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

TREVA THOMPSON, et al.,

Plaintiff,

Vs.

CASE NO.: 2:16cv783-ECM

STATE OF ALABAMA, et al.,

Defendant.

\* \* \* \* \*

SCHEDULING CONFERENCE

\* \* \* \* \*

BEFORE THE HONORABLE EMILY COODY MARKS, UNITED STATES  
DISTRICT JUDGE, at Montgomery, Alabama, on Tuesday, September  
11, 2018, commencing at 10:00 a.m.

APPEARANCES

FOR THE PLAINTIFFS:	Ms. Danielle Lang Attorney at Law CAMPAIGN LEGAL CENTER 1411 K Street NW, Suite 1400 Washington, DC 20005
	Mr. Joseph Mitchell McGuire Attorney at Law MCGUIRE & ASSOCIATES LLC 31 Clayton Street Montgomery, Alabama 36104

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APPEARANCES, continued:

FOR THE DEFENDANTS: Ms. Misty S. Fairbanks Messick  
Mr. James William Davis  
Ms. Laura Elizabeth Howell  
Mr. Winfield James Sinclair  
Office of the Attorney General  
Post Office Box 300152  
Montgomery, Alabama 36130-0152

ALSO PRESENT: Mr. Kevin W. Blackburn  
General Counsel  
Alabama Board of Pardons and Paroles  
301 South Ripley Street  
Montgomery, Alabama 36130

\* \* \* \* \*

Proceedings reported stenographically;  
transcript produced by computer

\* \* \* \* \*

(The following proceedings were heard before the Honorable  
Emily Coody Marks, United States District Judge, at  
Montgomery, Alabama, on Tuesday, September 11, 2018,  
commencing at 10:00 a.m.:)  
(Call to Order of the Court)

THE COURT: Good morning. We are here in the case of  
Thompson versus State of Alabama.

Could everybody please identify yourselves for the  
record and who you represent.

MR. MCGUIRE: Good morning, Your Honor. For the  
plaintiffs, Joseph McGuire.

MS. LANG: Good morning, Your Honor. For the  
plaintiffs, Danielle Lang.

1 MS. MESSICK: Good morning, Your Honor. Misty S.  
2 Fairbanks Messick for the defendants.

3 MR. SINCLAIR: Winfield Sinclair for the defendants.

4 MS. HOWELL: Good morning, Your Honor. Laura Howell  
5 for the defendants.

6 MR. BLACKBURN: Kevin Blackburn, general counsel for  
7 Pardons and Paroles.

8 MR. DAVIS: Jim Davis for the defendants, Judge.

9 THE COURT: All right. We are here today to talk about  
10 where we are in this case. As you all know, I'm a newly  
11 assigned judge to your case, and I've been reading through the  
12 pleadings as quickly as I possibly can.

13 I know that we have three pending motions, pretty  
14 significant motions, that need to be ruled on, and then a pro  
15 hac vice motion that's also pending. We're waiting for the  
16 filing fee to be paid for that. And once it is, we can rule on  
17 that motion.

18 So that will leave us with the defendants' motion to  
19 dismiss, the motion to certify the class, and a motion to  
20 strike; is that correct?

21 MS. MESSICK: Yes, Your Honor.

22 THE COURT: Okay.

23 MS. LANG: Yes, Your Honor. That's correct.

24 I would just add that kind of folded into the motion  
25 to dismiss briefing is a cross-motion for summary judgment on

1 one of the claims. So it's somewhat of a discrete issue for  
2 claim 18 where both parties have moved for summary judgment.

3 THE COURT: All right. And that count is the failure  
4 to specify eligibility requirements under the National Voter  
5 Registration Act?

6 MS. LANG: That's right, Your Honor.

7 THE COURT: Okay. Aside from the fact that I need to  
8 rule on these pending motions, where are you in the discovery  
9 process and what problems do you anticipate facing?

10 I'll hear from the plaintiffs first.

11 MS. LANG: Thank you, Your Honor.

12 We are significantly into the discovery process, I  
13 would say, at this point. We filed largely all of our requests  
14 for production back in March. There has been, I believe, now  
15 complete production from the Secretary of State and the  
16 Montgomery County Board of Registrars as of about a week ago,  
17 but there is still, I believe, a very significant number of  
18 documents outstanding from the Board of Pardons and Paroles.

19 Most of the defendants' depositions of plaintiff -- of  
20 the plaintiffs themselves have been completed. We have a number  
21 of depositions scheduled of officials from the Secretary of  
22 State's office for the next couple of weeks.

23 I think the main -- you know, so I don't actually  
24 anticipate a ton of additional discovery issues when it comes to  
25 the factual discovery. I think that the parties have largely

1 ironed that out except for timing and when we will be getting  
2 those documents, which is not entirely clear to me.

3 I think the thing we do need to iron out is a schedule  
4 that would allow, hopefully, the case to go to trial this coming  
5 spring. Your calendar, at least online, suggests that you have  
6 an availability in June. This case was originally scheduled for  
7 May for trial. So we would hope that in lieu of the May trial  
8 date, we may be able to schedule it for June 17th.

9 And I imagine the main sticking point will be how the  
10 expert disclosures will play out. The original schedule for  
11 expert disclosures was very long. It was plaintiffs'  
12 disclosures first, then 60 days rather than 30 days for the  
13 defendants' expert disclosures, then another 21 days for  
14 plaintiffs' rebuttal.

15 After that schedule was decided upon, defendants asked  
16 for an additional rebuttal report, even though we had a  
17 staggered schedule, that added another 21 days. You know, we  
18 don't see any need for kind of, like, that surreply. You know,  
19 each party should have an opportunity once to respond to the  
20 experts. So we can do that either through a staggered schedule,  
21 as is contemplated right now, or we could have kind of  
22 simultaneous expert disclosures where both parties put forward  
23 their expert disclosures on a certain date and then both parties  
24 put forward their rebuttal disclosures. We think either of  
25 those would be acceptable, but negotiations between the parties

1 on that particular issue have not been fruitful. That's what  
2 led to our motion to modify the schedule.

3           So, you know, really, as far as scheduling things go,  
4 we don't anticipate a lot of problems on factual discovery. And  
5 we just would like to iron out an expert disclosure schedule and  
6 the remainder of the schedule to ensure that we could go to  
7 trial in June 2019.

8           My clients filed this case two years ago, and they're  
9 trying to vindicate their fundamental right to vote. If they  
10 turn out to be correct in their claims, the irreparable harm of  
11 every election that goes by, they, obviously, cannot recoup. So  
12 the sooner we can move towards trial, the better, given the  
13 irreparable harm that my clients will face.

14           THE COURT: So if I'm hearing you correctly, as of  
15 right now, you have all been able to work out any discovery  
16 issues except for the expert witness disclosure deadlines;  
17 correct?

18           MS. LANG: Thus far, I believe that's correct. And  
19 defendants' counsel can certainly correct me if that's wrong,  
20 but I think that we've largely ironed out the remaining issues,  
21 at least for now. There's still -- I still expect there to be  
22 interrogatories and RFAs that may raise issues; but as far as  
23 production goes, I think we've agreed on the scope of  
24 production.

25           THE COURT: How will my ruling on the motion to certify

1 a class affect scheduling for trial, if at all?

2 MS. LANG: You know, Your Honor, I don't think that it  
3 will affect scheduling for trial all that much. Because with a  
4 23(b)(2) class, I don't think that there's a ton of additional  
5 discovery that has to go to class members. We were already  
6 conducting discovery about the treatment of the entire class in  
7 order to prove our substantive claims, and so I think the same  
8 evidence is really going to apply. And I don't anticipate a ton  
9 of additional discovery or motion practice related to the class.

10 THE COURT: Let me go ahead and hear from the defense.

11 MS. LANG: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MS. MESSICK: Good morning, Judge Marks. Misty Messick  
14 for the defense.

15 First of all, I think I do need to say that we have  
16 recently run into some problems with the production that I think  
17 are going to slow some things down and that we need to talk to  
18 the plaintiffs about and that has, really, just arisen since  
19 last Thursday. I also believe --

20 We think it's very important that this Court does rule  
21 on the motion to dismiss and on the motion for class  
22 certification. We basically -- it is our belief, and we do have  
23 motions pending, that every single claim should be dismissed.  
24 And at this point, we are spending a tremendous amount of time  
25 on discovery for claims that we do not believe should be going

1 forward.

2           On discovery, we have deposed Plaintiff G.B.M. and  
3 three of the individual plaintiffs. We do have one of the  
4 individual plaintiffs scheduled for next week, and the last one  
5 is still up in the air. Plaintiffs have, in fact, scheduled  
6 depositions of three Secretary of State people next week. We  
7 don't know if they want to depose any other people from the  
8 Secretary of State's office. If they do, it could raise a  
9 problem, because we have a general election in November. I'm  
10 actually surprised that my clients have said that they're  
11 available next week.

12           There's a lot that goes into the elections in advance  
13 of the elections. And, in fact, ballots have to go out --  
14 absentee ballots should be going out very soon if they're not  
15 already.

16           Plaintiffs have also indicated a desire to depose at  
17 least two people at the Board of Pardons and Paroles. And as to  
18 at least one of them, there's the potential to need a protective  
19 order. We need to better understand what they intend to depose  
20 him on to be able to work through that.

21           On the production, we have been through all of the  
22 Secretary of State documents and Board of Registrar documents  
23 the first time. I think I've actually bumped into a couple more  
24 documents that we had maybe marked no that are going to show up  
25 as yes, so you might get some more. But we have gone through



1 those.

2 On Pardons and Paroles, we had -- we used search terms  
3 to look for their ESI, and we had a huge number of responses. I  
4 think the original number was around 90,000. And that was in a  
5 situation where an email with attachments counts as one.

6 The plaintiffs offered to help reduce the search, and  
7 they did that, and they've -- actually, we've been through two  
8 iterations with that. And at this point, with that and with  
9 what we have reviewed, there's about 23,000 documents left to go  
10 through.

11 But what has happened in the last few days is that we  
12 have realized that a privilege that they have is broader than I  
13 understood. And that because of the nature of the documents  
14 that they have, that we really can't just look for  
15 attorney-client privilege and attorney work product and turn the  
16 rest of it over.

17 They have documents that are dealing with things like  
18 victim statements. We've already -- we kept running into  
19 documents from the ATF and the FBI where they are investigating  
20 people and want to know if they've been pardoned. I presume  
21 that they're looking into them being felons in possession, and  
22 they need to know if they've gotten pardons. So we had started  
23 segregating those.

24 But then we also were getting notices for victims that  
25 included the addresses of those victims. And I just realized

1 that we've just turned that over. We've actually just given to  
2 Pardons and Paroles yesterday a USB drive of about 8500  
3 documents that we turned over in this case from them for them to  
4 look at and tell us how bad the problem is in terms of what's  
5 already been turned over. There's a lot of stuff that there's  
6 not going to be an issue on, but there's also -- most of the  
7 stuff we've turned over we don't even think is relevant or  
8 significant.

9           Going forward, Pardons and Paroles is going to have to  
10 be more involved in reviewing the documents. They have --  
11 plaintiffs had filed -- as part of the motion to modify, I  
12 believe, they had filed responses to the RFPs. And we talked  
13 about in there the pardon file privilege. And I had understood  
14 that to apply to a paper file, but it also affects this ESI.

15           So looking at that and looking at the nature of the  
16 documents that they have, we can't just review for  
17 attorney-client privilege and turn the rest over because we're  
18 not worried that there's a smoking gun out there. Because what  
19 is out there is a lot of stuff that's not responsive and that  
20 reveals sensitive information. And so I feel like that is going  
21 to really slow down our ability to get those documents. But,  
22 again, I also feel like the documents we're producing are not  
23 really significant.

24           We have started looking again at the search string to  
25 see if there are some suggestions or changes that we can make to

1 narrow how many documents need to be reviewed. And we're  
2 certainly open to talking to the plaintiffs about ways to change  
3 and narrow that so that we don't have to look at all 23,000  
4 documents.

5 And Pardons and Paroles has really stepped up. They're  
6 completely willing to do this review and to help with the review  
7 going forward. But it is going to be more time consuming and  
8 difficult than we had expected.

9 The other thing that's going on with respect to timing  
10 and when that can realistically be done if, in fact, we go  
11 forward with this -- it's starting to simply feel unduly  
12 burdensome and out of proportion with the claims.

13 But another issue in terms of how fast that can  
14 actually be done is that all of the litigation team, which does  
15 not include general counsel for Pardons and Parole, we've all  
16 got a trial in front of Judge Watkins at the beginning of  
17 November. And that's going to take a lot of time as well.

18 So I think we need -- if we're going to be proceeding  
19 with -- continuing to proceed with discovery while we have these  
20 dispositive motions pending and while we don't know if there's  
21 going to be a class, then I think we're going to need a decision  
22 from the plaintiffs about whether they want to go forward with  
23 their expert reports before they get the documents so that they  
24 can get their earlier trial date, or if they are going to wait  
25 for all of these documents. Because it's going to take some

1 time.

2 And when I said there are about 23,000 documents,  
3 that's -- I think we have about 23,500 in our system right now  
4 to review. We've actually asked for documents from some  
5 additional custodians, and we don't have those yet. We don't  
6 know how many that's going to be. I'm hoping it's not a lot,  
7 but I won't know until I have it. I, frankly, never expected to  
8 get this many documents in this case from that agency in the  
9 first place.

10 And we've also already asked the Secretary of State to  
11 go ahead and run a new search just to update their materials.  
12 Since that's five months and not ten years, hopefully that won't  
13 be much either, but we are looking at bringing in some more  
14 documents to review as well.

15 I do agree with plaintiffs' statement that their  
16 discovery was already very broad in looking at the impact of all  
17 felons to prove their case. And so it may not have a huge  
18 impact on the discovery, whether there's a class or not.

19 But there's one area where I am concerned, and that is  
20 with the ex post facto claim. We actually -- we talked past  
21 each other a lot on that claim. We don't believe it should be  
22 going forward at all for the reasons in our original motion,  
23 including that the Fourteenth Amendment postdates the Eighth  
24 Amendment and specifically allows it, and then for the arguments  
25 that we have fleshed out in our renewed motion to dismiss.

1           But if it does -- if it is going to go forward --  
2           I'm sorry. Not the Eighth Amendment. The Fourteenth  
3 Amendment allows felon disenfranchisement and postdates the ex  
4 post facto clause.

5           But plaintiffs seem to try to get into a precise  
6 determination of every felony and whether it was or wasn't  
7 disenfranchising under the old system in order to make that  
8 claim. And we don't believe that's appropriate. And we  
9 certainly think if there are only five plaintiffs, that only  
10 their claims are the ones that would need to be addressed. And  
11 so I think that it does have the potential to broaden the  
12 discovery there.

13           And I also think that as we think about -- you know,  
14 the plaintiffs and a few people at the agencies are not the only  
15 people to be deposed. In addition to experts, they've listed  
16 legislators and some other people. And as we figure out who we  
17 want to depose and, presumably, as they figure out who they want  
18 to depose and what additional discovery we want to take, I think  
19 it would help a lot to understand what claims are going forward.

20           This case is really a bit of a mess in some ways. Not  
21 only -- like if you were to say that the cruel and unusual  
22 claim -- cruel and unusual punishment claim is going forward,  
23 not only do we need to know that that one is going forward,  
24 despite our motion to dismiss, but we need to understand what  
25 that claim is. Because in their reply -- in their motion for

1 class certification, they've referred to their primary argument  
2 under that cruel and unusual punishment count is that it's cruel  
3 and unusual to disenfranchise people who have served their time  
4 and are off probation and off parole.

5 Well, saying there is a primary argument suggests that  
6 there are other arguments, and we don't know what those are.

7 And the other problem is we weren't even on notice that  
8 that was their claim, because they're bringing it on behalf of  
9 people who are currently imprisoned and people who are currently  
10 on parole. So we find a lot of their claims to be very  
11 difficult to grasp, and we need to have a better understanding  
12 of what they are as we proceed with discovery in a reasonable  
13 way.

14 With respect to the expert reports, we are very much  
15 opposed to the idea of simultaneous filing. We believe our  
16 primary job is, in fact, to respond to what they do and that  
17 that is what is appropriate in this case. We asked for 60 days  
18 because we think that this case is significant, and it is  
19 different from the usual case, and we expect them to be bringing  
20 a complex analysis that our people are going to need time to  
21 respond to. And we're going to need time to review that and  
22 communicate with our experts, which is why we've got a problem  
23 with it being on top of our trial. There has --

24 You know, as I talked about documents, I was talking  
25 mostly about reviewing all this ESI. But there have been a lot

1 of databases turned over as well. We turned over a  
2 five-million-record snapshot of the entire voter registration  
3 database, in addition to pulling various smaller pieces that we  
4 thought might answer their questions and then working with the  
5 vendor to pull additional data that they thought that they  
6 needed. They subpoenaed 35 years' worth of records from AOC.  
7 This is presumably going to be a complex analysis with a lot of  
8 data that we need time to check and rebut. And we don't think  
9 that asking 60 days to do that is asking too much.

10 Which also raises the issue -- they keep talking about  
11 that they've got a fundamental right to vote and the case has  
12 been filed for two years. Of course, we've argued felons don't  
13 have a fundamental right to vote, but we understand the  
14 importance of the right to vote. We do. But they're  
15 challenging a constitutional amendment that was passed in 1996  
16 and a process to make it easier for people to vote that was  
17 created in 2003. They could have filed this lawsuit a long time  
18 ago. And frankly, some of the -- some of the issues that we  
19 need to get to the bottom of might have been easier if they had  
20 done so. So to say now that we shouldn't have sufficient time  
21 for our experts to perform their work to review and respond to  
22 their reports is simply not fair or appropriate.

23 And, you know, it did take Judge Watkins a long time to  
24 rule on the motion to dismiss, but that's because there were 15  
25 claims. If they want it to go fast, they can drop some of these

1 claims that we can't comprehend and focus on the strong ones,  
2 and we can move forward. But right now they've got -- they've  
3 still got eight claims out there. We think all of them need to  
4 go. Certainly some of them should. And they sent  
5 extraordinarily broad discovery. This is not going to be fast.

6 And I do think a class has the potential to slow things  
7 down if it's going to open up issues in ways that they've  
8 suggested that it might. We also have argued very strongly that  
9 a class isn't even necessary.

10 You know, if you were to hold that the 1996  
11 constitutional amendment were unconstitutional, then at this  
12 point you don't have anybody that we think you can enjoin very  
13 effectively. You would have a declaratory judgment, and the  
14 declaratory judgment against the Secretary of State would be  
15 sufficient. And I think all this class stuff just simply  
16 multiplies the proceedings that's already taken a lot of time.

17 I've gone on a while. Unless you have a specific  
18 question, I'll --

19 THE COURT: So in addition to the three pending  
20 motions, does the -- I guess the issue of the timing of the  
21 expert disclosures also needs to be resolved.

22 MS. MESSICK: Yes. There was a motion to modify  
23 schedule that prompted this hearing, and that is the most  
24 pressing one to respond to. What you did, as, of course, you  
25 know, is that you just stayed all deadlines generally. So at



1 this point we don't have a schedule, but we have been continuing  
2 to work.

3 THE COURT: Anything further from the plaintiff?

4 MS. LANG: Yes. I would just like to address a couple  
5 of things, although there were quite a few.

6 With respect to these new production issues, I mean,  
7 I'm learning about them for the first time, so I can't really  
8 speak to, you know, what can be worked out and what can't. You  
9 know, but I would say that I'm deeply concerned that they're  
10 coming up in September, when this case was clear that it was  
11 going forward to trial as of January. We agreed to a schedule  
12 in January. These requests for production have been outstanding  
13 for over five months. So to learn that there's these kind of  
14 major issues that are going to slow down discovery for months  
15 more is really concerning to me. So I understand all the other  
16 timing considerations, but this case does need to move forward.

17 The one thing I guess I would note as far as potential  
18 discovery issues down the line that I didn't identify for you  
19 earlier is that we haven't yet received a privilege log for any  
20 of the documents. We have with respect to redactions, but  
21 documents that have just not been produced we do not have a  
22 privilege log yet for.

23 MS. MESSICK: That's because there aren't any.

24 MS. LANG: Well, then --

25 THE COURT: I'm sorry. I didn't hear you.

1 MS. MESSICK: There aren't any documents that have  
2 simply been withheld. They've received notice where things have  
3 been redacted.

4 THE COURT: Okay.

5 MS. LANG: There you go. Then I don't have to worry  
6 about that.

7 As far as the question that opposing counsel had about  
8 whether or not we would be willing to go forward with experts  
9 prior to document production, I think we probably can, and  
10 here's why. With respect to the data, we have received  
11 everything that we have agreed upon for the most part, I think.  
12 So we can go forward with our data expert. There is one  
13 additional issue we're trying to work out with the  
14 Administrative Office of Courts, but I'm hopeful that that will  
15 be resolved.

16 We have also received all the documents from the  
17 Secretary of State's office, which I think are the most  
18 important documents to our historian who wants to review how  
19 this scheme has been implemented over time. So I think that  
20 those were the most pressing documents for our historical  
21 expert.

22 There may be relevant documents in this Board of  
23 Pardons and Paroles to one of our experts, but I don't -- I  
24 don't anticipate it being major. And so I think that could be  
25 dealt with with a supplemental expert disclosure with respect to

1 those specific documents.

2           So given the delays in the Board of Pardons and  
3 Paroles, I would suggest that we probably move forward with an  
4 expert schedule and then deal with late production of documents  
5 through supplemental disclosures.

6           With respect to the motion to dismiss, I would just  
7 point out that I don't believe that there's actually a question  
8 in this case as to whether or not all of the claims are going to  
9 be dismissed unless we are to rescind Judge Watkins' decision.  
10 The second motion to dismiss was entirely repetitive as to all  
11 of the claims that predated the supplemental complaints. That's  
12 claims one, two, 11, 12, and 13. With respect to claims one,  
13 two, and 13, defendants have actually admitted in their class  
14 certification opposition that they added no new arguments and  
15 would expect these claims to move forward. So I think the  
16 possibility of this case kind of going away, absent rescinding a  
17 prior decision, is not likely.

18           And with respect to claims 11 and 12, defendants have  
19 said that they kind of provided more developed arguments in  
20 their second motion to dismiss, but the federal rules are quite  
21 clear on not permitting kind of these cumulative motions to  
22 dismiss; that you get one opportunity. There are no new facts  
23 and no new intervening law that would allow for a motion to  
24 reconsider. So I think that the motion to dismiss should be  
25 denied in its entirety as against the rules with respect to one,

1 two, 11, 12, and 13.

2 So that only leaves, really, the supplemental claims  
3 which have to do with retroactivity and the National Voter  
4 Registration Act as to the motion to dismiss. So I don't think  
5 that there's, like, as many outstanding kind of issues about  
6 whether or not this case moves forward as defendants have  
7 suggested.

8 With respect to the ex post facto clause, I think that  
9 defendants' counsel is right that we were talking past each  
10 other. Because our position, and I believe the position of this  
11 Court in the prior motion to dismiss opinion and the position of  
12 the legislature in passing HB 282, is that the law under 1996's  
13 amendment, which said crimes involving -- felonies involving  
14 moral turpitude are disqualifying, did not provide notice to  
15 anyone of what crimes were disqualifying. And so HB 282 is the  
16 first time that there's been any notice. And so if felony  
17 disenfranchisement is, indeed, punishment, which we believe this  
18 Court must find it is, given federal law, then this is an ex  
19 post facto issue for everyone.

20 And so we're not going to kind of get into the weeds of  
21 individual plaintiffs and individual circumstances, because the  
22 question is whether or not the prior law provided notice. And  
23 if it didn't, then this new law that's applying retroactively  
24 violates the ex post facto clause.

25 With respect to the cruel and unusual punishment, I

1 think we've been quite clear in our claim, which is that  
2 lifetime disenfranchisement is cruel and unusual. That the  
3 national trend is away from that. That it is extreme. It kind  
4 of removes -- it's a form of civic death that's being imposed on  
5 our clients. So I don't think that there's as much confusion as  
6 defendants' counsel suggests.

7 As to the staggering of expert reports, we're perfectly  
8 happy to allow for staggering reports. We don't -- but we don't  
9 believe that staggering reports plus a surreply makes much  
10 sense. We should either have defendants provide a staggered  
11 report or rebuttal report. Not both.

12 I'm not sure if there are any other issues that  
13 defendants' counsel raised that you would like me to address,  
14 but I'm happy to do so.

15 THE COURT: Well, here's where we are, just  
16 realistically speaking. The pending motions need to be ruled  
17 on, obviously, before the case could move forward, if it's going  
18 to, depending on what the ruling would be. And, again, I've not  
19 studied the motions closely enough that I even have an idea  
20 about which way I would rule.

21 But if the motion to dismiss is denied in any way and  
22 claims move forward, would you anticipate that dispositive  
23 motions would be filed?

24 MS. MESSICK: We would absolutely. We believe this  
25 case should be resolved on the papers.

1 THE COURT: Okay.

2 MS. LANG: I think there are a number of claims where  
3 it's very unlikely. You know, the Supreme Court has opined  
4 repeatedly that cases involving intent are rarely appropriate  
5 for summary judgment or for -- or at the motion to dismiss  
6 stage, so we would expect our intent claims to move forward to  
7 trial.

8 And that includes probably the ex post facto and cruel  
9 and unusual punishment, because a key legal issue there is  
10 whether or not felony disenfranchisement is punishment, which is  
11 partially an intent-based analysis, so it falls in that same  
12 bucket.

13 The one way that I think that that's avoidable, I  
14 actually do think the ex post facto claim is probably -- could  
15 be ruled on on the papers because there is a federal law, the  
16 Readmission Act for Alabama, that actually says that the only  
17 permissible felony disenfranchisement is for punishment. So in  
18 order to kind of avoid a preemption problem, that is how this  
19 scheme should be read. But if that argument does not prevail,  
20 then I think that would probably have to move forward toward  
21 trial as well.

22 THE COURT: Well, regardless of whether summary  
23 judgment will be granted or not, for scheduling purposes, if the  
24 defense or the plaintiffs anticipate filing dispositive motions,  
25 that will -- they're typically, right now, since we're still in

1 a judicial emergency, filed 180 days before the pretrial, which  
2 would probably foreclose any sort of a July 2019 trial date.  
3 Again, that's with me being able to get a very quick turnaround  
4 on the pending motions which will affect what goes forward,  
5 maybe, or the way in which it goes forward, or may have no  
6 effect at all. I just -- I don't know at this point.

7 But I've got -- I don't know how quickly I can get  
8 rulings on these out. I have inherited quite the caseload that  
9 I am still sifting through. And as you can imagine, criminal  
10 cases are eating up a lot of our time, and so the civil cases,  
11 we're getting to them just as quickly as we can.

12 So my inclination at this point is to have all of the  
13 deadlines remain stayed pending my rulings on the pending  
14 motions, which are the motion to dismiss or, in the alternative,  
15 motion for summary judgment, with the cross-motion for summary  
16 judgment you referenced earlier, the motion to certify the  
17 class, and a motion to strike.

18 And then would you -- would it be helpful for you if  
19 you get a ruling on the expert disclosures schedule,  
20 irrespective of waiting on rulings on these substantive motions?

21 MS. LANG: I think it would, Your Honor, so that we can  
22 continue to move forward so that when a -- when your orders come  
23 out, we are not further behind in the schedule and further  
24 delaying everything. We're kind of full steam ahead. A lot of  
25 my expert reports are already partially -- or are nearly

1 completely drafted, you know, absent the additional documents  
2 that we need to incorporate. So I think it would be helpful for  
3 us to move forward and make sure that we're on schedule for  
4 discovery so that when you are able to rule on these pending  
5 motions, we'll be able to move forward in an expeditious manner.

6 THE COURT: Okay.

7 MS. MESSICK: Your Honor, we don't know exactly what  
8 experts they have or what they're going to be talking about, so  
9 I would be concerned about getting an expert report on a claim  
10 that you're deciding shouldn't go forward. I also -- again, we  
11 don't see the urgency to this case that the plaintiffs do. And  
12 I think that the schedule could be better crafted when we know  
13 what issues we have; that we're left with.

14 And if I may just briefly. There's nothing  
15 procedurally wrong with our motion to dismiss. They filed a  
16 supplemental complaint. They raised new claims. We didn't  
17 rebrief everything because we were talking to the same judge who  
18 had already considered it. You're a new judge, and we do  
19 believe that you can and should look at all of the issues.

20 In fact, on the ex post facto and cruel and unusual  
21 punishment claim, we raised an argument that Judge Watkins did  
22 not address. And then he also had said that our briefing -- it  
23 was 70 pages on 15 issues, but he said, you didn't tell me  
24 enough about this. So we told him more. There's nothing  
25 offensive about that. So we do believe that everything is and



1 should be in play.

2 We've engaged two experts. I don't know, when we see  
3 what they've got, if we're going to need more. And I'm  
4 concerned about how much money is being spent on experts and  
5 spent on discovery when we don't know what the claims are.

6 THE COURT: So I'm hearing you say, then, that you  
7 don't believe a ruling setting out deadlines for expert  
8 disclosures would be appropriate until after I make a ruling at  
9 least on the motion to dismiss.

10 MS. MESSICK: I think that it makes a lot -- yes. I  
11 think it makes a lot more sense to have an understanding of what  
12 the claims are and what this case is going to look like and then  
13 put out the entire schedule.

14 THE COURT: All right.

15 MS. LANG: I think the arguments are before you on both  
16 sides. The expense of expert reports has largely already been  
17 spent from plaintiffs' perspective. And given the prior order  
18 on the motion to dismiss, I -- you know, we're very hopeful that  
19 this case is going to move forward.

20 I did want to call your attention to one discrete  
21 issue. Because as you've mentioned, there's a lot before you  
22 right now, and a lot of it is quite complicated and dense and  
23 will require a lot of consideration.

24 There is one discrete issue that I think it would be  
25 best for the Court to rule on first and that I think deserves

1 the Court's early attention, if at all possible, and that is the  
2 cross-motion for summary judgment on the National Voter  
3 Registration Act. That's an issue that's been fully briefed.  
4 It's a really discrete legal issue.

5           The question is whether or not the language on the  
6 state form lives up to the requirements under the National Voter  
7 Registration Act that it specify eligibility requirements.  
8 There's no factual dispute about what the state form says.  
9 We're arguing plain language of the National Voter Registration  
10 Act compels something different.

11           And there is, as you well know, an upcoming election  
12 where the registration deadline is October 23. I believe that a  
13 simple change in the form, even one that just advises people  
14 that there is a list of disqualifying felonies and where that  
15 can be found, would make a profound difference in the  
16 accessibility of the right to vote for thousands of voters.

17           To understand the scope of the change of HB 282, I took  
18 a look at the most common felony offenses in Alabama, according  
19 to the sentencing commission. The top 25 felony offenses. And  
20 approximately half of them are no longer disqualifying under  
21 HB 282. And I took a look -- and the top two, possession and  
22 burglary in the third, you know, accounted for nearly one-third  
23 of all the felony convictions in recent years.

24           So we're talking about tens of thousands, potentially a  
25 hundred thousand people who have the right to vote, but nothing

1 in the eligibility requirements provided by the Secretary of  
2 State advised them of that fact. For decades voters were left  
3 in the dark, believing that they were not eligible to vote.

4           There is now clarity in the law, but, you know, people  
5 with convictions aren't kind of scanning the law books to see if  
6 their voting rights have changed. And without any additional  
7 information in the voter registration form, they will not be  
8 able to kind of effectuate their right to vote.

9           And I think that the language of the statute -- that's  
10 why the statute exists. That's why there's a requirement to  
11 specify eligibility requirements. The legislative history says  
12 it's so that all the information is available to the voters so  
13 that they can readily assess their eligibility.

14           The case law, the Supreme Court has held that specify  
15 means to state explicitly and in detail. The use of marginally  
16 ambiguous language does not suffice to specify something. And  
17 the statute itself is plain and says over and over again that  
18 forms must specify eligibility requirements.

19           But the state form simply says, you must not have been  
20 convicted of a disqualifying felony. Nothing more. It doesn't  
21 explain that there are -- there is a list of disqualifying  
22 felonies. This is merely advising folks to the idea that there  
23 is some sort of eligibility requirement related to felonies but  
24 doesn't explain what it is.

25           It would be as if you were to say, you cannot be of a

1 disqualifying age, or you should not be disqualified by reason  
2 of state of residency, rather than saying, you must be a  
3 resident of Alabama and you must be 18 years old. We need  
4 specifications so voters can understand their rights.

5           In fact, I actually think this language is quite  
6 misleading. Because the way it's written, it says, you must not  
7 be convicted of a disqualifying felony. Ordinarily I think a  
8 voter would read that language and, without any additional  
9 information, no knowledge about Alabama law and no information  
10 about specific felonies, would assume that that means that  
11 felonies themselves are disqualifying. That's not the law in  
12 Alabama. It's actually a very confined list of crimes that are  
13 disqualifying. And there's no information provided to voters on  
14 the registration forms about that. And I think that that's an  
15 area that requires your immediate attention, if at all possible,  
16 and should not be too taxing on the Court.

17           MS. MESSICK: Your Honor, may I respond to that,  
18 please.

19           THE COURT: Yes. Please.

20           MS. MESSICK: There's a number of pieces to that.

21           First of all, the idea that saying you must not have  
22 been convicted of a disqualifying felony. That could go  
23 Ms. Lang's way. That could go the other way. If we meant you  
24 haven't been convicted of a felony, why add the word  
25 disqualifying? So that's just one way to read it.

1           This argument highlights a problem we've had throughout  
2 this case and a reason that we need a -- what she is calling a  
3 surreply or surrebuttal on the expert reports. She has just  
4 said that she would be happy if the form simply said that there  
5 is a list and told you where to get it. That's not what she's  
6 briefed. What she's briefed is that we have to find a way to  
7 put on there every single disqualifying felony.

8           Now, the legislature did recently come up with a list,  
9 and we appreciate that they recognize -- it's a very short list.  
10 It's got, I think, between 40 and 60 crimes, depending on how  
11 you count them. But those are the Alabama crimes. You're  
12 also -- if you've committed any of those crimes -- if you've  
13 been convicted in federal court or in any of the states, that  
14 would also be disenfranchising. So their argument is actually  
15 that we would have to list every single crime. And it would be  
16 extremely difficult to do that.

17           And what they do is they back away from the principle  
18 of their argument and try to get to the practical result that  
19 they want. So now they're saying, well, if you just list the  
20 Alabama crimes, and you point out state and federal crimes,  
21 other states and federal would be okay. And now today she's  
22 saying, if you would just tell us there's a list.

23           That's not a principled argument. And that's an  
24 argument that's different from the ones that they've made in the  
25 papers and that we haven't had a chance to respond to.

1           Factually, though, you also need to know that there  
2 have been some developments. And let me know if you want me to  
3 file something on this. But they originally tried to sue the  
4 Secretary of State about the federal voter registration form,  
5 and we mooted that whole mess out by simply notifying the EAC  
6 that the law had changed, even though we believed the EAC  
7 already knew.

8           Very recently, in August, the EAC worked with the  
9 Secretary of State's office to revise the federal form.  
10 That form is available at a public web site -- I think it's  
11 eac.gov -- and it shows that it was updated on August 31 to  
12 provide that there's a list of felonies involving moral  
13 turpitude and provide a link for that.

14           So I think that that reflects on the federal agency's  
15 interpretation of the law insofar as it suggests that you don't,  
16 in fact, have to list every single felony. And if it is their  
17 position that we just have to say that there is a list, I don't  
18 see how they get that as a principled matter out of the --  
19 statutorily. But if there is -- if that's their argument, we  
20 ought to have an opportunity to put that clearly in front of our  
21 client, too.

22           I would also say that if this Court were to say that  
23 our form was insufficient, the state form, and that it should be  
24 changed, for instance, to match the federal form, there would  
25 only be so much that could be done before the election at this

1 point anyway. It could be changed -- the online form could be  
2 changed. You actually have the ability to register online by  
3 inputting your information and doing the whole thing there, or  
4 there's a form online that you can print off and mail in. But  
5 it's my understanding there are also millions of forms printed  
6 and out there in the state in various places. And I don't think  
7 it would be realistic to try to recall all of those forms and  
8 get new forms before the election.

9 I will also say that Ms. Lang's arguments presuppose  
10 that people don't know what the law is, which is not the way the  
11 courts operate. We assume that you do know what the law is.  
12 And this change in the law that created the list, it got a lot  
13 of press coverage. It got a lot of coverage. And there were  
14 also a lot of efforts made, not only by the Legal Services of  
15 Alabama and the ACLU, to reach voters, but also by the Board of  
16 Pardons and Paroles and the Secretary of State's office. So  
17 it's not like this is some dusty old law that nobody has ever  
18 heard of and we should be concerned they don't know about. They  
19 can also always talk to the Board of Registrars or the Secretary  
20 of State's office if they have a question about this.

21 The number of felons that we're talking about as  
22 compared to the entire voter population is not a lot of people  
23 to be trying to pull all these forms back and change them at the  
24 last minute like this. Thank you.

25 THE COURT: Anything else from the plaintiffs?

1 MS. LANG: Yes.

2 You know, I think that counsel made a good point  
3 earlier about how you could read disqualifying convictions. You  
4 could read it my way, or you could read it the other way.  
5 That's exactly the point, is that it's ambiguous. It's unclear.  
6 And the NVRA requires it to be clear and specific; hence, the  
7 word specify. So I think -- I don't disagree that it could be  
8 read different ways, but that's precisely the problem.

9 As to our argument that it does not even provide a  
10 list, I think that goes to how egregious the violation is. You  
11 know, Ms. Messick is not incorrect that we think that the  
12 appropriate approach is to specify the crimes that are  
13 disqualifying on the form.

14 Mississippi does. Mississippi has a list of 20-odd  
15 crimes. They include that list on the form. I think, you know,  
16 just because we have a confusing law or a long law doesn't  
17 absolve the state of its requirements under the National Voter  
18 Registration Act to inform voters of their rights and of  
19 eligibility requirements. The idea that we presume that people  
20 have knowledge of the law is overwritten by a federal law that  
21 puts the onus on the state to inform voters of eligibility  
22 requirements in this particular case.

23 I'm glad to hear that there's going to be some changes  
24 to the federal form. I'm discouraged to find out today about it  
25 and have not heard from opposing counsel about it before. But I



1 am encouraged that there are some changes, even if they are not  
2 as expansive as we would hope they would be, and we will  
3 continue to work with the Election Assistance Commission on that  
4 particular issue.

5           Finally, there is evidence in the record, a declaration  
6 from Tari Williams, saying that it's not the case that people  
7 with convictions understand or know this law. In fact, quite  
8 the contrary. That ordinarily when we run into folks with  
9 convictions, they believe they can't vote as a blanket matter.  
10 That's not true of everyone, but this is a population that's  
11 particularly difficult to reach.

12           And, yes, we're not talking about the whole population  
13 of the state of Alabama, but we're talking about hundreds of  
14 thousands of voters. And when it comes to the fundamental right  
15 to vote, even -- you know, the Seventh Circuit has said, it  
16 doesn't matter if it's just one voter. But in this case, it's  
17 hundreds of thousands of voters.

18           And, yes, maybe we can't fix everything before the  
19 election. Maybe we can't recall all the forms. But the changes  
20 to the online form, as Ms. Messick has suggested, would make a  
21 big difference. And the changes -- those forms could be  
22 distributed to registrars across the state to use going forward.  
23 That would make an enormous difference.

24           And finally, I have suggested to Ms. Messick several  
25 times that one of the problems with the form is that it does not

1 even include a referral to a list anywhere. So this is  
2 something she's had an opportunity to put before her client more  
3 than once. I actually have been surprised that we have not been  
4 able to negotiate a settlement on this claim, but there's been  
5 no offers forthcoming.

6 THE COURT: Ms. Messick.

7 MS. MESSICK: I'll just say that the declaration she's  
8 relying on is the one that I've moved to strike and leave it at  
9 that.

10 THE COURT: All right. I appreciate all of the  
11 arguments. This has been very helpful. I am going to go back  
12 and look and see where we are and look at my trial schedules.

13 And I will tell you, again, I'm inclined to just  
14 continue to stay all deadlines until I can get a ruling out on  
15 the motion to dismiss. I think that will provide you-all some  
16 clarity about what you will be moving forward on, which will  
17 help you with most of your issues.

18 As a subset of that, I will look at the expert  
19 disclosure deadlines and determine if I need to make an  
20 independent ruling on that sooner rather than later. But I do  
21 not anticipate that we will get a trial date set until these  
22 pending motions have been ruled on. And if you have any other  
23 issues come up that you need to bring before the Court, you can  
24 certainly do that.

25 I appreciate you continuing to work together as much as

1 possible to resolve as many of these issues between the parties  
2 to try to streamline this, because it is an important case for  
3 both sides. I understand that. And I will get a ruling out on  
4 the pending motions as quickly as I possibly can.

5 MS. MESSICK: Thank you, Your Honor.

6 MS. LANG: Thank you very much, Your Honor.

7 THE COURT: Appreciate it. We're in recess.

8 (Proceedings concluded at 10:49 a.m.)

9 \* \* \* \* \*

10 COURT REPORTER'S CERTIFICATE

11 I certify that the foregoing is a correct transcript  
12 from the record of the proceedings in the above-entitled matter.

13 This 15th day of October, 2018.

14  
15 /s/ Patricia G. Starkie  
16 Registered Diplomat Reporter  
17 Certified Realtime Reporter  
18 Official Court Reporter  
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