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

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

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
<u>THEIR MOTION FOR SUMMARY JUDGMENT</u>

Charles J. Cooper *(Pro Hac Vice)*
Haley N. Proctor (VSB #84272)
John D. Ramer *(Pro Hac Vice)*
Bradley L. Larson (*Pro Hac Vice*)*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

*Not a D.C. Bar Member; practice limited to matters in federal forums.

Counsel for Defendants John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Christopher P. Stolle, J. Chapman Petersen, Susan Beals, Eric Spicer, and Sandy C. Elswick

Jason S. Miyares
Attorney General

Kevin M. Gallagher (VSB #87548)
Solicitor General

Thomas J. Sanford (VSB #95965)
Deputy Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 – Telephone
(804) 786-1991 – Facsimile
KGallagher@oag.state.va.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The critical legal question in this case is the meaning of "felony" in the 1869 Virginia Constitution that Congress approved in the Virginia Readmission Act. Defendants presented a host of legal authorities and factual evidence showing that "felony" carried its ordinary meaning under Virginia law at the time: a crime punishable by imprisonment in the penitentiary. Plaintiffs' opposition fails to make any showing to the contrary.

Instead, Plaintiffs try to elide the question by presenting a new interpretation of the Readmission Act, raised neither in their own motion for summary judgment nor at any prior stage of this case. Plaintiffs now argue that the Readmission Act's phrase "entitled to vote by the Constitution herein recognized" covers "all adult male citizens," because it "protect[s] the population the 1869 Constitution enfranchised rather than the population it excluded from the franchise." Pls.' Opp. to Defs.' Mot. for Summ. J. (Pls.' MSJ Opp.) at 5–6 (ECF No. 165) (emphasis omitted). Therefore, Plaintiffs contend, the Readmission Act prohibits Virginia from disenfranchising anyone except those convicted of a "felony at common law." *Ibid*. But this convoluted argument breaks down at the first step: the 1869 Constitution did *not* enfranchise all adult male citizens. To the contrary, it "excluded from voting" several classes of citizens, including those convicted of any "felony." Va. Const. art. III, § 1 (1869). Nor does the Readmission Act's "except" clause support Plaintiffs' argument. That clause applies only when Virginia amends its Constitution to disenfranchise citizens who were entitled to vote under the 1869 Constitution. Because felons, such as Plaintiffs, were not "entitled to vote" under the 1869 Constitution, the "except" clause does not apply, and continuing to disenfranchise them under Virginia's current Constitution fully comports with the Readmission Act.

Plaintiffs also re-raise their two previous interpretations of the Readmission Act, but neither of these alternative interpretations fares any better. In their first alternative interpretation, Plaintiffs argue that "Congress understood the 1869 Constitution" as disenfranchising only common-law felons when it passed the Readmission Act, and that the actual meaning of the 1869 Constitution is somehow irrelevant. Pls.' MSJ Opp. 14. But Plaintiffs' contention that Congress believed "felony" actually meant "felony at common law" fails. Far from incorporating the Military Reconstruction Acts' voting requirements, the Virginia Readmission Act does not even reference those statutes, which became inoperative on their own terms. Other Readmission Acts, approving state constitutions that referred to crimes punishable with imprisonment in the penitentiary, further demonstrate that Congress did not believe it was prohibiting disenfranchisement for statutory felons. In any event, it is the actual meaning of the 1869 Constitution, not the subjective beliefs of members of Congress, that controls: Plaintiffs cannot ask this Court to re-write the plain text of the Readmission Act to fix Congress's supposed mistake. Plaintiffs' second alternative interpretation is just as flawed. They contend that the 1869 Constitution's reference to "felony" applies only to felonies that existed in 1869. But that is contrary to basic principles of statutory interpretation, including the reference canon.

Plaintiffs' various appeals to purpose are no more persuasive. They argue that the Virginia Readmission Act serves no function if "felony" encompasses all felonies. Pls.' MSJ Opp. 6. But that is plainly incorrect. Prohibiting Virginia from amending its Constitution to disenfranchise those "entitled to vote" by the 1869 Constitution set significant limits. As Plaintiffs themselves note, the 1869 Constitution extended the franchise "regardless of race." *Id.* at 1. The Readmission Act therefore prohibited racial discrimination in voting rights. It also prohibited a plethora of devices that could be used to disenfranchise freed slaves—such as property requirements, grandfather clauses, and disenfranchisement for misdemeanors or other petty offenses that were not felonies at common law—because no such restrictions on the franchise appeared in the approved 1869 Constitution. And the Readmission Act prohibited disenfranchisement based on any criminal laws that discriminated on the basis of race. 16 Stat. 63. But it permitted disenfranchisement of those not "entitled to vote" under the 1869 Constitution, in addition to those convicted of crimes that were common-law felonies. *Ibid.* This straightforward interpretation of the Act's plain text gives meaning to all of its provisions, and furthers its purpose of preventing racially discriminatory disenfranchisement. Congress simply did not create the specific prohibition Plaintiffs desire, on disenfranchising statutory felons. Defendants' motion for summary judgment should be granted.

ARGUMENT

I. Plaintiffs' brand new legal theory fails

A. The plain meaning of the Virginia Readmission Act and Virginia's 1869 Constitution allows Virginia to disenfranchise Plaintiffs

Plaintiffs' new theory that all adult male citizens were entitled to vote under the 1869 Constitution and that the Virginia Readmission Act allowed only common-law felons to be disenfranchised is contrary to the plain text of both the 1869 Constitution and the Virginia Readmission Act. For the first time in two years of litigation, Plaintiffs contend that the Virginia Readmission Act's prohibition on amending Virginia's Constitution to disenfranchise citizens who were "entitled to vote" under the 1869 Constitution except for felony at common law is far broader than anyone previously realized. See Pls.' MSJ Opp. 1, 5–8. Under Plaintiffs' theory, the Virginia Readmission Act prohibits Virginia from amending its Constitution to disenfranchise citizens "entitled to vote" by the 1869 Constitution, 16 Stat. 63, and the 1869 Constitution provided that all adult male citizens were "entitled to vote." Therefore, according to Plaintiffs, the Virginia Readmission Act prohibits Virginia from disenfranchising *any* adult male citizen, unless that person committed a common-law felony.

The gaping hole in Plaintiffs' argument is that Article III, Section 1 of the 1869 Constitution did not actually entitle all adult male citizens to vote. Article III, Section 1 lays out the "Elective Franchise" under the 1869 Constitution. It states that "[e]very male citizen of the United States, twenty-one years old, who shall have been a resident of this State twelve months . . . shall be entitled to vote" "provided [t]hat . . . the following persons shall be excluded from voting": (1) "Idiots and lunatics"; (2) "Persons convicted of bribery in any election, embezzlement of public funds, treason or felony"; and (3) duelists. Va. Const. art. III, § 1 (1869). The plain text of Article III, Section 1 thus makes clear that the only adult male citizens who were entitled to vote were those who were not idiots, lunatics, convicted of specific offenses (including felonies), or duelists.[1] The exclusions define the limit of the entitlement: a person who fell into one of the exclusions was not entitled to vote.

The Virginia Readmission Act allows the disenfranchisement of individuals who were not "entitled to vote" under the Constitution approved by Congress in the Act. The Act provides that Virginia's 1869 Constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law." 16 Stat. 63. The Act thus allows disenfranchisement in two distinct scenarios. First, if a citizen would *not* have been "entitled to vote by the [1869] Constitution," then the Virginia Readmission Act allows the citizen's continued disenfranchisement, because the citizen cannot be deprived of something he never possessed. See Deprive, *An American Dictionary of the English Language* (1828), https://tinyurl.com/bdxkzw5v ("To take from; to bereave of something possessed or

[1] Indeed, under Plaintiffs' interpretation, the 1971 Virginia Constitution's provision excluding "person[s] adjudicated to be mentally incompetent" from the franchise, Va. Const. art. II, § 1, would equally violate the Virginia Readmission Act.

enjoyed."). Second, even if a citizen would have been "entitled to vote" by the 1869 Constitution, the Commonwealth could disenfranchise him if he is convicted of a crime that was a felony at common law in 1870.

It beggars belief that a person who was "excluded from voting" under the 1869 Constitution, Va. Const. art. III, § 1 (1869), could nonetheless have been "entitled to vote" under that Constitution, 16 Stat. 63. To be "entitled" to something meant in the 1800s the same thing it means today: to be "qualif[ied]" or "possess[] . . . suitable qualifications." Entitle, *An American Dictionary of the English Language* (1828), https://tinyurl.com/nhb5p3sf; Entitled, *Merriam-Webster's Dictionary*, https://tinyurl.com/y2vkadkx ("having a right to certain benefits or privileges"). A person who is "excluded from voting," Va. Const. art. III, § 1 (1869), necessarily does not have the requisite qualifications to vote. Thus, Plaintiffs' claim that "Virginia[] pronounce[d]" in the 1869 Constitution "that all citizens are 'entitled to vote'" is demonstrably false. Pls.' MSJ Opp. 1. Idiots, lunatics, felons, and duelists were not entitled to vote under the 1869 Constitution.

At bottom, Plaintiffs ask this Court to focus only on the first sentence of Article III, Section 1 of the 1869 Constitution while ignoring the rest of that Section. But it makes no sense that when the Virginia Readmission Act refers to those "entitled to vote" under the 1869 Constitution, it was somehow excising much of that Constitution's own description of who was entitled to vote. Indeed, reading the Virginia Readmission Act this way would render it inherently contradictory. Cf. *Becerra v. Empire Health Found.*, 597 U.S. 424, 439 (2022). Everyone agrees that the point of the Virginia Readmission Act was to approve Virginia's newly ratified Constitution. See, *e.g.*, Memo. in Supp. of Pls.' Mot. for Summ. J. at 5 (ECF No. 152). But under Plaintiffs' interpretation, Congress approved a Constitution with exclusions from the franchise beyond just common-law felons while simultaneously preempting those exclusions. That cannot be. Congress approved the 1869 Constitution as "republican" in the Virginia Readmission Act, 16 Stat. 62, and incorporated by reference the 1869 Constitution against which it would judge future amendments of the Virginia Constitution, see 16 Stat. 63. Far from hiding an elephant in a mousehole, but see Pls.' MSJ Opp. 7 (citing *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), the Virginia Readmission Act states directly that it is approving the 1869 Constitution and prohibiting amendments only if they would disenfranchise people entitled to vote under that Constitution.

Plaintiffs' argument that the Virginia Readmission Act does not "implicitly incorporate[] by reference" the franchise provisions of the 1869 Constitution is thus puzzling. Pls.' MSJ Opp. 10. The Readmission Act *explicitly* refers to persons "entitled to vote by the Constitution herein recognized," 16 Stat. 63, thus explicitly incorporating the 1869 Constitution's demarcation of the franchise. This incorporation of state law is *far* clearer than other areas of law in which federal law incorporates state law, such as the statute of limitations for Section 1983 actions or what constitutes "property" within the meaning of the Due Process Clause. See *King v. Youngkin*, 122 F.4th 539, 545 (2024) (citing *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972), and *Wilson v. Garcia*, 471 U.S. 261, 266–80 (1985)). Indeed, if the Virginia Readmission Act did not incorporate the 1869 Constitution's "entitle[ment] to vote," there would be no way to determine who is *protected* by the Readmission Act. 16 Stat. 63.

The relevant text is thus clear. The Virginia Readmission Act prohibits Virginia from "amend[ing]" or "chang[ing]" its Constitution to "deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized." 16 Stat. 63. Thus, to determine whether a person who was "entitled to vote" had that entitlement stripped away, *ibid.*, this court must examine who the 1869 Constitution entitled to vote. That

Constitution is the legal document that created the relevant voting rights. The 1869 Constitution's meaning did not somehow transform when Congress voted to readmit Virginia to the Union in 1870. The Virginia Readmission Act itself, after all, did not purport to establish who was "entitled to vote" under the 1869 Constitution. *Ibid.* It simply provided that whoever was "entitled to vote" under that Constitution could not be disenfranchised by a later constitutional amendment. *Ibid.*

Neither does this plain text reading make "the Virginia Readmission Act's express, specific condition" concerning common-law felonies "mean[] next to nothing." Pls.' MSJ Opp. 7. In fact, Plaintiffs' interpretation makes that clause entirely meaningless. See Defs.' Opp. to Pls.' Mot. for Summ. J. (Defs.' MSJ Opp.) at 11–12 (ECF No. 162). The relevant clause allows Virginia to disenfranchise persons "entitled to vote" under the 1869 Constitution if they are convicted of common-law felonies, including those that are statutory misdemeanors under Virginia law. 16 Stat. 63. Because Plaintiffs believe that petit larceny is the only common-law felony that was a statutory misdemeanor at the time, they muse that "if all Congress meant to do was clarify that Virginia could extend disenfranchisement to petit larceny, it would have done so expressly." Pls.' MSJ Opp. 7–8. But petit larceny is just one notable example; it is far from the only one. Involuntary manslaughter, 1860 Va. Code Ch. 191, § 5; Report of Carissa Hessick (Hessick Report) at ¶ 31 (ECF No. 148-2), and assisting a misdemeanant to escape jail, 1860 Va. Code Ch. 194, § 8; Hessick Report ¶ 31, were statutory misdemeanors that Virginia could have also codified as offenses that led to disenfranchisement under the Virginia Readmission Act.

Indeed, petit larceny is a notable example precisely because Virginia utilized the Virginia Readmission Act's "except" clause to ensure disenfranchisement of those convicted of petit larceny. Because Virginia did not authorize time in the penitentiary for those convicted of petit larceny, 1860 Va. Code Ch. 192, § 14, it was not a "felony" under Virginia law, and persons convicted of it were not disenfranchised under the 1869 Constitution. Yet the Virginia Readmission Act allowed Virginia to amend its constitution to disenfranchise those convicted of petit larceny without making it a felony. Virginia utilized the common-law felonies clause in 1876 when it did exactly that. Plaintiffs claim that interpreting "felony" to encompass all felonies would make the 1876 Amendment redundant because petit larceny was a felony at common law. Pls.' MSJ Opp. 7. But when the Virginia General Assembly chose to codify a common-law felony as a misdemeanor, the crime did not somehow remain a felony under Virginia law. Indeed, if *Plaintiffs* are correct that "felony" in the 1869 Constitution meant "felonies at common law" without regard to statutory classification, then adding petit larceny in 1876 would have been unnecessary.[2]

Virginia has certainly amended its Constitution since the Readmission Act was passed in 1870. But none of those amendments "deprive[d] any citizen or class of citizens" who were "entitled to vote" in the 1869 Constitution of their voting rights. 16 Stat. 63. In the 1869 Constitution, "felony" included all crimes punishable with time in the penitentiary, not just felonies at common law. See Memo. in Support of Defs.' Mot. for Summ. J. (Defs.' MSJ Mem.) at 13–21 (ECF No. 148). Because no felons were "entitled to vote" under the 1869 Constitution, the 1971 Constitution does not "deprive" any felons of a "right to vote" that existed under the 1869 Constitution. 16 Stat. 63. In fact, Virginia has *expanded* the franchise considerably since 1869, including for felons: whereas the 1869 Constitution contained a permanent, categorical bar for all felons, the 1971 Constitution allows felons to vote if their "civil rights have been restored by the Governor or other appropriate authority." Va. Const. art. II, § 1; see also *Hawkins v. Youngkin*, __

[2] Plaintiffs' related argument that Virginia actually disenfranchised persons for petit larceny before the 1876 Amendment is based on a misreading of the historical record. They point to the conviction of George Cosby for petit larceny in 1876 before the Amendment was ratified and note that he was listed as a disenfranchised person. Pls.' MSJ Opp. 20 n.5. But there is no evidence that he was *disenfranchised* before the Amendment passed.

F.4th __, 2025 WL 2405515 (4th Cir. Aug. 20, 2025) (affirming district court decision rejecting constitutional challenge to Virginia's felon re-enfranchisement system). Additionally, Virginia is in the process of amending its constitution to allow felons to vote once they have completed their sentences. S.J.R. 248, 2025 Gen. Assemb., Reg. Sess. (Va. 2025).[3] Virginia's 1971 Constitution therefore fully complies with the Virginia Readmission Act's plain terms because it has expanded, rather than contracted, the franchise compared to 1869.

B. Plaintiffs' arguments about the purpose of the Readmission Act's clause regarding common-law felonies are inapposite

Plaintiffs cast Defendants' interpretation of the Readmission Act as "absurd" because they construe Defendants to suggest that the Act *permits* rather than *prohibits* a contraction of the franchise. See Pls.' MSJ Opp. 5. But they misconstrue Defendants' argument.

The Readmission Act's prohibition on "depriv[ing] any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized," 16 Stat. 63, restricts Virginia's ability to disenfranchise the vast majority of her citizens. Having imposed this significant restriction, the Readmission Act then authorizes the Commonwealth to disenfranchise a small subset of people: common-law felons who were nonetheless "entitled to vote" by the 1869 Constitution. It is therefore not true that, properly interpreted, the statute accomplishes nothing. See Pls.' MSJ Opp. 5–6. Under Defendants' reading, the Virginia Readmission Act imposes real limits on Virginia's ability to amend its Constitution to alter voting requirements. For example, Virginia could not add a property requirement or a literacy test to vote because none existed in the 1869 Constitution. Va. Const. art. III, § 1 (1869). Nor could Virginia

[3] Plaintiffs contend that the constitutional amendment has "no bearing" on this case because "the Virginia Readmission Act expressly prohibits certain kinds of *dis*enfranchisement, it puts no limits on *re*-enfranchisement." Pls.' MSJ Opp. 29 n.6. But under the amendment, statutory felons would be disenfranchised while in prison—exactly what Plaintiffs contend the Virginia Readmission Act prohibits.

add any sort of racial voting requirement because none existed in the 1869 Constitution, *ibid.*, and because the Readmission Act required Virginia to ratify the Fourteenth and Fifteenth Amendments, 16 Stat. 62. And Virginia could not disenfranchise anyone for a misdemeanor or non-criminal offense, unless that offense was a common-law felony. Instead, it would have to pass a law making a crime a felony—an action that has significant consequences beyond effects on the franchise, including a penalty of imprisonment, see Defs.' MSJ Mem. 3–4, as well as enhanced procedural protections, *Sperry v. Commonwealth*, 36 Va. (9 Leigh) 623, 624–25 (Va. Gen. Ct. 1838) (right to be physically present at felony trial); Va. Code, Ch. 202, § 3 (3d ed. 1873) ("A person tried for felony shall be personally present during the trial."); *Marshall v. Commonwealth*, 61 Va. (20 Gratt.) 845, 846 (1871) (requiring felonies to be tried in a circuit court). That is both costly for the government and may well be politically unpopular if the crime is not a serious one.

And because the Readmission Act required a valid conviction procured under laws equally applicable to all citizens, 16 Stat. 63, Virginia could not use sham proceedings to convict and disenfranchise otherwise-eligible voters. Indeed, the Readmission Act used that same provision—that any disenfranchisement result from a conviction "under laws equally applicable to all the inhabitants of said State," 16 Stat. 63—to protect against racially discriminatory disenfranchisement. That provision directly prohibits Virginia from creating new statutory felonies, then applying them unequally to "Black men" to disenfranchise them. Pls.' MSJ Opp. 13. The Readmission Acts also required the former rebel States, including Virginia, to ratify the Fourteenth and Fifteenth Amendments to qualify for readmission. 16 Stat. 62. Those amendments prohibit States from denying the right to vote based on race. U.S. Const. Amends. XIV, XV. The Readmission Act thus created substantial limitations on Virginia's ability to control the franchise; it just did not create the limitation that Plaintiffs desire.

II. "Felony" in Virginia's 1869 Constitution encompasses all felonies

Plaintiffs contend that the Virginia Readmission Act's text is "clear" with a "clear directive." Pls.' MSJ Opp. 1. But after presenting a brand-new interpretation of that text, they then proceed to reintroduce two alternative interpretations. First, they contend that Congress' understanding of "felony" in Virginia's 1869 Constitution is the relevant question, not the actual meaning of "felony" in the Virginia Constitution, and that Congress understood "felony" to mean "felony at common law." See Pls.' MSJ Opp. 14–17. Second, Plaintiffs argue that, even if the term "felony" encompasses all felonies, it includes only felonies that existed in 1869. See *id.* at 17–20. These alternative interpretations are also wrong.

A. This case turns on the meaning of "felony" in Virginia's 1869 Constitution, not the subjective belief of Congress

Plaintiffs have little response to Defendants' showing that "felony" in the 1869 Constitution did not mean "felony at common law." Nor could they. Every relevant tool of interpretation demonstrates that "felony" was used in its common, ordinary sense: all felonies, not merely felonies at common law. Defs.' MSJ Mem. 13–21. Virginia law, which is the relevant legal source to inform the meaning of the 1869 Constitution, see p.14, *infra*, had made this clear for two decades. Virginia had statutorily defined felony as any crime, regardless of its common-law origins, that could result in time in the penitentiary. Defs.' MSJ Mem. 13–21 (collecting sources). This view was adopted by prominent treatise writers who explicitly defined the term "felony" under Virginia law, was proffered during the Virginia constitutional convention when debating disenfranchisement, and was used immediately thereafter as well.[4] *Ibid.* Plaintiffs are wrong that

[4] Defendants acknowledge that only the list of "colored" voters who had been disenfranchised in Richmond has survived until today. Yet Plaintiffs cannot deny that list shows individuals were disenfranchised for statutory felonies under the 1869 Constitution, and they fail to produce a single source objecting to this practice. Given the fierce debates surrounding the

these post-enactment sources are irrelevant post-enactment legislative history. Pls.' MSJ Opp. 19 (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)). These sources are post-enactment *interpretations* of the law, which have long been viewed as evidence of the law's original meaning. *Jacobs v. Prichard*, 223 U.S. 200, 214 (1912); see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 368 (2024) ("[T]he longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law is." (cleaned up)).

To avoid the overwhelming evidence that the 1869 Constitution's use of "felony" meant crimes "which are punishable with death or confinement in the penitentiary," Defs.' MSJ Opp. 6, Plaintiffs instead focus on "how Congress understood the 1869 Constitution when it passed the [Virginia Readmission] Act," Pls.' MSJ Opp. 14. But Plaintiffs' contention that members of Congress thought the 1869 Constitution only disenfranchised common-law felons is erroneous. See Defs.' MSJ Opp. 12–18. And even if members of Congress misunderstood the 1869 Constitution when they approved it, that would not change its meaning. See *id.* at 19–20. As the Supreme Court has "emphasized many times," "what Congress (possibly) expected matters much less than what it (certainly) enacted." *Stanley v. City of Sanford*, 145 S. Ct. 2058, 2067 (2025) (quoting *Patel v. Garland*, 596 U.S. 328, 346 (2022)). Even where there is reason to believe that Congress "labored under [a] misapprehension" when it passed a statute, it "transcends the judicial function" for a court to rewrite the statute to correct Congress' apparent mistake. *Logan v. United States*, 552 U.S. 23, 35 & n.6 (2007) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)); *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute

imposition of conditions on the franchise, the failure to point to *any* contemporaneous evidence that disenfranchising statutory felons was unlawful speaks volumes.

is entirely clear, and if that is now what Congress meant then Congress has made a mistake and Congress will have to correct it.”).

Courts are frequently called to interpret state law when deciding whether a party is liable under federal law, and doing so does not somehow require the federal courts to ask what Congress subjectively thought the state law meant. For example, the Federal Tort Claims Act (FTCA) mandates that tort claims against the federal government be decided in accordance with the law of the State in which the events transpired. 28 U.S.C. § 1346(b); *Brownback v. King*, 592 U.S. 209, 212 (2021). When deciding cases under the FTCA, federal courts simply follow the “applicable state law” and do not guess at what Congress may have thought that law meant when it passed the FTCA. *Martin v. United States*, 145 S. Ct. 1689, 1696 (2025). Similarly, federal courts look to state law when determining the statute of limitations for actions under 42 U.S.C. § 1983.[5] *Wilson*, 471 U.S. at 266–80. The question in those cases is also what the State’s law means and not what Congress may have thought the law meant. Tellingly, Plaintiffs have not pointed to a single case where a court has looked to the subjective understanding of Congress to determine the meaning of a state law. Indeed, Plaintiffs cite a plethora of cases stating that subjective intent does not matter, and what matters is the meaning of the law as written. See, *e.g.*, *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). The text of the Virginia Readmission Act points to the 1869 Constitution, and the meaning of the 1869 Constitution is clear.

[5] Defendants’ interpretation of the Virginia Readmission Act would not “introduce[] varying interpretations of the same statutory language,” as Plaintiffs assert. Pls.’ MSJ Opp. 10 (citing *United States v. Davis*, 588 U.S. 445, 458 (2019)). The statutory meaning of the phrase “entitled to vote” remains constant. 16 Stat. 63. But who was “entitled to vote” under each state constitution may be different. This result is not anomalous. In the Section 1983 context, for instance, the statutory meaning remains the same, even if different States have different statutes of limitations for their causes of action.

Given that Congress was approving the *Virginia* Constitution, it is only logical that Congress would have understood the terms of that Constitution to mean what they mean under *Virginia* law. As Plaintiffs admit, "[c]ourts must 'assume that Congress is aware of existing law when it passes legislation.'" Pls.' MSJ Opp. 9 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). Plaintiffs' purported evidence that Congress understood "felony" in the 1869 Constitution to mean "felonies at common law" is also unpersuasive on its own terms. Indeed, their claim that Congress would have understood "felony" to reference a "discrete set of common-law crimes," Pls. MSJ Opp. 15 (quoting Hessick Report ¶ 23), is irreconcilable with Congress' decision to use the phrase "felonies at common law" in the Readmission Act, see Defs.' MSJ Opp. 14.

The Military Reconstruction Acts also do not help Plaintiffs prove that Congress understood "felony" to mean "felonies at common law." Those Acts, by their own terms, became inoperative in Virginia when Congress passed the Virginia Readmission Act, the constitutions of other Readmission Act States (which Congress approved) expressly disenfranchised those who committed crimes punishable by imprisonment in the penitentiary, and the evidence does not show that Congress viewed itself as following the letter of those Acts when it readmitted States after the Civil War. See Defs.' MSJ Opp. 14–18. Attempting to tie together the Military Reconstruction Acts and the Virginia Readmission Act, Plaintiffs claim that "[t]he Readmission Act's statement that Virginia had satisfied the 'condition precedent' to readmission refers to Congress's mandate in the Military Reconstruction Act." Pls.' MSJ Opp. 9. But Plaintiffs are wrong. The Readmission Act makes clear that "the people of Virginia ha[d] framed and adopted a constitution of State government which is republican" and "the legislature of Virginia elected under said constitution have ratified" the Fourteenth and Fifteenth Amendments. 16 Stat. 62. It was "the performance of these several acts in good faith" that "was a condition precedent to the representation of the State in Congress." *Ibid.* The Military Reconstruction Acts were not even mentioned in the Virginia Readmission Act, much less referred to as a "condition precedent" to readmission.

B. Neither the Virginia Readmission Act nor the 1869 Constitution disallowed Virginia from enacting new felony laws

Plaintiffs once again make the argument, albeit half-heartedly, that "felony" must be interpreted only to cover felonies that existed in 1869. See, *e.g.*, Pls.' MSJ Opp. 21. The entire gist of their argument is that "the Virginia Readmission Act expressly ties the scope of permissible disenfranchisement to a fixed time through the phrase 'such crimes as are now felonies at common law.'" Pls. MSJ Opp. 8 (quoting 16 Stat. 63). But Plaintiffs once again misunderstand how the Virginia Readmission Act and Virginia Constitution of 1869 interact. The relevant question is whether the term "felony" in Virginia's 1869 Constitution, which Congress approved as republican, 16 Stat. 62, covers only the felonies that existed in 1869 or covers all crimes that may fit the definition of "felony" in the future. As Defendants have already explained, basic legal principles (which were recognized in the mid-1800s) demonstrate that "felony" was an open set of crimes, including any future crimes that were deemed felonies. See Defs.' MSJ Opp. 25–26.

Plaintiffs believe that the Virginia Readmission Act's clause referring to "crimes as are now felonies at common law" meant that the statute "contained a temporal limitation on how its terms should be understood." Pls.' MSJ Opp. 20–22. That is true as to the "except" clause, but Plaintiffs have not been disenfranchised under the "except" clause. Rather, Plaintiffs were not "entitled to vote" under the 1869 Constitution, and so the Virginia Readmission Act provides that Virginia can disenfranchise them without any need to invoke the "except" clause. The "entitled to vote" clause simply points to the 1869 Constitution to determine the franchise, and there is no similar language in the 1869 Constitution fixing the meaning of "felony" as of 1869 (or 1870).

Indeed, the fact that Congress described "crimes that are now felonies at common law" in the Virginia Readmission Act provides more support for the proposition that the unadorned reference to "felony" in the 1869 Constitution is not likewise temporally fixed.

III. Plaintiffs' claim fails on multiple threshold grounds

Plaintiffs' claim presents a political question, Plaintiffs lack a cause of action, and sovereign immunity bars the remaining claim. See Defs.' MSJ Mem. 6–13. Plaintiffs' responses confirm that they are unable to overcome these threshold obstacles.

Plaintiffs first argue that "[t]he Fourth Circuit held that Plaintiffs have a cause of action in equity." Pls.' MSJ Opp. 26. But that is not what happened. Defendants' prior appeal in this case was in an interlocutory posture, and the existence of a cause of action is not the kind of issue that can be raised in an interlocutory appeal. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (cause of action is not jurisdictional); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995) (standard for interlocutory appeals). The Fourth Circuit did not decide whether Plaintiffs possess a cause of action: Defendants brought an interlocutory appeal to vindicate their sovereign immunity from suit, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and Plaintiffs disagreed because they believed their claim was within the *Ex parte Young*, 209 U.S. 123 (1908), exception to sovereign immunity. Defendants, in turn, countered that the *Ex parte Young* exception applies only if the plaintiff has a cause of action. See *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895 (6th Cir. 2014). The Fourth Circuit decided this dispute in favor of Plaintiffs, holding that *Ex parte Young* lifts a State's sovereign immunity if the "individual claims federal law immunizes him from state regulation." *King*, 122 F.4th at 545 (quoting *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326 (2015)). In other words, the Fourth Circuit determined that a cause of action is not required to invoke *Ex parte Young* as a method to skirt sovereign immunity. That holding obviated the need to decide whether Plaintiffs had a cause of action.

When opposing certiorari in this case, Plaintiffs emphasized the differences between the availability of *Ex parte Young* to breach a State's sovereign immunity and the existence of a cause of action to invoke the Court's powers. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). In their own words, "the *Ex parte Young* sovereign immunity issue is separate from . . . the existence of a private cause of action." Brief for Respondents in Opposition, *O'Bannon v. King*, No. 24-964 at 13 (U.S. 2025). Plaintiffs now reverse course and argue that when deciding the availability of *Ex parte Young*, the Fourth Circuit decided whether they had a cause of action. To the contrary, *now* is the time and posture for this Court to determine whether Plaintiffs have a cause of action to "invoke the power of the court." *Davis*, 442 U.S. at 239 n.18. Plaintiffs lack such authorization.

It is black-letter law, of course, that every plaintiff needs a cause of action to "invoke the power of the court." *Davis*, 442 U.S. at 239 n.18. Without one, a putative plaintiff cannot bring a suit to invoke whatever law he asserts has been violated, and he must raise any legal claim in a defensive posture. Cf. *Whole Women's Health v. Jackson*, 595 U.S. 30, 50 (2021) (describing how federal-law arguments are often brought in a defensive posture). A cause of action is thus analytically distinct from the jurisdiction of the court, which refers to "whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." *Davis*, 442 U.S. at 239 n.18.

Because the Virginia Readmission Act itself does not contain a cause of action and 42 U.S.C. § 1983 is unavailable, see Opinion at 12–15 (ECF No. 88), the only possible cause of action Plaintiffs could have is in equity. The Judiciary Act of 1789 "endowed federal courts with jurisdiction over 'all suits . . . in equity[.]'" *Trump v. CASA*, 145 S. Ct. 2540, 2551 (2025) (quoting

§ 11, 1 Stat. 78). "[S]till today, this statute 'is what authorizes the federal courts to issue equitable remedies[.]'" *Ibid* (quoting S. Bray & E. Sherwin, Remedies 442 (4th ed. 2024)). To determine whether the plaintiff has properly brought a suit in equity, federal courts look to the "tradition[al]" ways that a case in equity could be brought. *Whole Woman's Health*, 595 U.S. at 39. The most relevant historical tradition is that "a court of equity could issue an antisuit injunction to prevent an officer from engaging in tortious conduct." *CASA*, 145 S. Ct. at 2554 n.9. Plaintiffs, however, cannot invoke this tradition to sue these Defendants. None of the Defendants can initiate an enforcement proceeding if Plaintiffs managed to illegally register and vote. Plaintiffs' entire argument for the proposition that they can utilize this equitable tradition relies on the fact that Defendants "maintain the very 'prohibited table' that identifies disenfranchised voters." Pls.' MSJ Opp. 27. But Plaintiffs do not, and cannot, explain how "maintain[ing]" a table of ineligible voters will result in these Defendants initiating an enforcement action against them. *Ibid.* Indeed, they appear to acknowledge that these Defendants cannot initiate an enforcement action because they are "not prosecutors."[6] *Ibid.*

Erecting a cause of action here would be especially problematic because applying the Virginia Readmission Act today would raise serious constitutional issues. See *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005). As the Supreme Court has explained, restrictions on a State's sovereignty must be applied equally across all States unless "justified by current needs." *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2012) (quoting *Northwest Austin Municipal Util. Dist. No.*

[6] Defendants preserved their sovereign immunity arguments for further review by raising them once again in their motion for summary judgment. See Defs.' MSJ Mem. 12–13. For reasons that elude Defendants, Plaintiffs argue to this Court that "no further appellate review is available." Pls.' MSJ Opp. 28. But the Fourth Circuit could decide to revisit the panel opinion en banc. Likewise, the Supreme Court could grant certiorari and would plainly not be bound by the panel's previous ruling.

One v. Holder, 557 U.S. 193, 203 (2009)). Congress "cannot rely simply on the past" when it comes to prohibiting a State from amending its constitution or enacting new laws. *Id.* at 553. If private parties can initiate a suit to obtain an injunction, then the Virginia Readmission Act functions as precisely the kind of unequal burden on state sovereignty that the equal-footing doctrine prevents. See *ibid.*

Plaintiffs argue that there is no plausible equal-footing problem because Congress enacted the Virginia Readmission Act as "a direct response to Virginia's . . . disproportionate efforts to disenfranchise Black citizens." Pls.' MSJ Opp. 25. But the Supreme Court has made clear that unequal infringements on a State's sovereignty must be justified by "*current*" conditions. *Shelby Cnty.*, 570 U.S. at 536 (emphasis added). "Things have changed in the South," *Northwest Austin,* 557 U.S. at 202, and especially in Virginia, which enacted a new Constitution in 1971 precisely to put its opposition to civil rights behind it, A.E. Dick Howard & William Antholis, *The Virginia Constitution of 1971*, 129 Virg. Mag. of Hist. & Bio. 346, 356 (2021). Thus, the conditions authorizing the Virginia Readmission Act no longer exist. See *Shelby Cnty.*, 570 U.S. at 547. The fact that the Virginia Readmission Act was not "intended to be temporary" only makes the equal-footing problem worse. Pls.' MSJ Opp. 25 (quoting *Shelby Cnty.*, 570 U.S. at 536). Unlike the Voting Rights Act sections at issue in *Shelby County*, the Virginia Readmission Act does not require repeated Congressional authorization to continue depriving Virginia of its equal sovereignty. If the South had "changed" enough between 1965 and 2013 to no longer justify a series of temporary federal acts restricting their sovereignty, *Shelby Cnty.*, 570 U.S. at 547, Virginia has changed enough between 1870 and 2025 to at least raise a serious question whether "current conditions" justify a serious restriction on its sovereignty, *id.* at 557; *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 629 (1974).

CONCLUSION

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

Dated: August 21, 2025

Respectfully submitted,

JOHN O'BANNON
ROSALYN R. DANCE
GEORGIA ALVIS-LONG
CHRISTOPHER P. STOLLE
J. CHAPMAN PETERSEN
SUSAN BEALS
ERIC SPICER
SANDY C. ELSWICK

By: *___/s/ Kevin M. Gallagher___*
Kevin M. Gallagher (VSB #87548)
Solicitor General

Charles J. Cooper *(Pro Hac Vice)*
Haley N. Proctor (VSB #84272)
John D. Ramer *(Pro Hac Vice)*
Bradley L. Larson (*Pro Hac Vice*)*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

*Not a D.C. Bar Member; practice limited to matters in federal forums.

Counsel for Defendants John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Christopher P. Stolle, J. Chapman Petersen, Susan Beals, Eric Spicer, and Sandy C. Elswick

Jason S. Miyares
Attorney General

Thomas J. Sanford (VSB #95965)
Deputy Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 – Telephone
(804) 786-1991 – Facsimile
KGallagher@oag.state.va.us

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on August 21, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

*Kevin M. Gallagher*______________
Kevin M. Gallagher (VSB #87548)
Solicitor General