the most commonly found definitions. Moral turpitude signifies an inherent quality of baseness, vileness and depravity. It is immoral in itself, regardless of the fact that it is punished by law. Therefore, an offense for conviction of which a witness' credibility is lessened must be *mala in se* and not *mala prohibitum.*

Similarly, in *Williams v. State*, 55 Ala. App. 436, 437, 316 So. 2d 362, 363 (Ala. Crim. App. 1975), the Court of Criminal Appeals relied on a summary of the meaning of moral turpitude found in McElroy, Law of Evidence in Alabama, Vol. I, § 145.01(7):

> "Moral turpitude signifies an inherent quality of baseness, vileness, depravity." *Gillman v. State*, 165 Ala. 135, 51 So. 722. Moral turpitude 'implies something immoral itself, regardless of the fact whether it is punishable by law. The doing of the act, and not its prohibition by statute fixes the moral turpitude.' *Pippin v. State*, 197 Ala 613, 73 So. 340. Moral turpitude means 'something immoral in itself. * * * It must not be merely *Mala*

> *prohibita*, but the act itself must be inherently immoral. The doing of the act itself and not its prohibition by statute, fixes the moral turpitude. * * * It is the nature of the act itself, and not its legislative characterization or punishment which must be the test in determining whether or not it involves moral turpitude." *Ex Parte Marshall*, 207 Ala 566, 93 So. 451 (471).

To be blunt, such definitions provide no meaningful guidance on how to distinguish between those felonies that do involve moral turpitude and those that do not. This Court agrees with the conclusion of one commentator that "'moral turpitude' is an elusive, vague and troublesome concept in the law, incapable of precise definition; such is evidenced by the myriad of definitions and interpretations in judicial opinions." Wilson, The Definitional Problems with "Moral Turpitude," 16 J. Legal Prof. 261 (1991).[11]

Nor is this problem a recent one. Back in 1979, a member of the Morgan County Board of Registrars requested an attorney general's opinion, framing her request as follows:

> I would like to request an opinion from your office concerning the disenfranchisement of voters for the conviction of certain offenses. I am especially interested in those crimes involving moral turpitude.
>
> The disqualifying offenses are listed in Article 8, Section 182 of the 1901 Constitution *[now repealed and replaced by the new Section 177]*. I feel certain that some of these offenses may no longer be disqualifying due to recent federal or state court judgments. I am in hopes that your office might provide me with some form of an updated list.
>
> *It has always been difficult and confusing to determine those crimes involving moral turpitude which might keep someone from voting. I would especially appreciate any help or some form of a list of these crimes.*

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[11] This Court is reminded of former Justice Potter Stewart's famous quip in *Jacobellis v. State of Ohio*, 378 U.S. 184, 84 S. Ct. 1676 (1964). After acknowledging the difficulty in intelligibly defining obscenity, Justice Stewart figuratively threw his hands up in the air by proclaiming "[b]ut I know it when I see it, and the motion picture involved in this case is not that." 378 U.S. at 197, 84 S. Ct. at 1683 (Stewart, J., concurring). Given the difficulties in defining "moral turpitude," it must be wondered whether any judge or other official can honestly arrive at even that kind of conclusion.

192 Ala. Op. Atty. Gen. 16 (1979)(emphasis added). The attorney general's response was along the lines of that recently provided to the executive director of the Board of Pardons and Paroles, discussed in the parties' stipulations of fact, *supra*, in that it failed to provide a workable definition and instead resorted to listing those reported appellate decisions that have identified certain crimes one way or the other.

Under the current process, those attempting to interpret and apply sub-paragraph (b) of Amendment 579 must make *post hoc* decisions, using subjective assessments of what felonies are particularly immoral so as to fall in the category of moral turpitude. This Court has no doubt that when assistant county attorney Theo Lawson attempts to undertake that task, for example, he does so with skill, diligence, and a conscientious desire to do his job correctly. His decisions, however, may differ from those of an equally skilled and conscientious official undertaking the same task elsewhere. A crime that one may regard as involving moral turpitude, the other may regard as not. The problem is, if anything, made worse if the decision-makers are voter registrars who lack the familiarity that attorney Lawson possesses with our criminal justice system. Nor can a court review any such decision without using its own subjective assessment, armed with only the language from the above-quoted cases that shine precious little light on the matter.

At this juncture, the Eleventh Circuit's observation of this problem in the *Underwood v. Hunter* decision bears repeating:

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

730 F.2d at 616 n. 2. There are numerous such serpents, as shown by the following examples:

(A). Contrast *Finley v. State*, 661 So. 2d 762 (Ala. Crim. App. 1995) -- which held that felony DUI does not involve moral turpitude – with *Jarrard v. Clayton County Board of Registrars*, 262 Ga. 759, 425 S.E.2d 874 (1993), where the Georgia Supreme Court found that multiple convictions of felony DUI would render the crime to be one involving moral turpitude. If the distinction is explained by the number of convictions, how many are needed to transmogrify the crime into one of moral turpitude?

(B). The crime of moral turpitude in *Williams v. State*, quoted above, was sodomy. The Court of Criminal Appeals concluded there that homosexual conduct, even if consensual, was a crime involving moral turpitude, characterizing the offense "as abominable, detestable, unmentionable, and too disgusting and well known to require other definition or further details or description." 316 So.2d at 365. Today, while "deviate sexual intercourse" -- defined in *Ala. Code* §13A-6-60 – is still illegal, it is now only a misdemeanor under *Ala. Code* §13A-6-65(a)(3). Under changing societal standards, it would no longer serve as the basis of disqualification under the language of Section 177(b) of the Alabama Constitution.

(C). Selling marijuana is a crime of moral turpitude. *Jones v. State*, 527 So. 2d 795 (Ala.Crim.App. 1988). Selling cocaine isn't, at least not according to *Pippin v. State*, 197 Ala. 613, 73 So. 340 (Ala. 1916).[12]

(D). Here in Alabama, simple possession of marijuana is not a crime of moral turpitude. See *Ex parte McIntosh*, 443 So. 2d 1283 (Ala. 1983). Conceptions of right and wrong apparently depend on where you live, however. In Oklahoma, for example, a misdemeanor charge of simple possession of marijuana is a crime of moral turpitude, at least in the context of disciplinary proceedings against an attorney. See *State ex rel. Oklahoma Bar Ass'n v. Denton*, 598 P.2d 663 (Okla. 1979).

(E). In *Meriwether v. Crown Inv. Corp*., 289 Ala. 504, 268 So. 2d 780 (Ala. 1972), the Alabama Supreme Court concluded that income tax evasion was a crime of moral turpitude. That Court later held that "the failure to pay income taxes, as opposed to the failure to file an income tax return," is not a crime involving moral turpitude. *Clark v. Alabama State Bar*, 547 So.2d 461 (Ala. 1989). When it comes to assessing the "quality of baseness, vileness and depravity," this Court has difficulty distinguishing between these crimes.

This Court's disagreement is not with any prior determination of what is, or is not,

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[12] The *Pippin* decision has never been overruled. In *Ex parte McIntosh*, 443 So. 2d 1283 (Ala. 1983), it was suggested that the *Pippin* decision resulted from the fact that selling cocaine at that time was a misdemeanor. That, in and of itself, demonstrates how fluid society's conceptions of right and wrong can be. It should also be pointed out that in *Ex parte Bankhead*, 585 So. 2d 112, 122 (Ala. 1991), the court recognized that a crime involving "the unauthorized sale of a controlled substance" was a crime of moral turpitude. It cited no authority for this proposition, and the "controlled substance" at issue there was unspecified.

moral turpitude. The problem is the uncertainty that would inevitably result from differing "moral standards," which we are forced to employ in the absence of statutory pronouncements making clear to all citizens which crimes are those that would subject the guilty to the additional penalty of loss of voting rights.

In *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So. 2d 82 (Ala. 1983), the Supreme Court recognized that every citizen of Alabama enjoys the right to due process as guaranteed under the Alabama Constitution of 1901, Article 1, Sections 6 and 13. This right applies in both civil actions and criminal proceedings. *Id.* at 84, *citing Pike v. Southern Bell Telephone and Telegraph Co.*, 263 Ala. 59, 81 So. 2d 254 (1955).

Due process requires that a State provide meaningful standards to guide the application of its laws. *See Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858 (1983). "The touchstone of due process is protection of the individual against arbitrary action of government." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986), *quoting Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233 (1889).

In the *Ross Neely* case, the Alabama Supreme Court first noted that this right is violated when a statute or regulation is unduly vague, unreasonable, or overbroad, then quoted from *Kahalley v. State*, 254 Ala. 482, 48 So. 2d 794 (1950), in which a criminal misdemeanor statute was found to be unconstitutionally vague:

> [L]egislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement.

437 So.2d at 84. The overbreadth doctrine has historically applied when First Amendment rights of free speech are at issue. The Alabama Supreme Court has recognized a broader application of this doctrine, however, to protect a citizen's due process rights from overbroad legislation, as recognized in *Scott & Scott, Inc. v. City of Mountain Brook*, 844 So. 2d 577 (Ala. 2002), *citing Ross Neely*, 437 So. 2d at 85.

In *Jordan v. De George*, 341 U.S. 223, 71 S. Ct. 703 (1951), the United States Supreme Court addressed the issue of whether the crime of conspiracy to defraud the U. S. Government of taxes on distilled spirits involved moral turpitude so as to require deportation of an alien who had been twice convicted and sentenced for such a crime. The majority of the Court rejected the petitioner's argument that the statutory phrase fell afoul of the void-

for-vagueness doctrine. The dissent – Justice Jackson writing for himself and Justices Black and Frankfurter – refuted the majority opinion in such compelling fashion that extended quotation thereof is helpful:

> What the Government seeks, and what the Court cannot give, is a basic definition of "moral turpitude" to guide administrators and lower courts. (341 U. S. at 233, 71 S. Ct. at 709).
>
> Congress did not see fit to state what meaning it attributes to the phrase "crime involving moral turpitude." It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral. The Government confesses that it is "a term that is not clearly defined," and says: "The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved." (341 U. S. at 234-35, 71 S.Ct. at 709-10).
>
> Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard. The parties agree that the phrase is ambiguous and have proposed a variety of tests to reduce the abstract provision of this statute to some concrete meaning. (341 U. S. at 235, 71 S. Ct. at 710).
>
> Respondent suggests here, and the Government has on other occasions taken the position, that the traditional distinction between crimes *mala prohibita* and those *mala in se* will afford a key for the inclusions and exclusions of this statute. But we cannot overlook that what crimes belong in which category has been the subject of controversy for years. This classification comes to us from common law, which in its early history freely blended religious conceptions of sin with legal conceptions of crime. This statute seems to revert to that practice. (341 U. S. at 236-37, 71 S. Ct. at 710-11).
>
> The Government, however, offers the *mala prohibita*, *mala in*

> *se* doctrine here in slightly different verbiage for determining the nature of these crimes. It says: "Essentially, they must be measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral." Can we accept "the moral standards that prevail in contemporary society" as a sufficiently definite standard for the purposes of the Act? This is a large country and acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country, nor in all levels of "contemporary society." How should we ascertain the moral sentiments of masses of persons on any better basis than a guess? (341 U.S. at 237-38, 71 S. Ct. at 711).
>
> There have, however, been something like fifty cases in lower courts which applied this phrase. No one can read this body of opinions and feel that its application represents a satisfying, rational process. If any consistent pattern of application or consensus of meaning could be distilled from judicial decision, neither the Government nor the Court spells it out. Irrationality is inherent in the task of translating the religious and ethical connotations of the phrase into legal decisions. The lower court cases seem to rest, as we feel this Court's decision does, upon the moral reactions of particular judges to particular offenses. What is striking about the opinions in these 'moral turpitude' cases is the wearisome repetition of cliches attempting to define "moral turpitude,". . . . But the guiding line seems to have no relation to the result reached. The chief impression from the cases is the caprice of the judgments. How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law. (341 U.S. at 239-40, 71 S. Ct. at 712).
>
> Uniformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds. (341 U. S. at 242, 71 S. Ct. at 713).

This Court recognizes that it is relying on the dissent in the *Jordan v. De George* case. The majority found that under the circumstances of that case, no constitutional violation was

evident. Our jurisprudence was much different at the time of that case, however. The "separate but equal" doctrine of *Plessey v. Ferguson* was still good law, for example, and there have been numerous decisions of the U. S. Supreme Court that have subsequently broadened the parameters of due process rights.

In *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976), the U. S. Supreme Court recognized that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *quoting Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961). Rather than a fixed notion, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972).

This view is exemplified by the decision in *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018 (1970). In *Williams*, the U. S. Supreme Court invalidated on equal protection grounds a venerable practice of extending prison terms beyond the statutory maximum when a defendant was unable to pay a fine or court costs, explaining as follows:

> [N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .
>
> The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country.

Id., at 239-240, 90 S.Ct. at 2021.

Because this analysis focuses on due process considerations under the Alabama Constitution, moreover, this Court has the leeway to recognize developments in the law of due process in the 55 years since the *Jordan v. De George* decision. It is therefore proper to rely on the current state of the law in deciding the due process implications involved.

Mathews described a test involving three factors for determining whether a particular procedure is constitutionally adequate: (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the governmental interest in

avoiding these additional procedures. *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903.[13]

The private interest at stake is the right to vote, which – as was quoted at the beginning of this order -- has been recognized in *Reynolds v. Sims* as "the essence of a democratic society." The U. S. Supreme Court later characterized the right to vote as "a civil right of the highest order." *Oregon v. Mitchell*, 400 U.S. 112, 139, 91 S. Ct. 260, 272 (1970). This right implicates others, moreover. Under *Ala. Code* § 12-16-60, a citizen is qualified to serve on a jury only if he or she "has not lost the right to vote by conviction for any offense involving moral turpitude." Several appellate courts have also recognized that the right to sit on a jury is one of our fundamental civil rights. *See United States v. Maines*, 20 F.3d 1102, 1104 (10th Cir. 1994); *United States v. Thomas*, 991 F.2d 206, 214 (5th Cir.), *cert. denied*, 510 U.S. 1014, 114 S. Ct. 607 (1993); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir.1990); *United States v. Gomez*, 911 F.2d 219, 221 (9th Cir.1990).

The second *Mathews* prong focuses on the fairness and reliability of existing procedures. Following Justice Jackson's dissent in *Jordan v. De George*, what is in place now puts an individual's right to vote at the mercy of subjective discretion that is unguided by any meaningful standards. As an aspect of this second prong, moreover, it appears that this problem is easily remedied along the lines of what the separation-of-powers doctrine mandates in any event – for the Alabama Legislature to enact legislation specifying which felonies are to be regarded as involving moral turpitude.

The final *Mathews* factor asks whether the State of Alabama has a legitimate interest in preserving the *status quo* of a standardless, *post hoc* determination of which felonies deprive a citizen of the right to vote. There appears no legitimate interest in maintaining the *status quo*. Replacing the current process by one in which duly-enacted legislation identifies those crimes involving moral turpitude would appear to benefit all parties, plaintiffs and defendants alike, by promoting clarity and consistency.

This analysis may be seen as flying in the face of a number of cases from Alabama's appellate courts that purport to define crimes that either do or do not involve moral turpitude. How can this Court be so concerned about the matter when the appellate courts of this State have periodically undertaken this task without such concern? A thorough review of those cases fails to disclose a single instance in which a party claimed a violation of due process

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[13] Alabama's appellate courts have before recognized the *Mathews* balancing test. *See, e.g., Wild v. Wild*, ___ So.2d ___, 2006 WL 1120653 (Ala. Civ. App. 2006); *Morgan County Dept. of Human Resources v. B.W.J.*, 723 So. 2d 689, 693 (Ala. Civ. App. 1998); *see also Hayes v. Alabama State Bar*, 719 So. 2d 787, 791 (Ala. 1998)(See, J., concurring).

rights resulting from such a *post hoc* determination. This particular issue has apparently not been presented to Alabama's appellate courts for adjudication.

If possible, this Court must interpret Amendment 579 to be in harmony with fundamental due process rights provided by other provisions of the Alabama Constitution. If two provisions of our Constitution are in conflict, and one of them is contained in Article I (the Declaration of Rights), that provision must prevail. *State ex rel. Galanos v. Mapco Petroleum, Inc.*, 519 So. 2d 1275, 1277 (Ala.1987), *quoting In re Dorsey*, 7 Port. 293, 359 (Ala.1838). There is no conflict between Amendment 579 and those due process rights established under Sections 6 and 13 of the Alabama Constitution, however, so long as Amendment 579 is applied in the proper manner.

In entering this order, this Court does not intend to disparage the dedication or good faith of the named defendants, or of the defendant class members, in any way. To the contrary, this order is with the assumption that the defendants are dedicated, well-intentioned servants of the public. Given the overriding importance of the civil rights at stake, however, a system that deprives citizens of those rights based on the guesses of even such well-intentioned public servants fails to pass constitutional muster. In the absence of meaningful standards on which the defendants can base their decisions, the refusal to register members of the plaintiff class would violate their due process rights under the Alabama Constitution.

(4). *Adjudicating the Plaintiffs' Claims*

The above analysis of the separation-of-powers and due process problems is made in the context of adjudicating those claims based on Amendment 579 to the Alabama Constitution and *Ala. Code* §17-3-9. Given the above conclusions, a judgment in favor of the plaintiff class is due to be entered on Counts One and Two of the *Fourth Amended Complaint*, as well as on Count Six thereof, to the extent that that Count is based on the rights of the plaintiff class under Amendment 579 to the Alabama Constitution and *Ala. Code* §17-3-9. In view of the constitutional infirmities addressed above, sub-paragraph (b) of Amendment 579 may not be enforced until there is legislation effectuating its purpose and clarifying its scope. Absent such legislation, the right to vote provided by sub-paragraph (a) of Amendment 579 stands without qualification.[14]

The plaintiff class is therefore entitled to a declaration that the defendants may not

[14] This Court does not address the prohibition pertaining to the "mentally incompetent" found in sub-paragraph (b) of Amendment 579.

impede their rights to register and to remain on the voting lists simply because of prior felony convictions. The plaintiff class is further entitled to injunctive relief restraining the defendants from further efforts to prevent members of the plaintiff class from registering.

The Court now turns to the other claims of the *Fourth Amended Complaint*. Plaintiffs Gooden and Thomas may not prevail on their individual claims under *Ala. Code* §17-4-124. Gooden's claim is moot, and Thomas has waited too long to bring her claim under this statute. The Court declines to address any class claims that may arise under this statute; indeed, it is dubious that adjudication on a classwide basis is possible given the 30-day time bar of that statute.

Count Five alleges a violation of 42 U.S.C. §1971(a)(2)(B). After closely studying that statute, however, this Court concludes that it is inapplicable to the facts here. All claims under this Count must therefore be dismissed.

Count Six also raises equal protection/due process claims under both state and federal constitutions with regard to voter registration forms. Employing the due process analysis hereinabove, this Court concludes that the plaintiff class is entitled to a judgment on these claims based on the determination that the defendants' actions in preventing them from registering violate their due process rights under the Alabama Constitution. This Court declines to reach any federal claims.

D. Attorneys' Fees Petition

The plaintiffs have pending a motion for the award of attorneys' fees, based on 42 U.S.C. §1988. The Alabama Supreme Court has recently (and unanimously) held that Article I, Section 14 of the Alabama Constitution of 1901 prohibits such an award against state officials in their official capacity. *See Ex parte Town of Lowndesboro*, ____ So.2d ____, 2006 WL 1304902 (Ala., May 12, 2006). On the other hand, as the Court held in *James v. Alabama Coalition for Equity, Inc.*, 713 So.2d 937 (Ala.1997), the doctrine of sovereign immunity does not preclude an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

The plaintiffs here have alleged some claims under 42 U.S.C. §1983. This Court either rejected or did not reach the plaintiffs' federal claims, however, instead basing its conclusions on state law grounds. The first question is whether the *Lowndesboro* rule applies to foreclose any award.

There is a somewhat curious line of cases dealing with whether an award of attorneys' fees may be ordered even if relief is on only state law claims, provided those claims share a

nucleus of fact with accompanying federal claims. In *Davis v. Everett*, 443 So.2d 1232 (Ala. 1983), the plaintiff brought an action against city commissioners, alleging that their denial of her liquor license application violated her rights under both state and federal constitutions. The trial court found in her favor on the state law claim, and apparently did not address the federal claim brought under 42 U.S.C. § 1983. The trial court also denied her request for attorneys' fees. On appeal, the Supreme Court reversed on the following basis:

> It is not necessary here to equate equal protection under the Constitution of 1901, Art. I, §§ 1, 6, and 22, with equal protection under the United States Constitution for all purposes; however, the Alabama Constitution necessarily embraces at least the minimal requirements of the United States Constitution. Defendants violated plaintiff's equal protection rights under the Alabama Constitution. It may also follow that plaintiff's federal constitutional rights were violated; she alleged a substantial federal claim, which was not dismissed, and ultimately prevailed on her state constitutional claim. The *Gibbs* test was satisfied because both claims arose from a common nucleus of operative facts. Accordingly, Mrs. Davis was a prevailing party under § 1988.

Id. at 1236.[15]

After *Davis v. Everett* came *Federation of City Employees v. City of Birmingham*, 492 So.2d 1304 (Ala. 1986), which was an appeal from the trial court's denial of the plaintiff's motion for attorneys' fees under 42 U.S.C. § 1988, with the following facts involved:

> The employees initially filed suit under 42 U.S.C. § 1983, alleging violations of both federal constitutional law and state law, in order to obtain a three percent (3%) pay raise provided in Budget Ordinance Number 83-103, which had been adopted by the Birmingham City Council. The trial court granted summary judgment in favor of the employees, but specifically stated that the constitutional due process claim alleged by the employees was premature and that no decision concerning it

[15] The "*Gibbs* test" referred to in this quote comes from *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). *Gibbs* actually addresses the proper basis for a federal court's exercise of pendent jurisdiction over state law claims. The U. S. Supreme Court there found that such jurisdiction applies if the state and federal claims are derived from the same nucleus of facts.

> would be rendered.

Id. at 1305. In affirming the denial of fees, the Supreme Court relied on *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457 (1984) -- which followed the *Davis v. Everett* decision – to conclude that "a prevailing plaintiff may be awarded reasonable attorney fees based on a substantial, unaddressed constitutional claim, if that claim is reasonably related to the ultimate success." *Id.* at 1306. If the federal claim fails to present a justiciable issue -- for example, if the federal claim is unripe -- then it cannot be reasonably related to the ultimate success achieved by a plaintiff.

This case appears closer to *Davis v. Everett* than to the *Federation of City Employees* case. While the Court rejected the plaintiffs' federal claim under 42 U.S.C. §1971, the plaintiffs' equal protection/due process claims under Count Six were not reached, with the Court's ruling instead premised on its analysis of state constitutional rights. The claims of Count Six, and the due process analysis used in resolving the other claims in the plaintiffs' favor, however, certainly suggest that at least to some extent, relief to the plaintiffs could have been based on federal constitutional claims. An attorneys' fee award thus appears proper under the authority of the *Davis* case. The question then becomes what amount is properly awarded.

The governing law on this issue was most recently addressed in *Beal Bank, SSB v. Schilleci*, 896 So.2d 395 (Ala. 2004). The Supreme Court there first recognized the factors established in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983), which a court may consider in judging the reasonableness of an attorneys' fee request:

> (1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances.

896 So.2d at 403. Not every one of these factors must be considered in every case, however; rather, the *Peebles* list provides considerations that may factor into an analysis depending on the circumstances of a given case. *Id.* This Court has considerable discretion in weighing

the factors involved and may undertake its own evaluation of the value of services made the subject of an application. *Id.*, *quoting* *Dent v. Foy*, 214 Ala. 243, 249, 107 So. 210, 216 (1925). This Court is, however, obligated to explain any determination made for the benefit of any appellate review. *Id.*, at 404-05.

The Court first addresses the measure of success achieved. While the plaintiffs may not have prevailed on all their claims, the relief provided herein appears to be all that the plaintiffs could have asked for (indeed, the relief can be regarded as exceeding the plaintiffs' prayer since this Court's analysis goes beyond the issues explicitly raised by the parties). As a result of this order, the defendants are obligated to revamp their procedures for registering voters, so that no one may be denied the right to register because of a prior felony conviction (at least not until there is legislation implementing sub-paragraph (b) of Amendment 579). This change is significant in its scope and nature, and it affects all members of the class, of which there are thousands.

This litigation has raised significant issues, impacting on the fundamental civil rights of thousands of citizens residing in this State. For this reason, the Court places emphasis on the first *Peebles* factor identified above, which is "the nature and value of the subject matter of the employment." This also calls into play the second *Peebles* factor in that this type of litigation requires specialized knowledge and experience in voting rights litigation in order to effectively prosecute the claims of class members. The uniqueness of this kind of case, in and of itself, bears consideration.

The Court further finds that the plaintiffs' local counsel, Edward Still, enjoys a well-deserved reputation as a preeminent voting rights attorney. This reputation is based on his experience dating back many years. Attorney Ryan Haygood is a much younger attorney, having been in practice since 2001. It appears that for the past three years, however, he has worked primarily, if not exclusively, on this type of litigation.

The Court recognizes the affidavit testimony of attorneys Jack Drake, Jim Blacksher, Gayle Gear, and Alicia Haynes, also experienced attorneys in this area of law who enjoy a top-notch reputation. Based on their testimony, it appears that an hourly rate of at least $250 would be proper, with some of these affiants contending that a higher rate is warranted given the nature of the work. Attorneys Blacksher and Drake testify that a 100% enhancement of the lodestar amount would be proper.

Attorney Still has provided time logs showing that approximately 112 hours were logged on this matter. Attorney Haygood's records reflect 117 hours logged. This case did not require extensive discovery, and the parties were not required to participate in a trial of this matter. On the other hand, the attorneys did have to prepare for a class certification

hearing. The stipulations of fact reflect a good deal of work by the attorneys for all parties, moreover, and this litigation required briefing on numerous thorny issues of law.

The time billed does appear a bit excessive however, and after reviewing the records, this Court determines that a reasonable time for which an award is proper is 101 hours for Mr. Still and 105 hours for Mr. Haygood. This Court further determines that a reasonable hourly billing rate for Mr. Still is $350, while that of Mr. Haygood is $260. These lead to a calculation of $35,350 in fees for Mr. Still and $27,300 in fees for Mr. Haygood. Further, the Court recognizes that Mr. Still has incurred expenses of $1,295, while Mr. Haygood has incurred expenses of $2,079.

This Court declines to recognize an enhancement of the loadstar amounts, given that the plaintiffs enjoyed only partial success, and that success was in part on grounds having nothing to do with federal constitutional rights that could form the basis of an award under 42 U.S.C. §1988 (e.g., the separation-of-powers analysis leading to the conclusion that sub-paragraph (b) of Amendment 579 may not currently be enforced). On the other hand, given the scope of the issues presented in this case and the fundamental significance of the rights for which redress is herein provided, no reduction of the loadstar amounts appears warranted, either.

This Court therefore awards to Mr. Still $36,645 in fees and expenses and to Mr. Haygood $29,379 in fees and expenses. These amounts are taxed as costs to both the State defendants and to the defendant class of registrars, with the understanding that a county registrar is a state officer. *See*, *e.g.*, *Garner v. McCall*, 178 So.2d 210, 212 (Ala. 1938); *Mitchell v. Wright*, 69 F.Supp. 698, 702 (M. D. Ala. 1947). The defendants are ordered to remit these costs directly to the plaintiffs' attorneys.

IV. Conclusion

The Court recognizes that this order changes a practice that dates back many years. There have been various contexts in which courts have addressed whether particular crimes involve moral turpitude, with scant attention paid to any constitutional concerns. Upon recognizing that the disenfranchisement provision of Amendment 579 to the Alabama Constitution authorizes the imposition of a criminal penalty, however, the situation changes. Our constitutional rights mandate that government tread carefully in imposing punishment for crimes, given the significance of the consequences. Under modern American jurisprudence of criminal law, for example, well-developed procedures are in place to ensure that any criminal punishment constituting a deprivation of liberty is in accord with every citizen's fundamental protections under our state and federal constitutions.

We are not dealing with any deprivation of liberty; at issue here is the possible deprivation of a citizen's fundamental right to vote as a result of a criminal conviction. From the evidence before the Court, thousands of citizens residing in Jefferson County alone have incurred this punishment for their wrongs. Let there be no mistake: the State of Alabama does have the constitutional authority to impose such a criminal penalty, and this order should not be regarded as holding to the contrary. Any imposition of this type of penalty, however, must be in keeping with the protections we all enjoy under our state and federal constitutions, meaning that it must be done in the right way.

In the absence of any legislative pronouncement, neither this Court nor any other court has the constitutional authority to decide whether an individual must surrender his right to vote because of a prior felony conviction. Neither this Court nor any other court may engage in a *post hoc* determination of the nature of a crime, for such a task must necessarily depend on individual concepts of right and wrong as well as guesswork about what "moral turpitude" actually means, all in violation of every citizen's right to due process.

Just as this Court may not make such decisions, by the same token the defendants may not either. The task is one for our Legislature to undertake. Only the Legislature has the constitutional power to decide which crimes involve moral turpitude so as to justify the removal of a fundamental civil right for which so many have fought and died. This Court cannot here restrict the Legislature's power, moreover. So long as the decision-making process is free of illegal discriminatory motivation, it is the Legislature's prerogative to decide which, if any, felonies are to be regarded as involving moral turpitude.

All this Court can do now is decide what happens pending any such action by the Alabama Legislature. This Court sees only one choice. Given the fundamental nature of the right at stake, and the language of Amendment 579, the Court must conclude that every citizen otherwise eligible to register in this State may not be denied that right solely by virtue of a prior felony conviction. Until such time that there is a statute on the books specifying which crimes may properly serve as a basis of disenfranchisement, no defendant may take any action to interfere with a citizen's registration because of any criminal conviction.

In accordance with the above, the following is hereby ORDERED:

1. Ekeyesto Doss is dismissed as a plaintiff in this action. The Houston County registrars – Anita Gibson, Walter Long, and Molly Meadows -- are dismissed as defendants/class action representatives.

2. Andrew Jones is also dismissed as a plaintiff.

3. The State of Alabama's motion to intervene is GRANTED, and the State is added as a defendant, specifically with regard to Counts Three and Four of the *Fourth Amended Complaint.* Counts Three and Four are dismissed as to defendant Hunter and the defendant class defined below.

4. The defendants' summary judgment motions are GRANTED as to Counts Three, Four and Five of the *Fourth Amended Complaint.* As to the other counts, the defendants' pending motions are DENIED.

5. The following plaintiff class is hereby certified:

> Every citizen of the United States, currently residing in this State and 18 years of age or older, who has at any time been convicted of a felony in any jurisdiction and who is not, as of the date of this order, registered to vote in this State.

Attorneys Edward Still and Ryan P. Haygood are appointed to serve as counsel for this class.

6. The following defendant class is hereby certified:

> Every individual duly appointed and presently serving in an official capacity as a registrar for the purpose of conducting, supervising or otherwise regulating the registration of voters in the county where such individual resides.

Defendant Hunter is designated to serve as representative of this class.

7. The Court hereby DECLARES that the policy and practice previously promulgated or employed by the defendants of denying voter registration to an individual otherwise qualified to vote, but who had been convicted of *any* felony, violated Amendment 579 to the Alabama Constitution. This policy and practice further violated the due process rights of the plaintiff class members provided by the Alabama Constitution. The named defendants, all members of the defendant class, and all those who work with or on behalf of any of the defendants or defendant class members, are ORDERED immediately to cease and desist in refusing voter registration on this basis.

8. Unless and until the Alabama Legislature passes, and the Governor signs into law, legislation specifically identifying which felonies involve moral turpitude, and unless and until any such duly-enacted legislation receives the necessary pre-clearance from the U.S. Justice Department, the named defendants, all members of the defendant class, and all

those who work with or on behalf of any of the defendants or defendant class members, are ENJOINED from refusing to register any individual, otherwise qualified to vote, on the ground that the individual has previously been convicted of a felony.

9. Unless and until the Alabama Legislature passes, and the Governor signs into law, legislation specifically identifying which felonies involve moral turpitude, and unless and until any such duly-enacted legislation receives the necessary pre-clearance from the U.S. Justice Department, the named defendants, all members of the defendant class, and all those who work with or on behalf of any of the defendants or defendant class members, are ENJOINED from promulgating, distributing or employing voter registration application forms that refer in any way to a prior criminal conviction as a basis of disqualification. The defendant Secretary of State is further ORDERED to revise existing voter registration application forms to delete any such references.

10. Unless and until the Alabama Legislature passes, and the Governor signs into law, legislation specifically identifying which felonies involve moral turpitude, and unless and until any such duly-enacted legislation receives the necessary pre-clearance from the U.S. Justice Department, the named defendants, all members of the defendant class, and all those who work with or on behalf of any of the defendants or defendant class members, are ENJOINED from removing from voter lists any registered voter by reason of that voter's conviction of a felony.

11. The Court understands that pursuant to Section 5 of the federal Voting Rights Act, pre-clearance from the U. S. Justice Department is required before any change to existing voting policies and procedures may be implemented. Counsel for the State defendants are therefore ORDERED to promptly submit this order to the U. S. Justice Department for review under the federal Voting Rights Act and to provide to this Court a copy of any such submission. Counsel for the State defendants are further ordered to thereafter keep this Court apprised of developments regarding the Justice Department's review process. Pending such review, the provisions of this order effectuating a change in the current policy and practice of registering voters, specifically the orders of paragraphs 8-10 above, are STAYED.

12. As chief elections officer for the State of Alabama, defendant Worley is further ORDERED promptly to deliver copies of this order to all members of the defendant class.

13. Attorneys' fees and expenses in the amount of $ 36,645 are hereby awarded to attorney Edward Still and $29,379 are awarded to attorney Ryan Haygood. These fees and expenses are taxed as costs to the defendants, who are ordered to make payments directly to the plaintiffs' counsel.

14. This order concludes this litigation. All other costs are taxed as paid.

DONE and ORDERED on this 23rd day of August, 2006.

/s/ Robert S. Vance, Jr.
Circuit Judge

cc: W. Edward Still, Esq.
Ryan P. Haygood, Esq.
Margaret L. Fleming, Esq.
Jeffrey M. Sewell, Esq.