**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)

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR**
**MOTION FOR SUMMARY JUDGMENT AND FOR PERMANENT INJUNCTION**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

**STATUTES, RULES, AND REGULATIONS**

## INTRODUCTION

Plaintiffs ask the Court to find that Defendants violate the Virginia Readmission Act because Virginia has (1) amended its Constitution's felony disenfranchisement provision (four times) and (2) as amended, Virginia's Constitution disenfranchises all Virginians who have been convicted in ***any*** jurisdiction of ***any*** felony—regardless of whether it was a felony at common law in 1870. *See* Dkt. 152 ("Mot."). The focus of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 162, "Opp."), however, is not on the Virginia Readmission Act's plain text, but instead on Virginia's now-defunct 1869 Constitution. Nearly all of Defendants' brief is devoted to arguing about the meaning of a single word ("felony") in the 1869 Constitution. But Defendants have not shown that the meaning of "felony" in the 1869 Constitution matters at all to Plaintiffs' claim, let alone that the case turns on that word's meaning, as Defendants insist.

The Virginia Readmission Act was a critical component of Congressional Reconstruction in Virginia—once Congress and President Grant determined "the people of Virginia ha[d] framed and adopted a constitution of State government which is republican" and "ratified the fourteenth and fifteenth amendments to the Constitution of the United States," Virginia was readmitted to congressional representation. 16 Stat. 62. Guaranteeing Black voting rights in Virginia was central to Congress's program. *See generally* Ex. B, Dkt. 153-2 ("Ayers Report") ¶¶ 50-58.[1] The Act therefore includes a prophylactic measure to prevent "rebel" elements in Virginia from ever reversing those guarantees: it prohibits Virginia from amending 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, except as punishment for ***such crimes as are now felonies at***

[1] Citations to Ex._ refer to exhibits to the three Declarations of Brittany Blueitt Amadi filed in support of Plaintiffs' summary judgment briefing. All internal citations and quotation marks are omitted and all emphasis added, unless noted.

***common law***." 16 Stat. 63. Defendants (at 12) resist the clear import of the Virginia Readmission Act's text by insisting that Congress implicitly incorporated by reference the 1869 Constitution's disenfranchisement of people convicted of a "felony," an interpretation that runs counter to the plain text of the Virginia Readmission Act and fundamental principles of statutory interpretation. Even if Defendants were right that their interpretation of the phrase "felony" in the 1869 Constitution controlled the scope of federal law, they are wrong that "felony" means ***any*** felony—felonies at common law in 1870, felonies codified by statute in 1870, and felonies Virginia might create by statute in the future. Defendants' interpretation of "felony" cannot be squared with the plain text of the Virginia Readmission Act, historical sources evincing that Congress would have read "felony" to mean "felonies at common law," or applicable canons of construction. The Court should decline Defendants' invitation to read the "fundamental condition" out of the Virginia Readmission Act.

Virginia has unlawfully expanded its Constitution's disenfranchisement provision in violation of the Virginia Readmission Act. The Court should enforce the Virginia Readmission Act as written and declare that Defendants are enforcing Virginia's disenfranchisement regime in violation of federal law. And as a result, the Court should enjoin Defendants and all those acting in concert with them from disenfranchising any otherwise qualified Virginian voter, except as punishment for conviction of an offense that would have been recognized as a felony at common law in 1870.

## FACTUAL BACKGROUND

The parties agree that no fact material to Plaintiffs' Virginia Readmission Act claim is genuinely disputed. Defendants dispute (at 4) certain characterizations, such as whether ***they*** "enforce" Virginia's felony disenfranchisement provision (an issue they forfeited when they argued only that the governor and secretary "do not enforce" their disenfranchisement regime,

"Defs. MTD," Dkt.77 at 9). None of these disputes are material to the issue now before the Court. Defendants further argue that certain statements "consist of legal conclusions and legislative facts" that they say need not have been set forth, but they identify no purported inaccuracy. Opp.4. The undisputed factual record therefore permits the Court to grant summary judgment for Plaintiffs and resolve this case.

Defendants' procedural objection (at 3) to Plaintiffs' presentation of the undisputed factual record is both wrong and irrelevant. The objection is wrong because Plaintiffs' brief does contain "a specifically captioned section listing all material facts as to which the[re] … is no genuine issue and citing the [supporting] parts of the record," L.R. 56(B). *See* Mot.3-11 ("Factual Background" section, citing record evidence). These facts set forth in the brief are undisputed and support granting summary judgment in Plaintiffs' favor. Plaintiffs also attached a numbered list articulating those same facts, to aid the parties and the Court in identifying any specific facts that Defendants might dispute. *See* Dkt. 152-1 ("SUMF"). As a case cited by Defendants (at 3) explains, a movant for summary judgment violates Local Rule 56(B) when it "fail[s] to include within its statement of undisputed facts those facts on which [it] later relies throughout its brief." *CertusView Techs., LLC v. S & N Locating Servs., LLC*, 2015 WL 4717256, at *4 (E.D. Va. Aug. 7, 2015).[2] Defendants cite a few decades-old cases that criticized parties who filed a separate statement of facts for failing to "set forth any facts essential to" their motion, *id.*, or for not specifically controverting purportedly undisputed facts or citing any evidence, *e.g., W. Insulation,*

[2] Parties in this District routinely file supporting statements of undisputed facts. *See, e.g.*, Statement of Undisputed Material Facts, *Stabilis Fund II, LLC v. Hopkins Land Co., LLC*, No. 3:13-cv-799-JAG, Dkt. 16 (E.D. Va. Apr. 18, 2024); Statement of Undisputed Material Facts, *Kim v. Amusements of America, Inc.*, No. 1:22-cv-427-PTG-JFA, Dkt. 15 (E.D. Va. Nov. 14, 2022); Statement of Undisputed Material Facts, *Gentry v. Virginia Hosp. Ctr.*, No. 1:20-cv-1018-LMB-JFA, Dkt. 68-1 (E.D. Va. July 15, 2022); Statement of Undisputed Material Facts, *United States v. Comunicad, Inc. et. al*, No. 1:20-cv-1436-AJT-JFA, Dkt. 32-1 (E.D. Va. July 7, 2021).

*L.P. v. Moore*, 2006 WL 208590, at *5 n.4 (E.D. Va. Jan. 25, 2006) (criticizing non-movant for submitting counter-statement of facts rather than identifying disputes, but still "consider[ing] the additional factual assertions offered in the separate filings"). But Defendants do not (and cannot) assert that any of the substantive violations of L.R. 56(B) in those cases applies here. Moreover, even were Defendants' view of L.R. 56(B) correct, there is no conceivable prejudice. Plaintiffs did not "exceed[] the 30-page limit," Opp.3—the separate filing presents the same facts recited in Plaintiffs' 30-page brief. *Compare* SUMF, *with* Mot.3-11. And Defendants offer no substantive dispute to the facts set forth in Plaintiffs' statement, confirming the absence of any conceivable prejudice. *See generally* Opp.3-4.

## ARGUMENT

### I. THIS COURT SHOULD REJECT DEFENDANTS' STRAINED READING OF THE VIRGINIA READMISSION ACT

#### A. Defendants' Proposal To Recast The Virginia Readmission Act's "Fundamental Condition" As A License To Disenfranchise Is Supported By Neither The Act's Text Nor Any Principle Of Statutory Construction

Throughout this litigation, Plaintiffs have presented a straightforward reading of the Virginia Readmission Act's "fundamental condition," which mirrors the structure of the state-law voting rights provision it addressed. The Act's first clause establishes a floor for the scope of ***enfranchisement***, providing that "the Constitution of Virginia 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," 16 Stat. 63—*i.e.*, all adult male citizens, ***regardless of race***, whom the 1869 Constitution had "entitled to vote" for the first time, Va. Const. art. III § 1 (1869). The subsequent "except clause" establishes a ceiling on Virginia's ability to deprive its citizens of the right to vote, by limiting acceptable grounds of ***disenfranchisement*** to "punishment for ***such crimes as are now felonies at common law***" in 1870,

16 Stat. 63. Consistent with its express object of protecting voting rights from state-sanctioned disenfranchisement, *see* Mot.17-22, the Virginia Readmission Act references "the Constitution herein recognized" in the first clause only to lock in its guarantee that Virginians would be entitled to the right to vote regardless of race.

Defendants' opposition brief (at 5-20) largely ignores the text and structure of the Virginia Readmission Act, instead focusing (at 5-12) on whether "'felony' in the 1869 Constitution meant 'felony at common law.'" But Defendants present no authority to support the fundamental premise of their argument. They simply assert (at 5-6) that the Virginia Readmission Act's protection of "any citizen or class of citizens of the right to vote who are entitled to vote by the Constitution herein recognized" incorporates by reference the 1869 Constitution's "felony" exception and thereby authorized the General Assembly to expand disenfranchisement in perpetuity by enacting new statutory "felonies." Defendants' flat insistence (at 6) that "the Act's text makes [this] clear" is just as false as their assertion that "Plaintiffs acknowledge[] this case turns on whether the word 'felony' in the 1869 Constitution includes statutory felonies."

Defendants cite no case law or canon of construction that supports their reading of the federal statute. The best Defendants can muster are general statements cautioning against "assum[ing] that any interpretation of a law that does more to advance a statute's putative goal must be the law" and that "textual limitations upon a law's scope must be understood" as "part of its purpose." Opp.20 (quoting *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) and *Stanley v. City of Sanford*, 145 S. Ct. 2058, 2067 (2025)). True enough. But the fundamental condition's first clause speaks only of those entitled to "the right to vote"; it nowhere refers to what Defendants call (at 5) a "class of persons ***disenfranchised*** by the 1869 Constitution." Accordingly, the purported "textual limitation" that Defendants seek to read into the Virginia

Readmission Act relies on the idea that Congress nullified the plain meaning of the fundamental condition's "except" clause by impliedly incorporating a limitless definition of "felony" in a state constitutional provision. Had Congress intended to authorize disenfranchisement for future statutory felonies, it could have written the Virginia Readmission Act to expressly authorize such an exception from the franchise, but "that is not the statute Congress wrote," *Becerra v. Empire Health Found.*, 597 U.S. 424, 439 (2022) (cited at Opp.22). To read the Virginia Readmission Act's reference to those "class[es] of citizens [given] the right to vote by the Constitution herein recognized" as silently incorporating a broad grant of authority to disenfranchise by statute would require this Court to find that Congress hides "elephants in mouseholes," something that Congress "does not [do]," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In this respect, the instant interpretive question (whether the Act's brief reference to "the Constitution herein recognized" changes the meaning of its "except as a punishment for such crimes as are now felonies at common law" phrase), is analogous to the issue in *Empire Health Foundation*, 597 U.S. at 435-436. There, the Supreme Court rejected a party's proposal to read the phrase "'entitled to [Medicare] benefits'"—a reference to "all people who meet the basic statutory criteria"—as implicitly incorporating exclusions of certain patients ineligible for coverage simply because the "entitled" clause included the qualifier "'(for such days).'" *Id.* The Court concluded "[t]hat slight phrase is incapable of bearing so much interpretive weight," and refused "to read" the accompanying parenthetical "as transforming the uniform statutory meaning of 'entitled to benefits,'" because "if Congress had wanted to accomplish that unexpected object, it would simply have said so…. What it would not have done is upend the settled meaning of that language … through so subtle, indirect, and opaque a mechanism." *Id.* at 440. So too, here.

As Defendants acknowledge (at 13-14), the Virginia Readmission Act's "fundamental

condition" language must be construed with a view to the other four Readmission Acts. Courts "normally presume that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 588 U.S. 445, 458 (2019). However, Defendants' proposal to construe the scope of voting rights protection as limited by each state's interpretation of its own disenfranchisement laws would create a patchwork of protection across the former Confederacy, despite Congress's use of identical language in framing the "fundamental condition" for all but one of the former Confederate states. *See* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, Dkt. 165 ("Pls. MSJ Opp.") at 10. As Defendants concede (at 13), the language of the readmission act states' Reconstruction-era disenfranchisement provisions varied, such that Defendants demand different interpretations of the readmission acts' "fundamental condition" on a state-by-state basis. Reading the specific language in the fundamental condition's except clause as establishing the limit of permissible felony disenfranchisement across the former Confederacy avoids this patchwork problem.

Defendants agree (at 11-12) that the fundamental condition must be interpreted so as not to "make[] th[e 'except'] clause entirely meaningless," but that is precisely what their construction would do. They simply assume (at 11) that the "'except' clause [must] permit[] amendments to the 1869 Constitution to ***broaden*** the scope of disenfranchisement," and they assign the clause the narrow purpose of permitting Virginia to amend its constitution to disenfranchise for petit larceny. As Plaintiffs have explained, that would make the except clause superfluous as a practical matter, because on Defendants' reading of the Act, the General Assembly could disenfranchise for petit larceny simply by recodifying it as a felony. *See* Pls. MSJ Opp.19-21. This would violate "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley*

*v. United States*, 556 U.S. 303, 314 (2009). By contrast, Plaintiffs' construction establishes the "fundamental condition" as a substantive limitation on Virginia's ability to broadly disenfranchise its citizens, permitting disenfranchisement only for conviction of a fixed, small set of crimes traditionally understood as serious. Defendants are wrong (at 11) that this construction would have made it "impossible to amend the 1869 Constitution": Virginia was free to eliminate or narrow the 1869 Constitution's felony disenfranchisement provision, but it is eminently reasonable to read the Act as prohibiting Virginia from "broaden[ing] the scope of disenfranchisement," *id*.

### B. Defendants Ignore The Virginia Readmission Act's Context Because It Clearly Confirms Plaintiffs' Reading Of The Plain Text

Defendants seek to avoid the context in which the Virginia Readmission Act was passed for one reason: The Act's historical context confirms that the Reconstruction Congress did not intend to impliedly license Virginia to disenfranchise for any offense the General Assembly might later decide to codify as a "felony."

Defendants agree (at 21) that Congress enacted the Virginia Readmission Act (and the other Readmission Acts) to protect the Black vote from "racially discriminatory disenfranchisement." But their briefing is notably silent on the specific "racially discriminatory disenfranchisement" practices that the former Confederate states were using at the time the Reconstruction Congress passed the Readmission Acts. *See generally* Opp.20-26. Defendants are silent because the historical record is crystal clear that Congress enacted both the Military Reconstruction Act and the Readmission Acts precisely to address the former Confederate States' use of so-called Black Codes—codified felonies, such as vagrancy, that were facially neutral but disproportionately enforced against Black people—to strip Black people of their liberty and their right to vote. *See* Mot.3; *see, e.g.*, Ayers Report ¶ 26. The Act not only "means what it says," but "a look at its history"—which the Court must still consider—"if anything only underscores that

plain meaning." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 393 (2024). The Congressional debates over readmission reflect that states' Black Codes and other manipulations of their criminal codes were a principal concern. *See* Mot.3; Ayers Report ¶¶ 26-30. It is only by ignoring this historical context that Defendants can insist (at 21) that Congress "pursued other means to protect" the Black vote but not "prohibiting disenfranchisement of statutory felons." To be sure, the fundamental condition's requirement that offenses leading to disenfranchisement be "equally applicable to all the inhabitants" of a state helped address express racial discrimination, *see* Opp.21, but the Black Codes were particularly insidious in that their discriminatory impact arose "from the spirit in which the civil authorities enforce the laws," not from formal racial distinctions written into criminal codes. Ayers Report ¶ 36. The undisputed record demonstrates that the Reconstruction Congress adopted a consistent policy of prohibiting disenfranchisement for new purported "felonies" as a prophylactic measure against these abuses. *See, e.g.*, *id.* ¶ 54 (discussing intent to "'plant barriers against the future robbery of the civil and political rights of the colored citizens'… us[ing] 'ingeniously prepared laws' to exclude 'a very large proportion' of Black men from voting." (quoting Sen. Drake and Sen. Harlan)).

The fundamental condition's manifest purpose was to protect Black voting rights, but the Virginia Readmission Act undisputedly demands no proof of discriminatory intent or racially disparate impact to establish a violation. *See* Opp.22. Virginia has amended its felony disenfranchisement provision four times and now disenfranchises adult citizens for conviction of offenses that were not felonies at common law in 1870—and contrary to Defendants' assertion (Opp.2), nothing else is required to establish a violation of the Act. *See* Mot.6, 9. Even so, Defendants' enforcement of Virginia's felony disenfranchisement provision has undisputedly led Virginia to disproportionately disenfranchise Black people today. *See* Mot.11; Opp.4 (not

substantively disputing SUMF ¶¶ 60-70).[3]

Defendants' only substantial engagement with the historical record concerns the Military Reconstruction Acts (at 14-17), but in focusing on whether they continue to "apply of their own force" or "b[ound] a later Congress," Defendants argue against strawmen. As Defendants admit (at 15), Plaintiffs have not argued either point, nor have they suggested "that Virginia had perfectly complied with the Military Re[construction] Acts," Opp.16. Rather, the key point is that the express mandate established by Section 5 of the First Military Reconstruction Act to disenfranchise only for punishment of a "felony at common law," 14 Stat. 428, 429 (1867), is relevant to both Congress's understanding of the scope of the new disenfranchisement provision in the 1869 Constitution and the forward-looking limitations imposed by the Virginia Readmission Act's fundamental condition (which adopts identical language). Mot.20. To be sure, the 1869 Constitution denied the vote to, *inter alia*, "lunatics," "idiots," and people who committed "bribery in an election" or participated in a duel, and those exclusions were not contemplated by the First Circuit Military Reconstruction Act. *See* Opp.4, 17. But, as Professor Ayers explained, the legislative debates over the "fundamental condition" reflect that Congress's concern regarding

[3] In a footnote, Defendants feebly assert (at 22 n.4) a constitutional avoidance argument based on the so-called "equal footing doctrine." Arguments raised only in an "isolated footnote" are "waived." *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015). In any event, Defendants concede that Virginia's uniquely harsh felony disenfranchisement regime has produced today the very result Congress intended to prohibit: the disproportionate denial of Black voting rights. *See supra* pp.9-10; Mot.11. To the extent Defendants suggest that the equal footing doctrine requires greater statistical detail on the population of disenfranchised Virginians, Defendants forfeited that argument in a stipulation to resolve a discovery dispute. *See* Ex.AE at 2-4. Defendants' new equal footing argument was also waived, because they failed to disclose this "legal and factual bas[i]s for th[e] contention" that "the Felony Voting Provision does not violate the Virginia Readmission Act" in their court-ordered response to Plaintiffs' contention interrogatory. *See* Defs. Responses to Pltfs. First Interrogatories at 8-10; Dkt. 138 (Court Order). Defendants' footnote cross-referencing their justiciability arguments is likewise insufficient. *See* Opp.5 n.1; *see also* Pls. MSJ Opp.22-26 (refuting justiciability arguments).

disenfranchisement was to protect Black voting rights, and none of the 1869 Constitution's other exceptions were racially coded to target Black voters. *See* Ex. D, Dkt. 153-4 ("Ayers Dep.") at 212-216; Mot.18. Accordingly, the 1869 Constitution's disenfranchisement of duelists does not weaken the inference that the Reconstruction Congress's intention in enacting the Virginia Readmission Act was to prohibit Virginia from having free rein to disenfranchise for conviction of statutory felonies that did not correspond to "such crimes as [we]re [then] felonies at common law," 16 Stat. 63. *Contra* Opp.19. The Court should reject Defendants' incorporation-by-reference theory and decline their invitation to invert the Virginia Readmission Act, the plain text of which (consistent with historical context) ***restricts*** Virginia from expanding disenfranchisement in lockstep with its criminal code.

### C. Defendants' Importation Of The 1869 Constitution Is Misguided

This case turns on the meaning of the Virginia Readmission Act—a federal law—not Virginia's 1869 Constitution. Accordingly, even if the Act incorporated the 1869 Constitution's exception to the franchise for "persons convicted of … felony" (it does not), that would not transform the Act's fundamental condition into a license to freely disenfranchise for any new statutory felony Virginia might enact. If the 1869 Constitution's exception for "felony" convictions is relevant at all, ***Congress'*** 1870 interpretation of the phrase governs—not the Virginia legislature's or courts', *contra* Opp.6-7. "In any case turning on statutory interpretation" of a federal law—here, the Virginia Readmission Act—the "goal is to ascertain the ***intent of Congress***." *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996). As Plaintiffs' motion explained, contemporary usage and legislative history support that Congress would have understood the phrase "felony" in the 1869 Constitution to refer to felonies at common law, not any crime the General Assembly might later codify. *See* Mot.19. Defendants nowhere refute the basic but essential point that Congress's intent, not Virginia's, controls the scope of federal law.

*See generally* Opp.5-20. And there is simply no reasonable basis to conclude that Congress incorporated by reference all future statutory felonies.

Defendants' position (at 12-14) that Congress would have understood "felony" to mean statutory and common law felonies is incorrect. The 1869 Constitution was ratified in July 1869, Ayers Report ¶ 41, only about six months before Congress passed the Virginia Readmission Act (in January 1870), which is why Defendants can point to no pre-1870 judicial interpretation of the disenfranchisement provision's scope that Congress could be presumed to incorporate. And because there was no significant prior judicial construction of the Virginia Constitution's "felony" exception, Plaintiffs' argument is not (as Defendants claim (at 1, 19)) that "Congress misunderstood the 1869 Constitution when approving it"; the provision was ambiguous at best. As Plaintiffs have explained, *see* Mot.20, Congress would most likely have interpreted the 1869 Constitution's bare reference to "felony" to refer to felonies at common law. *See, e.g.*, Ex. C, Dkt. 153-3 ("Hessick Report") ¶ 15. Even after several decades of criminal codification, federal cases continued to describe a bare "felony" reference as referring to common law crimes. *See, e.g.*, *Bannon v. United States*, 156 U.S. 464, 467 (1895) ("The word 'felony' was used at common law to denote offenses which occasioned a forfeiture" such that "capital or other punishment [m]ight be superadded," and that although by "the present day [as of 1895], imprisonment in a state prison or penitentiary[]" began to be "considered an infamous punishment[,] [i]f such imprisonment were made the sole test of felonies, … a great many offenses of minor importance[]" would be improperly "treated as felonies."); *Ex parte Wilson*, 114 U.S. 417, 423 (1885) (explaining that "any felony" as understood at "the law of England" meant "any offense which ***at common law*** occasioned a total forfeiture of the offender's lands or goods, or both").

The post-enactment records of disenfranchised "colored persons" upon which Defendants

rely (at 12 (citing Dkt. 148 ("Defs. MSJ") at 20)) cannot as a matter of law have any bearing on the Virginia Readmission Act's meaning, because "[p]ost-enactment legislative history … is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). In any event, these records of Virginia's subsequent disenfranchisement of "colored persons" lack any probative value regarding the 1870 Congress's intent in enacting a "fundamental" constraint on Virginia's suppression of Black voting rights. *See* Mot.18-19; Pls. MSJ Opp.18-20.

Moreover, even if Congress understood "felony" to include statutory felonies, the Virginia Readmission Act could incorporate at most the exclusion of people convicted of one of the roughly 60 statutory felonies that Virginia had codified by 1870. *See* Mot.21-22. The Act's text makes that clear: it expressly limits disenfranchisement to punishment for acts "as are ***now***"—not in the future—"felonies at common law." 16 Stat. 63.

Defendants respond (at 25) by invoking but misstating and misapplying the "well established … 'reference' canon" of statutory interpretation, *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209 (2019). As the Supreme Court has repeatedly held, "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises"; however, "[i]n contrast, a statute that refers to another statute by specific title … in effect cuts and pastes the referenced statute ***as it existed when the referring statute was enacted***." *Id.* Here, the "referring statute" is the Virginia Readmission Act, which specifically references the 1869 Constitution ("the Constitution herein recognized"). 16 Stat. 63. Accordingly, to the extent the Virginia Readmission Act incorporates the 1869 Constitution's exceptions to the franchise, the Act "cut[] and paste[d]" the scope of "felony" "as it existed" in 1870, *Jam*, 586 U.S. at 209. Indeed, the Supreme Court applied the reference canon in a similar context just last year, holding that the Armed Career Criminal Act ("ACCA") incorporated a set of predicate crimes that was fixed when

ACCA was enacted. *Brown v. United States*, 602 U.S. 101, 115-116 (2024). That was because ACCA referenced a specific statute, 18 U.S.C. § 802, which referred to the phrase "serious drug felony," so the court interpreted ACCA's incorporation of that term to only include the set of predicate crimes that was fixed at the time of ACCA's enactment. *Id.* To the extent Congress specifically incorporated the 1869 Constitution by reference, any such incorporation would adopt only those crimes which were a "felony"—and thus a permissible basis for disenfranchisement—***as of the date the Virginia Readmission Act was signed into law***. Accordingly, Defendants would still violate the Virginia Readmission Act because Virginia amended its Constitution (four times) since 1870, and it now disenfranchises people for more than the approximately 60 statutory felonies that existed in 1870.[4]

None of Defendants' other arguments would preclude granting summary judgment in Plaintiffs' favor. Defendants' principal support for their reading of "felony" (at 8-11) is to apply the canon against surplusage to the 1869 Constitution's exceptions to the franchise for those convicted of bribery, embezzlement of public funds, treason, and "felony." But that analysis is convoluted and unconvincing. At most, their exegesis identifies some edge cases (*e.g.*, embezzlement of less than $5 in public funds) and outmoded definitions (*e.g.*, of treason). But even accepting those arguments, those edge cases do not change the fact that if Defendants are correct that "felony" means ***any*** felony, their reading would create surplusage twice over, because

[4] Defendants are wrong (at 26) that Plaintiffs' reading of "felony" in the 1869 Constitution conflicts with Plaintiffs' understanding of the term "felony" in the current felony disenfranchisement provision. To start, the term "felony" has taken on a starkly different meaning over the intervening century, including because the modern Virginia Code specifically defines "felony." *See* Va Code § 18.2-8. In any event, the reference canon applies differently with respect to the current felony disenfranchisement provision because—unlike the Virginia Readmission Act's reference to the 1869 Constitution—the current felony disenfranchisement provision contains no reference to a specific law. *See Jam*, 586 U.S. at 209.

embezzlement and treason were statutory felonies in 1869. *See* Pls. MSJ Opp.17-18. More importantly, Defendants' arguments hardly compel rejecting the then-traditional definition of "felony" as a common-law term, because the relevant question is how ***Congress*** would have understood "felony" in the 1869 Constitution—and Congress would have understood it to mean "felonies at common law." *See* Mot.21; Hessick Report ¶¶ 15, 20.

At bottom, Defendant's near-exclusive focus on the single word "felony" in the 1869 Constitution cannot negate the key issue in this case: the scope of the Virginia Readmission Act. However one approaches the issue, the Act's plain text prohibited Virginia from expanding its felony disenfranchisement regime to automatically and permanently strip voting rights from otherwise eligible voters for conviction of a crime that was not a felony at common law in 1870. The Act should be enforced as written and Defendants' felony disenfranchisement regime declared unlawful and preempted by federal law.

## II. PLAINTIFFS ARE ENTITLED TO THE STRAIGHTFORWARD INJUNCTIVE RELIEF THEY SEEK

### A. Defendants Fail To Address The Factors For Equitable Relief And Have Waived Any Argument As To Those Factors

Defendants have waived any argument that Plaintiffs are not entitled to injunctive relief by failing to respond to Plaintiffs' arguments regarding the equitable factors this Court must consider to issue an injunction. Mot.11-12 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)); *id.* at 23-25. As Plaintiffs explained, they have suffered irreparable injury because Defendants deprive them of the right to vote. *See League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (explaining that "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury" and collecting cases). Further, Plaintiffs have no adequate remedy at law because where enforcement of state law will deprive "a plaintiff of [constitutional] rights, the threat to enforce" the state law "constitutes 'a continuing

unlawful restriction upon and infringement of the rights' of the plaintiff as to which he has 'no remedy at law which is as practical, efficient or adequate as the remedy in equity.'" *Boston Correll v. Herring*, 212 F. Supp. 3d 584, 615 (E.D. Va. 2016) (quoting *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)). The balance of hardships and public interest merge because this case is against state officials sued in their official capacities, so is treated as a suit against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991), *cited in King v. Youngkin*, 122 F.4th 539, 543 (2025). And as Plaintiffs have explained, these factors decisively weigh in their favor, because "[b]y definition, [t]he public interest ... favors permitting as many qualified voters to vote as possible." *League of Women Voters*, 769 F.3d at 247-248. That "interest is best served by favoring enfranchisement." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011).

Nowhere do Defendants contest that Plaintiffs have suffered irreparable injury, argue that Plaintiffs have an adequate remedy at law, or dispute that the balance of hardships and public interest favor issuing injunctive relief. That is fatal. Their "[f]ailure to respond to an argument made in a dispositive pleading results in a concession of that claim." *Edmond v. Wells Fargo Clearing Servs., LLC*, 2022 WL 327757, at *6 (E.D. Va. Feb. 3, 2022); *see also, e.g.*, *Amazon.com, Inc. v. WDC Holdings, LLC*, 2023 WL 2815140, at *11 (E.D. Va. Apr. 6, 2023); *Ruddy v. Bluestream Prof'l Serv., LLC*, 444 F. Supp. 3d 697, 714 n.34 (E.D. Va. 2020); *Intercarrier Commc'ns, LLC v. Kik Interactive, Inc*., 2013 WL 4061259, at *1 (E.D. Va. Aug. 9, 2013). By failing to address the equitable factors at all, Defendants have conceded that Plaintiffs have satisfied the requirements for injunctive relief. This Court should treat Plaintiffs' argument on the *eBay* factors as unopposed and enter Plaintiffs' proposed injunction.

Defendants' only response on the availability of injunctive relief is to argue (at 26-27) that the "*Purcell* principle" prevents this Court from issuing an injunction before the November 2025

election. *Purcell* merely concerns the timing of preliminary injunctive relief, not entitlement to final injunctive relief. *See Purcell v. Gonzalez*, 549 U.S. 1, 3, 5 (2006). And Plaintiffs have not requested that this Court issue an order before the November election. This Court has the discretion to issue an injunction that would take effect ***after*** the election, which would moot Defendants' *Purcell* concern.

**B. Defendants Forfeited Their Overblown Administrability Critiques**

Plaintiffs' proposed injunction is straightforward: Plaintiffs ask this Court to enjoin Defendants from disenfranchising any otherwise-eligible voter except for conviction of an offense that this Court determines would have been recognized as a felony at common law in 1870.

First, there is no live dispute on the list of Virginia felonies that would have been recognized as felonies at common law in 1870 and so are a permissible basis for disenfranchisement under the Virginia Readmission Act; no "Virginia official[ would have to] guess at which crimes qualify," Opp.23. The parties agree on the relevant list of felonies at common law in 1870. *See* Mot.15; Ex. A Dkt. 153-1 (Defs. Responses to Pltfs. First Interrogatories), at 6. And Plaintiffs have put forward the list of 96 felony offenses in the current Virginia criminal code that would have constituted felonies at common law in 1870. Hessick Report ¶ 39; Plaintiffs' Proposed Order, Dkt. 151-1 at 3-11. In showing the work that supported her careful analysis, Professor Hessick identified a separate set of 238 offenses for which there could potentially be some dispute (though Defendants have offered none)—but ultimately Professor Hessick did not include them in her list of common-law felonies, and Plaintiffs maintain that these offenses ***do not*** qualify under the Act as lawful bases for disenfranchisement. *See* Mot.10 n.4; Hessick Report ¶¶ 40-41; *contra* Opp.22-23. If the Court enters Plaintiffs' Proposed Order, Virginia voters and election officials need only refer to the identified list to determine whether federal law permits a voter to be disenfranchised for a particular conviction.

Despite repeatedly bemoaning that Plaintiffs' requested injunction would be "unworkable" (at 22-24), Defendants have still never disputed Plaintiffs' list of current Virginia offenses that would have been recognized as a felony a common law in 1870 (aside from arguing that the phrase incorporates the entire modern Virginia Criminal Code) or presented any evidence or argument that another modern felony qualifies. *See generally* Opp.22-24; Defs. MTD at 15; Defs. MSJ at 21-24 (discussing Plaintiffs' list). Defendants' "wholesale failure to respond to [this] conspicuous, nonfrivolous [issue in Plaintiffs'] brief … constitutes a forfeiture." *W. Virginia Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226 (4th Cir. 2019). Indeed, Defendants have exhibited "an outright failure to join in the adversarial process" on this issue, including by steadfastly refusing to provide their position on what current offenses they contend would be recognized as a felony at common law in 1870, *see* Defs. Responses to Pltfs. First Interrogatories at 6; this "would ordinarily result in waiver," and this case is no exception. *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016). Requiring Defendants to ***respond*** to Plaintiffs' extensive evidence and argument on this issue is not an "attempt to shift the burden," Opp.23 n.5; it merely points out that Defendants have failed to counter Plaintiffs' extensive analysis. And in any case, "when the government regulates … constitutional rights," such as the right to vote, "***it*** bears the burden to justify its regulation." *United States v. Rahimi*, 602 U.S. 680, 691 (2024). Having failed either to (1) state their position in discovery on what current Virginia felonies would have been recognized as felonies in common law—including in their response following an order from this Court compelling them to respond to Plaintiffs' contention interrogatory—or (2) brief the issue in response to Plaintiffs' clearly articulated position, Defendants cannot now be heard to argue there is some purported ambiguity regarding the scope of Plaintiffs' requested injunctive relief. Plaintiffs' requested relief is clear; Defendants have simply refused to respond on the merits.

Defendants are also wrong to suggest (at 23) an injunction would spur "a never-ending stream of disputes," since the Court's order would define the Virginia felonies for which disenfranchisement is legal under federal law. Should the Court wish to provide additional clarity by listing federal or out-of-state felonies for which disenfranchisement is permitted (even though Defendants present none to add), Professor Hessick's analysis could readily be applied to such felonies, as she stated in her report. *See* Hessick Report ¶ 11. With access to a definitive categorization for thousands of state and federal felonies, there is no basis to suggest that election officials would be unable to process registrations of voters with out-of-state convictions.[5] And even if Defendants had not forfeited any objection to the list of modern felonies for which disenfranchisement is permitted, their argument that the Court cannot perform the necessary common-law analysis is squarely foreclosed by the Fourth Circuit's mandate. *See King*, 122 F.4th at 546-547 ("[D]ecid[ing] whether … a particular crime was a 'felon[y] at common law' … fall[s] within the heartland of what federal courts do every day."). Defendants wish (at 23) that the Reconstruction Congress had adopted a more "[]workable test" for tying Virginia to a fixed set of crimes viewed as traditionally serious, but "that policy choice is a 'matte[r] for Congress, not this Court, to resolve,'" *Soto v. United States*, 145 S. Ct. 1677, 1689 (2025).

Defendants are incorrect (at 24) that the injunction Plaintiffs propose would result in a "highly anomalous" system of disenfranchisement. Far from being anomalous, Plaintiffs' proposed injunction would result in a disenfranchisement regime no more complicated than Alabama's. Alabama amended its constitution in 2022 to allow for disenfranchisement only for convictions for felonies "involving moral turpitude." Ala. Const. Art. VIII, § 177(b). To

[5] Defendants cannot now complain about a hypothesized burden having refused to produce relevant data and successfully moved to quash relevant depositions under Rule 30(b)(6). *See* Dkt. 138 (Order Directing Responses and Quashing Deposition Notices).

implement that general provision, the legislature passed a statute specifying fifty-five felonies in the Alabama Code that "involve[e] moral turpitude" and so may serve as the basis for disenfranchisement. Ala. Code § 17-3-30.1(c)(1)-(55). To account for convictions for federal and other states' crimes, the legislature provided that those convictions can only serve as the basis for disenfranchisement if, had the crime been "committed in [Alabama], [it] would constitute one of the offenses listed in" the statute. *Id.* § 17-3-30.1(c)(56). That system, which requires state officials to refer to a specific list of disqualifying felonies and consider whether federal and out-of-state convictions would match that list, has not proven unworkable for Alabama election officials. Beyond Alabama, "four other states only permit permanent disenfranchisement for corrupt practices in elections or governance." *Hopkins v. Sec'y of State Delbert Hosemann*, 76 F.4th 378, 405 (5th Cir.), *reh'g en banc granted, opinion vacated on other grounds*, 108 F.4th 371 (5th Cir. 2024). Plaintiffs' proposal for a similar system that allows only for disenfranchisement for certain offenses is therefore far from "anomalous."

## CONCLUSION

Plaintiffs respectfully request that the Court (1) grant Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief, Dkt. 151, (2) deny Defendants' Motion for Summary Judgment, Dkt. 147; and (3) enter Plaintiffs' Proposed Order granting declaratory and injunctive relief, Dkt. 151-1.

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 electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically e-mail notification of such filing to all counsel of record.

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