**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

TATI ABU KING *and* TONI HEATH JOHNSON,

*Plaintiffs,*

*v.*

JOHN O'BANNON, *in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia*; ROSALYN R. DANCE, *in her official capacity as Vice Chair of the State Board of Elections for the Commonwealth of Virginia*; GEORGIA ALVIS-LONG, *in her official capacity as Secretary of the State Board of Elections for the Commonwealth of Virginia*; DONALD W. MERRICKS, *in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia*; MATTHEW WEINSTEIN, *in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia*; SUSAN BEALS, *in her official capacity as Commissioner of the Department of Elections for the Commonwealth of Virginia*; ERIC SPICER, *in his official capacity as the General Registrar of Fairfax County, Virginia*; and SANDY C. ELSWICK, *in her official capacity as the General Registrar of Smyth County, Virginia*,

*Defendants.*

Case No. 3:23-cv-00408 (JAG)

**REPLY IN SUPPORT OF PLAINTIFFS'**
**MOTION FOR CLASS CERTIFICATION**

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## INTRODUCTION

Plaintiffs move for certification of the following class:

> All citizens of the Commonwealth of Virginia who are currently, or in the future will be, disqualified from voting under Article II, Section 1 of the Virginia Constitution because they were convicted of a crime that was not a felony at common law in 1870.

Dkt. 96 ("Compl.") ¶ 89. District courts have "'wide discretion' in deciding whether to certify or decertify a class." *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010). And here, Defendants do not even dispute the key elements of class certification: they have stipulated to numerosity, do not address the common questions of law and fact that Plaintiffs have identified, do not contest that they have acted or refused to act in the same manner to disenfranchise all class members, or even attempt to dispute the danger of inconsistent outcomes in the absence of class treatment. Instead, their lone argument against certification (which they repeat and repackage throughout their opposition) is that the class is supposedly not ascertainable because determining whether a felon is within the class requires assessing whether her particular conviction was a crime at common law in 1870. But that argument fails for numerous reasons.

***First***, the Fourth Circuit has made clear that there is no ascertainability requirement in civil rights class actions, such as this case, in which the class is seeking only injunctive relief against unlawful government action (pursuant to Federal Rule of Civil Procedure 23(b)(2)). Defendants do not dispute that all class members have suffered the same injury (loss of their ability to vote) as a result of the same official conduct (enforcement of the Virginia Constitution to cancel and deny voter registration on the basis of conviction of *any* felony).

***Second***, Plaintiffs' proposed class is plainly ascertainable. Plaintiffs seek to certify a class consisting of persons eligible to vote but disenfranchised for conviction of a modern felony *not* listed in Plaintiffs' proposed injunction as existing at common law in 1870—a list whose entries

Defendants do not dispute. Ascertaining who is in that class simply requires identifying whether or not an otherwise eligible Virginia voter was convicted of a felony identified in Plaintiffs' proposed injunction.

For those reasons, detailed below, and the reasons set forth in Plaintiffs' opening brief, class-wide relief is appropriate. The Court should certify the class to efficiently provide all unlawfully disenfranchised Virginians with relief.

## ARGUMENT

### I. PLAINTIFFS SATISFY RULE 23(b)'S REQUIREMENTS

#### A. Rule 23(b)(2)

This is a classic Rule 23(b)(2) action, and there can be no question that Defendants have "acted or refused to act on grounds that apply generally to the class" and "final injunctive relief … is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) certification is "most useful in civil rights and constitutional case" like this one. *Fraser v. Bureau of Alcohol*, 2023 WL 5616011, at *4 (E.D. Va. Aug. 30, 2023). Certification under the rule "is appropriate even if not all class members may have suffered the injury presented in the class complaint so long as the challenged policy or practice was generally applicable to those in the class as a whole." *Id.* (citing 2 Newberg and Rubenstein § 4:28). Defendants do not dispute that they apply their policy and practice (disenfranchising any Virginian convicted of any felony) to the class as a whole; all agree that Defendants cancel the voter registration, or deny the application for registration, of anyone convicted of *any* felony. *See* Mem. in Support of Mot. for Class Certification, Dkt. 150 ("Mot.") at 8 (quoting Defendants' First Production of Documents, Dkt. 158, at ELECT_0017).[1]

[1] Unless otherwise noted, all emphases are added and citations omitted.

Defendants have no answer to any of these bases for Rule 23(b)(2) certification. *See* Defendants' Mem. in Opp. to Plaintiffs' Mot. for Class Cert., Dkt. 161 ("Opp.") at 13-14. And the two additional requirements that they attempt to graft onto the Rule 23(b)(2) inquiry (cohesiveness and ascertainability) are no basis for rejecting certification.

1. No Further Cohesion Is Necessary

"[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, ***assumed*** to be a homogeneous and cohesive group with few conflicting interests among its members." *Berry v. Schulman*, 807 F.3d 600, 608-609 (4th Cir. 2015) (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir.1998)). Defendants' argument that Rule 23(b)(2) requires some further level of "cohesion" is wrong. The "particular cohesion" that Rule 23(b)(2) requires "focuses on the ***defendant*** and asks whether the defendant has acted (or not) in a way that affects everyone in the proposed class in a similar fashion." *Fraser*, 2023 WL 5616011, at *4 (citing 2 Newberg & Rubenstein § 4:28). As the Fourth Circuit has explained, it is Rule 23(b)(3) (a rule Plaintiffs do not invoke) that requires predominating cohesion; "[u]nlike Rule 23(b)(3), Rule 23(b)(2)" achieves all the cohesion necessary "[b]y requiring that injunctive or declaratory relief predominate." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006); *see also, e.g.*, *Berry v. LexisNexis Risk & Info. Analytics Grp. Inc.*, 2014 WL 4403524, at *12-13 (E.D. Va. Sept. 5, 2014) (analyzing cohesion under Rule 23(b)(3) but not Rule 23(b)(2)). But Plaintiffs are not seeking certification of the Rule 23(b)(3) class. Defendants cannot graft onto Rule 23(b)(2) a more rigorous cohesion inquiry that applies only to certification under a rule Plaintiffs do not invoke.

Defendants' cohesion challenge, which (at p. 14) argues that Plaintiffs' requested injunction is "too vague" or would require Defendants "to answer thousands of variations of questions," has no relevance to the Rule 23(b)(2) inquiry and are also meritless. The proposed

injunction does more than "simply require[e] the defendant to obey the law"; it articulates precisely ***how*** Defendants must obey the law: stop disenfranchising individuals convicted of a felony other than the modern felonies that were felonies at common law in 1870 and are listed in Exhibit A to Plaintiffs' Proposed Order, Dkt. 151-1. "[T]his is a paradigmatic Rule 23(b)(2) case" because Plaintiffs seek an injunction that will "benefit[] all … members' of the (b)(2) Class at once." *Schulman*, 807 F.3d at 609. Where, as here, all class members have suffered the same injury as a result of the same conduct of Defendants, and "[t]here are no claims for different injunctions or declaratory judgments for different members of the class, nor claims for individualized awards of money damages[,] … Defendants' argument that the case 'presents individual issues that destroy the necessary cohesiveness that Rule 23(b)(2) requires' has no merit." *Connor v. Md. Dep't of Health*, 2025 WL 1167846, at *13 (D. Md. Apr. 22, 2025).

Even Defendants' out-of-circuit authority (at Opp.13), like the case that relies on it, reiterates that 23(b)(2) certification's cohesion inquiry requires only that "the class members' injuries" are "sufficiently similar that they can be addressed in [a] single injunction" and Plaintiffs identify that particular relief. *Shook v. Bd. of Cnty. Commr's of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008), *cited in Williams v. Jones*, 2014 WL 2155251, at *9 (D.S.C. May 22, 2014). By contrast, Rule 23(b)(2) certifications are rejected when, for example, plaintiffs seek a vague order requiring prison to provide, *e.g.*, "an adequate system for delivering medication" while taking no "effort to give content to what it would mean to provide" that and other relief. *Shook*, 543 F.3d at 606; *see also, e.g.*, *Parsons v. Columbia Gas Transmission, LLC*, 2022 WL 4809492, at *2, *13 (S.D.W. Va. Sept. 30, 2022) (rejecting certification where Plaintiffs' requests for compensation and "requests for declaratory and injunctive relief[]" preventing action on each of their properties "require[d] individualized title determinations"). Plaintiffs' requested injunction

requires no individual determinations, because Defendants take the same actions to indiscriminately disenfranchise all members of the class.

2. No Ascertainability Requirement Exists

"There is no threshold ascertainability requirement in [a] Rule 23(b)(2) case, which seeks only declaratory and injunctive relief from a[n unlawful] policy." *Kadel v. Folwell*, 100 F.4th 122, 161 (4th Cir. 2024) *cert. granted, judgment vacated sub nom. on other grounds*, *Crouch v. Anderson*, 2025 WL 1787678 (U.S. June 30, 2025). Contrary to Defendants' argument (at Opp.8) *Kadel* continues to persuasively caution against subjecting a class seeking Rule 23(b)(2) certification to Rule 23(b)(1)(a)'s separate ascertainability requirement. The Supreme Court vacated *Kadel*'s ***judgment*** because it denied the underlying Fourteenth Amendment-based challenge *Kadel* concerned in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025). *See Crouch*, 2025 WL 1787687. The Fourth Circuit's ***opinion*** remains intact, including as to class certification (an issue no party in *Kadel* even asked the Supreme Court to review, *see* Petition for Writ of Certiorari at 9-31, No. 24-99 (U.S. July 26, 2024)). When the Supreme Court vacates a decision on different grounds, "the unchallenged portion of an opinion containing a vacated judgment is … persuasive authority." *United States v. Young*, 846 F. App'x 179, 182 (4th Cir. 2021) (collecting cases).

Courts in this circuit have since adhered to *Kadel*'s bar on injecting ascertainability questions into Rule 23(b)(2) class certifications. In holding that Rule 23(b)(2) "is almost automatically satisfied in actions primarily seeking injunctive relief" because such suits need only "define the relationship between the defendant(s) and the world at large," *CASA, Inc. v. Trump*, 2025 WL 2263001, at *6 (D. Md. Aug. 7, 2025) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)), a court noted that "the Fourth Circuit limited this 'ascertainability' requirement to Rule 23(b)(1) and (b)(3) classes, for which 'issues of notice and damages are at play,' holding '[t]here is no threshold ascertainability requirement in [a] Rule 23(b)(2) case, which

seeks only declaratory and injunctive relief from a discriminatory policy.'" *Id.* at *6 n.3 (quoting *Kadel*, 100 F.4th at 160-161 and noting its judgment's vacatur). It then described *Kadel*'s rule as consistent with "Rule 23(b)(2)'s advisory committee note." *Id.* The court conducted no ascertainability inquiry of its own, finding Rule 23(b)(2)'s requirements "easily met" where plaintiffs sought "declaratory and injunctive relief" asking "the Court to declare that [an] Executive Order is unconstitutional and violates" federal law and "enjoin the defendants from enforcing" it because such an order "would provide complete relief to all class members" regardless of disputes about which members of the class would ***benefit*** from such an order. *Id.* at *6. Another court has relied on *Kadel* to explain that "[f]or the injunctive class, the plaintiffs do not need to demonstrate that other class members are readily identifiable, as is required for classes under Rule 23(b)(1) and Rule 23(b)(3)." *Brantmeier v. Nat'l Collegiate Athletic Ass'n*, 2025 WL 2108638, at *3 (M.D.N.C. July 28, 2025) (citing *Kadel*, 100 F.4th at 160-161 and noting its judgment's vacatur).

Nor have Defendants presented ***any*** Fourth Circuit authority that would justify rejecting *Kadel* and the Supreme Court's recent endorsement of its bar on subjecting Rule 23(b)(2) certifications to ascertainability questions; as *Kadel* acknowledged, the Fourth Circuit—like four other circuit courts—has ***only*** imposed the ascertainability requirement in Rule 23(b)(1) and (b)(3) cases. *Kadel*, 100 F.4th at 160 (listing cases). It has regularly affirmed the certification of (b)(2) classes without any ascertainability finding. *See, e.g.*, *Schulman*, 807 F.3d at 615. Defendants' reliance on *EQT Production* (Opp.3, 7-8) is therefore misplaced, because *Kadel* itself described that case as "recogniz[ing] an implicit requirement in ***23(b)(1) and 23(b)(3) cases*** that members of a proposed class be 'readily identifiable,'" 100 F.4th at 160 (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)), not as imposing any such restriction on Rule 23(b)(2) classes.

This case presents a classic Rule 23(b)(2) class, and no ascertainability requirement applies; in any event, as explained below, the proposed class is ascertainable, *see infra* Part I.B.[2]

**B. Rule 23(b)(1)(A)**

Defendants dispute that Plaintiffs satisfy the requirements of Rule 23(b)(1)(A) only in a footnote that again asserts that the proposed class is not ascertainable. *See* Opp.13 n.2. But the class is ascertainable, and Defendants do not otherwise dispute Rule 23(b)(1)(A)'s applicability.

Rule 23(b)(1)(A) provides for class treatment when "prosecuting separate actions by ... individual class members would create a risk of ... inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Here, if one proposed class member with a particular conviction prevailed in demonstrating that the Virginia Readmission Act barred Defendants from disenfranchising individuals only as to that conviction and then a second proposed class member lost on the same theory for the same offense of conviction, Defendants would face incompatible standards of conduct as to whether they would be required or prohibited from declining voter registrations of individuals convicted of that offense. *See* Mot.9-12. Class certification avoids that otherwise intractable problem, and Defendants have no answer to it.

The class is also ascertainable. For a proposed class to be ascertainable, a court must be able to "'readily identify the class members in reference to objective criteria.'" *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655 (4th Cir. 2019). "The goal is not to identify every class member at the time of certification, but to define a class in such a way as to ensure that there will be some 'administratively feasible [way] for the court to determine whether a particular individual

[2] The discussion below well exceeds any ascertainability showing that could conceivably apply to a Rule 23(b)(2) class; Defendants concede that even courts in other jurisdictions that apply ascertainability to (b)(2) inquiries recognize that the test is "less stringent" as to such classes. *See* Opp.8. (quoting *Thorpe v. Dist. of Columbia*, 303 F.R.D. 120, 139 (D.D.C. 2014)).

is a member at some point." *Id.* at 658. The class is readily identifiable with regard to objective criteria: A person with a felony conviction is a member of the class if convicted of a felony not on the list of felonies Plaintiffs identify in their proposed injunction. *See* Proposed Order Ex. A.

There is no dispute that the information readily available to Defendants can be used to make this determination. Defendants' prohibited table, which lists those whose voter registrations must be denied based on a felony conviction, undisputedly contains a list of all persons disenfranchised for a felony conviction. *See* Plaintiffs' Statement of Undisputed Material Facts ("Plaintiffs' SUMF"), Dkt. 152-1, ¶ 51; Defendants' Mem. in Support of Summary Judgment ("Defendants' MSJ") at 5-6 (not disputing this fact). Defendants also undisputedly disenfranchise all persons on that list. *See* Mot.5; Decl. of Susan Beals, Dkt. 54-2, ¶¶ 4-5; *see also* Defendants' First Production of Documents at ELECT_0137-38. And every individual on that list (which establishes the outer bounds of the class) undisputedly has a criminal conviction record that objectively identifies the felonies for which she was convicted. *See* Mot.12; Defendants' First Production of Documents at ELECT_0237 (showing conviction information), ELECT_0128; Plaintiffs' SUMF ¶ 51; Decl. of Susan Beals at ¶¶ 1-2, 4 (describing these records). Comparing that conviction against the list of felonies at common law that Plaintiffs have identified, *see* Plaintiffs' Proposed Order at Ex. A, will readily identify those few individuals from Defendants' list of disenfranchised felons who are not members of the class because they were disenfranchised for conviction of a felony that Plaintiffs have not asserted was a felony at common law in 1870 (or because their age or citizenship status makes them otherwise ineligible to vote). There is, therefore, no need for "mini-trials" to determine class membership when public records show each class member's conviction. *See Krakauer*, 925 F.3d at 658 (no ascertainability concern, in

23(b)(3) class, where "data showing" relevant information meant "class members could … be identified on a large-scale basis").

Defendants' arguments to the contrary have no merit.

***First***, Defendants' argument that the set of common-law felonies in 1870 is not readily identifiable is incorrect and irrelevant. Defendants complain (at Opp.5-7) that it will be too "difficult" for them to apply Plaintiffs' short list of ten common-law felonies, Plaintiffs' Mem. in Support of Summary Judgment ("Plaintiffs' MSJ"), Dkt. 152, at 15; Expert Report of Prof. Carissa Byrne Hessick ("Hessick Rep."), Dkt. 153-3, ¶ 31, to particular convictions to determine which individuals they may still disenfranchise. But Plaintiffs have already done that second-stage analysis, too. They have assessed every single felony in Virginia's criminal code to identify (1) the complete list of state felonies that trigger exclusion from the class because those felonies were punished as felonies at common law in 1870, *see* Plaintiffs' Proposed Order at Ex. A; and (2) for good measure, the full list of such state statutory felonies (attached as Exhibits D and E to Professor Hessick's report) that warrant ***inclusion*** in the class. There is no "uncertainty" as to which felonies are on either list; the lists are complete and before the Court, and Defendants' claims of uncertainty are not relevant here.

Defendants question the ***method*** by which Professor Hessick identified the statutes punishing common-law felonies (Opp.6-7), but this is no "attack on ascertainability;" it is "a ***Daubert*** challenge to the reliability of the class identification methodology used by" Plaintiffs' expert that is irrelevant here. *Vance v. DirecTV, LLC*, 2022 WL 3044653, at *5 (N.D.W. Va. Aug. 1, 2022) (emphasis in original) (certifying class). It is also meritless. In describing her methodology, Professor Hessick merely stated that she was more "uncertain" about the categorization of "four crimes," Hessick Rep. ¶ 35, but still ***concluded*** that those crimes did not

constitute felonies at common law, *see id.* ¶ 41. Defendants' complaint (Opp.6) that Professor Hessick could not answer their hypothetical questions about specific factual scenarios in which they might seek to disenfranchise people mischaracterizes the conclusiveness of her report. Professor Hessick has evaluated the entire state criminal code and already identified the state statutes punishing arson (which Defendants cite as an example of "uncertainty," Opp.6) just as it would have been recognized in 1870. She lists the statute punishing attempted arson of a dwelling as a common-law felony, Hessick Rep. at 68 (citing Va. Code § 18.2-90), and the statute punishing the burning of an unoccupied dwelling as not a common-law felony, *see id.* at 73 (citing Va. Code § 18.2-80). If the Court disagrees with that or other conclusions, it should "'modify class definitions to provide the necessary precision on the ascertainability requirement,'" *Thorpe v. Va. Dep't of Corr.*, 2023 WL 5038692, at *3 (W.D. Va. Aug. 8, 2023), by adjusting the list of felonies at common law that Plaintiffs attach to their proposed order, not deny class certification altogether.

But Defendants offer no basis for any such modification. As explained in Plaintiffs' contemporaneously filed Reply in Support of Summary Judgment, Defendants have not specifically disputed and have waived any challenge to the scope of that list. *See* Defendants' Motion to Dismiss First Amended Complaint, Dkt. 77, at 15; Defendants' MSJ at 21-24 (discussing Plaintiffs' list); Defendants' Response to Plaintiffs' Motion for Summary Judgment ("Resp. to Plaintiffs' MSJ"), Dkt. 162, at 26-28. Having declined to engage on this issue with Plaintiffs either in discovery or in summary judgment briefing, Defendants should not be permitted "to profit from the difficulty [they] caused" and disrupt class certification. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 462 (2016).

***Second***, that Plaintiffs have not *also* combed through every felony in the United States code or "the laws of the other 49 states," Opp.12, *see also* Opp.7-8, does not make the class

unidentifiable. Again, the injunction they seek would extend to all whom Virginia has disenfranchised for a felony conviction (and identified as such), excluding only those convicted of conduct constituting a common-law felony in 1870. Any persons with out-of-state or federal felony convictions whom Defendants have or seek to disenfranchise need not be identified "'at the time of certification.'" *Krakauer*, 925 F.3d at 658. Defendants need only be able to identify them when such individuals register to vote or when ***Defendants*** seek to proactively disenfranchise them by adding such persons to their prohibited table. Such class members are, like the members with state felony convictions, readily identifiable. Anyone eligible to vote in Virginia but convicted of a non-Virginia felony is a member of the class unless that non-Virginia felony's elements are identical to those of a crime on the exhibit attached to Plaintiffs' Proposed Order (*i.e.*, their list of Virginia felonies that were felonies at common law in 1870). That exhibit, in other words, provides the objective criteria by which Defendants can identify prospective voters with out-of-state convictions as class members. *See* Hessick Rep. ¶ 11 (describing applicability to out-of-state convictions). That task requires no "mini-trials," nor is it unadministrable. States do it all the time. In Alabama, for example, state officials may disenfranchise only for those felonies that "involv[e] moral turpitude," and routinely determine whether an out-of-state conviction qualifies based on whether it "would constitute one of the" *state* statutory felonies on a list. *See* Ala. Code §§ 17-3-30.1(c)(1) to 17-3-30.1(c)(56).

***Third***, Defendants' arguments about fact-specific applications of any injunction to particular class members does not make the class—all those whom Defendants have disenfranchised for a felony conviction not listed in Plaintiffs' Proposed Order—any less ascertainable. Nor is it an "impossible" task. The Fourth Circuit has already held that such application of law to facts is ***not*** impossible and instead "fall[s] within the heartland of what federal

courts" (and by extension, governments which must apply the law) "do every day," and that this Court cannot withhold adjudication because applying the Virginia Readmission Act may prove administratively difficult to the government or to future courts. *King v. Youngkin*, 122 F.4th 539, 547 (4th Cir. 2024) (collecting cases), *cert. denied*, 2025 WL 1727393 (June 23, 2025). Indeed, it specifically ***rejected*** Defendants' analogy (at Opp.7) to application of the Armed Career Criminal Act's "categorical approach," listing a court's application of the "categorical approach" as an example of the kind of task governments and courts are regularly required and should be expected to do. *King*, 122 F.4th at 547. Other examples abound. *See, e.g.*, *Considine v. United States*, 112 F. 342, 345-346 (6th Cir. 1901) (determining that federal statutory crime was not a felony at common law for purposes of establishing the accused's number of peremptory challenges); *United States v. Sims*, 161 F. 1008, 1012-1014 (N.D. Ala. 1907) (determining "that embezzlement by a national bank officer, as defined by section 5209, is [not] a felony … at common law"); *Jacobs v. City of Wichita*, 531 F. Supp. 129, 131 n.3 (D. Kan. 1982) ("While burglary was a felony at common law, the break-in of which [plaintiff] was suspected would not have qualified as burglary since unoccupied business premises would not qualify as the 'dwelling house of another.'").

## II. THE PROPOSED CLASS MEETS ALL OF RULE 23(A)'S REQUIREMENTS

Rule 23(a) has four requirements, the first of which (numerosity) the parties agree is satisfied. *See* Opp.2; Mot.2. The proposed class also meets the remaining three requirements (commonality, typicality, and adequacy of representation).

### A. Common Questions Exist

There can be no real dispute about commonality. "So long as 'a single issue common to the class' exists, commonality will be satisfied." *Trauernicht v. Genworth Fin., Inc.*, 2024 WL 3835067, at *8 (E.D. Va. Aug. 15, 2024) (quoting *Soutter v. Equifax Info. Servs. LLC*, 307 F.R.D. 183, 199 (E.D. Va. 2015)). In other words, Plaintiffs need only "show that the putative class has

'suffered the same injury.'" *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Mr. King, Ms. Johnson, and every other proposed class member suffer the same injury, disenfranchisement. And that disenfranchisement implicates several "questions of law [and] fact common to the class," Fed. R. Civ. P. 23(a)(2), none of which Defendants dispute is a common question. The common question of law (described at Mot.3) is the one at the core of this case: whether the Virginia Readmission Act prohibits Defendants from disenfranchising otherwise eligible Virginians for convictions of offenses that were not felonies at common law. That question is common to all class members' claims and capable of class-wide resolution. That, like the question whether the government "has a policy or practice that … amounts to a violation of the Administrative Procedure Act or Due Process Clause," more than suffices to show commonality. *Guerra v. Perry*, 2024 WL 3581226, at *1 (E.D. Va. Apr. 26, 2024). And there are multiple common questions of fact (listed at Mot.4) concerning Defendants' administration of their disenfranchisement scheme, including whether they treat it as requiring them to disenfranchise any otherwise eligible Virginian for conviction of any felony and how they identify and disenfranchise those individuals.

Relying almost entirely (at Opp.10) on the principle that commonality "merge[s]" with the other factors, Defendants do not independently address commonality (aside from repeating their arguments concerning typicality). They also do not even address, let alone dispute, a single one of these multiple questions as common to the class. *See* Opp.9-10. But the commonality bar is "not high," *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009), *cert. denied*, 559 U.S. 974, and Supreme Court precedent dictates that "for purposes of Rule 23(a)(2) '[e]ven a single [common] question'' will do," so long as its "determination…will resolve *an issue* that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350, 359-360 (citation

omitted) (alterations in *Dukes*). So long as "common evidence will generate a common answer to help resolve an element within the class' common claim, then [*Dukes*'s] 'one stroke' demand is satisfied." *Soutter*, 307 F.R.D. at 200 (quoting *EQT Production*, 764 F.3d at 360). Commonality is met, for example, where "[t]he common contention … is that [a] disorderly conduct law is unconstitutionally vague," as it would "generate 'common *answers*'—including the permissibility of the type of injunctive relief sought." *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 780 (4th Cir. 2023) (emphasis *Wilson*'s).[3]

Defendants assert as a general matter (again, without addressing the actual questions presented) that "'individualized review precludes a finding of commonality.'" Opp.10 (quoting *EQT Production*, 764 F.3d at 363). But the case they cite denied commonality where the commonality of the sole question turned on a question of state law that the district court had "failed to resolve" such that certification was premature. *EQT Production*, 764 F.3d at 360-362. Here, there are multiple common questions of law and fact, as just described. Defendants do not even attempt to challenge the questions of fact as uncommon. For the common questions of law, unlike in *EQT Production*, Defendants have proposed no alternative reading of the law that would render the questions presented uncommon to the class. Their position has been that fact discovery is

[3] This is also why Defendants' suggestion that individually classifying the felony convictions of the class would not be "economical," Opp.10 (quoting *Dukes*, 564 U.S. at 350 n.5), is irrelevant. No such individual classification would be necessary at the merits stage (if at all). *Dukes* does not require any independent efficiency assessment; instead, the commonality and typicality tests are "guideposts for determining whether under the particular circumstances maintenance of a class action *is* economical." *Dukes*, 564 U.S. at 350 n.5 (emphasis added). And it is certainly more economical to group these class members together (even if slight variations in their felony convictions must be sorted at the remedy stage) than to have each member re-litigate whether Defendants have violated the Virginia Readmission Act. To the extent Defendants take the position that any "individualized" questions *outweigh* those common questions, that is an issue of predominance inapplicable to certification under Rule 23(b)(2).

unnecessary, because ***no*** class member (rather than some identifiable subset) is entitled to relief on their reading of the Virginia Readmission Act. *See* Defendants' MSJ at 13.

**B. The Named Plaintiffs' Claims Are Typical Of The Class**

The bar for typicality is "'not high; Rule 23(a) requires only that resolution of the common questions affect all or a ***substantial number*** of the class members.'" *Brown*, 576 F.3d at 153. The named plaintiffs' claim (*i.e.*, that Defendants' indiscriminate disenfranchisement of all who commit any statutory felony violates federal law) is also "typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3), because Mr. King's and Ms. Johnson's "interest in prosecuting" this case "simultaneously tend[s] to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). Both were disenfranchised for a conviction of a felony without regard to whether it was a felony at common law in 1870. *See* Decl. of Tati Abu King ("King Decl."), Dkt. 150-1, ¶ 2; Decl. of Toni Johnson ("Johnson Decl."), Dkt. 150-2, ¶ 2. So was every other member of the class, because again, Defendants do not distinguish between the convictions for which they disenfranchise people convicted of a felony. *See supra* p.8. And so the named plaintiffs' claim that Defendants have, as a matter of law, violated the Virginia Readmission Act is typical of the class members' claims because it "advance[] the interests of the absent class members" in requiring Defendants to comply with the Act. *Deiter*, 436 F.3d at 466.

Defendants do not assess the typicality of Plaintiffs' legal claim at all. Instead, they argue that King and Johnson are atypical because they were ***convicted*** only of a subset of the offenses for which Defendants have disenfranchised class members. Opp.9. That objection merely repeats Defendants' ascertainability argument, and again, it is irrelevant to the claims at issue in this lawsuit. So long as named Plaintiffs have, like all class members, been disenfranchised for the commission of a felony that was not a felony at common law in 1870, their claims are typical of the class. Typicality does not "require[] that the plaintiff's claim and the claims of class members

be perfectly identical or perfectly aligned." *Deiter*, 436 F.3d at 467. Plaintiffs' convictions do not affect their ability to advance class members' interests, including in answering Defendants' only arguments on the merits (that the Voting Rights Act is not judicially enforceable against Defendants and that it permits Defendants to disenfranchise for ***any*** statutory felony). *See* Defendants' MSJ at 6, 13; Resp. to Plaintiffs' MSJ at 1-2, 5, 26. And since Defendants do not dispute Plaintiffs' list of common law felonies, *supra* p.10, they have forfeited any argument that Plaintiffs are atypical of some imaginary and unidentified subset of the class.

As *Deiter* emphasizes, it is the "*claims or defenses*" on the merits—i.e., not questions about remedy—that must be "typical." 436 F.3d at 466 (quoting Fed. R. Civ. P. 23(a)(3)) (emphasis *Deiter*'s). Where, as here, class members seek merely to enjoin state officials "against *future* uses of" a federally preempted state law against them, any individual facing the law's enforcement is "especially typical" of the others. *Wilson*, 60 F.4th at 780 (emphasis *Wilson*'s). Any "class representatives" who have "been referred under or" subjected to the state law they challenge meet the mark, even if "the vast majority of class members have ***never***" been subjected to the challenged state law. *Id.* The class here is like the class whose certification the Fourth Circuit affirmed in *Wilson*: ***all*** "elementary and secondary students" in the state, "each of whom face[d] a ***risk*** of … arrest or juvenile referral" under a disorderly conduct law. *Id.* at 777, 787 (quoting record). As in *Wilson*, "the class representatives' past charges do not bear on their typical experiences as [citizens] threatened by future" disenfranchisement." *Id.* at 780.

Plaintiffs' straightforward claim is therefore nothing like the antitrust lawsuit at issue in *Deiter* (on which Defendants rely at 9-10). The *Deiter* lawsuit called for a multi-pronged merits showing of injury to competition, including a showing that *individual* class members were "overcharged in [their] purchases because of" it. 436 F.3d at 467. Contrary to Defendants'

characterization, Plaintiffs do not seek a "determination as to whether" all statewide convictions for which class members have been disenfranchised "qualify as common-law felonies," Opp.9. They seek only a ***prospective*** injunction that would prohibit ***Defendants*** from enforcing their disenfranchisement scheme against the class—and that request requires the Court to make no case-by-case determination. *See* Plaintiffs' MSJ at 25; *see also* Plaintiffs' Proposed Order (asking for no individual determinations).

### C. The Named Plaintiffs Are Adequate Class Representatives

Defendants have not challenged class counsel as inadequate (nor could they, *see* Mot.7-8). Instead, Defendants contest only whether Mr. King and Ms. Johnson "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). But as individuals disenfranchised for their felony convictions, they will "vigorously prosecute the class's shared claim" that Defendants are violating the Virginia Readmission Act, *Wilson*, 60 F.4th at 780, and have worked with counsel to represent the interests of the class as a whole, *see* King Decl. ¶¶ 6-8, 10; Johnson Decl. ¶¶ 6-8, 10.

Defendants' response repeats their arguments for typicality, and should be rejected for the reasons described above. *See* Opp.10-11. Their assertion (at 11) that named Plaintiffs "will not adequately represent all those convicted of *other* crimes" is again irrelevant; as with the other Rule 23(a) factors, the specific felonies for which they have been disenfranchised have no bearing on adequacy. Again, any differences in class members' disqualifying felony convictions goes to which class members will ultimately benefit from the Court's injunction, not named Plaintiffs' ability to adequately represent class members' shared interest in obtaining one. *See supra* p.16. Courts regularly reject challenges to adequacy that turn only on differences in individual class members' ability to ***benefit from*** the injunction the class seeks. *See Wilson*, 60 F.4th at 780; *see also, e.g.*, *Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 160 (N.D. Cal. 2015) ("Class

representatives have less risk of conflict with unnamed class members when they seek only declaratory and injunctive relief."); *New Directions Treatment Servs v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (similar); *In re Rodriguez*, 432 B.R. 671, 699 (Bankr. S.D. Tex. 2010) (similar), *aff'd*, 695 F.3d 360 (5th Cir. 2012).

Even if it were relevant to the adequacy inquiry, Defendants' speculative example (Opp.11) of how Plaintiffs could sacrifice some class members' potential claims only highlights the relative care Plaintiffs have taken to present a cohesive and nuanced list of common-law crimes and to identify the modern state statutes that correspond to them. Plaintiffs have no interest in sacrificing such nuance (or "throw[ing] overboard the person convicted of larceny for stealing a trade secret") to present "a more administrable test." Opp.11. Nor do they need to: not only does there happen to be an easily administrable and short list of felonies at common law in 1870, but the Fourth Circuit has already rejected any argument that "the Virginia Readmission Act lacks judicially manageable standards" and required that courts "interpret[] and apply[] this statute" (including on a class-wide basis) even when it "may not always be easy." *King*, 122 F.4th at 547. And the only example Defendants could come up with does not work. Plaintiffs identify larceny as a common-law felony, *see* Hessick Rep. ¶ 31, but that crime involved only the theft of *physical* goods or chattel, *see* Ex. AF (4 William Blackstone, *Commentaries On The Laws Of England* (G.W. Childs 1868)) at 112 (explaining that larceny "must be of the personal goods of another" and excluded theft of things that cannot "be taken and carried away"), *cited in* Hessick Rep. ¶ 31. Indeed, even by *statute*, Virginians in 1870 categorized larceny based on the value of the "goods or chattels" seized. *See* Hessick Rep. at 57; Va. Code ch. 192 § 14 (1860). Professor Hessick's report reflects that nuance. *See, e.g.*, Hessick Rep. at 63-65 (listing modern statutory felonies that constituted

common-law larceny in 1870); *id.* at 76 (excluding theft of computer services from list of common-law felonies).[4]

Finally, for the reasons described above, *see supra* pp.10-11, the Court should reject Defendants' arguments (at Opp.12) about felony convictions beyond Virginia's jurisdiction, which Plaintiffs have no obligation to describe further because the relief they seek and arguments they advance will run to such class members.

## CONCLUSION

The proposed class meets each requirement for certification under Rule 23(a) and 23(b)(2), and, in the alternative, 23(b)(1)(A). The Court should grant Mr. King and Ms. Johnson's Motion, appoint them as class representatives, and appoint the undersigned counsel as class counsel.

[4] Citations to Ex._ refer to exhibits to the three Declarations of Brittany Blueitt Amadi filed in support of Plaintiffs' summary judgment briefing.

Dated: August 21, 2025

Respectfully submitted,

*/s/ Brittany Blueitt Amadi*

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on August 21, 2025, I served a copy of the above memorandum by electronic mail on counsel of record.

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