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

Treva Thompson, Timothy Lanier, Pamela King, Darius Gamble, and Greater Birmingham Ministries, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, James Snipes, III, in his official capacity as Chair of the Montgomery County Board of Registrars, and Leigh Gwathney, in her official capacity as Chair of the Board of Pardons and Paroles, Defendants.	)	Civil Action No. 2:16-cv-783-ECM-SMD

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT – AND – NOTICE OF OBJECTIONS PURSUANT TO FED. R. CIV. P. 56(C)(2)

Secretary of State John H. Merrill, Chair of the Montgomery County Board of Registrars James Snipes, III, and Chair of the Board of Pardons and Paroles Leigh Gwathney, collectively the State Defendants, reply in support of their motion for summary judgment and simultaneously object to Plaintiffs' reliance on material that "cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2), all as follows.

I. The State Defendants' briefing complies with Fed. R. Civ. P. 56.

Plaintiffs complain that the State "Defendants do not include any statement of undisputed facts nor do they identify which facts they assert are material or undisputed anywhere in their motion." Doc. 268 at 9. The State Defendants' brief in support of their motion for summary judgment, doc. 261, is chock full of facts that the State Defendants contend are undisputed and

which are supported by citations to the record, as required by Fed. R. Civ. P. 56(c)(1). The facts are included throughout the brief as they become relevant to each of the varied claims that Plaintiffs press. For example: facts about felon disenfranchisement generally as well as in Alabama specifically are set out at the beginning of the brief to provide context for the entire case, doc. 261 at 18-23; facts about the 1901 Constitutional Convention and subsequent constitutional reform efforts, including the repeal and replacement of the Suffrage and Elections article in the mid-1990s, are set out in the discussion of Counts 1 and 2, which allege intentional discrimination, *id.* at 39-55; facts about Plaintiff Thompson's and Plaintiff Gamble's court-ordered monies and their ability to pay those monies are among the facts included in the discussion of Count 13, which alleges wealth discrimination, *id.* at 93-97; and, facts about the contents of the Federal Form and the STATE OF ALABAMA MAIL-IN VOTER REGISTRATION FORM are among those included in the discussion of Count 18, which challenges the content of the latter, *id.* at 116-17, 123. Given the different facts relevant to the different claims, any other manner of proceeding would have required setting out all the facts at the beginning of the brief and then repeating them again as relevant. The State Defendants' brief was long enough, and Fed. R. Civ. P. 56 does not require that inefficiency.

II. Secretary Merrill and Chair Snipes are entitled to summary judgment on Counts 1 and 2, which allege that Alabama's current constitutional provision disenfranchising on the basis of convictions for felonies of moral turpitude is intentionally racially discriminatory, in violation of the Equal Protection Clause and the Fifteenth Amendment, respectively.

a. Summary judgment is appropriate.

Plaintiffs contend that summary judgment is rarely appropriate on intent claims, doc. 268-at 10-12, but the Eleventh Circuit has "firmly resist[ed] any inducement to establish a category of claims (*e.g.*, vote denial claims or constitutional challenges to laws affecting voting) that can never succeed on a Rule 56 motion for summary judgment." *Greater Birmingham Ministries v.*

Secretary of State for Alabama, 966 F.3d 1202, 1221 (11th Cir. 2020). The *GBM* Court recognized that "[a]s a general matter, determining the intent of the legislature is a problematic and near-impossible challenge," *id.* at 1227, and ultimately affirmed the district court's grant of summary judgment on intent claims, *id.* at 1231. In this case—as was true in GBM—the parties focus on different facts and interpret some facts differently, but do not really dispute any material facts. Testimony does not assist the Court in such a situation.

Plaintiffs protest that both sides have provided expert testimony. Doc. 268 at 11-12. The State Defendants have offered the expert testimony of Dr. David Beito. Doc. 257-1. Dr. Beito "address[ed] the history of criminal disenfranchisement with an emphasis on Alabama through the adoption of the 1901 Constitution." *Id.* at 3. He found that "Alabama barred certain types of felons from voting since the beginning of its history as a State," *id.* at 10, and that the 1868 Reconstruction Constitution "was sweeping in felon disenfranchisement," *id.* at 11. While it is undisputed that certain crimes listed in the 1901 Constitution as disenfranchising were included for racist reasons, "[t]here is no direct evidence in the convention debates that racial animus motivated the inclusion of either disenfranchisement based on felony convictions or the standard of moral turpitude when applied to felonies . . . ," *id.* at 3. Moreover, "[g]iven the precedent of earlier constitutions, . . . including the 1868 Reconstruction Constitution, any constitution [in 1901] would have probably included a felon disenfranchisement clause of some type even if non-racist and African American delegates had written the document." *Id.* at 17. Soon after the 1901 Constitution was enacted, the need for reform was identified, and Dr. Karen Owen examined efforts to revise the Constitution. Doc. 257-17. She detailed the efforts under Governor Brewer, Governor James, and Lt. Governor Baxley, *id.* at 14-48, before turning to the successful mid-1990s effort to repeal and replace the Suffrage and Elections article, *id.* at 48-57, 61-71, and then touching

on subsequent developments, *id.* at 57-59. Dr. Owen demonstrated the will to move away from the 1901 Constitution, and, in particular, the fact that the 1996 Constitutional Amendment passed through the Legislature without controversy, *id.* at 49-51, and was very favorably received by the electorate, including in majority Black counties, *id.* at 53-57, 61-71. Plaintiffs' offered expert reports that address other matters but did not rebut this testimony, and Plaintiffs did not identify in their opposition any facts as to which they contend the experts disagree. Indeed, at times, they point to areas where the experts agree. *E.g.*, doc. 268 at 13 (general racist motivation of the 1901 Constitutional Convention).

b. Plaintiffs' attempts to tie Alabama's current felon disenfranchisement law to 1901 fail.

Plaintiffs contend that their claim has always been "that the entire 1901 criminal disenfranchisement scheme—and in particular the moral turpitude provision—was intentionally racially discriminatory," and the 1996 repeal and replacement of that scheme "did nothing to remove the underlying racially discriminatory purpose and impact of that scheme." Doc. 268 at 12.[1] Thus, they say, they must prove both that the 1901 provision was adopted for a racially discriminatory purpose and that the 1996 repeal and replacement of that provision "maintained that racially discriminatory purpose." *Id.* (*citing Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1223-24 (11th Cir. 2005) (*en banc*)). Plaintiffs are wrong on the law and the facts.

"Whenever a challenger claims that a [S]tate law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 585 U.S. ___, 138 S. Ct. 2305, 2324 (2018). "The allocation of the burden of proof and the presumption of legislative

[1] Plaintiffs' impact claims were dismissed, doc. 80 at 19-22, 39, but impact is a factor in considering intent, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

good faith are not changed by a finding of past discrimination. [P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case." *Id.* at 2324-25 (internal citations and quotation marks omitted; alteration by the Court). While "[t]he "historical background of a legislative enactment is one evidentiary source relevant to the question of intent," the Supreme Court has "never suggested that past discrimination flips the evidentiary burden on its head." *Id.* at 2325 25 (internal citations and quotation marks omitted). And, indeed, since moral turpitude "has deep roots in the law," *Jordan v. De George*, 341 U.S. 223, 227 (1951), and was applied in 1996 to a different group of crimes (felonies as opposed to misdemeanors) and within an entirely new article, this Court should not conclude that the 1996 revision "carried forward the effects of any discriminatory intent on the part" of the 1901 Convention, *Abbott*, 138 S. Ct. at 2325. That being the case, it is the intent of the Legislature in 1995 and/or the electorate in 1996 that matters, and it is "[P]laintiffs' burden to overcome the presumption of legislative good faith and show that the" actors in the mid-1990s "acted with invidious intent." *Id.*; *see also Cotton v. Fordice*, 157 F.3d 388, 392 (5th Cir. 1998) (Mississippi's provision "as it presently exists is unconstitutional only if the amendments were adopted out of a desire to discriminate against blacks."). Plaintiffs have not demonstrated racial animus in the adoption of the current law; instead, they focus on 1901 and then contend that not enough deliberation occurred in the mid-1990s (and the decades before).

Plaintiffs spend several pages explaining why they believe that the 1901 criminal disenfranchisement provision was discriminatory. Doc. 268 at 13-18. They rely at length on the report of their expert, Dr. R. Volney Riser. *Id.* at 13-17. This testimony is immaterial, and the State Defendants do not challenge it at the summary judgment stage. Plaintiffs also rely on their

understanding of the *Hunter v. Underwood* decision. *Id.* at 13-14, 18. While the parties disagree on the meaning of *Hunter v. Underwood*, this Court does not need a trial to ascertain what a Supreme Court decision says.

Plaintiffs also rely on a law review article from the Utah Law Review to provide factual rebuttal. Doc. 268 at 16 n. 4 (discussing Julia Ann Simon-Kerr, *Moral Turpitude*, UTAH L. REV. 1001 (2012)). The State Defendants **OBJECT** to Plaintiffs' use of this material. The article is an out-of-court statement of Professor Simon-Kerr improperly being offered for the truth of the matter asserted, and remarkably, as untimely rebuttal expert testimony. It is plain hearsay. Fed. R. Evid. 801(a)-(b) & 802; *Ramdass v. Angelone*, 530 U.S. 156, 172 (2000) ("Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it.") (plurality opinion); *United States v. An Article of Food Consisting of Cartons of Swordfish*, 395 F. Supp. 1184, 1186 (S.D.N.Y. 1975) ("Claimant, arguing that 0.5 ppm mercury does not render fish injurious to health, relies almost exclusively on articles which have appeared in the Harvard Law Review, the New York Times, the Daily News, and a medical publication, none of which appear to have been based upon personal knowledge of any of the matters here in dispute and, of course, none of them are sworn. This is insufficient to raise an issue which would defeat summary judgment under Rule 56(e)."); *Henry v. Bradshaw*, 2008 WL 11409966, *2 (S.D. Fla. 2008) (citing, *inter alia*, *Swordfish* in excluding newspaper articles at summary judgment). In addition to the article being hearsay, Professor Simon-Kerr was not disclosed as an expert in this case, and Plaintiffs never disclosed her law review article during discovery. Accordingly, the article "cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2), and should not be considered at summary judgment.

Finally, with respect to the 1901 provision, Plaintiffs focus on the phrase "moral turpitude" and the discretion of the Boards of Registrars. Doc. 268 at 15-17. While Plaintiffs are correct that there was no statutory list of felonies involving moral turpitude until 2017, Ala. Code § 17-3-30.1, and that the Boards of Registrars are still appointed by three statewide officials, Ala. Code § 17-3-2, Plaintiffs have produced no evidence that the actors involved today are the same as 120 years ago or that racism motivates the appointments. Moreover, it is not subject to debate that *all* felonies were disenfranchising in 1901, *see Hunter v. Underwood*, 471 U.S. 222, 223 n. ** (1985) (reproducing the now-repealed 1901 language including "any crime punishable by imprisonment in the penitentiary"), which means that the moral turpitude standard would have no work to do with respect to felonies.

Moving on to the 1996 Constitutional Amendment, Plaintiffs spend about seven pages arguing that there are questions of fact about whether there was sufficient deliberative process in the adoption of that Amendment to cancel out any taint that existed in the 1901 criminal disenfranchisement provision. Doc. 268 at 18-25. As explained above, this is not the right question. But, even if it were, the undisputed facts clearly show that there was.

Plaintiffs rely on *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1223-24 (11th Cir. 2005) (*en banc*). There, the Eleventh Circuit "assume[d], without deciding, that racial animus motivated the adoption of Florida's 1868 disenfranchisement law," *Johnson*, 405 F.3d at 1223, and proceeded to consider whether such taint had been removed, *id.* at 1223-24. Consistent with the Fifth Circuit's decision in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1988), the *Johnson* Court found that "Florida's disenfranchisement provision was amended through a deliberative process in 1968," *Johnson*, 405 F.3d at 1224. Mississippi had twice tweaked the list of disqualifying felonies through a process that included the Legislature and a vote by the people, *id.* at 1223-24

(discussing *Cotton v. Fordice*), while Florida had revised its constitution through committee work, the Legislature, and a vote of the people, *id.* at 1224. By comparison, Alabama *repealed and replaced* the entire Suffrage and Elections article from the 1901 Constitution through a process that involved the Alabama Legislature proposing the constitutional amendment and the people adopting it by a statewide vote.[2] *See* Ala. Act No. 95-443, doc. 257-7 ("Article VIII of the Constitution of Alabama of 1901 is hereby repealed and in lieu thereof the following article shall be adopted."); *Hunter v. Underwood*, 471 U.S. 222, 223 n. ** (1985) (reproducing the now-repealed 1901 language for just Section 182 of the 1901 Alabama Constitution, which was the criminal disenfranchisement provision); doc. 261 at 52-55 (discussing the 1996 Constitutional Amendment); doc. 257-17 at 48-57, 61-71 (Dr. Owen discussing the 1996 Constitutional Amendment). That process followed substantial efforts by Governor Brewer, Governor James, and Lt. Governor Baxley to revise the entire Constitution, including the Suffrage and Elections article. *See* doc. 261 at 40-52; doc. 257-17 at 14-48. Thus, it is plain that, if deliberation were required, the State deliberated.

Plaintiffs argue otherwise. They suggest, doc. 268 at 18-19, that the 1996 Constitutional Amendment (which disenfranchises for felonies of moral turpitude and made other changes to the

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[2] The process for amending the Alabama Constitution is set out in Ala. Const. art. XVIII, § 284. "The proposed amendments shall be read in the house in which they originate on three several days, and, if upon the third reading three-fifths of all the members elected to that house shall vote in favor thereof, the proposed amendments shall be sent to the other house, in which they shall likewise be read on three several days, and if upon the third reading three-fifths of all of the members elected to that house shall vote in favor of the proposed amendments, the legislature shall order an election by the qualified electors of the state upon such proposed amendments . . . ." Ala. Const. art. XVIII, § 284. *Cotton v. Fordice* mentioned notice to the electorate, 157 F.3d at 391, and the Alabama Constitution requires that notice of the constitutional amendment election, "together with the proposed amendments, shall be given by proclamation of the governor, which shall be published in every county in such manner as the legislature shall direct, for at least four successive weeks next preceding the day appointed for such election," Ala. Const. art. XVIII, § 284. A statewide constitutional amendment is adopted by a majority vote of the electorate. *Id.*

Suffrage and Elections article) is no different than the 1901 provision (which disenfranchised for all felonies and for a long list of other crimes and also contained other provisions). This is not a factual dispute, as this Court can look at the relevant laws and perceive the obvious differences without a trial. Plaintiffs' reliance on *Hunter*, doc. 268 at 18, is unfounded as *Hunter* involved the original 1901 provision, which (at that time) had never been amended by the State, though certain portions had been stricken by the courts. *See Abbott*, 138 S.Ct. at 2325 ("The article was never repealed, but over the years, the list of disqualifying offenses had been pruned . . . ."). Similarly, Plaintiffs' reliance on a Fifth Circuit decision for the proposition that the "mere passage of time" is insufficient is likewise unfounded because the Court deals here not with the mere passage of time but with the *repeal and replacement* of the an entire article of the Constitution and by a whole different group of people. Plaintiffs' reliance on *United States v. Fordice*, 505 U.S. 717, 746-47 (1992) (Thomas, J.), is unfounded because it is not the majority opinion Plaintiffs suggest it to be, doc. 268 at 19, and because the case involves the very different context of desegregation of universities.

Next Plaintiffs are wrong to contend that a trial is needed to determine whether the clear change in law was made through a deliberative process. Plaintiffs' start with Dr. Samuel Beatty and his memo during the reform efforts under Governor Brewer. Doc. 268 at 20-21. The State Defendants read the memo to say that felony disqualifications, like those found in other States' constitutions, can be set out in general terms. *See* doc. 261 at 42. Plaintiffs read it differently. Doc. 268 at 20. But no trial is needed to determine what the memo says. The memo is available in the record at 257-19, and the key language for purposes of this case is reproduced in the State Defendants' brief, doc. 261 at 42; *see also* doc. 257-17 at 17-18 (discussion in Dr. Owen's report). Plaintiffs do not contest the words of the memo or offer a counter-memo; the parties just read the

Beatty memo differently. Dr. Beatty has passed, **Exhibit 1**, and, even if his obituary were not believed, Plaintiffs have not provided in support of their opposition any declaration from him about the meaning of his memo. Further, Justice Beatty would not be able to testify at trial because he has not been included in Plaintiffs' initial disclosures as a potential witness (or, alternatively, because he really is dead).

Plaintiffs move on to Governor James' efforts. Doc. 268 at 21-22. They put their spin on the deposition testimony of the State Defendants' witness Mike Waters, but do not offer any counter-testimony and the State Defendants accept Waters' testimony. Plaintiffs emphasize the statements of Mary Weidler, doc. 268 at 22, but the State Defendants do not suggest those did not occur or dispute the contents: we forthrightly reproduced Weidler's comments at length, doc. 261 at 48-49. Plaintiffs confusingly suggest that the James working group was uninformed because it did not contain Black members, doc. 268 at 21, but the record is actually clear that Mike Waters wrote to Rep. Earl Hillard, with a carbon copy to the Members of the Alabama Black Legislative Caucus, that he had invited "Mr. James Wilson of Mobile and Mr. Myron Thompson of Dothan to serve on the [Governor's working] committee" and "both . . . agreed to serve." Doc. 256-8 at 25-26; *see also id.* at 28. And, in any event, as Plaintiffs cannot dispute, the proposed constitutional revisions did not stop with the working group. Indeed, Plaintiffs have dug up part of the House Journal showing a portion of the movement of the proposed bill. Doc. 268 at 22; doc. 270-6. While the State Defendants think the Plaintiffs should have disclosed the document during discovery and should have included more than the limited excerpts they did—and that those excerpts show the referenced vote was not the "last vote taken on the 1979 Constitution proposal," doc. 268 at 22, *compare* doc. 270-6 at 7 (resuming business on S. 40)—the State Defendants do not offer any contrary evidence.

Plaintiffs' relegate the constitutional reform efforts under Lt. Governor Baxley to a footnote, saying there was no change in language. Doc. 268 at 22 n. 6. Plaintiffs again offer no evidence that any of the facts offered by the State Defendants in their brief (which included passage through both Chambers of the Legislature of a new proposed constitution), doc. 261 at 50-52, or Dr. Owen's report, doc. 257-17 at 40-48, are wrong. Thus, Plaintiffs introduce no factual dispute.

Plaintiffs finally turn to the 1996 Constitutional Amendment, which they assert was "strictly housekeeping." Doc. 268 at 23-25. The State Defendants do not dispute that Rep. Venable made the housekeeping statement, and, again, they had included it in their own briefing, doc. 261 at 53. Once again, the parties understand this evidence differently. And, again, the witness has passed, **Exhibit 2** at 4 (Request for Admission No. 7), and the available evidence is undisputed. Plaintiffs have not offered contrary evidence, only a contrary interpretation of the evidence.[3]

Ultimately, throughout this discussion, Plaintiffs offer only the House Journal excerpts as new facts, and those are uncontested. They have no evidence rebutting Dr. Owen's thorough report of the constitutional revision process, culminating in the Legislature's non-controversial adoption of a proposed constitutional amendment in 1995 and then the electorate's adoption of that amendment in 1996. Instead, Plaintiffs' argument is that Alabama has not sufficiently deliberated under *Johnson.* If deliberation were required, the sufficiency of deliberation would be a question for the Court. Here, the Court can answer that question easily and affirmatively based on the undisputed facts set out above.[4] If, in fact, it is "[P]laintiffs' burden to overcome the presumption

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[3] There is some evidence that, though the 1996 Constitutional Amendment plainly applied the moral turpitude standard to felonies, all felons were denied registration until the *Segrest* opinion was issued. *See e.g.*, doc. 261 at 81-82.

[4] In a footnote, doc. 268 at 12-13 n.1, Plaintiffs argue that the State Defendants "have not established that *only* the moral turpitude language is infected with racial intent," such that it could be stricken, leaving all felonies disenfranchising. Plaintiffs have focused their case on the moral

of legislative good faith and show that the" actors in the mid-1990s "acted with invidious intent," *Abbott*, 138 S. Ct. at 2325, Plaintiffs' theory that the felony disqualification issue was never really addressed after the 1970s demonstrates that they have no case.

c. The *Arlington Heights* factors favor Secretary Merrill and Chair Snipes.

Plaintiffs begin their *Arlington Heights* analysis with another flawed reading of *Hunter v. Underwood* and with a skewed reading of Alabama law. Both readings are aimed at convincing this Court to consider impact up through today in evaluating intent. When *Hunter v. Underwood* was decided, the Court was confronted with the original provision as adopted at the 1901 Constitutional Convention and modified only insofar as some courts had stricken extremely limited portions of it. *Hunter v. Underwood*, 471 U.S. 222, 223 n. **, 232-33 (1985); *Abbott*, 138 S.Ct. at 2325 ("The article was never repealed, but over the years, the list of disqualifying offenses had been pruned . . . ."). The State itself had never acted. Circumstances are different here. In the years since the 1996 Constitutional Amendment was adopted, Alabama created and then refined the CERV process, *see* doc. 261 at 22-23, and developed a limited statutory list of which felonies are disenfranchising, *see id.* at 22. Plaintiffs identify alleged flaws in that list and argue the impact of that list is evidence of the intent behind the constitutional amendment. Doc. 268 at 26. However, the list of disenfranchising felonies was first adopted in 2017 and then amended. *See* doc. 261 at 22. It is irrational to hold that the intent of the 1995 Alabama Legislature and/or 1996 statewide electorate can be condemned on the basis of actions taken two decades later by different actors. The fact that Ala. Code § 17-3-30.1 sets out its purposes does not change this.[5]

turpitude language as (allegedly) bearing racial taint, and it is undisputed that all felonies were disenfranchising in the 1868 and 1875 Constitutions, *see* doc. 261 at 20.

[5] Plaintiffs also assert that the 2017 Legislature was acknowledging the unconstitutional vagueness of the moral turpitude standard. Doc. 268 at 26. That, again, is based on their reading

If anything, the subsequent history—which shows a willingness to re-enfranchise some felons and a willingness to limit which felons are disenfranchised in the first instance—should be viewed by the Court as positive developments.

Secretary Merrill and Chair Snipes understand that impact is a starting point for the *Arlington Heights* analysis, but reiterate that it is not the end of the analysis and, further, that the State had a well-established non-racial interest in excluding felons from the ballot. *See* doc. 261 at 30-35. Plaintiffs' reliance on data that predates the 1996 Constitutional Amendment, doc. 268 at 27, is misplaced because the earlier provision imposed a different standard. Additionally, their citation to data in *Hunter v. Underwood*, doc. 268 at 27, is irrelevant both because it predates 1996 and because it says on its face that it concerns "nonprison offenses"—not felonies—and only in two counties, *id.* (*quoting Hunter*, 471 U.S. at 227 (*quoting* the district court). Plaintiffs also rely on a data from the Vera Institute of Justice and the Sentencing Project, all of which they find online. Doc. 268 at 28. The State Defendants **OBJECT** to Plaintiffs' reliance on this data. Once again, it is hearsay evidence that is not subject to cross-examination and which was never disclosed during discovery. Accordingly, the data "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). Finally, on impact, Plaintiffs' rely on Dr. Smith's analysis, much of which the State Defendants have moved to exclude or to be accorded no weight, doc. 258. Plaintiffs do not cite to any data from Dr. Smith analyzing who was disenfranchised under the 1996 Constitutional Amendment prior to the adoption two decades later of a statutory list of disqualifying felonies. Doc. 268 at 28-29. For the evidence that they do cite, Plaintiffs are correct that the State Defendants have not offered competing expert testimony. Thus, Dr. Smith's

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of the statute. The State Defendants continue to assert that the moral turpitude standard was not unconstitutional, and that the Ala. Act No. 2017-378 does not say otherwise.

analysis—to the extent that it is not excluded—is part of the undisputed record before the Court as it considers summary judgment.

As to the other *Arlington Heights* factors, the State Defendants offered extensive evidence of the events leading to the adoption of the 1996 Constitutional Amendment as well as the unremarkable way in which it passed through the 1995 Legislature and the tremendous support it received from the statewide electorate, including in majority Black counties. *See Vill. of Arlington Heights*, 429 U.S. at 265-68; doc. 261 at 35-55. Plaintiffs respond with several pages complaining about the manner in which the common law moral turpitude standard was implemented, doc. 268 at 29-32, but it is unclear why—even accepting as true for purposes of summary judgment all of the facts they allege—this would be evidence of *racially discriminatory* intent.

That said, some of the evidence Plaintiffs offer cannot be considered at summary judgment. The State Defendants **OBJECT** to Plaintiffs' reliance on the work of Donald Strong, doc. 268 at 30. While his writing is exempted from exclusion as hearsay by virtue of being an ancient document, *see* Fed. R. Evid. 803(16), that does not permit Plaintiffs to use Dr. Strong as an untimely and undisclosed expert, as they attempt to do. The State Defendants also **OBJECT** to Plaintiffs' citation to the *Gooden v. Worley* complaint. To the extent that they offer it to prove the truth of the allegations asserted, it is hearsay. Fed. R. Evid. 801 & 802. Additionally, this is yet another document that was not disclosed by the Plaintiffs during the discovery period. The State Defendants also **OBJECT** to Plaintiffs' reliance on the communications from Griffin Sikes, doc. 268 at 30, which are hearsay, Fed. R. Evid. 801 & 802, and which, of course, reflect one person's opinion ten years after the 1996 Constitutional Amendment was adopted.[6] And, the State

[6] Plaintiffs rely on the Griffin Sikes memo again at page 44 of their brief, and the State Defendants objection applies to that reference as well as any others. Indeed, the State Defendants' objections to all evidence apply to each of Plaintiffs' uses of that evidence.

Defendants **OBJECT** to Plaintiffs' reliance on the Campaign Legal Center letter to Morgan County, doc. 268 at 31, which is hearsay, Fed. R. Evid. 801 & 802.[7] In any event, even if the documents demonstrated that an error had been made in Morgan County, it would not establish (as Plaintiffs allege) that training was insufficient, nor would it speak to racist intent.

Further, Plaintiffs are wrong to assert that Alabama "le[f]t the determination of which crimes involved moral turpitude up to individual registrars with disastrous results." Doc. 268 at 31. State law provides for an appeal when an applicant is denied registration, Ala. Code § 17-3-55, as well as when a voter is removed from the rolls, Ala. Code § 17-4-3(b). These appeals are to the probate court and can reach the circuit courts and then the Supreme Court of Alabama, which can provide authoritative guidance statewide. Plaintiffs are further wrong to rely on the 2017 law to interpret the intent of the Legislature and the voters in the mid-1990s, doc. 268 at 31-32, for the reasons already stated. It should also be noted that while some of the evidence on which Plaintiffs rely in this discussion concerns federal convictions and out-of-State convictions, doc. 268 at 31, all of the individual Plaintiffs were convicted in Alabama courts and Plaintiffs have not cited to the Court any admissible evidence about the number of Alabama citizens who have federal convictions and/or out-of-State convictions as context for considering the evidence they do offer.

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Plaintiffs' opposition on the intent claims is based on a different reading of the law and a different reading of some of the evidence. They do not put forward admissible evidence that contradicts the evidence introduced by Secretary Merrill and Chair Snipes. Accordingly, no trial is needed, and the Court should rule for the State Defendants on the record before it.

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[7] Counsel from Campaign Legal Center represent Plaintiffs in this litigation.

III. Felony disenfranchisement is not punishment.

The State Defendants set out in their original brief their arguments as to why felon disenfranchisement is not punishment (and, indeed, cannot be punishment as to felons convicted outside of Alabama courts). Doc. 261 at 58-68. Plaintiffs' contend that felon disenfranchisement is punishment and that a trial is needed to resolve the parties' disagreement. Doc. 268 at 32. However, for most of their nearly 10 pages of argument, doc. 268 at 32-41, Plaintiffs make legal arguments which they say are dispositive. The State Defendants primarily rely on their original briefing, but offer a few brief responses.

First, Plaintiffs' reliance on the Eleventh Circuit's references to punishment in the Florida felon voting case, doc. 268 at 33, is misplaced because Florida relied on a "multifaceted" interest in punishment, *Jones v. Governor of Florida*, 950 F. 3d 795, 810 (11th Cir. 2020). Thus, the question of whether felon disenfranchisement is punishment was not raised, even in the most recent *en banc* decision. *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020) (*en banc*). Moreover, even the *Jones* panel decision from the preliminary injunction stage of the case recognized that "[t]he longstanding policy of felon disenfranchisement has been justified on two grounds, suggesting what those interests could be: (1) punishment for those who have breached the social contract by committing crimes, *and (2) shielding the ballot box from those who have manifested antagonism to society's laws*." *Jones*, 950 F. 3d at 810 (panel; emphasis added). In so doing, the panel relied, in part, on *Green v. Board of Elections of City of New York*, 380 F.2d 445 (2nd Cir. 1967), *Jones*, 950 F. 3d at 810 (panel), which the State Defendants have also relied upon, *see e.g.*, doc. 261 at 31.

Second, the State Defendants **OBJECT** to Plaintiffs' reliance on a law review article by Richard and Christopher Re, doc. 268 at 34-35 (*quoting* Richard M. Re & Christopher M. Re,

Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 YALE L.J. 1584 (2012)). The Re article is hearsay. Fed. R. Evid. 801(a)-(b) & 802; *Ramdass v. Angelone*, 530 U.S. 156, 172 (2000) ("Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it.") (plurality opinion); *United States v. An Article of Food Consisting of Cartons of Swordfish*, 395 F. Supp. 1184, 1186 (S.D.N.Y. 1975) ("Claimant, arguing that 0.5 ppm mercury does not render fish injurious to health, relies almost exclusively on articles which have appeared in the Harvard Law Review, the New York Times, the Daily News, and a medical publication, none of which appear to have been based upon personal knowledge of any of the matters here in dispute and, of course, none of them are sworn. This is insufficient to raise an issue which would defeat summary judgment under Rule 56(e)."); *Henry v. Bradshaw*, 2008 WL 11409966, *2 (S.D. Fla. 2008) (citing, *inter alia*, *Swordfish* in excluding newspaper articles at summary judgment). In addition, Plaintiffs never disclosed this review article during discovery. Accordingly, it "cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2), and should not be considered at summary judgment.

The State Defendants do not object to the citation to the Congressional Globe (which is included in the Re article and reproduced at doc. 268 at 34), but believe any quotations therefrom should be considered in context rather than wrenched out of it. Further, what one Representative said is hardly dispositive. Not only is Rep. Bingham described by the Re article as "the primary author" of Section *1* of the Fourteenth Amendment, doc. 268 at 34, while the "except for participation in rebellion, or other crime" language is in Section *2* of the Fourteenth Amendment, but "[t]he problem of interpreting the 'intention' of a constitutional provision is. . . a difficult one." *Richard v. Ramirez*, 418 U.S. 24, 43 (1974). "Not only are there deliberations of congressional

committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States." *Id.* Further, with respect to the language at issue here, "[t]he legislative history . . . is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here." *Id.* While the *Richardson v. Ramirez* Court went on to hold that "what legislative history there is indicates that this language was intended by Congress to mean what it says," *id.*, and thus felon disenfranchisement is "affirmative[ly] sanction[ed]" by the Fourteenth Amendment, *id.* at 54, the Fourteenth Amendment does not express any limitations on the purposes States may further in disenfranchising felons. At bottom, Plaintiffs offer no binding authority for their novel theory that the Fourteenth Amendment itself denies the States the ability to disenfranchise felons on any basis other than punishment. And, of course, a plurality of the Supreme Court indicated in *dicta* that felon disenfranchisement is "a nonpenal exercise of the power to regulate the franchise," *Trop v. Dulles*, 356 U.S. 86, 97 (1958).

With respect to the Readmission Act, the State Defendants make two brief points. First, the Fourteenth Amendment postdates it. And, second, once again, Plaintiffs' offer a skewed reading of text that the Court can read for itself. The Readmission Act does not "expressly prohibit Alabama from imposing disenfranchisement in future constitutions for any purpose other than punishment," as Plaintiffs' say, doc. 268 at 35. Instead, it provides that the State may not deprive anyone of the right to vote who could vote under the 1868 Reconstruction Constitution (which disenfranchised all felons), "except as punishment for such crimes as are not felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all in the inhabitants of the State." Act of June 25, 1868, ch. 50, 15 State. 73.

After insisting that the Eleventh Circuit's decisions and federal law require a finding that felon disenfranchisement is punishment, Plaintiffs next insist that, if there is any question about that then a trial would be needed. Doc. 268 at 36. Plaintiffs spend two pages on facts before returning to legal arguments. As to the facts, they note the State Defendants recognition that "'Undeniably, some of the discussion in Alabama over the years has included persons expressing the view that disenfranchisement is punitive.'" Doc. 268 at 36 (*quoting* doc. 261 at 60). But the fact that the State Defendants recognize that some people have made those statements means there is no dispute of fact as to those statements having been made. Similarly, Plaintiffs point to testimony of a Secretary of State employee as to the views of the Exploratory Committee more than two decades after the adoption of the 1996 Constitutional Amendment. Doc. 268 at 37. But the fact that some people hold the view that felon disenfranchisement is punishment does not make that the State's view or the State's interest, and the State cannot be called to testify. Plaintiffs may be hoping to call Rep. Tony Harrison, to whom they refer on page 36. However, the record is already clear as to his opinion (*circa* 1979) on disenfranchisement as punishment and his personal opinion is not dispositive or even particularly helpful. Additionally, should the issue present itself, the State Defendants would expect to object to Rep. Harrison being called at trial as Plaintiffs did not disclose him as a potential witness in this case until the day discovery closed.

The State Defendants also **OBJECT** to Plaintiffs' reliance on a THINKPROGRESS article to assert Secretary Merrill's views on felon disenfranchisement, *see* doc. 268 at 37 (*quoting Alabama Elections Chief Calls Losing the Right to Vote a 'Minor Disability'*, THINKPROGRESS (Apr. 10, 2018)). Once again, the article is hearsay, Fed. R. Evid. 801 & 802, and it was not disclosed during discovery. Even if the statements of Secretary Merrill himself would be admissible under Fed. R. Evid. 801(d)(2), which it is not at all clear they are, *Hope for Families & Community Service, Inc.*

v. Warren, 2012 WL 13015131, *1 (M.D. Ala. 2012) ("The article is hearsay because a reporter's written text of what a party said is an out-of-court statement" *by the reporter*), the questions from the reporter are certainly not. And, of course, Secretary Merrill was a private citizen in 1996 when Alabama's current felon disenfranchisement provision was adopted, and a single vote in the Legislature and then a single vote among the electorate when the 2012 Constitutional Amendment was adopted.

Plaintiffs finally return to making legal arguments, doc. 268 at 38-41, which no trial is needed to resolve. The discussion concerns the *Mendoza-Martinez* factors, and the State Defendants rely on their earlier briefing of those factors as well as on their briefing above concerning Plaintiffs' novel theory that the Fourteenth Amendment limits the ability of the States to disenfranchise felons only for punitive purposes.

IV. Secretary Merrill and Chair Snipes are entitled to summary judgment on Count 11 which alleges a violation of the *Ex Post Facto* Clause.

Secretary Merrill and Chair Snipes have explained in their initial brief that each individual Plaintiff committed felonies after the Supreme Court of Alabama had held those felonies involved moral turpitude, and two did so at a time when *all* felonies were disenfranchising (prior to the 1996 Constitutional Amendment's adoption). Doc. 261 at 79-80. Plaintiffs claim that "it is the codified law of Alabama that the 'moral turpitude' standard that predated [Ala. Act No. 2017-378] was vague and *no* particular felony was authoritatively disqualifying." Doc. 268 at 43 (emphasis by Plaintiffs). Once again, this Court can read Ala. Code § 17-3-30.1, where the 2017 Act is codified, as amended, and see that is *not* what the Legislature said. The Legislature said there was no "comprehensive, authoritative source," not that there were no authoritative sources at all. Plaintiffs also cite to various lists that were used before the statutory list was created. Doc. 268 at 44-45. By contrast, the State Defendants have relied on decisions of the Alabama appellate courts,

and the Supreme Court of Alabama is undeniably "the ultimate expositor[] of [S]tate law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Alabama law is what the Supreme Court of Alabama said it was, not what anyone else believed or wrote in a memo or handbook. The reason that a comprehensive list was not available before the statutory list was created is simply that the Supreme Court of Alabama had (quite understandably) not faced a question about whether each and every Alabama felony involves moral turpitude.

Plaintiffs cite various record evidence about what Secretary of State employees understood to be happening in the field or what could possibly happen in the field. Doc. 268 at 43-44. Three points are critical. First, State law provides for an appeal when an applicant is denied registration, Ala. Code § 17-3-55, as well as when a voter is removed from the rolls, Ala. Code § 17-4-3(b). These appeals are to the probate court and can reach the circuit courts and then the Supreme Court of Alabama, which can provide authoritative guidance statewide. Second, Plaintiffs' concern that it is possible that a felon who was *not* eligible to vote under Alabama law might nonetheless be registered by a State actor in disregard of State law does not mean there is a problem with the law itself. If a State Trooper pulls over a driver going 68 m.p.h. in a 70 m.p.h.-zone, the speeding laws nonetheless survive. Third, none of this creates a dispute of fact about whether the individual Plaintiffs' felonies were disenfranchising at the time they committed them.

Plaintiffs also argue that none of the individual Plaintiffs was on notice that his or her felony was disenfranchising despite Supreme Court of Alabama decisions holding that those felonies involve moral turpitude. Doc. 268 at 46-51. Plaintiffs make several sub-arguments. They first contend that decisions interpreting moral turpitude for purposes of evidence law did not govern questions of moral turpitude for purposes of voting. In support of this argument, Plaintiffs point (again) to the 2017 law which sets out a list of felonies of moral turpitude for voting purposes

only. Ala. Code § 17-3-30.1. It is true that Ala. Code § 17-3-30.1(b)(2)(c) provides that a purpose of the legislation is "[t]o provide a comprehensive list of acts that constitute moral turpitude *for the limited purpose of disqualifying a person from exercising his or her right to vote*," and that Ala. Code § 17-3-30.1(c) makes clear that the list in that subsection is only for voting purposes. However, importantly, this statute did not take effect until 2017—after the individual Plaintiffs committed their felonies. Plaintiffs are wrong to argue that moral turpitude had a different meaning in the voting context than it did in every other context before the State explicitly drew such a line in 2017. "The term 'moral turpitude' has deep roots in the law," *Jordan v. De George*, 341 U.S. 223, 227 (1951). It has been used in a variety Alabama laws, *see* doc. 261 at 33-34 n. 10, in the laws of other States and in federal law, *see id.* at 32-35. The Supreme Court of Alabama has looked to the decisions of courts of other States to interpret moral turpitude. *Pippen v. State*, 73 So. 340, 342 (Ala. 1916) (*quoting Fort v. Brinkley*, 112 S.W. 1084 (Ark. 1908)); *Meriwether v. Crown Inv. Corp.*, 268 So.2d 780, 787 (Ala. 1972) (*quoting Lee v. Wisconsin State Board of Dental Examiners*, 139 N.W. 2d 61 (Wisc. 1966)). And, the Attorney General of Alabama in 2005 looked to Alabama cases dealing with moral turpitude generally in issuing an opinion to Hon. William C. Segrest, Executive Director, Board of Pardons and Paroles, dated March 18, 2005, A.G. No. 2005-092, available at doc. 257-18. While Plaintiffs have consistently (and derisively) assumed that moral turpitude had a special meaning in Alabama or in Alabama felon disenfranchisement law, they have never established that. Should the Court believe that it needs to resolve this dispute between the parties to dispense with the claims presented, it is not a question for trial but one for the Supreme Court of Alabama, the only body that can authoritatively respond, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *See* Ala. R. App. P. 18 (Certified Questions from Federal Courts).

Continuing their argument that Plaintiffs were not on notice despite the authoritative decisions of the Supreme Court of Alabama, Plaintiffs argue that *Stahlman v. Griffith*, 456 So.2d 287 (Ala. 1984), could not have put Plaintiff Thompson on notice because it involved a misdemeanor conviction and she has a felony conviction. The argument is specious. The witness in *Stahlman* had been convicted of attempted theft of property in the second degree, which the Supreme Court of Alabama said involved moral turpitude: "Given the settled law that a conviction for the misdemeanor offense of *theft* is a crime involving moral turpitude, we are unable to perceive a material difference, for impeachment purposes, where the conviction is for the lesser offense of *attempted theft*. It is not the *class* of the crime, as that crime is legally defined, but its nature and character that form the basis for the test of its admissibility. The moral baseness of the act is not lessened by the fact that the theft was *attempted* as opposed to being completed. The element of intent is present to the same degree in both." *Id.* at 290-91. That being the case, it is inconceivable that Plaintiff Thompson's conviction for theft of property (1st degree), doc. 1 at ¶ 38, would not also involve moral turpitude where she succeeded in the commission of her felony.[8]

Plaintiffs also argue that Plaintiff Gamble was not on notice that his conviction for trafficking in marijuana would be disenfranchising because one may violate the trafficking statute

[8] Plaintiffs also contend that *Stahlman* recognized that most (but not all) felonies involve moral turpitude while some misdemeanors do not, but that the 2017 law recognizes few felonies and no misdemeanors. Doc. 268 at 47. First, and again, the 2017 law was a change in that it explicitly drew a line between, on the one hand, moral turpitude as a long-established legal concept applied to multiple areas of the law and, on the other hand, moral turpitude only for purposes of voting in Alabama. The idea that most felonies involve moral turpitude—under the common law definition—was expressed during the constitutional reform efforts *with respect to felon disenfranchisement.* Doc. 257-17 at 32; doc. 256-13 at 53. Second, the 2017 law does not include any misdemeanors because it provides a list to follow in implementing Ala. Const. art. VIII, § 177(b), which provides that convictions for *felonies* involving moral turpitude are disenfranchising. Ala. Code § 17-3-30.1 does not pretend to mean that misdemeanors cannot involve moral turpitude; those misdemeanors are simply irrelevant for voting purposes in Alabama when only felony convictions are disenfranchising.

by mere possession of drugs. Doc. 268 at 48-49. Indeed, Ala. Code § 13A-12-231(1) breaks down the mandatory minimum term of imprisonment and the fine based on whether the conviction is for more than 2.2 pounds but less than 100 pounds, more than 100 pounds but less than 500 pounds, more than 500 pounds but less than 1,000 pounds, or more than 1,000 pounds. Ala. Code § 13A-12-231(1). Plaintiffs apparently expect this Court to believe that someone with more than 2.2 pounds or more 1,000 pounds of marijuana may only hold it for personal use. And they ask this Court to indulge this idea even as Plaintiff Gamble seeks equity where his underlying conduct involved roughly $10,000 in cash and a pistol (both at the time of his arrest), doc. 222-6 at 20:21-21:4, and roughly 30 pounds of cannabis, *id.* at 27:6-14. The *Ex parte McIntosh* Court said that "Trafficking in and encouraging others to utilize a controlled substance, such as marijuana, indicates far greater untrustworthiness and depravity of character than personal consumption of a controlled substance. One could logically assume that, because of the illegal nature of trafficking itself, a person would likely lie and operate covertly in order to engage in such selling. On the other hand, personal consumption is likely achieved without such conduct." 443 So. 2d 1283, 1286 (Ala. 1983). Plaintiff Gamble was on notice.

Moreover, to be clear, it is *not* the State Defendants' position that the moral turpitude standard only put a felon on notice where there was a Supreme Court of Alabama holding directly on point. It is only that the frivolous nature of Plaintiffs' claims is made apparent by the fact that there were Supreme Court of Alabama decisions on point for each of them.

Plaintiffs Lanier and King were, as previously briefed, *see* doc. 261 at 79, further on notice because all felons were disenfranchised at the time of their crimes. Plaintiffs try to circumvent this through their argument that Ala. Const. art. VIII, § 177(b)'s disenfranchisement of those convicted of felonies involving moral turpitude was unconstitutionally vague when only the

common law definition was available—that is prior to the enactment of Ala. Code § 17-3-30.1 in 2017—and thus, pursuant to *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), the law "was void at all times it purported to be in effect." Doc. 268 at 45. *Montgomery v. Louisiana* is not a roving commission for plaintiffs' lawyers to unilaterally decide which prior laws they believe were never effective, nor it is a gaping exception to the general mootness rules that allows one to relitigate moot claims. Indeed, in this very case, Counts 6 through 10 of the original complaint were tied to the allegation that the moral turpitude standard was not sufficiently defined, *see* doc. 72 at 6-7, 13-14, and were rendered moot by the enactment of Ala. Code § 17-3-30.1, *id.* at 11-18; *see also* doc. 80 at 27-28. *Montgomery v. Louisiana* does not allow Plaintiffs to nonetheless litigate the constitutionality of the old law, much less unilaterally declare it. Instead, *Montgomery v. Louisiana* is exceptionally narrow and does not apply here. It arose from State collateral proceedings challenging a criminal sentence where the sentence imposed had been held categorically to violate the Cruel and Unusual Punishment Clause for felons like Montgomery and that decision had been handed down about five decades after he was arrested and long after his sentence was final. 136 S.Ct. at 725-26. In determining whether it had jurisdiction over the case, the Supreme Court discussed the rule of *Teague v. Lane*, 489 U.S. 288 (1989), on retroactivity, with a focus on the fact that "courts must give retroactive effect to substantive rules of constitutional law [which] include rules forbidding criminal punishment of certain primary conduct as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery v. Louisiana*, 136 S.Ct. at 728 (internal citations and quotation marks omitted). It was in this context that the Court discussed *Ex parte Siebold's* statement that "[a]n unconstitutional law is void, and is as no law." *Montgomery v. Louisiana*, 136 S.Ct. at 731 (*quoting Ex parte Siebold*, 100 U.S. 371, 376 (1880)). The present case does not

present the issue of any new substantive rule of constitutional law forbidding the convictions of any of the individual Plaintiffs or having rendered their punishment (which felon disenfranchisement is not) unconstitutional. There is no applicable new substantive rule at all. Further, this case certainly is not a collateral proceeding. *Montgomery v. Louisiana* does not apply.

V. Secretary Merrill and Chair Snipes are entitled to summary judgment on Plaintiffs' Due Process Claims in Counts 16 and 17.

Plaintiffs' premise their opposition as to the Due Process claims on their theory that Alabama's use of a common law moral turpitude standard was unconstitutional and thus void, doc. 268 at 65-69, though it was never so declared by any court. For the reasons set out in the State Defendant's original briefing and above, this is not so. Moreover, as already explained, while there was no comprehensive list of disqualifying felonies under the common law, each individual Plaintiff was on notice that his or her felony was disqualifying, and GBM's facial challenge thus fails. For this reason, Count 17—which is an alternative to Count 11 (in the event that the Court agrees with the State Defendants that felon disenfranchisement is not punishment)—fails for the same reasons Count 11 does.

Plaintiffs do make one argument with respect to Count 17 that requires a response. They argue that the State Defendants' interests in avoiding an "'administrative nightmare' and in [avoiding] 'undermin[ing] the Legislature's intent in enacting Ala. Code § 17-3-30.1'" cannot "outweigh [their] fundamental voting rights." Doc. 268 at 73 (second alteration by the Plaintiffs). First, felons do not have a fundamental right to vote; instead, the Constitution includes an "affirmative sanction" for felon disenfranchisement, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *4 (11th Cir. Sept. 11, 2020) (*en banc*) ("Whatever may be true of the right to vote generally, felons cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly

permitted under the terms of *Richardson*.") (internal quotation marks omitted). Second, the relevance of the administrative nightmare that would be occasioned by interpreting the statute as Plaintiffs' suggest is that it helps reveal the Legislature's intent, and thus may be properly considered, under Alabama law, in ascertaining the Legislature's intent. *See* doc. 261 at 84-85. Plaintiffs' reading entirely undermines the Legislature's actions. That Tennessee has two rules based on timing, *see* doc. 268 at 74 n. 32, which is a function of language in the Tennessee Constitution, *see Gaskin v. Collins*, 661 S.W. 2d 865, 866 (Tenn. 1983), tells this Court nothing about the Alabama Legislature's willingness to continue the common law system it clearly intended to replace while simultaneously layering on a new statutory-list-based system.

With respect to Count 16, Plaintiffs' arguments are grounded in their flawed interpretation of State law, doc. 268 at 69-70, and their assertions that Ala. Const. art. VIII, § 177(b) could have no effect without a statutory list. The State Defendants set out their arguments on these points in their initial briefing and in this briefing and any further argument would be redundant. The State Defendants do continue to assert that any questions this Court has about the proper interpretation of State law should be addressed to the Supreme Court of Alabama. Ala. R. App. P. 18. Further, to the extent that Plaintiffs are calling for this Court to order the State Defendants to conform their conduct to Plaintiffs' view of State law—whether as to these claims or any other—the State Defendants expressly assert that the Eleventh Amendment deprives the Court of subject matter jurisdiction to do so, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106-07 (1984) ("[I]t is difficult to think of a greater intrusion on [S]tate sovereignty than when a federal court instructs [S]tate officials on how to conform their conduct to [S]tate law."); the State Defendants do not waive their sovereign immunity defense; the suggestion of certification is only insofar as this Court believes it necessary to resolve an issue of State law in order to rule on a federal question.

The State Defendants note that Plaintiffs' Due Process argument contains one of many assertions that the State Defendants have made a concession. *See* doc. 268 at 69. If the State Defendants wish to make a concession, they know how to be clear about it. In fact, the State Defendants' arguments that every alleged State law violation is not converted into a federal law violation and that Plaintiffs have no substantive due process right at issue in this case, doc. 95 at 12-15, are preserved and not waived.[9] The State Defendants have, in their summary judgment briefing, simply focused on the most expedient manner of resolving Plaintiffs' claims, which is a recognition that Plaintiffs were on notice.

Finally, with respect to both Due Process counts, the State Defendants note that, while Plaintiffs did not move for summary judgment on these claims, they also introduced no factual disputes in their opposition (though they spin the testimony they do cite). The disagreements between the parties revolve around legal arguments and a trial would not resolve them.

[9] Secretary Merrill and Chair Snipes note that *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), is much more narrow than Plaintiffs seem to recognize and that, to the extent *Duncan* is inconsistent with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (*en banc*), on which the State Defendants relied, doc. 95 at 13, *McKinney v. Pate* controls. Helpfully, in light of some of Plaintiffs' briefing, *McKinney v. Pate* recognized that "We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." *McKinney v. Pate*, 20 F.3d at 1559 (*quoting Bishop v. Wood*, 426 U.S. 341, 349-50 (1976)). While the statement was made in the public employment context, it is equally true here. Alabama's recognition of the importance of voting rights at issue in the voter registration/purge decision explains why State law provides for an appeal when an applicant is denied registration, Ala. Code § 17-3-55, as well as when a voter is removed from the rolls, Ala. Code § 17-4-3(b).

VI. Secretary Merrill and Chair Snipes are entitled to summary judgment on Count 12 which alleges cruel and unusual punishment in violation of the Eighth Amendment.

a. Summary judgment on Plaintiffs' categorical claim is appropriate.

Plaintiffs assert that the State Defendants have misunderstood their cruel and unusual punishment claim. Doc. 268 at 52-53. They assert that their claim is not about each individual Plaintiff's sentence based on his or her conviction, but is categorical in nature. *Id.* And, they say, the State Defendants' motion for summary judgment should be denied for having moved on the wrong claim. *Id.* The State Defendants disagree that Plaintiffs' claim was clear and contend that, under the circumstances, it would be appropriate for this Court, "[a]fter giving notice and a reasonable time to respond," to grant the State Defendants summary judgment on the claim Plaintiffs say they press. *See* Fed. R. Civ. P. 56(f). Alternatively, the Secretary Merrill and Chair Snipes seek leave to file a supplemental motion for summary judgment on Plaintiffs' cruel and unusual punishment claim. Any confusion about the claim was unintentional, and it serves no purpose to go to trial due to that confusion when there are no material facts in dispute. *Cf. Thomas v. Kroger Co.*, 24 F.3d 147, 149 (11th Cir. 1994) ("A district court . . . may consider an otherwise untimely motion if, among other reasons, doing so would be the course of action most consistent with the interest of judicial economy.") (internal citation and quotation marks omitted).

The State Defendants disagree that Plaintiffs' claim was clear from either the complaints or earlier briefing, especially in light of the fact that Plaintiffs sought to represent a class and subclasses and have consistently operated at a level of abstraction in this case. Moreover, the State Defendants made clear in their opposition to the motion for class certification that they understood the claim as they subsequently briefed it at summary judgment, *see* doc. 113 at 16-17, and Plaintiffs responded that their "*primary* Eighth Amendment argument is that continuing disenfranchisement

past the completion date of incarceration, parole, and probation is both cruel and unusual among the [S]tates." Doc. 114 at 17 (emphasis added). They dropped a footnote that "Plaintiffs may prove that, for certain disqualifying felonies, *any* disenfranchisement violates the Eighth Amendment. But any such arguments would be relatively few . . . ." *Id.* at 17 n. 9.[10]

Seeking to better understand the claim, the State Defendants propounded two interrogatories to Plaintiff Greater Birmingham Ministries. Interrogatory No. 10 demanded that GBM:

> Describe each and every claim you bring in Count 12. Your description should explain, *inter alia*, whether the claim originally brought in Count 12 has been replaced by the claim in the supplemental complaint or whether Count 12 currently pursues two or more claims, and, if there are two or more claims, whether they are in the alternative. You should also make clear whether each claim is facial or as applied.

Exhibit 3 at ROG 10. GBM objected and did not substantively respond. **Exhibit 4** at ROG 10. Interrogatory No. 11 demanded that GBM "Explain how your presence in this case as a Plaintiff broadens the scope of issue(s) in Count 12 beyond the factual circumstances of" the individual Plaintiffs. **Exhibit 3** at ROG 11. GBM objected, said that it "alleges its own injuries," and said its "injuries would not be remedied by a remedy limited to the factual circumstances of the individual Plaintiffs." **Exhibit 4** at ROG 11.

The State Defendants opened the meet-and-confer process, explaining that they believed Interrogatory No. 10 was a proper contention interrogatory that is "important to the State Defendants' ability to understand GBM's claims in order to properly move for summary judgment and to otherwise prepare our defense." **Exhibit 5** at 1-2. The letter continued that the State Defendants "have not been able to obtain this information to date through other means" and did

[10] Plaintiffs' current briefing on their categorical claim also makes reference to "the individual plaintiffs' convictions in this case." Doc. 268 at 59.

"not wish to burden the Court with briefing that misunderstands a claim" or "fail to move for summary judgment on a claim because" it was not understood. **Exhibit 5.** Plaintiffs responded that they would stand on their objection with respect to Interrogatory No. 10, **Exhibit 6**, and discovery closed shortly thereafter. Under these circumstances, the State Defendants briefed the Count 12 as they understood it.

b. The Court must not consider the cruel and unusual punishment claim that Plaintiffs disavow.

Plaintiffs argue that "[e]ven applying the incorrect proportionality analysis that" the State Defendants briefed, the defense motion for summary judgment should be denied. Doc. 268 at 59-63. However, Plaintiffs have asserted the claim the State Defendants briefed is not in their complaints, doc. 268 at 52-53. Plaintiffs cannot "raise a new legal claim for the first time in response to the opposing party's summary judgment motion." *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1313 (11th Cir. 2004) (*per curiam*). Thus, there are no individualized claims, and the State Defendants brief the matter no further.

c. Secretary Merrill and Chair Snipes are entitled to summary judgment on Plaintiffs' categorical claim.

Turning to the claim that Plaintiffs say they bring, Plaintiffs rely on the Supreme Court's categorical analysis set out in *Graham v. Florida*, 560 U.S. 48 (2010). The *Graham* Court explained that "The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. *The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty*." *Id.* at 59 (emphasis added).

Indeed, before *Graham*, "[t]he previous cases in this [second] classification involved the death penalty." *Graham*, 560 U.S. at 60. *Graham* dealt with sentences of life without parole, which it described as "the second most severe penalty permitted by law." *Id.* at 69 (internal citation and quotation marks omitted). Plaintiffs argue that disenfranchisement "is tantamount to the revocation of citizenship altogether—a penalty that the Supreme Court has held was too 'cruel and unusual' of a punishment even for wartime deserters. *See Trop v. Dulles*, 356 U.S. 92, 99-100 (1958) (plurality op.)." Doc. 268 at 54. The *Trop* Court explained that rendering someone stateless is "the total destruction of the individual's status in organized society." *Trop*, 356 U.S. at 101. "The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. *In short, the expatriate has lost the right to have rights*." *Id.* at 101-02 (footnotes omitted; emphasis added). The revocation of one's citizenship is more serious than the revocation of one's right to vote. Assuming *arguendo* that the former is the political equivalent of life imprisonment, disenfranchisement is certainly something lesser. Moreover, while Plaintiffs focus on the fact that Alabama disenfranchises felons for life, *see e.g.*, doc. 268 at 52, 59, the State does provide opportunities for regaining the right to vote, in the same way the parole opportunities fundamentally alter the character of a life sentence.

The *Graham* "analysis begins with objective indicia of national consensus." *Graham*, 560 U.S. at 62. At this stage of the analysis, Plaintiffs cite to a number of documents to prove the statements asserted within them. Each of these documents is hearsay, Fed. R. Evid. 801 & 802,

and each was not disclosed during the course of discovery (indeed, two were written *after* discovery closed). The State Defendants therefore **OBJECT** to each of the following documents: The Brennan Center, *Criminal Disenfranchisement Laws Across the United States* (Aug. 5, 2020), Exhibit 24; Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT 4 (June 27, 2019), Exhibit 25; and, Brittany Renee Mayes & Kate Rabinowitz, *Since 2016, 11 states and D.C. have expanded voting rights for the currently and formerly incarcerated*, WASH. POST (Aug. 12, 2020), Exhibit 27. Additionally, and for the same reasons, the State Defendants **OBJECT** to Plaintiff's introduction of Christopher Uggen, Ryan Larson, and Sarah Shannon, *6.1 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (October 2016), Exhibit 26, though it is not apparent where the material is relied upon in Plaintiffs' briefing.

Plaintiffs next turn to international practices. Doc. 268 at 56. They again cite to documents that were not previously disclosed and which are hearsay. Fed. R. Evid. 801 & 802. The State Defendants therefore **OBJECT** to: Sarah C. Grady, *Civil Death Is Different: An Examination of A Post-Graham Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441 (2012); Alec Ewald & Brandon Rottinghaus, CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (2009); and, Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, P 35, U.N. Doc. CCPR/C/USA/CO/3/Rev.1,11 (Dec. 18, 2006), Exhibit 32. Additionally, Plaintiffs' analysis relies, in footnotes 20 through 23, on court documents from outside the United States to prove, as a factual matter, what those courts have held. Doc. 268 at 56. Plaintiffs should have disclosed the documents before the close of discovery, but they did not. On these grounds, the State Defendants **OBJECT**.

Substantively, on the issue of international norms, it is important to recognize that the *Graham* Court looked beyond the country's borders only after considering the constitutionality of the punishment itself, and it did so merely for support of the conclusions it reached at earlier stages of the analysis. *Graham*, 560 U.S. at 80. The practices of other counties "do[] not control [the] decision." *Id.*

While international norms may support the Court's judgment and "[c]ommunity consensus" *within* the United States is "entitled to great weight," the key step in the present analysis is the court's own "exercise of independent judgment." *Graham*, 560 U.S. at 67 (internal citation and quotation marks omitted). This is because, "[i]n accordance with the constitutional design, the task of interpreting the Eighth Amendment remains [the Court's] responsibility." *Id.* (internal citation and quotation marks omitted). This Court can rule for Secretary Merrill and Chair Snipes at this step of the analysis, rendering any dispute about consensus within or without the country's borders non-material.

"The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67 "[T]he Court also considers whether the challenged sentencing practice serves legitimate penological goals." *Id.* In this particular case, it is undeniable that the Court must also consider the "affirmative sanction" for felon disenfranchisement found in section 2 of the Fourteenth Amendment, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

Turning first to the traditional analysis, the severity of punishment has been discussed *supra.* As to the offenders, Plaintiffs do not advance their claims only for juveniles or those "whose intellectual functioning is in a low range," *Graham*, 560 U.S. at 61, or any other

identifiable class deserving of special protections. The offenders before the Court were convicted of murder, burglary, theft, and drug trafficking, doc. 1 at ¶¶ 38, 48-49; doc. 93 at ¶ 26, and the *Graham* Court's recognition that non-murderers "are categorically less deserving of the most serious forms of punishment," *Graham*, 560 U.S. at 69, implicitly recognizes that, of course, murderers may receive the most serious forms of punishment.

Plaintiffs do attempt to group themselves as a class of felons whose crimes "have nothing to do with elections, the political process, or fraud of any sorts," doc. 268 at 58. The fraud point is factually incorrect, while the political process point is misplaced. Alabama may disenfranchise felons to protect the ballot box not just from election crimes but from a situation where "convicted mafiosi . . . vote for district attorneys or judges," *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 451-52 (2nd Cir. 1967), or sheriffs, or Attorneys General, *etc*. *See* doc. 261 at 31-32. This is a sort of incapacitation argument that applies if one considers disenfranchisement to be punishment; the State may rationally decide that public safety is better served by not letting felons "take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." *Green*, 380 F.2d at 451.

With respect to deterrence, the State Defendants have argued that disenfranchisement is not likely to be effective. Doc. 261 at 67. However, as Plaintiffs' must recognize, *compare* doc. 268 at 58 *with id.* at 40, the State Defendants can alternatively argue that, if disenfranchisement is punishment subject to an Eighth Amendment challenge, then "[t]o conclude that the loss of voting rights does not deter is to make an inappropriate presumption about the civic-mindedness" of felons, doc. 268 at 40.

In addition to penological interests in incapacitation and deterrence, Alabama's felon disenfranchisement scheme also serves an interest in retribution. Plaintiffs focus on the fact that Alabama's disenfranchises felons for life, *see e.g.*, doc. 268 at 52, 59, but the State does provide opportunities for regaining the right to vote, *see* Ala. Const. art. VIII, § 177(b) ("No person convicted of a felony involving moral turpitude, . . . shall be qualified to vote *until restoration of civil and political rights* . . . ."") (emphasis added). First, pardons may be granted "[i]n all cases, except treason and impeachment and cases in which sentence of death is imposed and not commuted . . . ," Ala. Code § 15-22-36(a), that is, in all but a very limited class of exceptionally serious felonies. Secondly, Certificates of Eligibility to Register to Vote are available to felons who meet certain criteria. Ala. Code § 15-22-36.1. These criteria include having not been convicted of a limited number of very serious crimes including murder and rape, Ala. Code § 15-22-36.1(g), and having completed one's sentence, including incarceration, probation, and parole, Ala. Code § 15-22-36.1(a). These factors help ensure that the term of disenfranchisement is "directly related to the personal culpability of the criminal offender," *Graham*, 560 U.S. at 71, and thus serves the State's retribution interests. *See also Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *6 (11th Cir. Sept. 11, 2020) (*en banc*) (explaining that completion of one's sentence including the requirement to pay court-ordered monies "ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote").

With respect to rehabilitation, Alabama's felon disenfranchisement scheme is keyed to completion of sentence including probation, parole, and payment of court-ordered monies. This "promotes full rehabilitation." *Jones*, 2020 WL 5493770 at *6; *see also id.* at *9 ("If a State may decide that those who commit serious crimes are presumptively unfit for the franchise, it may also conclude that those who have completed their sentences are the best candidates for

reenfranchisement.") (citation omitted). Further, CERVs are only available to felons who have "no criminal felony charges pending against him or her in any [S]tate or federal court," Ala. Code § 15-22-36.1(a), and thus have provided some evidence of their ongoing adherence to the laws of the society they wish to help govern.

Thus, if disenfranchisement is to be treated as punishment subject to an Eighth Amendment analysis, then this longstanding "punishment" naturally serves interests sufficient to sustain it. Those interests may be made to fit into the traditional penological interests in public safety, deterrence, retribution and rehabilitation, or it may be that the Supreme Court would recognize a different interest as satisfactory in light of the different nature of felon disenfranchisement (as compared to the death penalty, imprisonment, hard labor, *etc.*). Indeed, the Court's analysis cannot end without a consideration of the felon disenfranchisement's unique role in the law.

Plaintiffs make no attempt to grapple with the conflict between their argument that felon disenfranchisement is categorically unconstitutional and the Constitution's "affirmative sanction" for felon disenfranchisement, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). *See also Simmons v. Galvin*, 575 F.3d 24, 34 (1st Cir. 2009) (felony disenfranchisement is "deeply rooted in our history, in our laws, and in our Constitution"); *Jones v. Governor of Fla.*, 950 F.3d 795, 801 (11th Cir. 2020) ("Regardless of the political trend toward re-enfranchisement, there is nothing unconstitutional about disenfranchising felons—even all felons, even for life."). Neither the death penalty nor life imprisonment are affirmatively written into the Constitution the way that felon disenfranchisement is. Plaintiffs would have the evolutionary Eighth Amendment write over the Fourteenth Amendment's text. This ask is particularly problematic because the Eighth Amendment's prohibition on cruel and unusual punishment is made applicable to the States *by* the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962). Thus, while Plaintiffs

bicker with the State Defendants' arguments that their claims would render the United States Constitution internally inconsistent, *see* doc. 261 at 68-71 (defense arguments), doc. 268 at 63-65, Plaintiffs' cruel and unusual punishment claim is, in fact, a frontal attack on the State's right to categorically disenfranchise felons. It is hard to see how a Court could reasonably hold that the Eighth Amendment could evolve beyond constraints affirmatively imposed by the Fourteenth Amendment.

* * *

This Court should decline Plaintiffs' invitation to re-write the Constitution, and, for the reasons stated above, including the lack of material, factual disputes, grant summary judgment to Secretary Merrill and Chair Snipes on Plaintiffs' cruel and unusual punishment claim.

VII. Chair Gwathney is entitled to summary judgment on Count 13, which alleges wealth discrimination in violation of the Equal Protection Clause.

Since Chair Gwathney moved for summary judgment on Plaintiffs' wealth discrimination claim, the *en banc* Eleventh Circuit has upheld Florida's requirement that felonies pay their court-ordered monies before their rights are restored, and it did so under rational basis review. *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020) (*en banc*). Plaintiffs' preserve their arguments that strict scrutiny should apply, doc. 268 at 74-76, and Chair Gwathney preserves her arguments that rational basis should. Plaintiffs also attempt to distinguish *Jones*, but their attempts fail.

First, Plaintiffs attempt to distinguish *Jones* on the theory that Florida demanded completion of the felon's sentence, which included payment of court-ordered monies, while Alabama sets out the requirement to complete the supervisory portions of the sentence in one subsection, Ala. Code § 15-22-36.1(a)(4) (requiring "release[] upon completion of sentence," a pardon, or "successful[] complet[ion of] probation or parole"), and the requirement to have paid

court-ordered monies in the preceding subsection, Ala. Code § 15-22-36.1(a)(3). Doc. 268 at 76-77. Plaintiffs' argument elevates form over substance. The court-ordered fees that Alabama demands are the same in kind as those Florida demands: fines, fees, court costs and restitution. *Compare* Ala. Code § 15-22-36.1(a)(3) *with Jones*, 2020 WL 5493770, *1. Alabama does not impose some different felon-only fee aimed at testing wealth. The fact that Alabama chose to set out its requirements with more detail in a statute than Florida did in its constitution does not meaningfully distinguish the monies. Indeed, it is plain from a reading of Ala. Code § 15-22-36.1(a) that a felon must have completed the supervisory and monetary terms of his sentence, and not have any new felonies pending against him, in order to be eligible for a CERV: that is, each term must be met simultaneously, and Plaintiffs' suggestion of sorting through felons on the basis of supervisory status first and financial status second is misguided.

Next, Plaintiffs' argue that Alabama's court-ordered monies requirement does not survive rational basis review. Doc. 268 at 77-80. "In deciding whether [the] classification is rational," this Court's "review is extremely narrow." *Jones*, 2020 WL 5493770, *8. The Court "must uphold the classification unless the felons 'negative every conceivable basis which might support it" and, as a result, "the Supreme Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Id.* (internal citations and quotation marks omitted). Further, "[a] legislative classification may be based on rational speculation unsupported by evidence." *Id.* at *10 (internal citations and quotation marks omitted).

The Eleventh Circuit recognized that "in the rare instances" where the Supreme Court has stricken a policy under rational basis review, "a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group." *Jones*, 2020 WL 5493770, *8. (internal citations and quotation marks omitted). The Eleventh Circuit then said

"[t]here is no evidence that any kind of *animus toward indigent felons* motivated Florida voters and legislators to condition reenfranchisement on the completion of all terms of sentence." *Id.* (emphasis added). Plaintiffs seize on the word "animus" and wrench it from the wealth discrimination context of their claim, arguing that there is *racial* animus at work in Alabama's disenfranchisement scheme. Doc. 268 at 78. Not only is racial animus not what the Eleventh Circuit was addressing, but the State Defendants have demonstrated in their dispositive motion briefing that Plaintiffs' intentional discrimination claims are meritless.[11] As with Florida's constitutional amendment re-enfranchising felons, *Jones*, 2020 WL 5493770, *8, Alabama's CERV program enhanced the opportunity for some felons to have their voting rights restored.

Applying the rational basis analysis, the Eleventh Circuit recognized Florida's "twin interests" in "disenfranchising felons, even those who have completed their sentences" and in "*restoring* felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system." *Jones*, 2020 WL 5493770 at *8. Alabama has those same interests. And, the Eleventh Circuit found that Florida's law served these interests because the State could "conclude that those who have completed their sentences are the best candidates for reenfranchisement." *Id.* at *9. Likewise, Alabama has rationally concluded that those who have completed their sentences, Ala. Code § 15-22-36.1(a)(3) & (4), acted such that they have no currently pending felony charges, Ala. Code § 15-22-36.1(a)(2), and avoided conviction for certain

[11] Plaintiffs make reference to the "racist 1901 Constitution," doc. 268 at 78, and earlier in the briefing stated "the 1901 Constitution is now in effect," *id.* at 35. It is true that there has been no new constitution passed in a convention since 1901, and that the Baxley efforts to replace the Constitution entirely through a single amendment were held unlawful. However, there can also be no dispute that the 1901 Constitution has been amended 948 times to date, as reflected on a website of the State Legislature, *see* http://alisondb.legislature.state.al.us/alison/CodeOfAlabama/Constitution/1901/Constitution1901_toc.htm, and that includes the repeal and replacement of the Suffrage and Elections article.

particularly reprehensible felonies, Ala. Code § 15-22-36.1(g),[12] are the best candidates for reenfranchisement. The line Alabama drew is entirely reasonable, and it need not be perfect to survive constitutional scrutiny, *Jones*, 2020 WL 5493770 at *9.

Plaintiffs disagree. Ironically, their argument is based on the theory that Alabama does not disenfranchise enough felons. While Florida disenfranchises all felons, *Jones*, 2020 WL 5493770 at *1, Alabama disenfranchises only those whose felony convictions involve moral turpitude, Ala. Const. art. VIII, § 177(b); Ala Code § 17-3-30.1. Taking issue with this line, Plaintiffs contend that there is no rational basis for letting the felons who are not disenfranchised under Alabama law vote while not enfranchising Plaintiffs Thompson and Gamble. Doc. 268 at 78-80. The analysis breaks down because Plaintiffs compare the wrong groups. As set out above, the Eleventh Circuit recognized the State's interests in disenfranchising felons and in restoring some of them to the vote, and said it was rational, in deciding whom to reenfranchise, to select those who have completed their sentences. Thus, the relevant comparison is between those disenfranchised felons who are eligible for rights restoration and those disenfranchised felons who are *not* eligible for rights restoration; felons who have not lost their voting rights are not part of the analysis of whose rights to restore. Moreover, the Eleventh Circuit reiterated that, under rational basis review the line drawn need not be perfect; a State may wish to take incremental steps and may not go so far as others would like. *Jones*, 2020 WL 5493770 at *9. While couched in the language of rational basis review, Plaintiffs' criticisms are aimed at alleged imperfections, and thus they fail.

Alabama's requirement that disenfranchised felons pay the court-ordered monies imposed on them at sentencing in connection with their disqualifying felony, Ala. Code § 15-22-36.1(a)(3)

[12] Similarly, Florida's 2018 constitutional amendment does not provide for restoration for those convicted of murder or sexual offenses. *Jones*, 2020 WL 5493770 at *1.

survives rational basis review and does so without the need for any trial. Further, Chair Gwathney preserves her argument that the requirement would survive strict scrutiny, if it applied.

VIII. Secretary Merrill is entitled to summary judgment on Count 18, which alleges that the State mail-in form does not comply with a provision of the National Voter Registration Act of 1993.

Count 18 is the one Count on which both parties moved for summary judgment. As a result, Secretary Merrill has already filed a comprehensive response to Plaintiff GBM's initial arguments in his opposition to granting GBM summary judgment. Doc. 265. Secretary Merrill adopts those arguments here. Only a few additional points need to be made.

First, Plaintiffs have not offered this Court any reason why Congress would have used the word *specify* with respect to mail-in voter registration forms, 52 U.S.C. § 20508(b)(2), but *state* with respect to the motor voter provision, 52 U.S.C. § 20504(c)(2)(C)(i), if Plaintiffs are right that a hyper-specific listing of eligibility requirements is needed to reasonably inform potential voters. Indeed, Plaintiffs instead focus on the separate voter registration agencies in footnote 33, without acknowledging the different standard for offices issuing driver's licenses. *See* doc. 268 at 80 n. 33. Then, in the next footnote, they acknowledge the difference, encouraging the Court to put blinders on in studying § 20508(b)(2) and professing a lack of understanding of the critical way the motor voter language undermines their argument. *See* doc. 268 at 81 n. 34. As previously explained, GBM has argued that Congress was concerned that potential applicants have all their eligibility questions answered on the face of the voter registration form. For reasons the Secretary has set out at length, it makes sense to read the statutes consistently and with a lesser demand for specificity than Plaintiffs invoke. Such a reading is more natural, avoids absurdity and constitutionality concerns, and is consistent with the reading of the EAC.

Plaintiff GBM attacks the EAC's actions on this front. Plaintiffs contend that the statute does not allow room for deference to EAC's considered judgments, and that the EAC has made none. GBM relies on *SAS Institute, Inc. v. Iancu*, 584 U.S. ___, 138 S. Ct. 1348 (2018), for the proposition that the statute "delivers an unmistakable command, and thus no deference is due" doc. 268 at 84 (cleaned up). *Iancu* revolved around a statute requiring that "any patent claim challenged by the petitioner" had to be resolved, while the Patent Office was selecting which claims to resolve. *Iancu*, 138 S.Ct. at 1354. This is not a question of degree the way that the appropriate level of specificity is, and the Court's holding was that the Patent Office did not have discretion to decline to resolve some claims, *id.* By contrast, here, the EAC is charged with developing the Federal Form, and that requires determining how much detail to include. As to Plaintiffs' assertions that the EAC has failed in its responsibilities with respect to Alabama and Tennessee, doc. 268 at 84-85, Plaintiffs are attempting to substitute their judgment for that of the EAC. Furthermore, the evidence shows that, with respect to Alabama, the EAC asked for input from the Secretary's office, doc. 257-35 at 12 ("Please advise how the Felony Disqualification Act will change your existing instructions."), and provided proofs for the Secretary's review, *id.* at 7-10, but also that the EAC's response to the proposed language was: "We will review," *id.* at 11. This is simply the EAC working "in consultation with the chief election officers of the States" to develop the Federal Form, as Congress instructed, 52 U.S.C. § 20508(a)(2).

IX. Conclusion.

For the reasons set out in their brief in support of their motion for summary judgment, doc. 261, and above, Secretary of State John H. Merrill, Chair of the Montgomery County Board of Registrars James Snipes, III, and Chair of the Board of Pardons and Paroles Leigh Gwathney are entitled to judgment as a matter of law as to each claim pending against them

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2020, 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: Armand Derfner (aderfner@derfneraltman.com); Danielle Lang (dlang@campaignlegalcenter.org); James U. Blacksher (jblacksher@ns.sympatico.ca); Jessica Ring Amunson (jamunson@jenner.com); J. Gerald Herbert (gherbert@campaignlegalcenter.org); J. Mitch McGuire (jmcguire@mandabusinesslaw.com); Mark P. Gaber (mgaber@campaignlegalcenter.org); Michael E. Stewart (mstewart@jenner.com); Jason P. Hipp (jhipp@jenner.com); Molly Danahy (mdanahy@campaignlegal.org); Jonathan Diaz (jdiaz@campaignlegalcenter.org); Melissa Takara Fedornak (mfedornak@jenner.com); and, Julie Strass Harris (Julie.StrausHarris@usdoj.gov).

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Of Counsel

SAMUEL ALSTON BEATTY

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BIRMINGHAM | Samuel Alston Beatty died on May 21, 2014. He lived a remarkable 91 years.

He was born on April 23, 1923, and raised in Tuscaloosa, Alabama. He endured the Depression; survived World War II as a B-25 pilot in the Solomon Islands; and attended the University of Alabama on the GI Bill, earning a BA (1949) and then an LLB (1953) from the law school, where he graduated first in his class. He then practiced law in Tuscaloosa; taught at the University of Alabama School of Law for 15 years (1955-1970); earned a masters degree (1959) and a doctorate (1964) from Columbia University; and served as dean of the Walter F. George School of Law at Mercer University in Macon, Georgia. After he returned to private practice in Alabama, a successful group of former law students persuaded him to run for the Alabama Supreme Court. He won election in 1976 and was re-elected in 1982. He served on the Court for 12 years before he retired in 1989.

He was preceded in death by his parents, Columbus Eugene Beatty and Rosabelle Horton Beatty; and three sisters, Eloise Beatty Ozment, Marie Beatty Shiley and Carolyn Beatty Williams.

He is survived by his wife of 65 years, Maude Applegate Beatty; two children, Rosa Beatty Lord (Wayne) and Eugene Applegate Beatty (Gerriann Fagan); two grandchildren, Farley Lord Smith (Owen) and Katherine Beatty Lord; his nephews, James Bradford Shiley (Karen Whitman) and Joseph Eugene Williams (Ellen); his niece, Sylvia Seeley Duncan (Lee); his sister, Eugenia Beatty Dean; and a few remaining friends, many former clerks and innumerable former students. Although hard to get along with at times, he had an outgoing, larger-than-life personality that filled the room wherever he went. He loved to tell stories and perform long-winded jokes. His audiences no doubt remember his two most memorable jokes: the Robert Hall Suit and the Super Salt Salesman. He will be sorely missed by all who loved, admired and respected him.

A memorial service will be held on June 2, 2014, at 11 a.m., at Trinity United Methodist Church in Homewood, Alabama, preceded by a visitation from 9 until 10:30 a.m.

Instead of flowers, the family suggests donations to the United Methodist Church Children's Home, which can be sent to Trinity United Methodist

Church, 1400 Oxmoor Road, Homewood, AL 35209,
or other worthwhile charity.

Published in Tuscaloosa News on May 25, 2014

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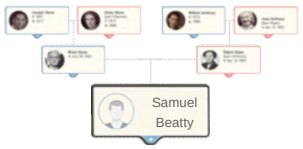

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Treva Thompson, *et al.*, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, *et al.*, Defendants.	Civil Action No. 2:16-cv-783-WKW-CSC

PLAINTIFFS' REVISED RESPONSES AND OBJECTIONS TO STATE DEFENDANTS' SECOND REQUESTS FOR ADMISSION

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, Plaintiffs hereby respond and object to the State Defendants' Second Requests for Admission to Plaintiffs. In formulating these responses, Plaintiffs have relied on the information presently available to them. Further information may be discovered during this phase of the litigation. Plaintiffs will supplement these responses to the extent required under Rule 26 of the Federal Rules of Civil Procedure.

GENERAL STATEMENT

1. Plaintiffs' responses to each request are made subject to all objections as to competence, relevance, materiality, propriety, and admissibility, as well as any and all other objections and grounds that would require the exclusion of evidence. Plaintiffs reserve the right to make any and all such objections in pre-trial motions, at trial, and in any proceeding related to this action.

2. Plaintiffs object to each request to the extent it is overly broad, not limited to a reasonable time period or scope, unduly burdensome, harassing, vague, ambiguous, irrelevant, and/or not reasonably calculated to lead to the discovery of admissibly evidence.

3. Plaintiffs object to each request to the extent it imposes any requirements or discovery obligations beyond those specified in the Federal Rules of Civil Procedure, the orders governing this case, and/or related agreements.

4. Plaintiffs object to each request to the extent it relates to purely legal questions and thus is not a valid request for admission pursuant to Federal Rule of Civil Procedure 36(a)(1).

5. Plaintiffs object to each request to the extent it seeks information protected from discovery by the attorney-client privilege, the attorney work-product doctrine, or other applicable privileges.

6. Plaintiffs object to each request to the extent Defendants seek to impose upon Plaintiffs the burden and expense of investigating, identifying, or verifying information the Defendants have the equal ability to investigate, identify, or verify on their own.

7. Plaintiffs object to each request to the extent it refers to "contemporaneous" documents or electronically stored information because the word "contemporaneous" is undefined, vague, ambiguous, and confusing.

8. Plaintiffs object to each request to the extent it refers to documents or electronically stored information "evidencing" a particular conclusion on the grounds that the word "evidencing" us undefined, vague, ambiguous, and confusing.

9. Plaintiffs have attempted in good faith to fully respond to the Requests. The responses are based on information currently available after a reasonable search. Plaintiffs reserve the right to alter or supplement its responses as additional documents and information become available and in light of facts not now known, the relevance to the subject matter or the relationship to admissible evidence if which has not yet been ascertained by may subsequently be discovered.

10. Except for explicit facts admitted herein, no admissions of any nature whatsoever are to be implied or should be inferred. The fact that any Request herein has been objected to should not be taken as an admission or acceptance of the existence of any facts set forth or assumed by such Request or that such constitutes admissible evidence.

11. By responding to the Requests, Plaintiffs do not concede the relevance or materiality of the information requested, nor of the subject matter to which the Requests refer. Rather, the responses are made expressly subject to, and without waiving any question or objection related to the competency, relevancy, privilege, or admissibility as evidence of any of the matters referred to in the responses.

These general objections are incorporated by reference into each specific answer made by Plaintiffs to Defendant's Requests for Admission. Without waiving any of these general objections, Plaintiffs respond as follows:

REQUEST FOR ADMISSION NO. 7: Admit that the legislative sponsor of the proposed constitutional amendment that became Article VIII, Section 177 in 1996, Rep. Jack Venable, died in 2005.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 8: Admit that Alabama Attorney General Bill Baxley prosecuted Robert "Dynamite Bob" Chambliss for killing Denise McNair in the September 15, 1963 16th Street Baptist Church bombing.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 9: Admit that D151070 is a true and authentic copy of a February 19, 1976 letter to Alabama Attorney General Bill Baxley from Edward R. Fields of the National States Rights Party.

RESPONSE: Plaintiffs lack sufficient knowledge and have no reasonable means to obtain knowledge sufficient to admit or deny whether D151070 is a true and authentic copy of a letter from Edward R. Fields to then Attorney General Bill Baxley. Nonetheless, Plaintiffs are willing to stipulate to the authenticity of D151070 for purposes of admissibility, but do not waive any other objection to the admissibility of D151070 that may be available to Plaintiffs.

REQUEST FOR ADMISSION NO. 10: Admit that D151069 is a true and authentic copy of a February 20, 1976 letter from Alabama Attorney General Bill Baxley responding to Edward R. Fields of the National States Rights Party.

RESPONSE: Plaintiffs lack sufficient knowledge and have no reasonable means to obtain knowledge sufficient to admit or deny whether D151069 is a true

and authentic copy of a letter from Edward R. Fields to then Attorney General Bill Baxley. Nonetheless, Plaintiffs are willing to stipulate to the authenticity of D151069 for purposes of admissibility, but do not waive any other objection to the admissibility of D151069 that may be available to Plaintiffs.

REQUEST FOR ADMISSION NO. 11: Admit that, when he was United States Attorney for the Northern District of Alabama, now-United States Senator Doug Jones prosecuted Thomas Edwin Blanton Jr. and Bobby Frank Cherry for their roles in the September 15, 1963 16th Street Baptist Church bombing.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 12: Admit that Thomas Edwin Blanton Jr. is a member of the proposed plaintiff class in this case.

RESPONSE: Plaintiffs object to this request as irrelevant. Subject to the foregoing objection Plaintiffs admit Request No. 12.

REQUEST FOR ADMISSION NO. 13: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that the proposed revisions to Alabama's suffrage article as part of Gov. Albert Brewer's constitutional revision efforts were motivated by racial intent.

RESPONSE: Plaintiffs object to Request for Admission No. 13 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 13 as irrelevant – neither an admission nor denial that

Plaintiffs have a particular document in their possession has any bearing on whether the proposed revisions to Alabama's suffrage article as part of Gov. Albert Brewer's constitutional revision efforts were motivated by racial intent. Plaintiffs further object that Request for Admission No. 13 is vague – the Request does not define "contemporaneous" and "evidencing." Plaintiffs further object to Defendants' use of Request for Admission No. 13 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request for Admission No. 13.

REQUEST FOR ADMISSION NO. 14: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that the proposed revisions to Alabama's suffrage article as part of Gov. Fob. James' constitutional revision efforts were motivated by racial intent.

RESPONSE: Plaintiffs object to Request for Admission No. 14 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 14 as irrelevant – neither an admission nor denial that Plaintiffs have a particular document in their possession has any bearing on whether the proposed revisions to Alabama's suffrage article as part of Gov. Fob. James' constitutional revision efforts were motivated by racial intent. "Determining whether invidious discriminating purpose was a motivating factor demands a

sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v.* Such a determination can rarely be made on the basis of a single determinative statement or piece of evidence, but rather requires a fact-intensive review of myriad factors. *Id.* Plaintiffs further object that Request for Admission No. 14 is vague – the Request does not define "contemporaneous" and "evidencing." Plaintiffs further object to Defendants' use of Request for Admission No. 14 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request No. 14.

REQUEST FOR ADMISSION NO. 15: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that the proposed revisions to Alabama's suffrage article as part of Lt. Gov. Bill Baxley's constitutional revision efforts were motivated by racial intent.

RESPONSE: Plaintiffs object to Request for Admission No. 15 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 15 as irrelevant – neither an admission nor denial that Plaintiffs have a particular document in their possession has any bearing on whether the proposed revisions to Alabama's suffrage article as part of Lt. Gov. Bill Baxley's constitutional revision efforts were motivated by racial intent. "Determining whether invidious discriminating purpose was a motivating factor

demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v.* Such a determination can rarely be made on the basis of a single determinative statement or piece of evidence, but rather requires a fact-intensive review of myriad factors. *Id.* Plaintiffs further object that Request for Admission No. 15 is vague – the Request does not define "contemporaneous" and "evidencing." Plaintiffs further object to Defendants' use of Request for Admission No. 15 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request No. 15.

REQUEST FOR ADMISSION NO. 16: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that the Alabama Legislature was motivated by racial intent when it passed Act No. 95-443.

RESPONSE: Plaintiffs object to Request for Admission No. 16 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 16 as irrelevant – neither an admission nor denial that Plaintiffs have a particular document in their possession has any bearing on whether the Alabama Legislature was motivated by racial intent when it passed Act No. 95-443. "Determining whether invidious discriminating purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available." *Arlington Heights v.* Such a determination can rarely be made on the basis of a single determinative statement or piece of evidence, but rather requires a fact-intensive review of myriad factors. *Id.* Plaintiffs further object that Request for Admission No. 16 is vague – the Request does not define "contemporaneous" and "evidencing." Plaintiffs further object to Defendants' use of Request for Admission No. 16 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request No. 16.

REQUEST FOR ADMISSION NO. 17: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that there was a campaign to encourage the Alabama electorate to support Amendment 1 on the June 4, 1996 Primary Election ballot in order to disenfranchise blacks.

RESPONSE: Plaintiffs object to Request for Admission No. 17 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 17 as irrelevant – neither an admission nor denial that Plaintiffs have a particular document in their possession has any bearing on whether there was a campaign to encourage the Alabama electorate to support Amendment 1 on the June 4, 1996 Primary Election ballot in order to disenfranchise blacks. "Determining whether invidious discriminating purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available." *Arlington Heights v.* Such a determination can rarely be made on the basis of a single determinative statement or piece of evidence, but rather requires a fact-intensive review of myriad factors. *Id.* Plaintiffs further object that Request for Admission No. 17 is vague – the Request does not define "contemporaneous" and "evidencing" Plaintiffs further object to Defendants' use of Request for Admission No. 17 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request No. 17.

REQUEST FOR ADMISSION NO. 18: Admit that you do not have any contemporaneous documents or electronically stored information evidencing that the Alabama electorate supported Amendment 1 on the June 4, 1996 Primary Election ballot in order to disenfranchise blacks.

RESPONSE: Plaintiffs object to Request for Admission No. 18 because it seeks admission of a question of law – an impermissible subject for a Request or Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either.). Plaintiffs further object to Request for Admission No. 18 as irrelevant – neither an admission nor denial that Plaintiffs have a particular document in their possession has any bearing on whether the Alabama electorate supported Amendment 1 on the June 4, 1996 Primary Election ballot in order to disenfranchise blacks. "Determining whether invidious discriminating purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

Arlington Heights v. Such a determination can rarely be made on the basis of a single determinative statement or piece of evidence, but rather requires a fact-intensive review of myriad factors. *Id.* Plaintiffs further object that Request for Admission No. 18 is vague – the Request does not define "contemporaneous" and "evidencing." Plaintiffs further object to Defendants' use of Request for Admission No. 18 to "conclusively establish," Fed. R. Civ. P. 36(b), whether evidence relevant to a legal claim exists prior to the close of discovery. Subject to the foregoing objections, Plaintiffs deny Request No. 18.

Respectfully submitted,

/s/ *Danielle Lang*
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to an agreement memorialized in the Report of the Parties' Planning Meeting, electronic service is acceptable for this document. I hereby serve a copy of the foregoing document on Winn Sinclair (wscinlair@ago.state.al.us), Misty Fairbanks Messick (mmessick@ago.state.al.us), and Laura Howell (lhowell@ago.state.al.us), three of the counsel for Defendants, via email on this 17th day of April 2019.

/s/ Danielle Lang
Danielle Lang

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

Treva Thompson, Timothy Lanier, Pamela King, Darius Gamble, and Greater Birmingham Ministries, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, Cindy Sahlie, in her official capacity as Chair of the Montgomery County Board of Registrars, and Leigh Gwathney, in her official capacity as Chair of the Board of Pardons and Paroles, Defendants.	)	Civil Action No. 2:16-cv-783-ECM-SMD

STATE DEFENDANTS' INTERROGATORIES TO PLAINTIFF GREATER BIRMINGHAM MINISTRIES

Pursuant to Fed. R. Civ. P. 26 and Fed. R. Civ. P. 33, Alabama Secretary of State John Merrill, Montgomery County Board of Registrars Chair Cindy Sahlie, and Alabama Board of Pardons and Paroles Chair Leigh Gwathney, collectively the State Defendants, hereby propound the following Interrogatories to Plaintiff Greater Birmingham Ministries, to be answered, separately and severally, according to such Rules and applicable Orders of the Court, except that, given the COVID-19 pandemic, Plaintiffs are welcome to take 60 days to respond.

Interrogatory No. 1

For the time period since Ala. Act No. 2017-378 took effect to the present, identify each federal felony conviction about which you have had a question arise with a potential voter as to whether the conviction was disenfranchising in Alabama.

Interrogatory No. 2

As to each federal felony conviction listed in response to Interrogatory no. 1, describe what efforts, if any, you made to ascertain whether the conviction was disenfranchising in Alabama.

Interrogatory No. 3

As to each federal felony conviction listed in response to Interrogatory no. 1, describe the advice you gave the potential voter.

Interrogatory No. 4

For the time period since Ala. Act No. 2017-378 took effect to the present, identify each out-of-State felony conviction about which you have had a question arise with a potential voter as to whether the conviction was disenfranchising in Alabama.

Interrogatory No. 5

As to each out-of-State felony conviction listed in response to Interrogatory no. 4, describe what efforts, if any, you made to ascertain whether the conviction was disenfranchising in Alabama.

Interrogatory No. 6

As to each out-of-State felony conviction listed in response to Interrogatory no. 4, describe the advice you gave the potential voter.

Interrogatory No. 7

For the time period from January 1, 2018 to present, when working with felons interested in registering to vote, what percentage of the time do you advise a felon to complete a voter registration form in order to determine whether the felon is eligible to vote.

Interrogatory No. 8

Describe each and every claim you bring in Count 11. Your description should explain, *inter alia*, whether the claim originally brought in Count 11 has been replaced by the claim in the supplemental complaint or whether Count 11 currently pursues two or more claims, and, if there are two or more claims, whether they are in the alternative. You should also make clear whether each claim is facial or as applied.

Interrogatory No. 9

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 11 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Interrogatory No. 10

Describe each and every claim you bring in Count 12. Your description should explain, *inter alia*, whether the claim originally brought in Count 12 has been replaced by the claim in the supplemental complaint or whether Count 12 currently pursues two or more claims, and, if there are two or more claims, whether they are in the alternative. You should also make clear whether each claim is facial or as applied.

Interrogatory No. 11

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 12 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Interrogatory No. 12

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 13 beyond the factual circumstances of Treva Thompson and Darius Gamble.

Interrogatory No. 13

Describe each and every claim you bring in Count 16. Your description should explain, *inter alia*, whether you agree with the Court's description of this Count in the Memorandum Opinion and Order dated December 5, 2019, doc. 179-1, or whether you bring a different and/or additional claim.

Interrogatory No. 14

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 16 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Interrogatory No. 15

Describe each and every claim you bring in Count 17. Your description should explain, inter alia, whether you agree with the Court's description of this Count in the Memorandum Opinion and Order dated December 5, 2019, doc. 179-1, or whether you bring a different and/or additional claim.

Interrogatory No. 16

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 17 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Interrogatory No. 17

Identify any felon you assisted in registering to vote, or attempting to register to vote, after that felon became confused about his or her eligibility to register and/or vote when offered the opportunity to register during a transaction to get a Alabama driver's license or State non-driver photo ID. Only include those felons whose confusion was related to their felony conviction. "Identify" means to provide the name, race, and any contact information you have for the felon and to describe any circumstances of which you are aware concerning the confusion and/or your subsequent interaction with the felon.

Interrogatory No. 18

Identify any felon you assisted in registering to vote, or attempting to register to vote, after that felon became confused about his or her eligibility to register and/or vote when offered the opportunity to register by any agent of the Alabama Medicaid Agency. Only include those felons whose confusion was related to their felony conviction. "Identify" means to provide the name, race, and any contact information you have for the felon and to describe any circumstances of which you are aware concerning the confusion and/or your subsequent interaction with the felon.

Interrogatory No. 19

Identify any felon you assisted in registering to vote, or attempting to register to vote, after that felon became confused about his or her eligibility to register and/or vote when offered the opportunity to register by any agent of the Alabama Department of Human Resources. Only include those felons whose confusion was related to their felony conviction. "Identify" means to provide the name, race, and any contact information you have for the felon and to describe any circumstances of which you are aware concerning the confusion and/or your subsequent interaction with the felon.

Interrogatory No. 20

To the extent not already identified, identify any felon you assisted in registering to vote, or attempting to register to vote, after that felon became confused about his or her eligibility to register and/or vote when offered the opportunity to register by an agent of any NVRA voter registration agency, *see* 52 U.S.C. § 20506. Only include those felons who confusion was related to their felony conviction. "Identify" means to provide the name, race, and any contact information you have for the felon and to describe any circumstances of which you are aware concerning the confusion and/or your subsequent interaction with the felon.

Interrogatory No. 21

Explain how the testimony of Gregory Butler supports any pending claim or claims you bring.

Interrogatory No. 22

Explain how the testimony of Maurio Moseley supports any pending claim or claims you bring.

Interrogatory No. 23

Explain how the testimony of Richard Williams supports any pending claim or claims you bring.

Interrogatory No. 24

Explain how the testimony of Joseph Rohe supports any pending claim or claims you bring.

Interrogatory No. 25

Explain how the testimony of Carl Winchester supports any pending claim or claims you bring.

Respectfully submitted,

Steve Marshall
Attorney General

James W. Davis (ASB-4063-I58J)
Deputy Attorney General

s/ Misty S. Fairbanks Messick
Winfield J. Sinclair (ASB-1750-S81W)
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Certificate of Service

Pursuant to an agreement memorialized in the Report of the Parties' Planning Meeting, electronic service is acceptable for this document. I hereby certify that I have served a copy of the foregoing document on Danielle Lang (dlang@campaignlegalcenter.org), Mark P. Gaber (mgaber@campaignlegal center.org), Molly Danahy (mdanahy@campaignlegal.org); Jim Blacksher (jblacksher@ns.sympatico.ca), Jason P. Hipp (JHipp@jenner.com), and J. Mitch McGuire (jmcguire@mandabusinesslaw.com), six of the counsel for Plaintiffs, *via* email on this the 24th day of April 2020.

s/ Misty S. Fairbanks Messick
Of Counsel

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

TREVA THOMPSON, et al., Plaintiffs, v. JOHN MERRILL, in his Official Capacity as Secretary of State of Alabama, et al., Defendants.	)	CIVIL ACTION NO. **2:16-cv-783-ECM-WMD**

PLAINTIFF GREATER BIRMINGHAM MINISTRIES' RESPONSES AND OBJECTIONS TO STATE DEFENDANT'S INTERROGATORIES

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff Greater Birmingham Ministries (GBM) hereby responds and objects to the State Defendants' Interrogatories to Plaintiff GBM. In formulating these responses, Plaintiff GBM has relied on the information presently available to it. Further information may be discovered during this phase of the litigation. Plaintiff GBM will amend its objections and answers to the extent required under Fed. R. Civ. P. 26.

GENERAL OBJECTIONS

1. Plaintiff GBM objects to each and every one of the interrogatories to the extent they purport to impose upon it any obligations different from, or greater than, those established or required by the Federal Rules of Civil Procedure, local rules, an order of the Court, or a prior agreement of the parties.

2. Plaintiff GBM objects to each and every one of the interrogatories to the extent they seek information or documents protected by the attorney-client privilege, the work-product doctrine, the common-interest privilege, or any other applicable privilege, exemption, immunity, principle, doctrine, or rule of confidentiality. If any protected information or material is disclosed, such disclosure is not intentional and shall not be deemed a waiver of any privilege or protection.

3. Plaintiff GBM objects to each and every one of the interrogatories to the extent they seek information already in the possession, custody, or control of the Defendants, or otherwise equally available to the Defendants.

4. Plaintiff GBM objects to each and every one of the interrogatories to the extent they seek information that is not relevant to any claim or defense before the court.

5. Plaintiff GBM objects to each of the interrogatories to the extent that they are unclear, ambiguous, overly broad, unduly burdensome, and/or not proportional to the needs of the case.

6. By answering these discovery requests, Plaintiff GBM does not concede the relevance or materiality of any of the information requested, nor of the subject matter to which the request for production refers. Rather, the responses are made expressly subject to, and without in any way waiving or intending to waive any question or objection as to the competency, relevance, privilege, or admissibility as evidence, of any of the matters referred to in the responses.

7. Plaintiff GBM expressly reserves:

a. the right to object, on grounds of competency, relevance, materiality, privilege, or any other applicable ground, to the use of responses provided to this request for production or the subject matter thereof, in any subsequent proceeding in, or the hearing of, this or any other action;

b. the right to object on any ground to other document requests, interrogatories, or other discovery proceedings involving or relating to the subject matter of the request for production; and

c. the right to supplement Plaintiff GBM's responses should further investigation or discovery disclose additional information.

SPECIFIC RESPONSES AND OBJECTIONS

Interrogatory No. 1

For the time period since Ala. Act No. 2017-378 took effect to the present, identify each federal felony conviction about which you have had a question arise with a potential voter as to whether the conviction was disenfranchising in Alabama.

Objections and Response

GBM objects to this interrogatory as unduly burdensome. Typically, every person GBM assists that has a felony conviction, whether federal or otherwise, raises the question of whether their conviction is disenfranchising in Alabama. Indeed, this is often why they seek out GBM's assistance.

GBM is not required to, nor does it, keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. GBM is not required to, nor does it keep a record of each individual it determines is eligible to vote and who submits a voter registration application. GBM keeps some records of individuals it assists with submitting CERVs or requests for remission. GBM only began keeping partial records of CERV applications in late 2017 or early 2018 because it was hearing from its clients that they were not receiving responses after 44 days of submission. As such, GBM cannot provide a list of every instance where it has assisted an individual with a federal felony conviction determine their eligibility to vote.

Interrogatory No. 2

As to each federal felony conviction listed in response to Interrogatory no. 1, describe what efforts, if any, you made to ascertain whether the conviction was disenfranchising in Alabama.

Objections and Response

GBM objects to this interrogatory to the extent it calls for privileged communications between GBM and its counsel. GBM also objects to this interrogatory as unduly burdensome. As described above, GBM does not document all of its efforts to assist citizens determine their voting rights and therefore cannot provide an accounting of all efforts made with respect to each federal felony conviction that has arisen during its work.

As a general matter, every time GBM is confronted with a conviction, it must undertake its own research to determine whether the conviction is disqualifying under Alabama law, including by consulting with legal experts. As it pertains to federal convictions, GBM is typically unable to determine whether a federal conviction is disqualifying during its first interaction with the individual it is trying to help. GBM takes down all information available from the individual about the federal conviction. GBM then sometimes conducts its own research but also consults with legal experts for an opinion. Conducting research and consulting with legal experts with respect to whether the crime of conviction and any potential corollaries under Alabama law takes time. As such, GBM may have to let the potential voter leave without an answer after the initial interaction, and then reach back out to them at a later date. It takes additional time and effort to re-establish contact with potential voters after the first interaction, and sometimes we are not able to re-initiate contact. At times, GBM is unable to determine whether a federal felony conviction is disqualifying and must counsel the voter to apply for a CERV in order to be safe.

Interrogatory No. 3

As to each federal felony conviction listed in response to Interrogatory no. 1, describe the advice you gave the potential voter.

Objections and Response

GBM objects to this interrogatory as unduly burdensome. GBM is not required to, nor does it, keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. GBM is not required to, nor does it, keep a record of each individual it determines is eligible to vote and who submits a voter registration application. GBM only keeps records of individuals it assists with submitting CERVs or requests for remission. As such, GBM cannot and does not provide an explanation of the guidance given to each potential voter with a federal conviction.

When GBM's efforts to determine whether a federal conviction is disqualifying lead to a clear answer that the federal conviction is likely disqualifying under the statute (i.e. that the elements of the federal conviction match the elements of a disqualifying state conviction), GBM advises the person to seek a Certificate of Eligibility to Register to Vote, if eligible, provides them with that form, and in some cases assists them with the process of filling it out.

When GBM's efforts to determine whether a federal conviction is disqualifying lead to a clear answer that the conviction is not disqualifying under the statute (i.e. that the elements of the federal conviction do not match the elements of a disqualifying state conviction), and that person has no other disqualifying felony convictions, GBM advises the person to register to vote, provides them with the registration form, and answers any questions about how to fill it out.

If GBM's efforts to determine whether a federal conviction is disqualifying do not lead to a clear answer as to whether it is disqualifying under the statute, then GBM advises the person to submit to seek a Certificate of Eligibility to Register to Vote, if eligible, provides them with that form, and in some cases assists them with the process of filling it out. GBM advises the CERV process even though the person might be eligible to register because GBM is not aware of a mechanism by which a person can obtain an official determination of their eligibility to register without first filling out a registration form testifying to their eligibility under penalty of perjury.

Interrogatory No. 4

For the time period since Ala. Act No. 2017-378 took effect to the present, identify each out-of-State felony conviction about which you have had a question arise with a potential voter as to whether the conviction was disenfranchising in Alabama.

Objections and Response

GBM objects to this interrogatory as unduly burdensome. Typically, every person GBM assists that has a felony conviction, whether out-of-state or otherwise, raises the question of whether

their conviction is disenfranchising in Alabama. Indeed, this is often why they seek out GBM's assistance.

GBM is not required to, nor does it keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. GBM is not required to, nor does it keep a record of each individual it determines is eligible to vote and who submits a voter registration application. GBM only keeps records of individuals it assists with submitting CERVs or requests for remission. As such, GBM cannot and does not provide an accounting of each out-of-state conviction it has encountered during its rights restoration and voter registration work.

Interrogatory No. 5

As to each out-of-State felony conviction listed in response to Interrogatory no. 4, describe what efforts, if any, you made to ascertain whether the conviction was disenfranchising in Alabama.

Objections and Response

GBM objects to this interrogatory to the extent it calls for privileged communications between GBM and its counsel. GBM also objects to this interrogatory as unduly burdensome. GBM is not required to, nor does it keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. Thus, GBM cannot provide an accounting of its process for each individual out-of-state convictions. As a general matter, GBM's process for out-of-state convictions is not any different than its process for federal felony convictions. Therefore, GBM refers Defendants to its response to Interrogatory No. 2.

Interrogatory No. 6

As to each out-of-State felony conviction listed in response to Interrogatory no. 4, describe the advice you gave the potential voter.

Objections and Response

GBM objects to this interrogatory as unduly burdensome. GBM is not required to, nor does

it keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. Thus, GBM cannot provide an accounting of its advice for each individual out-of-state convictions. As a general matter, GBM's process and accompanying advice for out-of-state convictions is not any different than its process for federal felony convictions. Therefore, GBM refers Defendants to its response to Interrogatory No. 3.

Interrogatory No. 7

For the time period from January 1, 2018 to present, when working with felons interested in registering to vote, what percentage of the time do you advise a felon to complete a voter registration form in order to determine whether the felon is eligible to vote.

Objections and Response

GBM does not advise an individual to register to vote if there is any material question of that person's eligibility.

Interrogatory No. 8

Describe each and every claim you bring in Count 11. Your description should explain, inter alia, whether the claim originally brought in Count 11 has been replaced by the claim in the supplemental complaint or whether Count 11 currently pursues two or more claims, and, if there are two or more claims, whether they are in the alternative. You should also make clear whether each claim is facial or as applied.

Objection

GBM objects to this interrogatory as it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33.

Interrogatory No. 9

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 11 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius

Gamble.

Objection and Response

GBM objects to this interrogatory to the extent it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33. GBM alleges its own injuries as a result of the Ex Post Facto violation in so far as it diminishes GBM's voter registration efforts and requires GBM to divert and expend substantial resources on fact-intensive research and assistance for potential voters with felony convictions. Those injuries would not be remedied by a remedy limited to the factual circumstances of the individual Plaintiffs.

Interrogatory No. 10

Describe each and every claim you bring in Count 12. Your description should explain, inter alia, whether the claim originally brought in Count 12 has been replaced by the claim in the supplemental complaint or whether Count 12 currently pursues two or more claims, and, if there are two or more claims, whether they are in the alternative. You should also make clear whether each claim is facial or as applied.

Objection

GBM objects to this interrogatory as it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33.

Interrogatory No. 11

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 12 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Objection and Response

GBM objects to this interrogatory to the extent it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33. GBM

alleges its own injuries as a result of the Eighth Amendment violation in so far as it diminishes GBM's voter registration efforts and requires GBM to divert and expend substantial resources on fact-intensive research and assistance for potential voters with felony convictions. Those injuries would not be remedied by a remedy limited to the factual circumstances of the individual Plaintiffs.

Interrogatory No. 12

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 13 beyond the factual circumstances of Treva Thompson and Darius Gamble.

Objections and Response

GBM objects to this interrogatory to the extent it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33. GBM alleges its own injuries as a result of the pay-to-vote violation encompassed by Count 13 in so far as it diminishes GBM's voter registration efforts and requires GBM to divert and expend substantial resources on fact-intensive research and assistance for potential voters with felony convictions and remission applications with little chance of success. Those injuries would not be remedied by a remedy limited to the factual circumstances of the individual Plaintiffs.

Interrogatory No. 13

Describe each and every claim you bring in Count 16. Your description should explain, inter alia, whether you agree with the Court's description of this Count in the Memorandum Opinion and Order dated December 5, 2019, doc. 179-1, or whether you bring a different and/or additional claim.

Objection

GBM objects to this interrogatory as it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33.

Interrogatory No. 14

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 16 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Objection and Response

GBM objects to this interrogatory to the extent it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33.GBM suffers the same injuries as a result of the violation alleged in Count 16 as those alleged in Count 11. Therefore, GBM refers Defendants to its response to Interrogatory No. 9.

Interrogatory No. 15

Describe each and every claim you bring in Count 17. Your description should explain, inter alia, whether you agree with the Court's description of this Count in the Memorandum Opinion and Order dated December 5, 2019, doc. 179-1, or whether you bring a different and/or additional claim.

Objection

GBM objects to this interrogatory as it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33.

Interrogatory No. 16

Explain how your presence in this case as a Plaintiff broadens the scope of the issue(s) in Count 17 beyond the factual circumstances of Treva Thompson, Timothy Lanier, Pamela King, and Darius Gamble.

Objection and Response

GBM objects to this interrogatory to the extent it calls solely for legal conclusions and legal theories. Interrogatories "may not extend to issues of 'pure law.'" See Notes to Fed. R. Civ. P. Rule 33. GBM suffers the same injuries as a result of the violation alleged in Count 17 as those alleged in Count 11. Therefore, GBM refers Defendants to its response to Interrogatory No. 9.

Interrogatory No. 17

Identify any felon you assisted in registering to vote, or attempting to register to vote, after that felon became confused about his or her eligibility to register and/or vote when offered the opportunity to register during a transaction to get a Alabama driver's license or State non-driver photo ID. Only include those felons whose confusion was related to their felony conviction. "Identify" means to provide the name, race, and any contact information you have for the felon and to describe any circumstances of which you are aware concerning the confusion and/or your subsequent interaction with the felon.

Objections and Response

GBM objects to this interrogatory as unduly burdensome, not proportional to the needs of the case, harassing, and seeking to invade the privacy of individuals that GBM assists. GBM is not required to, nor does it keep a record of each person it assists to determine their eligibility to vote under Ala. Act No. 2017-378. GBM does not regularly monitor voter registration at ALEA offices. GBM cannot presently recall any specific encounter with an individual related to confusion with respect to voter registration for people with felony convictions at ALEA offices. However, that is unsurprising given that GBM does not log each of its potential voter interactions and does not indicate a lack of confusion at ALEA offices. Moreover, GBM has testified about voter confusion with respect to eligibility for people with felony convictions in general and is unaware why it would be any different at ALEA offices. ALEA's representative has testified that it does not provide any information about eligibility for people with felony convictions, nor does it answer questions about voter eligibility, if a person with a felony seeks to register at one of its offices. *See*, Pregno Dep. at 42:1-44:8.

Date: _____June 24, 2020__ _____

Scott Douglas

Respectfully submitted,

/s/ *Molly Danahy*
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to an agreement memorialized in the Report of the Parties' Planning Meeting, electronic service is acceptable for this document. I served a copy of the foregoing document on Winn Sinclair (wscinlair@ago.state.al.us) and Misty Fairbanks Messick (mmessick@ago.state.al.us), counsel for Defendants, via email on the 24th day of June 2020.

/s/ Molly E. Danahy

Molly E. Danahy

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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July 2, 2020

via email

Ms. Molly Danahy
Legal Counsel, Litigation
Campaign Legal Center
1411 K St. NW, Suite 1400
Washington, DC 20005

Re: Thompson, et al., v. Merrill, et. al., Civil Action No. 2:16-cv-783-ECM-SMD (M.D. Ala. pending).

Dear Molly:

I write to open the meet-and-confer process concerning Greater Birmingham Ministries' recent responses to interrogatories, and to bring to your attention inadequacies in the responses of GBM, Timothy Lanier and Darius Gamble. Taking the latter matter first, you served the responses for each of these Plaintiffs last week, but did so without signing for the objections or including a certificate of service. Counsel should promptly sign for the objections.

Substantively, GBM states that it cannot provide comprehensive answers in response to Interrogatory Nos. 1 and 4, but then fails to provide any information that GBM does have. GBM was required to provide the information that it does have, even if it cannot respond completely, *cf.* Fed. R. Civ. P. 33(b)(3), and it should do so now.

Next, Interrogatory Nos. 8, 10, 13 and 15 asked GBM to explain certain claims it brings, namely those in Counts 11, 12, 16, and 17. GBM objected because "Interrogatories 'may not extend to issues of pure law.' *See* Notes to Fed. R. Civ. P. Rule 33." The *claims* brought in this case are not "issues of pure law" divorced from the facts of the case. That is key because the 1970 notes to which you refer explained: "On the other hand, under the new language interrogatories may not extend to issues of 'pure law,' *i.e.*, legal issues unrelated to the facts of the case." Notes to Fed. R. Civ. P. Rule 33. The "new language" noted there was the 1970 amendment "to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact." *Id.* The Notes for the 2007 amendment provide, in relevant part:

> Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "necessarily."

Notes to Fed. R. Civ. P. Rule 33. Interrogatory Nos. 8, 10, 13 and 15 are contention interrogatories that are important to the State Defendants' ability to understand GBM's claims in order to properly move for summary judgment and to otherwise prepare our defense. Further, we have not been able to obtain this information to date through other means. The State Defendants do not wish to burden the Court with briefing that misunderstands a claim, and we certainly do not want to fail to move for summary judgment on a claim because we did not understand GBM to be asserting it. GBM should provide revised answers that are responsive to Interrogatory Nos. 8, 10, 13 and 15.

Finally, GBM simply stopped answering at Interrogatory No. 17, but we served 25 interrogatories. Thus, responses to Interrogatory Nos. 18 through 25 are past due, and should be immediately provided, along with revised responses to Interrogatory Nos. 1, 4, 8, 10, 13 and 15.

Given the impending closure of discovery, we look forward to your prompt attention to this matter.

Sincerely,

s/ Misty S. Fairbanks Messick
Misty S. Fairbanks Messick
Assistant Attorney General

Messick, Misty

From: Molly Danahy <mdanahy@campaignlegalcenter.org>
Sent: Monday, July 13, 2020 3:16 PM
To: Messick, Misty; Sinclair, Win
Cc: Danielle Lang; Mark Gaber; Jonathan Diaz
Subject: Re: Interrogatory Responses
Attachments: Suppl. GBM ROGs.pdf

Counsel,

Please find attached GBM's supplemental responses to ROGs 1 and 4. With respect to ROGs 8, 10, 13, and 15, Plaintiffs intend to stand on their objections.

Best,

Molly Danahy
Legal Counsel, Litigation

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