No. 24-1265

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TATI ABU KING, *et al.*,

Plaintiffs-Appellees,

v.

GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

JOINT APPENDIX

VISHAL AGRAHARKAR
EDEN HEILMAN
ACLU FOUNDATION OF VIRGINIA
701 E. FRANKLIN STREET, STE. 1412
RICHMOND, VA 23219
(804) 523-2151
VAGRAHARKAR@ACLUVA.ORG
EHEILMAN@ACLUVA.ORG

JASON S. MIYARES
ATTORNEY GENERAL
ERIKA L. MALEY
Solicitor General
KEVIN M. GALLAGHER
Principal Deputy Solicitor General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071

BRITTANY BLUEITT AMADI
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 PENNSYLVANIA AVE NW
WASHINGTON, DC 20037
(202) 663-6000
BRITTANY.AMADI@WILMERHALE.COM

Counsel for Plaintiffs-Appellees

CHARLES J. COOPER
HALEY N. PROCTOR
JOSEPH O. MASTERMAN
JOHN D. RAMER
COOPER & KIRK, PLLC
1523 NEW HAMPSHIRE AVE., N.W.
WASHINGTON, D.C. 20036
(202) 220-9600 – TELEPHONE
(202) 220-9601 – FACSIMILE

Counsel for Defendants-Appellants

TABLE OF CONTENTS

APPEAL,STAYED

U.S. District Court
Eastern District of Virginia - (Richmond)
CIVIL DOCKET FOR CASE #: 3:23-cv-00408-JAG

King et al v. Youngkin et al
Assigned to: District Judge John A. Gibney, Jr
Case in other court: USCA, 24-01265
Cause: 42:1983 Civil Rights Act

Date Filed: 06/26/2023
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Plaintiff

Tati Abu King

represented by **Vishal Mahendra Agraharkar**
ACLU of Virginia
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
(804) 523-2151
Fax: (804) 644-8022
Email: vagraharkar@acluva.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Andrea Lynne Fenster
ACLU of Virginia
P.O. Box 26464
Richmond, VA 23261
585-217-7997
Email: afenster@acluva.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Aryn Frazier
Wilmer Cutler Pickering Hale & Dorr LLP (DC-NA)
2100 Pennsylvania Ave NW
Washington, DC 20037
*** NA ***
(202) 663-6000
Fax: (202) 663-6363
Email: aryn.frazier@wilmerhale.com
TERMINATED: 03/15/2024
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Leon Berwick
Protect Democracy Project, Inc. (MA-NA)
15 Main Street
Suite 312

Watertown, MA 02472
*** NA ***
(202) 579-4582
Fax: (929) 777-8428
Email: ben.berwick@protectdemocracy.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Eden Brooke Heilman
ACLU of Virginia
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
(804) 523-2152
Fax: (804) 649-2733
Email: eheilman@acluva.org
ATTORNEY TO BE NOTICED

Jared Fletcher Davidson
Protect Democracy Project, Inc. (LA-NA)
3014 Dauphine Street
Suite J
New Orleans, LA 70117
NA
(202) 579-4582
Fax: (929) 777-8428
Email:
jared.davidson@protectdemocracy.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jason Liss
Wilmer Cutler Pickering Hale & Dorr LLP
(MA-NA)
60 State Street
Boston, MA 02109
NA
(617) 526-6000
Fax: (617) 526-5000
Email: jason.liss@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Li-tsung Alyssa Chen
Wilmer Cutler Pickering Hale & Dorr LLP
(DC-NA)
2100 Pennsylvania Ave NW
Washington, DC 20037
*** NA ***
(202) 663-6000
Fax: (202) 663-6363
Email: l.alyssa.chen@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Matthew Wollin
Wilmer Cutler Pickering Hale & Dorr LLP (NY-NA)
7 World Trade Center
250 Greenwich Street
New York, NY 10007
NA
(212) 230-8800
Fax: (212) 230-8888
Email: matthew.wollin@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Nicholas Werle
Wilmer Cutler Pickering Hale & Dorr LLP (NY-NA)
7 World Trade Center
250 Greenwich Street
New York, NY 10007
NA
(212) 230-8800
Fax: (212) 230-8888
Email: nick.werle@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Rachel F. Homer
Protect Democracy Project, Inc. (DC-NA)
2020 Pennsylvania Ave NW
Suite 163
Washington, DC 20006
NA
(202) 579-4582
Fax: (929) 777-8428
Email: rachel.home@protectdemocracy.org
TERMINATED: 08/21/2023
PRO HAC VICE

Robert Donoghue
Wilmer Cutler Pickering Hale & Dorr LLP (MA-NA)
60 State Street
Boston, MA 02109
NA
(617) 526-6000
Fax: (617) 526-5000
Email: Robert.Donoghue@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Robert Kingsley Smith
Wilmer Cutler Pickering Hale & Dorr LLP (MA-NA)

60 State Street
Boston, MA 02109
NA
(617) 526-6000
Fax: (617) 526-5000
Email: Robert.Smith@wilmerhale.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brittany Blueitt Amadi
2100 Pennsylvania Avenue NW
Washington, DC 20037
202-663-6022
Email: brittany.amadi@wilmerhale.com
ATTORNEY TO BE NOTICED

Plaintiff

Melvin Lewis Wingate
TERMINATED: 08/31/2023

represented by

Vishal Mahendra Agraharkar
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Andrea Lynne Fenster
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Aryn Frazier
(See above for address)
TERMINATED: 03/15/2024
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Leon Berwick
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Eden Brooke Heilman
(See above for address)
ATTORNEY TO BE NOTICED

Jared Fletcher Davidson
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jason Liss
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Li-tsung Alyssa Chen
(See above for address)

PRO HAC VICE
ATTORNEY TO BE NOTICED

Matthew Wollin
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Nicholas Werle
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Rachel F. Homer
(See above for address)
TERMINATED: 08/21/2023
PRO HAC VICE

Robert Donoghue
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Robert Kingsley Smith
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brittany Blueitt Amadi
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Toni Heath Johnson represented by **Vishal Mahendra Agraharkar**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Andrea Lynne Fenster
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Aryn Frazier
(See above for address)
TERMINATED: 03/15/2024
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Leon Berwick
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Eden Brooke Heilman
(See above for address)
ATTORNEY TO BE NOTICED

Jared Fletcher Davidson
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jason Liss
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Li-tsung Alyssa Chen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Matthew Wollin
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Nicholas Werle
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Rachel F. Homer
(See above for address)
TERMINATED: 08/21/2023
PRO HAC VICE

Robert Donoghue
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Robert Kingsley Smith
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brittany Blueitt Amadi
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Bridging The Gap In Virginia
TERMINATED: 03/18/2024

represented by **Vishal Mahendra Agraharkar**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Andrea Lynne Fenster
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Aryn Frazier
(See above for address)
TERMINATED: 03/15/2024
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Leon Berwick
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Eden Brooke Heilman
(See above for address)
ATTORNEY TO BE NOTICED

Jared Fletcher Davidson
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jason Liss
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Li-tsung Alyssa Chen
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Matthew Wollin
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Nicholas Werle
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Rachel F. Homer
(See above for address)
TERMINATED: 08/21/2023
PRO HAC VICE

Robert Donoghue
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Robert Kingsley Smith
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brittany Blueitt Amadi
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Glenn Youngkin
in his official capacity as Governor of the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
Office of Attorney General
Office of the Solicitor General
202 North Ninth Street
Richmond, VA 23219
804-786-7704
Fax: 804-786-1991
Email: aferguson@oag.state.va.us
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
804-786-6731
Email: spopps@oag.state.va.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
Shaw, Pittman, Potts & Trowbridge
2300 N Street N W
Washington, DC 20037
NA
(202) 663-8000
Email: ccooper@cooperkirk.com
ATTORNEY TO BE NOTICED

Erika L. Maley
Office of the Attorney General
Solicitor General
202 North 9th Street
Richmond, VA 23219
703-635-3750
Fax: 804-786-1991
Email: emaley@oag.state.va.us
ATTORNEY TO BE NOTICED

Haley N. Proctor
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW

Washington, DC 20036
202-220-9600
Fax: 202-220-9601
Email: hproctor@cooperkirk.com *(Inactive)*
ATTORNEY TO BE NOTICED

John Duross Ramer
Cooper & Kirk, PLLC (DC-NA)
1523 New Hampshire Ave., NW
Washington, DC 20036
NA
(202) 220-9600
Fax: (202) 220-9601
Email: jramer@cooperkirk.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
Cooper & Kirk, PLLC (DC-NA)
1523 New Hampshire Ave., NW
Washington, DC 20036
NA
202-220-9600
Fax: 202-220-9623
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
Virginia Office of the Attorney General
Solicitor General
202 North 9th Street
Richmond, VA 23219
804-592-8307
Fax: 804-786-1991
Email: kgallagher@oag.state.va.us
ATTORNEY TO BE NOTICED

Defendant

Kelly Gee
in her official capacity as Secretary of the Commonwealth of Virginia

represented by

Andrew N. Ferguson
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)

ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

John O'Bannon
in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Rosalyn R. Dance
in her official capacity as Vice Chair of the State Board of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Georgia Alvis-Long
in her official capacity as Secretary of the State Board of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)

ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Donald W. Merricks
in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)

ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Matthew Weinstein
in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Susan Beals
in her official capacity as Commissioner of the Department of Elections for the Commonwealth of Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Angie Maniglia Turner
in her official capacity as the General Registrar of Alexandria, Virginia
TERMINATED: 09/01/2023

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Taylor Yowell
in her official capacity as the General Registrar of Charlottesville, Virginia
TERMINATED: 09/01/2023

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Shannon Williams
in her official capacity as the General Registrar of Smyth County, Virginia,

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Eric Spicer
in his official capacity as General Registrar of Fairfax County, Virginia

represented by **Andrew N. Ferguson**
(See above for address)
TERMINATED: 03/26/2024
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Erika L. Maley
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven G. Popps
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles J. Cooper
(See above for address)
ATTORNEY TO BE NOTICED

Haley N. Proctor
(See above for address)
ATTORNEY TO BE NOTICED

John Duross Ramer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph O'meara Masterman
(See above for address)
ATTORNEY TO BE NOTICED

Kevin Michael Gallagher
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

Prof. Gregory P. Downs represented by **Stephen Barkai Pershing**
Kalijarvi, Chuzi, Newman & Fitch
818 Connecticut Ave., N.W.
Ste. 1000
Washington, DC 20036
202-331-9260
Fax: 866-452-5789
Email: spershing@kcnlaw.com
ATTORNEY TO BE NOTICED

Amicus

Prof. Kate Masur represented by **Stephen Barkai Pershing**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/26/2023	1	Complaint (Filing fee $ 402, receipt number AVAEDC-8997093.), filed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King. (Attachments: # 1 Exhibit A, # 2 Civil Cover Sheet)(Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	2	Proposed Summons *as to Glenn Youngkin* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	3	Proposed Summons *as to Kay Coles James* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)

06/26/2023	4	Proposed Summons *as to John O'Bannon* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	5	Proposed Summons *as to Rosalyn R. Dance* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	6	Proposed Summons *as to Georgia Alvis-Long* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	7	Proposed Summons *as to Donald W. Merricks* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	8	Proposed Summons *as to Matthew Weinstein* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	9	Proposed Summons *as to Susan Beals* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	10	Proposed Summons *as to Angie Maniglia Turner* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	11	Proposed Summons *as to Taylor Yowell* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023	12	Proposed Summons *as to Shannon Williams* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 06/26/2023)
06/26/2023		Case Assigned to District Judge John A. Gibney, Jr. (Kat) (Entered: 06/26/2023)
06/26/2023	13	Summons Issued as to Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell, NOTICE TO ATTORNEY: Please remove the headers and print two duplex copies of the electronically issued summons for each Defendant. Please serve one copy of the summons and a copy of the Complaint upon each Defendant. Please ensure that your process server returns the service copy (executed or unexecuted) to your attention. Electronically file it using the filing events, Summons Returned Executed or Summons Returned Unexecuted. (Kat,) (Entered: 06/26/2023)
07/07/2023	14	Motion to appear Pro Hac Vice by Li-tsung Alyssa Chen and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016618. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	15	Motion to appear Pro Hac Vice by Robert Donoghue and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016635. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	16	Motion to appear Pro Hac Vice by Jason Liss and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016648. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	17	Motion to appear Pro Hac Vice by Robert Kingsley Smith and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016665. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)

07/07/2023	18	Motion to appear Pro Hac Vice by Matthew Wollin and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016668. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	19	Motion to appear Pro Hac Vice by Benjamin Leon Berwick and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016673. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	20	Motion to appear Pro Hac Vice by Jared Fletcher Davidson and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016689. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/07/2023	21	Motion to appear Pro Hac Vice by Rachel F. Homer and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9016692. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 07/07/2023)
07/10/2023	22	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Glenn Youngkin served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 22 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	23	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Kay Coles James served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 23 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	24	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King John O'Bannon served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 24 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	25	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Rosalyn R. Dance served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 25 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	26	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Georgia Alvis-Long served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 26 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	27	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Donald W. Merricks served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 27 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	28	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Matthew Weinstein served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 28 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	29	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Susan Beals served on 6/28/2023, answer due

		7/19/2023 (Amadi, Brittany) (Main Document 29 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	30	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Angie Maniglia Turner served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 30 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	31	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Taylor Yowell served on 6/27/2023, answer due 7/18/2023 (Amadi, Brittany) (Main Document 31 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	32	SUMMONS Returned Executed by Toni Heath Johnson, Melvin Lewis Wingate, Bridging The Gap In Virginia, Tati Abu King Shannon Williams served on 6/28/2023, answer due 7/19/2023 (Amadi, Brittany) (Main Document 32 replaced on 7/11/2023) (Kat,). (Entered: 07/10/2023)
07/10/2023	33	ORDER granting 14 Motion for Li-tsung Chen to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	34	ORDER granting 15 Motion for Robert Donoghue to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	35	ORDER granting 16 Motion for Jason Liss to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	36	ORDER granting 17 Motion for Robert Kingsley Smith Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	37	ORDER granting 18 Motion for Matthew Wollin to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	38	ORDER granting 19 Motion for Benjamin Leon Berick to appear Pro hac vice Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	39	ORDER granting 20 Motion for Jared Fletcher Davidson to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	40	ORDER granting 21 Motion for Rachel F. Homer to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/10/2023. (Kat) (Entered: 07/10/2023)
07/10/2023	41	Motion to appear Pro Hac Vice by Andrea Fenster and Certification of Local Counsel Vishal Agraharkar Filing fee $ 75, receipt number AVAEDC-9018530. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Agraharkar, Vishal) (Entered: 07/10/2023)
07/11/2023	42	NOTICE of Voluntary Dismissal *as to Defendant Angie Maniglia Turner in Her Official Capacity as the General Registrar of Alexandria, Virginia* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate (Amadi, Brittany) (Entered: 07/11/2023)

07/11/2023	43	NOTICE of Appearance by Andrew N. Ferguson on behalf of Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell (Ferguson, Andrew) (Entered: 07/11/2023)
07/11/2023	44	Consent MOTION for Extension *of time to file Rule 12 motions and oppositions thereto* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Ferguson, Andrew) (Entered: 07/11/2023)
07/11/2023	45	Waiver of *Oral Argument* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell (Ferguson, Andrew) (Entered: 07/11/2023)
07/11/2023	46	NOTICE of Appearance by Kevin Michael Gallagher on behalf of Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell (Gallagher, Kevin) (Entered: 07/11/2023)
07/11/2023	47	NOTICE of Appearance by Erika L. Maley on behalf of Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell (Maley, Erika) (Entered: 07/11/2023)
07/12/2023	48	CERTIFICATE of Service re 42 Notice of Voluntary Dismissal, by Brittany Blueitt Amadi on behalf of Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate (Amadi, Brittany) (Entered: 07/12/2023)
07/18/2023	49	ORDER granting in part and denying in part 44 Motion for Extension of Time. Defendants may file their responsive pleadings or motions on or before August 1, 2023. SEE ORDER FOR DETAILS Signed by District Judge John A. Gibney, Jr. on 7/18/2023. (Kat) (Entered: 07/18/2023)
07/24/2023	50	ORDER granting 41 Motion for Andrea Fenster to appear Pro hac vice for Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. Signed by District Judge John A. Gibney, Jr on 7/24/2023. (Kat) (Entered: 07/24/2023)
08/02/2023	51	SCHEDULING ORDER:Initial Pretrial Conference set for 9/19/2023 at 09:30 AM before District Judge John A. Gibney, Jr. Counsel shall report to Courtroom 6000. Signed by District Judge John A. Gibney, Jr. on 8/2/23. (wtuc) (Entered: 08/02/2023)
08/17/2023	52	MOTION to Withdraw as Attorney *for Rachel F. Homer* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Attachments: # 1 Proposed Order)(Amadi, Brittany) (Entered: 08/17/2023)
08/17/2023	53	MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Ferguson, Andrew) (Entered: 08/17/2023)
08/17/2023	54	Memorandum in Support re 53 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Attachments: # 1 Exhibit A - Declaration of Kay Coles James, # 2 Exhibit B - Declaration of Susan Beals, # 3 Exhibit C - Alexandria Felon Register)(Ferguson, Andrew) (Entered: 08/17/2023)

08/21/2023	55	SO ORDERED re 52 Motion to Withdraw as Attorney. Signed by District Judge John A. Gibney, Jr. on 8/21/2023. (adun,) (Entered: 08/21/2023)
08/29/2023	56	Motion to appear Pro Hac Vice by Aryn Frazier and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9099074. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 08/29/2023)
08/29/2023	57	ORDER granting 56 Motion for Aryn Frazier to appear Pro hac vice for Plaintiffs. Signed by District Judge John A. Gibney, Jr on 8/29/2023. (Kat) (Entered: 08/29/2023)
08/31/2023	58	AMENDED COMPLAINT against Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kay Coles James, Donald W. Merricks, John O'Bannon, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Eric Spicer, filed by Toni Heath Johnson, Bridging The Gap In Virginia, Tati Abu King. (Attachments: # 1 Exhibit A)(Amadi, Brittany) (Entered: 08/31/2023)
08/31/2023	59	Proposed Summons *as to Eric Spicer* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King. (Amadi, Brittany) (Entered: 08/31/2023)
09/01/2023	60	Summons Issued as to Eric Spicer, NOTICE TO ATTORNEY: Please remove the headers and print two duplex copies of the electronically issued summons for each Defendant. Please serve one copy of the summons and a copy of the Complaint upon each Defendant. Please ensure that your process server returns the service copy (executed or unexecuted) to your attention. Please electronically file it using the filing events, Summons Returned Executed or Summons Returned Unexecuted. (Kat) (Entered: 09/01/2023)
09/07/2023	61	SUMMONS Returned Executed by Melvin Lewis Wingate, Tati Abu King, Toni Heath Johnson, Bridging The Gap In Virginia Eric Spicer served on 9/5/2023, answer due 9/26/2023 (Amadi, Brittany) (Entered: 09/07/2023)
09/08/2023	62	MOTION for Extension *of Time to File Responsive Pleadings or Motions* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin. (Ferguson, Andrew) (Entered: 09/08/2023)
09/11/2023	63	ORDER Upon due consideration, the Court GRANTS the defendants' motion for an extension of time 62 . The defendants shall file their responsive pleadings or Rule 12 motions on or before September 28, 2023. Signed by District Judge John A. Gibney, Jr on 9/11/2023. (Kat) (Entered: 09/11/2023)
09/11/2023	64	Motion to appear Pro Hac Vice by John Duross Ramer and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118293. by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Gallagher, Kevin) (Main Document 64 replaced on 9/12/2023) (Kat,). (Entered: 09/11/2023)
09/11/2023	65	Motion to appear Pro Hac Vice by Joseph O'Meara Masterman and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118323. by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Gallagher, Kevin) (Main Document 65 replaced on 9/12/2023) (Kat,). (Entered: 09/11/2023)
09/11/2023	66	Motion to appear Pro Hac Vice by Charles Justin Cooper and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118335. by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks,

		John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Gallagher, Kevin) (Main Document 66 replaced on 9/12/2023) (Kat,). (Entered: 09/11/2023)
09/11/2023	67	Motion to appear Pro Hac Vice by Nicholas Werle and Certification of Local Counsel Brittany Amadi Filing fee $ 75, receipt number AVAEDC-9118569. by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 09/11/2023)
09/13/2023	68	NOTICE of Appearance by Haley N. Proctor on behalf of Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin (Proctor, Haley) (Entered: 09/13/2023)
09/18/2023	69	NOTICE of Appearance by Steven G. Popps on behalf of Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin (Popps, Steven) (Entered: 09/18/2023)
09/18/2023	70	NOTICE of Proposed Initial Pretrial Order by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King (Attachments: # 1 Proposed Initial Pretrial Order)(Amadi, Brittany) Modified to edit text on 9/19/2023 (Kat). (Entered: 09/18/2023)
09/19/2023		Minute Entry for proceedings held before District Judge John A. Gibney, Jr.:Initial Pretrial Conference held on 9/19/2023. (wtuc) (Entered: 09/19/2023)
09/19/2023	71	ORDER granting 65 Motion for Joseph O'Meara Masterman to appear Pro hac vice Appointed for all defendants. Signed by District Judge John A. Gibney, Jr on 9/19/2023. (Kat) (Entered: 09/19/2023)
09/19/2023	72	ORDER granting 66 Motion for Charles J. Cooper to appear Pro hac vice Appointed for all defendants. Signed by District Judge John A. Gibney, Jr on 9/19/2023. (Kat) (Entered: 09/19/2023)
09/19/2023	73	ORDER granting 67 Motion for Nicholas Werle to appear Pro hac vice for all Plaintiffs. Signed by District Judge John A. Gibney, Jr on 9/19/2023. (Kat) (Entered: 09/19/2023)
09/19/2023	74	ORDER granting 64 Motion for John Duross Ramer to appear Pro hac vice for all defendants. Signed by District Judge John A. Gibney, Jr on 9/19/2023. (Kat) (Entered: 09/19/2023)
09/19/2023	75	ORDER The Court STAYS discovery in this matter pending the resolution of the defendants' motion to dismiss. SEE ORDER FOR DETAILS. Signed by District Judge John A. Gibney, Jr on 9/19/2023. (Kat) (Entered: 09/19/2023)
09/20/2023		Set as to 53 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction: Motion Hearing set for 11/22/2023 at 09:00 AM in Richmond Courtroom 6000 before District Judge John A. Gibney, Jr. (wtuc) (Entered: 09/20/2023)*
09/28/2023	76	MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Ferguson, Andrew) (Entered: 09/28/2023)
09/28/2023	77	Memorandum in Support re 76 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Attachments: # 1 Exhibit

		A - Declaration of Kelly Gee, # 2 Exhibit B - Declaration of Susan Beals, # 3 Exhibit C - Alexandria Felon Register)(Ferguson, Andrew) (Entered: 09/28/2023)
10/26/2023	78	RESPONSE in Opposition re 76 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 10/26/2023)
11/02/2023	79	MOTION for Leave to File *brief as amici curiae in support of plaintiffs* by Prof. Gregory P. Downs, Prof. Kate Masur. (Attachments: # 1 Proposed brief of amici curiae)(Pershing, Stephen) (Entered: 11/02/2023)
11/08/2023	80	ORDER This matter comes before the Court on the plaintiffs' motion to allow Professor Kate Masur and Professor Gregory P. Downs to file a brief as amici curiae in support of the plaintiffs 79 . The Court GRANTS the motion. The Court DIRECTS the Clerk to file the Proposed Brief as a separate docket entry. Signed by District Judge John A. Gibney, Jr on 11/8/2023. (Kat) (Entered: 11/08/2023)
11/08/2023	81	Brief of Amici Curiae Gregory P. Downs and Kate Masur in Support of Plaintiffs and in Opposition to Defendants' Motion to Dismiss the Complaint filed by Prof. Gregory P. Downs, Prof. Kate Masur. (Kat) (Entered: 11/08/2023)
11/09/2023	82	REPLY to Response to Motion re 76 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Ferguson, Andrew) (Entered: 11/09/2023)
11/16/2023	83	MOTION for Electronic Device Application by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King, Melvin Lewis Wingate. (Amadi, Brittany) (Entered: 11/16/2023)
11/22/2023	84	Minute Entry for proceedings held before District Judge John A. Gibney, Jr. (Court Reporter Halasz, OCR): Motion Hearing held on 11/22/2023 re 76 Motion to Dismiss the First Amended Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by defendants Glenn Youngkin, Kelly Gee, John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Donald W. Merricks, Matthew Weinstein, Susan Beals, Eric Spicer, and Shannon Williams. Argument heard. Memorandum Opinion to enter. (rpiz) (Entered: 11/22/2023)
12/06/2023	85	MOTION to Withdraw as Attorney *for Aryn A. Frazier* by Bridging The Gap In Virginia, Toni Heath Johnson, Tati Abu King. (Attachments: # 1 Proposed Order)(Amadi, Brittany) (Entered: 12/06/2023)
12/14/2023	86	TRANSCRIPT of proceedings held on 11/22/2023, before Judge Hon. John A. Gibney, Jr., Court Reporter Gil Halasz, Telephone number 804 916-2248. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 1/16/2024. Redacted Transcript Deadline set for 2/13/2024. Release of Transcript Restriction set for 3/13/2024.(halasz, gil) (Entered: 12/14/2023)**
03/15/2024	87	ORDER granting 85 Motion to Withdraw as Attorney. Attorney Aryn Frazier terminated. Signed by District Judge John A. Gibney, Jr. on 3/14/24. (wtuc) (Entered: 03/15/2024)

03/18/2024	88	OPINION. Signed by District Judge John A. Gibney, Jr. on 3/18/2024. (jsmi,) (Entered: 03/18/2024)
03/18/2024	89	ORDER that the Court GRANTS IN PART and DENIES IN PART defendants' 76 motion to dismiss. The Court DISMISSES the plaintiff, Bridging the Gap, Inc., for lack of standing. The Court DISMISSES Counts One, Three, and Four. The Court DENIES the motion as to Count Two. This case will proceed as to Count Two only. Signed by District Judge John A. Gibney, Jr. on 3/18/2024. (jsmi,) (Entered: 03/18/2024)
03/25/2024	90	MOTION to Withdraw as Attorney by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Angie Maniglia Turner, Matthew Weinstein, Shannon Williams, Glenn Youngkin, Taylor Yowell. (Ferguson, Andrew) (Entered: 03/25/2024)
03/26/2024	91	NOTICE OF INTERLOCUTORY APPEAL as to 89 Order on Motion to Dismiss for Failure to State a Claim, 88 Memorandum Opinion by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin. Filing fee $ 605, receipt number AVAEDC-9437149. (Maley, Erika) (Entered: 03/26/2024)
03/26/2024	92	MOTION to Stay *Pending Appeal* by Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin. (Maley, Erika) (Entered: 03/26/2024)
03/26/2024	93	ORDER setting deadlines; the parties shall complete discovery by June 26, 2024 and written discovery shall be served such that responses are due no later than June 26, 2024; the parties shall file their motions for summary judgment by July 16, 2024; the Court will hold a hearing on any motion for summary judgment on August 14, 2024 at 9:00 a.m.; the plaintiff has until April 5, 2024 to file an amended complaint and the defendants have within 10 days thereafter to file an answer or responsive pleading. Signed by District Judge John A. Gibney, Jr. on 3/26/24. (wtuc,) (Entered: 03/26/2024)
03/26/2024	94	ORDER granting 90 Motion to Withdraw as Attorney. Attorney Andrew N. Ferguson terminated. Signed by District Judge John A. Gibney, Jr. on 3/26/24. (wtuc) (Entered: 03/26/2024)
03/26/2024		Minute Entry for proceedings held before District Judge John A. Gibney, Jr.:Conference call held on 3/26/2024. (wtuc) (Entered: 04/09/2024)
03/27/2024	95	Transmission of Notice of Appeal to US Court of Appeals re 91 Notice of Interlocutory Appeal, (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (Lgar,) (Entered: 03/27/2024)
03/29/2024		USCA Case Number 24-1265: Case Manager, RSewell, for 91 Notice of Interlocutory Appeal, filed by Rosalyn R. Dance, Shannon Williams, Matthew Weinstein, John O'Bannon, Glenn Youngkin, Donald W. Merricks, Kelly Gee, Susan Beals, Eric Spicer, Georgia Alvis-Long. (Lgar,) (Entered: 03/29/2024)
04/04/2024	96	AMENDED COMPLAINT *Second Amended Class Action Complaint* against Georgia Alvis-Long, Susan Beals, Rosalyn R. Dance, Kelly Gee, Donald W. Merricks, John O'Bannon, Eric Spicer, Matthew Weinstein, Shannon Williams, Glenn Youngkin, filed by Tati Abu King, Toni Heath Johnson. (Attachments: # 1 Exhibit A)(Amadi, Brittany) (Entered: 04/04/2024)
04/05/2024	97	STIPULATION *and Proposed Order Regarding Litigation Schedule Pending Appeal* by Toni Heath Johnson, Tati Abu King. (Amadi, Brittany) (Entered: 04/05/2024)

04/19/2024	98	SO ORDERED - STIPULATION AND ORDER REGARDING LITIGATION SCHEDULE PENDINGAPPEAL - IT IS HEREBY STIPULATED and AGREED by the Parties and, subject to the approval of the Court, ORDERED as follows: Litigation of this matter is stayed pending resolution of the interlocutory appeal concerning Defendants' assertion of sovereign immunity, and all subsequent discovery and briefing deadlines entered in Dkt. 93 are hereby vacated. Defendants' deadline to file an answer or responsive pleading to the Second Amended Complaint shall be fourteen days from the date that the Fourth Circuit issues any mandate remanding the litigation back to this Court for any reason. Defendants' motion to stay, Dkt. 92 , is moot in light of the Parties' agreement. Signed by District Judge John A. Gibney, Jr on 4/18/2024. (jpow,) (Entered: 04/19/2024)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

TATI ABU KING, TONI HEATH JOHNSON, and BRIDGING THE GAP IN VIRGINIA,

Plaintiffs,

v.

GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia; KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia; 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 SHANNON WILLIAMS, in his official capacity as the General Registrar of Smyth County, Virginia,

Defendants.

Case No. 3:23-cv-00408

FIRST AMENDED COMPLAINT

INTRODUCTION

1. The right to vote is fundamental—it is the bedrock of American democracy. Voting is the basic means by which citizens participate in the democratic process and the primary mechanism by which citizens hold their government accountable. Voting is also critical to guaranteeing a republican form of government, whereby citizens are governed by leaders who are representative of the citizenry.

2. Despite its preeminence, the right of all citizens to vote has been more of an ideal than a reality since our country was founded. Certain segments of the population—most notably Black citizens—have been the target of continuous voter suppression efforts throughout American history.

3. Some of the most pernicious attempts to suppress the voting rights of Black citizens originated in the former Confederate states after the Civil War—with consequences that persist to the present day. One such effort involved exploiting the criminal laws to strip Black citizens of their voting rights. Because conviction for crimes punishable by whipping led to disenfranchisement, former Confederate states made certain petty crimes punishable by whipping and then subjected Black citizens to sham trials where a conviction was all but guaranteed. As a Major in the Union Army observed: "[T]here is a deliberate and a general purpose . . . to seize negroes, procure convictions for petty offenses punishable at the whipping post, and thus disqualify them forever from voting."[1] These efforts were not disguised or concealed. As one white state legislator in a former Confederate state openly admitted, the goal was to limit Black

[1] Letter from Major Rob't. Avery to Brevet Major General Jno. C. Robinson (Dec. 17, 1866) (in Records of U.S. Army Continental Commands, National Archives of the United States, Department of the South, Letters Received, file A-99 1866).

electoral power: "We are licking them in our part of the State and if we keep on we can lick them all by next year, and none of them can vote."[2]

4. Following the Civil War, Congress passed a series of statutes—known as the Readmission Acts—setting the conditions under which former Confederate states could have their representatives readmitted to Congress. These statutes included ongoing requirements to ensure equal protection of the laws—including requiring each former Confederate state to ratify the Fourteenth Amendment and guarantee voting rights for newly emancipated Black citizens living in those states. Recognizing that former Confederate states were manipulating their criminal laws with the specific intent to disenfranchise Black citizens, the Readmission Acts explicitly prohibited former Confederate states from including within their constitutions any provision that disenfranchises their citizens for committing crimes that were not "***now felonies at common law***."[3]

5. The Virginia Readmission Act, passed into law in 1870, includes such language. It states:

> That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, 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, ***except as a punishment for such crimes as are now felonies at common law***, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State.[4]

---

[2] *Id.*

[3] *E.g.*, An Act to Admit the State of Virginia to Representation in the Congress of the United States, 16 stat. 62 (Jan. 26, 1870) (the "Virginia Readmission Act") (emphasis added) (attached hereto as Exhibit A); An Act to Admit the State of Arkansas to Representation in Congress, 15 Stat. 72 (1868); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, 15 Stat. 73 (1868).

[4] Virginia Readmission Act (emphasis added).

In other words, the Virginia Readmission Act explicitly prohibits the Commonwealth of Virginia from adopting constitutional provisions that disenfranchise citizens other than those convicted of crimes that were felonies at common law in 1870.

6. The Virginia Readmission Act remains good law. It has never been repealed or otherwise dismantled. Virginia accordingly remains subject to all of its requirements, including the prohibition against stripping citizens of the right to vote "***except as a punishment for such crimes as [were] felonies at common law***" in 1870.[5]

7. Despite the Virginia Readmission Act's clear prohibition against depriving citizens of the right to vote for crimes that were not felonies at common law in 1870, Virginia later amended its Constitution to disenfranchise citizens for conduct that was not a "felon[y] at common law," in 1870. Indeed, Virginia's current Constitution automatically disenfranchises citizens with ***any*** felony conviction.[6]

8. There is now a national consensus against permanent disenfranchisement due to a prior felony conviction. As the U.S. Court of Appeals for the Fifth Circuit recently found, today, the vast majority of states and the District of Columbia do not permanently disenfranchise citizens as a punishment for felony offenses unrelated to corrupt practices in elections or governance.[7]

9. The Virginia Constitution's lifetime deprivation of the right to vote is a form of punishment that is cruel and unusual under contemporary standards of decency. Virginia is one of only three states whose constitution permanently strips citizens with any felony conviction of

---

[5] *Id*. (emphasis added).

[6] Va. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

[7] *Hopkins v. Sec'y of State Delbert Hosemann*, No. 19-60662, 2023 WL 4990543, at *16 (5th Cir. Aug. 4, 2023). Because *Hopkins* held that Mississippi's lifetime ban on voting violates the Eighth Amendment, Mississippi will soon join this vast majority. *See generally id.*

their right to vote absent the governor's restoration of voting rights. And of those three states, Virginia is the ***only*** state that does not currently have any automatic process for restoring voting rights.

10. As a result, an estimated 312,540 Virginians are disenfranchised, rendering Virginia the state with the fifth highest number of citizens disenfranchised for felony convictions, and the sixth highest rate of disenfranchisement.

11. Critically, this impact has fallen disproportionately on Black Virginians—the very population Congress sought to protect when it passed the Virginia Readmission Act more than 150 years ago. Although Black Virginians comprise less than 20% of Virginia's voting age population, they account for nearly half of all Virginians disenfranchised due to a felony conviction. Felony disenfranchisement among Black voting-age Virginians is nearly two-and-a-half times as high as the rest of Virginia's voting-age population. And, perhaps most significantly, the rate of felony disenfranchisement among Black voting-age Virginians is more than ***twice as high*** as the rate of felony disenfranchisement among the entire United States Black voting-age population.

12. The dire impact of Virginia's sweeping disenfranchisement provision has been exacerbated by Governor Glenn Youngkin's recent actions. While Virginia's prior three governors restored voting rights to disenfranchised citizens with felony convictions based on specific criteria, Governor Youngkin has ended his predecessors' restoration programs and resurrected an opaque and arbitrary rights restoration policy without any objective criteria or set timeframe for rendering restoration decisions.

13. This lawsuit seeks to redress these wrongs by restoring the voting rights that Congress guaranteed to Virginia's citizens in 1870 and ending the imposition of a cruel and unusual punishment banned by the U.S. Constitution. Plaintiffs respectfully request that this Court

declare that the Virginia Constitution violates the Virginia Readmission Act and enjoin Defendants from denying the fundamental right to vote to Virginia citizens who have been convicted of crimes that were not common law felonies at the time the Virginia Readmission Act was passed in 1870. Plaintiffs further respectfully request that this Court declare that the Virginia Constitution violates the Eighth Amendment of the U.S. Constitution[8] and enjoin Defendants from inflicting cruel and unusual punishment by denying the fundamental right to vote to Virginia citizens who have been convicted of any felony.

PARTIES

14. Plaintiff Tati Abu King is a 52-year-old Virginia resident who is currently disenfranchised based on a December 2018 felony conviction in Fairfax County, Virginia. Mr. King lives in Alexandria, Virginia with his fiancé and two stepchildren.

15. In December 2018, Mr. King was convicted of a drug possession crime. After being incarcerated for 11 months, he was released in June 2019 and has completed his term of probation. Mr. King is no longer under any probation or parole and does not owe any fines to Virginia.

16. Although Mr. King was registered to vote prior to his December 2018 felony conviction, upon information and belief, Mr. King is currently disenfranchised as a result of his December 2018 conviction and his rights have not been restored.

17. As a result of his disenfranchisement, Mr. King was unable to vote in the 2018 midterm elections, the 2020 presidential election, the 2021 Virginia gubernatorial election, and the 2022 midterm elections. Had Mr. King not been disenfranchised, he would have voted in each of those elections. Moreover, as a result of his disenfranchisement, Mr. King will be unable to vote in the upcoming November 2023 Virginia elections.

[8] The Eighth Amendment is applicable to the States through the Fourteenth Amendment.

18. Mr. King has applied for his voting rights to be restored. Were he eligible to do so, Mr. King would register and exercise his right to vote.

19. Plaintiff Toni Heath Johnson is a 60-year-old Virginia resident who is currently disenfranchised based on 2021 felony convictions in Washington County, Virginia. She lives in Marion in Smyth County, Virginia where she cares for her ill wife at home.

20. Ms. Johnson was convicted of drug possession and distribution crimes, as well as child endangerment. She was released from incarceration in 2022 and currently is on probation.

21. Prior to these most recent convictions, Ms. Johnson had been convicted of other offenses, but she had her voting rights restored following those prior convictions and therefore was able to vote before her most recent 2021 convictions. Therefore, Ms. Johnson is currently disenfranchised ***only*** as a result of her 2021 convictions—none of which constituted felonies at common law at the time the Virginia Readmission Act was passed. Consequently, since her release, Ms. Johnson has been unable to vote in the 2022 midterm election. Had Ms. Johnson not been disenfranchised, she would have voted in that election. Moreover, as a result of her disenfranchisement, she will be unable to vote in the upcoming November 2023 Virginia elections.

22. Ms. Johnson has applied for her voting rights to be restored and has followed up on multiple occasions with the Office of the Secretary of the Commonwealth of Virginia ("Secretary of the Commonwealth") regarding her application. Ms. Johnson learned in June 2023 that her restoration application had been denied. Were she eligible to do so, Ms. Johnson would register and would exercise her right to vote.

23. Plaintiff Bridging The Gap In Virginia ("Bridging the Gap") is a 501(c)(3) non-profit organization committed to providing a bridge to success for individuals struggling with substance use disorder, chronic homelessness, and lack of employability, with a particular focus

on previously-incarcerated individuals. Its mission is to empower formerly incarcerated persons and to help these individuals overcome barriers that hinder their effective transition into mainstream society following incarceration, with positive outlooks towards sustained success. As a central component of that work, Bridging the Gap assists previously incarcerated Virginians who have been disenfranchised—including Virginians disenfranchised because of convictions for crimes that were not felonies at common law in 1870, and Virginians who have been convicted of felonies more generally—in having their voting rights restored.

24. The Virginia Constitution authorizes the Governor of the Commonwealth of Virginia to restore voting rights to Virginians who have lost that right because of a felony conviction. Individuals who have had their civil rights taken away due to a felony conviction may apply to have their rights restored by the Governor. The Governor has discretion as to whether to approve or deny an application to restore voting rights. By denying an application to restore voting rights, the Governor ensures that individuals who have been disenfranchised pursuant to Article II, Section 1 of the Virginia Constitution remain permanently disenfranchised.

25. Defendant Glenn Youngkin is the Governor of the Commonwealth of Virginia. Defendant Youngkin is sued in his official capacity. Upon information and belief, Defendant Youngkin resides in Richmond, Virginia, which is located in the Richmond Division of this Court.

26. The Secretary of the Commonwealth is appointed by the Governor, subject to confirmation by the General Assembly. The Secretary of the Commonwealth administers the process for the restoration of civil rights, including the right to vote. If the Governor, through the Secretary of the Commonwealth, denies an application to restore voting rights, the Secretary of the Commonwealth informs the individual seeking to have their voting rights restored that

restoration has been denied, thus ensuring that individuals who have been disenfranchised pursuant to Article II, Section 1 of the Virginia Constitution remain permanently disenfranchised.

27. Defendant Kelly Gee is the Secretary of the Commonwealth. Defendant Gee is sued in her official capacity. Upon information and belief, Defendant Gee resides in Mechanicsville, Virginia, which is located in the Richmond Division of this Court.

28. The State Board of Elections for the Commonwealth of Virginia (the "Board of Elections") is authorized to prescribe standard forms for voter registration and elections, and to supervise, coordinate, and adopt regulations governing the work of local electoral boards, registrars, and officers of election. The members of the Board of Elections are appointed by the Governor, subject to confirmation by the General Assembly. The Board of Elections submits an annual report to the Governor on the activities of the Board of Elections and Department of Elections in the previous year.

29. Defendant John O'Bannon is the Chairman of the Board of Elections. Defendant O'Bannon is sued in his official capacity. Upon information and belief, Defendant O'Bannon resides in Henrico County, Virginia, which is located in the Richmond Division of this Court.

30. Defendant Rosalyn R. Dance is the Vice Chair of the Board of Elections. Defendant Dance is sued in her official capacity. Upon information and belief, Defendant Dance resides in the City of Petersburg, Virginia, which is located in the Richmond Division of this Court.

31. Defendant Georgia Alvis-Long is the Secretary of the Board of Elections. Defendant Alvis-Long is sued in her official capacity. Upon information and belief, Defendant Alvis-Long resides in Augusta County, Virginia.

32. Defendant Donald W. Merricks is a member of the Board of Elections. Defendant Merricks is sued in his official capacity. Upon information and belief, Defendant Merricks resides in Pittsylvania County, Virginia.

33. Defendant Matthew Weinstein is a member of the Board of Elections. Defendant Weinstein is sued in his official capacity. Upon information and belief, Defendant Weinstein resides in Arlington County, Virginia.

34. The Department of Elections for the Commonwealth of Virginia (the "Department of Elections") conducts the Board of Elections' administrative and programmatic operations and discharges the Board's duties consistent with delegated authority. The Department of Elections is authorized to establish and maintain a statewide automated voter registration system to include procedures for ascertaining current addresses of registrants; to require cancellation of records for registrants no longer qualified; to provide electronic applications for voter registration and absentee ballots; and to provide electronic delivery of absentee ballots to eligible military and overseas voters.

35. Consistent with Virginia's current Constitution, the Department of Elections requires the general registrars to delete from the record of registered voters the name of any voter who has been convicted of any felony.

36. Defendant Susan Beals is the Commissioner of the Department of Elections. Defendant Beals is sued in her official capacity. Upon information and belief, Defendant Beals resides in Chesterfield County, Virginia, which is located in the Richmond Division of this Court.

37. Each city or county in Virginia has a general registrar. The general registrars process voter registration applications for residents in their particular locality. This process includes determining whether an applicant has ever been convicted of a felony, and if so, under

what circumstances the applicant's right to vote has been restored. The general registrars must promptly notify each applicant of the acceptance or denial of their registration or transfer request. In addition, as discussed above, the Department of Elections requires the general registrars to delete from the record of registered voters the name of any voter who has been convicted of a felony. The general registrars must comply within 30 days of receiving a notification from the Department of Elections.

38. Defendant Eric Spicer is the General Registrar of Fairfax County, Virginia, where Plaintiff King resides. Defendant Spicer is sued in his official capacity. Upon information and belief, Defendant Spicer resides in Fairfax County, Virginia.

39. Defendant Shannon Williams is the General Registrar of Smyth County, Virginia, where Plaintiff Johnson resides. Defendant Williams is sued in his official capacity. Upon information and belief, Defendant Williams resides in Smyth County, Virginia.

40. Defendants, at all times relevant to this action, were acting under the color of state law, in their official capacities as the Governor, the Secretary of the Commonwealth, members of the Board of Elections, the Commissioner of the Department of Elections, and General Registrars, in overseeing, managing, and administering the voter registration system and elections for Virginia.

JURISDICTION AND VENUE

41. This action arises under the Virginia Readmission Act (Act of Congress of 1870, 16 Stat. 62), 42 U.S.C. § 1983, the Eighth Amendment of the U.S. Constitution, principles of federal equity, and *Ex parte Young*. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343.

42. Venue in the United States District Court for the Eastern District of Virginia, Richmond Division, is proper pursuant to 28 U.S.C. § 1391 because Defendants are residents of Virginia, and at least one Defendant resides in the Eastern District of Virginia, Richmond Division.

FACTS

I. The Reconstruction Congress Intended to Prevent the Former Confederate States from Manipulating Their Criminal Laws to Disenfranchise Black Citizens

43. In the decades preceding the Civil War, Virginia used its criminal laws to effectively remove all free Black citizens from the Commonwealth, including by enslavement, expulsion, or worse. As early as 1824, Virginia law provided that when any free person of Black descent was convicted of a crime punishable by imprisonment for more than two years, instead of being imprisoned, that person would be enslaved (among other punishments).

44. In April 1865, the Civil War ended, along with Virginia's and the other Confederate states' attempt at secession. The passage of the Thirteenth Amendment in December of that year ended slavery, but it did not address whether formerly enslaved people had the full rights of citizenship—including the right to vote.

45. As a result, the voting rights of Black citizens were especially vulnerable in former Confederate states like Virginia. These former Confederate states had governments comprised of past members of the Confederate military and supporters of slavery. These governments immediately set about placing statutory restrictions on the rights of Black citizens, with the goal of restricting Black voting power. These laws—commonly referred to as "Black Codes"—significantly increased incarceration rates among Black citizens and, as a result, disenfranchised many Black citizens.

46. For example, one state's "Black Code" provided that all Black people found without employment on the second Monday of January 1866 would be deemed vagrants, fined,

and jailed.[9] That state also levied a poll tax of one dollar a year on all Black people, and anyone unable to pay would be deemed a vagrant and subject to fines, sentencing, and hiring out—often to their former slaveowner.[10] Under another state's "Black Code," anyone accused of being a loiterer or a "stubborn and refractory" servant might be fined fifty dollars and hired out for six months.[11] Similarly, the Virginia Vagrancy Act of 1866 forced into servile "employment" any person who appeared to be unemployed or experiencing homelessness.[12] This prompted the United States Commanding General in Virginia to issue a proclamation that the law would reinstitute "slavery in all but its name."[13]

47. Many states also enacted laws that reclassified many forms of petty theft from misdemeanors to felonies, and often explicitly embraced disenfranchisement as a punishment. For example, those laws often specified that courts could punish felonies with disenfranchisement for ten or twenty years.[14] As explained by one of the chairmen of the South Carolina Constitutional Convention in 1868: "The intent of those laws was to deprive every colored man of their right to citizenship" by making "the most trivial offense a felony."[15] These efforts nearly doubled the percentage of nonwhite people in prisons in many former Confederate states between 1850 and

---

[9] *See* Mississippi Black Codes, "Act to Amend the Vagrant Laws of the State," § 2 (Nov. 25, 1865).

[10] *See id.* § 6.

[11] *See* Alabama Black Codes, "An Act Concerning Vagrants and Vagrancy," §§ 2-3 (Jan. 20, 1866).

[12] *See* Va. Vagrancy Law, Ch. 28., *An ACT providing for the punishment of Vagrants* (passed Jan. 15, 1866).

[13] *See* Order by Major General A.H. Terry, Dep. of Virginia (issued Jan. 24, 1866).

[14] *See Acts of the General Assembly of the State of South Carolina, Passed at the Sessions of 1864–1865* 271-73 (Columbia, S.C.: Julian A. Selby 1866).

[15] *See Proceedings of the Constitutional Convention of South Carolina, 1868* 540 (Charleston: Denny and Perry, 1868) (quoting Thomas J. Robertson).

1870, substantially restricting the ability of Black citizens to vote throughout the former Confederacy.

48. In 1866, Congress sought to prevent this widespread disenfranchisement of Black citizens in the former Confederate states by adopting the Fourteenth Amendment. Ultimately ratified in 1868, the Fourteenth Amendment provided that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[16] And it specified that representatives would be apportioned among the states in accordance with the number of citizens in each state—with one key exception: that states in which "the right to vote at any election" was denied or in any way abridged "except for participation in rebellion, or other crime" had their Congressional representation reduced in proportion to the extent of that abridgment.[17] Accordingly, once ratified, the Fourteenth Amendment prohibited state governments from disenfranchising their citizens unless those citizens had participated in "rebellion, or other crime."

49. Virginia and other former Confederate states immediately began enacting laws that would deny Black citizens the right to vote while still preserving their degree of Congressional representation—namely, by manipulating the parameters of the Fourteenth Amendment's "other crime" language.[18] Specifically, states expanded the scope of crimes that resulted in disenfranchisement to include less serious crimes. Several states changed their laws to upgrade misdemeanor property crimes to felonies for which they could disenfranchise citizens, for example by redefining grand larceny to include the theft of any items with a value of more than two

[16] U.S. CONST. amend. XIV, § 1.

[17] U.S. CONST. amend. XIV, § 2.

[18] *Id.*

dollars.[19] Another mechanism was to impose public whippings for petty crimes, which gave rise to disenfranchisement.[20] These efforts were so prevalent that representatives of the federal government observed and commented on them as well. One agent of the Freedmen's Bureau in Lynchburg, Virginia wrote: "There seems to be a growing spirit among the whites of resolve to keep the freed people 'in their proper place' as they term it, or in other words to keep them as nearly as possible to their former state of servitude."[21]

50. States also imposed criminal convictions on Black citizens using sham trials that afforded few—if any—meaningful procedural protections. Many courts in the former Confederate states failed to keep formal records, had a local citizen with no legal training serving as a judge, and had no venue requirements. Often, not even a trial was necessary: "If a colored man struck a white man, all [the latter] had to do was go before an officer of the law and declare that the colored man struck him with intent to kill, and that offense, according to the law of 1865, constituted a felony."[22] The result of these efforts was clear. As one delegate to Virginia's 1868 constitutional convention stated: It was "well known that there is a large class of prisoners now committed unjustly" by the courts of Virginia's secession government.[23] Those same sham convictions unjustly deprived Black Virginians of their right to vote. The situation in Virginia was so dire that

---

[19] *See* Acts of the General Assembly of the State of Arkansas (Little Rock Gazette Book and Job Printing, 1874), 112.

[20] *See* Letter from Major Rob't. Avery to Brevet Major General Jno. C. Robinson (Dec. 17, 1866) (in Records of U.S. Army Continental Commands, National Archives of the United States, Department of the South, Letters Received, file A-99 1866).

[21] Freedmen's Bureau Records: George T. Cook to R. S. Lacey, July 31, 1866, https://valley.lib.virginia.edu/papers/B1003.

[22] *See Proceedings of the Constitutional Convention of South Carolina, 1868* 540 (Charleston: Denny and Perry, 1868) (quoting Thomas J. Robertson).

[23] *Journal of the Constitutional Convention of the State of Virginia* 99-100 (Richmond: Office of the New Nation 1867) (quoting William H. Andrews).

it prompted one Freedmen's Bureau agent to state: "The most intense hostility is manifested toward the exercise of either civil or political rights by the Freedmen and from what reaches my ears daily one would imagine the people here were further away from [reconstruction] than in any portion of the South."[24]

51. With ratification of the Fourteenth Amendment pending, Congress took action by passing the Military Reconstruction Acts in 1867 to restrict the ability of Virginia and other former Confederate states to expand disenfranchisement. Premised on the conclusion that the governments of Virginia and nine other states were not "loyal and republican State governments," the first Military Reconstruction Act required each state to call a constitutional convention to rewrite its constitution.[25] Moreover, the first Military Reconstruction Act prohibited state constitutions from disenfranchising any adult man except for "participation in the rebellion or for felony at common law."[26]

52. After the Fourteenth Amendment was ratified in 1868, Virginia sought and was granted readmission of their representatives in Congress pursuant to the Virginia Readmission Act of 1870. The Virginia Readmission Act built on the Military Reconstruction Act's requirement that Virginia adopt a revised constitution that enfranchised all adult men except those who had been convicted of participating in the rebellion or a "felony at common law" by placing a continuing prohibition on modifying the Virginia Constitution in any way that would violate that condition. The Virginia Readmission Act's enfranchisement provision therefore requires:

> 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

[24] Freedmen's Bureau Records: John W. Jordan to Orlando Brown, May 31, 1868, https://valley.lib.virginia.edu/papers/B1024 (emphasis removed).

[25] First Reconstr. Act, Preamble (Mar. 2, 1867).

[26] *Id.* § 5.

> who are entitled to vote by the Constitution herein recognized, ***except as a punishment for such crimes as are now felonies at common law***, whereof they shall have been duly convicted, under laws equally applicable to all of the inhabitants. [27]

53. The Virginia Readmission Act's enfranchisement provision was intended to ensure that all citizens, regardless of the color of their skin, are entitled to equal application of the voting eligibility standard. As succinctly stated by Senator Drake of Missouri, the sponsor of the enfranchisement language that exists in every former Confederate state's Readmission Act, including Virginia's: "It is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men."[28]

54. The Virginia Readmission Act thus sought to foreclose this double standard by restricting disenfranchisement to convictions for crimes that were felonies at common law ***when the Act was passed in 1870***, and that were the result of criminal procedures that applied laws equally to all citizens. This enfranchisement provision was so essential to Congress's efforts to guarantee a republican government within Virginia that Congress referred to it in the Virginia Readmission Act as a "fundamental condition[]" of the readmission of Virginia's representatives into Congress.[29]

55. The Virginia Readmission Act remains good law. It has never been repealed or otherwise dismantled, and therefore Virginia must comply with its mandate.

---

[27] Virginia Readmission Act (emphasis added).

[28] Cong. Globe, 40th Cong., 2d Sess. 2600 (1868).

[29] Virginia Readmission Act.

II. Virginia Subsequently Criminalized Certain Conduct to Disenfranchise Its Black Citizens in Violation of the Virginia Readmission Act

56. Despite the explicit mandate of the Virginia Readmission Act, Virginia continued to manipulate the criminal laws to disenfranchise its Black citizens. In 1875, the Alexandria Gazette reported that "[t]he Conservative Legislative caucus . . . has decided to recommend . . . the conviction of petty larceny to disqualify the party from voting."[30] The Virginia legislature followed through on that plan the following year, amending its Constitution to disenfranchise individuals convicted of petty larceny.

57. This change to Virginia's Constitution was specifically intended to target Black citizens. In a November 1876 edition of the Richmond Daily Dispatch, for example, Elizabeth L. Van Lew (an advocate for the rights of Black citizens) discussed the legislature's efforts "to amend the Constitution so that the theft of a chicken shall disqualify forever a man as a voter," noting that it was "easy to see at whom this is aimed" because "colored men and women are not admitted into the almshouse if [not] able to work" and, "pressed by hunger, cold, and starving children, they may yield to temptation and steal, and for small offences the penitentiary receives them, and a voter is lost."[31]

58. Virginia and other former Confederate states also systematically began enacting laws that were designed to disenfranchise what were considered "Black" crimes, such as theft or housebreaking, but not those considered to be "white" crimes, such as fighting. In Virginia (as across the other former Confederate states), these statutes were then used to target Black citizens.

---

[30] *Alexandria Gazette. (Alexandria, D.C.), 08 Feb. 1875,* in *Chronicling America: Historic American Newspapers. Lib. of Congress*, https://chroniclingamerica.loc.gov/lccn/sn85025007/1875-02-08/ed-1/seq-2/.

[31] *Elizabeth L. Van Lew, "To Northern Democrats," The Daily Dispatch, November 1, 1876,* in *Chronicling America: Historic American Newspapers, Library of Congress*, https://chroniclingamerica.loc.gov/lccn/sn84024738/1876-11-01/ed-1/seq-2/.

For example, a November 1883 copy of the Richmond Daily Dispatch published "a list of ***negroes*** convicted of petit larceny in the Police Court of the city of Richmond," but did not publish such a list for Virginians of other races convicted of the same crime.[32] The paper urged that "Democratic challengers should examine [the list] carefully"—confirming that the list was published for one reason, and one reason only: to prevent the identified Black Virginians from voting.[33]

59. In 1902, Virginia held a constitutional convention to further amend its Constitution with the express goal of suppressing the voting rights of Black citizens. John Goode, president of the 1902 constitutional convention and former colonel in the Confederate Army, started off the convention by expressing a widely-held sentiment that Congress committed "a crime against civilization and Christianity, when, against the advice of their wisest leaders, they required the people of Virginia and the South, under the rule of bayonet, to submit to universal negro suffrage."[34] This statement was met with applause.[35]

60. Aware that the Fifteenth Amendment prohibited denying or abridging the right to vote on account of race, color, or previous servitude, Virginia legislators looked for more creative ways to suppress the voting rights of Black citizens. In addition to imposing a poll tax and literacy requirements, Virginia legislators ignored the clear mandate of the Virginia Readmission Act and amended the state Constitution to strip citizens of the right to vote if they had been convicted of

---

[32] *The Daily Dispatch, Nov. 4, 1883*, in *Chronicling America: Historic American Newspapers, Library of Congress*, http://chroniclingamerica. loc.gov/lccn/sn84024738/1883-11-04/ed-1/seq-6/ (emphasis added).

[33] *Id.*

[34] Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia (Held in the City of Richmond June 12, 1901 to June 26, 1902), at 20.

[35] *Id.*

"treason, or of ***any*** felony, bribery, petit larceny, obtaining money or property under false pretences, embezzlement, forgery, or perjury."[36] Carter Glass, a Virginia State Senator, explained:

> This . . . will eliminate the darkey as a political factor in this State in less than five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government. . . . Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. [37]

61. The 1902 constitutional amendments were so successful in their goal, that they functionally eliminated Black voting power in the state. Between 1901 and 1905 alone, the number of eligible Black voters in Virginia dropped from approximately 147,000 to 10,000. Indeed, up until the 1960s, these discriminatory restrictions so severely limited the number of eligible Black voters that those who wanted to suppress Black voting power did not view Black voters as possessing any real political influence.

62. By 1970, however, the Supreme Court had established that poll taxes were unconstitutional and the Voting Rights Act of 1965 had outlawed literacy tests as a precondition to voting. So when Virginia amended its Constitution in 1970, although it could no longer require poll taxes or literacy tests, it nonetheless retained a provision that contravenes the Virginia Readmission Act. That provision disenfranchises anyone convicted of ***any*** felony, regardless of whether the crime was a felony at common law in 1870. In other words, although "[t]he generic term 'felony' [was] substituted for the list of crimes" that appeared in the 1902 constitution,[38] "the

---

[36] Va. CONST. 1902 art. II, § 23 (emphasis added).

[37] Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia (Held in the City of Richmond, June 12, 1901, to June 26, 1902), Vol. 2 at 3076.

[38] Proceedings and Debates of the House of Delegates [Senate of Virginia] pertaining to Amendment of the Constitution: extra session 1969, regular session 1970, at 5.

essence of the [1902] constitutional disqualifications [was] retained."[39] That 1902 disenfranchisement provision, retained in 1970 amendments, remains in place today.

III. The Virginia Constitution's Permanent Disenfranchisement Provision Inflicts Cruel and Unusual Punishment On Virginia Citizens in Violation of the Eighth Amendment

63. Article II, Section 1 of the Virginia Constitution provides that "[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." Defendants have used this provision to implement a lifetime ban on voting for those convicted of any felony.

64. The Virginia Readmission Act prohibits Virginia from modifying its constitution to disenfranchise any citizen "except as a ***punishment*** for such crimes as are now felonies at common law."[40] "Under the plain language of the Readmission Act, [Virginia] may only alter its constitution to authorize disenfranchisement if it does so *as a punishment* for a common law felony offense."[41] As a post-Readmission Act disenfranchisement provision, Article II, Section 1 of the Virginia Constitution imposes disenfranchisement as a punishment for felony convictions.

65. The felony disenfranchisement provision of the Virginia Constitution conflicts with a national consensus against imposing permanent disenfranchisement as punishment for a felony conviction. As the Fifth Circuit recently acknowledged, the national consensus is evidenced by "the aggregate number of jurisdictions rejecting the punishment," as well as "consistent legislative trends in that direction."[42] Indeed, the vast majority of states and the District of Columbia do not punish felony offenses unrelated to corrupt practices in elections or governance with a lifetime ban

[39] *Id.* at iii.

[40] Virginia Readmission Act (emphasis added).
[41] *Hopkins*, 2023 WL 4990543, at *13 (emphasis in original).
[42] *Id.* at *16.

on voting.[43] Virginia, by contrast, is one of only three states with a constitution that permanently strips citizens convicted of any felony of their right to vote absent the governor's restoration of voting rights. And of those three states, Virginia is the only state that does not currently have any automatic process for restoring voting rights.

66. The national consensus against imposing permanent disenfranchisement as punishment for a felony conviction is "further evidenced by a clear and consistent trend in state legislatures to abandon the punishment."[44] Over the last five decades, there has been a "steady rejection of permanent felon disenfranchisement."[45] For example, in 2016, Maryland passed legislation restoring voting rights to people who have been convicted of a felony, including those who are still on probation or parole.[46] By contrast, in Virginia, citizens with felony convictions will continue to be disenfranchised for the rest of their lives absent intervention by the Governor.

67. Permanent disenfranchisement is a disproportionate punishment for Virginians who have been convicted of a felony. As the Fifth Circuit recently found:

> [V]oting is the lifeblood of our democracy and . . . the deprivation of the right to vote saps citizens of their essential right to have a say in how and by whom they are governed. Permanent denial of the franchise, then, is an exceptionally severe penalty, constituting nothing short of the denial of the democratic core of American citizenship. It is an especially cruel penalty as applied to those whom the justice system has already deemed to have completed all terms of their sentences. These individuals, despite having satisfied their debt to society, are precluded from ever fully participating in civic life. Indeed, they are excluded from the most essential feature and expression of citizenship in a democracy—voting.[47]

68. Accordingly, Article II, Section 1 of the Virginia Constitution exacts a cruel and unusual punishment of lifetime disenfranchisement against individuals with felony convictions in

---

[43] *Id.* at *16.
[44] *Id.* at *16.
[45] *Id.* at *17.
[46] H.B. 980, 2015 Gen. Assemb., Reg. Sess. (Md. 2016).
[47] *Hopkins*, 2023 WL 4990543 at *19.

violation of the Eighth Amendment, as applicable to the States pursuant to the Fourteenth Amendment.

IV. The Disenfranchisement Provision of Virginia's Constitution Disproportionately Affects Its Black Citizens

69. Article II, Section 1 of the Virginia Constitution currently provides: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." Importantly, Virginia classifies as "felonies" numerous crimes that were not common law felonies when the Virginia Readmission Act was passed in 1870.

70. In 1870, "common law" felonies were widely understood to be a distinct category of crime from "statutory" felonies. The nine "common law" felonies were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.

71. Today, Virginia's criminal code designates as felonies numerous crimes beyond the nine that were understood to be felonies at common law in 1870. Among the numerous crimes currently defined as "felonies" by Virginia that were not felonies at common law in 1870 are controlled substance offenses. Indeed, criminalization of controlled substance offenses did not exist at the time the Virginia Readmission Act was passed; rather, controlled substances offenses were not criminalized until the regulation of opium in the late 1870s and early 1880s. And it was not until the early 1900s that Virginia began prohibiting the use, sale, or possession of opium, cocaine, or other modern controlled substances. In fact, Virginia first criminalized drug sales in 1904, punishing as a misdemeanor certain sales of opium, and then made possession of cocaine with intent to distribute a statutory felony in 1908. Virginia did not make possession of marijuana a misdemeanor until 1936, and did not elevate penalties for that crime to be commensurate with those for drugs such as heroin, morphine, and cocaine until 1952.

72. Virginia's disenfranchisement of citizens with felony convictions for crimes other than those that were felonies at common law in 1870 has resulted in the disproportionate disenfranchisement of Black Virginians.

73. Black citizens in Virginia are more heavily policed and thus more likely to be arrested, charged, and convicted of crimes than other citizens. For example, Black drivers in Virginia are almost two times more likely than white drivers to be pulled over by the police, and are more likely to have their vehicles searched once stopped. And in 2020, even though Black residents constituted approximately 20% of Virginians, Black residents accounted for 40% of arrests, 43% of the jail population, and 53% of the prison population. In Richmond, for instance, Black residents are three times more likely to be arrested for low-level offenses than white residents. These disparities apply to arrests for drug crimes in particular: In 2020, 72% of all drug-related arrests in Virginia were of Black citizens.

74. As a result of this disproportionate policing of Black citizens and resulting disproportionate felony convictions, Black citizens in Virginia are also more likely to be disenfranchised than other Virginia citizens. More than 12% of Black voting-age Virginians are disenfranchised due to a felony conviction, a rate nearly two-and-a-half times that of all voting-age Virginians disenfranchised due to a felony conviction. The rate of felony disenfranchisement of Black Virginians (12.16%) is also more than twice the national average for Black citizens (5.28%). And Black citizens make up nearly half of all citizens who are disenfranchised due to a felony conviction in Virginia, despite making up less than a quarter of the total voting age population.

75. This disproportionate and widespread disenfranchisement of Black citizens in Virginia ensures that its voting population is not representative of the citizen body. This is

precisely the kind of abrogation of the republican form of government that the Virginia Readmission Act was designed to prevent and a violation of a "fundamental condition" of the readmission of its Congressional representatives.[48]

V. Plaintiffs Are Injured By Virginia's Illegal Disenfranchisement Regime

76. Plaintiffs have been personally injured by Virginia's unlawful disenfranchisement regime.

77. Plaintiff King is currently disenfranchised based on a December 2018 felony conviction in Fairfax County, Virginia. Specifically, Mr. King was convicted of possession of a controlled drug with intent to distribute. Possession of a controlled drug with intent to distribute was not a felony at common law in 1870. If Mr. King were eligible, he would register and exercise his right to vote. He believes that just like any other citizen, he should be able to express his opinion about who represents him as an elected official. He wants to use his vote to set an example for his children and grandchildren, to advocate for everyone's rights, and to make sure his voice is heard, regardless of the outcome. As a formerly incarcerated Black man, he feels a duty to share his unique perspective and to secure the rights of future generations of Black citizens.

78. Plaintiff Johnson is currently disenfranchised based on 2021 felony convictions in Washington County, Virginia. Ms. Johnson was convicted of certain drug-related crimes, including the possession and distribution of controlled substances, and related child endangerment charges due to her child being present in connection with the drug offenses. None of these underlying crimes constituted felonies at common law in 1870.

79. Ms. Johnson initially registered to vote as a young adult because her grandfather was adamant that she exercise her voting rights. If Ms. Johnson were eligible, she would register

[48] Virginia Readmission Act.

and exercise her right to vote. Voting has always been important to her, and she believes strongly in securing rights restorations for others who face voting bans. Ms. Johnson lives in a rural area of Virginia, and believes it's important that low-income, rural Virginians have the opportunity to have their voices heard through their votes.

80. Plaintiff Bridging the Gap works to reintegrate Virginia citizens who are returning from incarceration into society. Defendants' illegal disenfranchisement of Virginians has actively frustrated Bridging the Gap's organizational mission and caused it to divert its scarce resources to address the resulting mass disenfranchisement. Bridging the Gap's mission is to empower formerly incarcerated persons by supporting their reintegration as full participants in society. Virginia's impermissible disenfranchisement policies directly hinder Bridging the Gap's mission to support the successful transition of formerly incarcerated persons to active citizenship by denying their fundamental right to vote and thus their full participation in society. Virginia's lifetime voting ban disempowers the community that Bridging the Gap seeks to serve and support, and therefore directly harms Bridging the Gap by impeding the organization's core mission and goals.

81. Not only has Defendants' violations of the Virginia Readmission Act and Eighth Amendment frustrated Bridging the Gap's mission to support the re-integration of formerly incarcerated people in Virginia, but Defendants have also caused Bridging the Gap to divert its limited resources away from its core programming and instead towards combating the widespread disenfranchisement resulting from this policy.

82. Bridging the Gap's organizational mission includes a focus on three main areas: career training, civil rights/criminal justice advocacy, and housing resources, all in service of a community at high risk of experiencing homelessness and unemployment. Bridging the Gap is

dedicated to supporting career opportunities and housing stability for the individuals it serves, but it has been compelled to invest substantial staff time and expenses towards advocacy and programming to support the restoration of voting rights.

83. Bridging the Gap's efforts at ameliorating the effects of Defendants' conduct include (but are not limited to) organizing rallies to educate people about their ability to have their rights restored, encouraging people to check the status of their voting rights, counseling those who may not be aware that their rights were restored, holding "rights restoration fairs" to help people fill out restoration applications and understand their voting rights status, and running an educational "mobile justice tour" to conduct outreach and support individuals in restoring their rights.

84. Bridging the Gap's diversion of resources to respond to Virginia's unlawful disenfranchisement regime is even greater after the changes that Governor Youngkin has made to the discretionary rights restoration process. Now that the restoration process is no longer transparent, the organization spends even more time and resources assisting people in completing applications for rights restoration and navigating the ensuing bureaucratic process. To date, Bridging the Gap has assisted over 10,000 people with understanding the rights restoration process, determining whether their rights have been restored, and applying for rights restoration, in the over 10 years since its founding.

85. In addition to providing individualized support, Bridging the Gap has also diverted significant resources toward advocating for a systemic solution to Virginia's unlawful disenfranchisement regime (namely, a constitutional amendment to change Virginia's approach to disenfranchisement), and has engaged in regular community outreach and education regarding the impact of Virginia's felony voting rights ban and opportunities for rights restoration.

86. Due to the time and effort it has expended supporting thousands of individuals with rights restoration as a result of Defendants' conduct, Bridging the Gap has foregone investment into other core areas of its organizational goals and services, and even delayed or suspended other projects and programs vitally important to its mission. Moreover, because it is more difficult for Bridging the Gap's clients to obtain employment when they cannot represent to potential employers that their rights have been restored, the organization has needed to spend more time assisting each individual client with obtaining employment. For example, as part of its career services and commitment to environmental justice, Bridging the Gap has led trainings in solar panel installation to prepare formerly incarcerated individuals to secure jobs in the solar industry. The frequency of these trainings and the organization's capacity to perform outreach for them has been severely diminished due to the time and resources spent on rights restoration work. In fact, beginning in 2023, Bridging the Gap needed to reduce the frequency of its trainings from every six weeks to every eight weeks, as a direct consequence of spending additional time on rights restoration efforts.

87. Similarly, Bridging the Gap has been unable to devote as many resources to another core aspect of its mission, namely, supporting the housing needs of formerly incarcerated persons, due to time spent on rights restoration work. Bridging the Gap operates as a facilitator that connects people leaving incarceration to transitional housing, at the request of the Virginia Department of Corrections. From 2020 through the end of 2022, Bridging the Gap assisted approximately 25 people leaving incarceration in finding transitional housing. However, since the beginning of 2023, Bridging the Gap has substantially reduced the time and resources it puts toward connecting people leaving incarceration with transitional housing due to the time and

resources the organization instead has needed to devote to rights restoration in the face of Virginia's unlawful disenfranchisement regime.

88. In addition, Bridging the Gap's lean staff and critical mission goals are supported by a minimal operating budget, and the organization's ability to apply for grants is hampered by the resources it dedicates to counteract Virginia's unlawful disenfranchisement regime. For example, there are at least three grants that Bridging the Gap chose not to apply to because of the time the organization has needed to spend countering Virginia's unlawful disenfranchisement regime.

FIRST CAUSE OF ACTION

Violation of the Virginia Readmission Act, Actionable Under 42 U.S.C. § 1983

89. Plaintiffs hereby reallege and incorporate the foregoing paragraphs as if fully set forth herein.

90. Defendants, at all times relevant to this action, were acting under the color of state law in overseeing, managing, and administering the voter registration system and elections for Virginia.

91. Article II, Section 1 of the Virginia Constitution states: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."

92. Defendants have enforced and continue to enforce Article II, Section 1 of the Virginia Constitution in connection with their ongoing oversight, management, and administration of the voter registration system and elections for Virginia.

93. As a result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiffs King and Johnson have been disqualified from voting in Virginia because

they were convicted of crimes that were not felonies at common law in 1870 and their voting rights have not been restored.

94. As an additional result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiff Bridging the Gap has been impeded in its mission to help previously incarcerated people overcome barriers that hinder their effective transition into mainstream society. As a result, Bridging the Gap has expended significant resources to help restore voting rights to Virginians who have been unlawfully disenfranchised because of convictions of crimes that were not felonies at common law in 1870, and diverted its scarce organizational resources away from its core mission, as detailed above.

95. The Virginia Readmission Act forbids Defendants from enforcing Article II, Section 1, of the Virginia Constitution, to the extent that it disenfranchises any citizens for crimes that were not "felonies at common law" in 1870.

96. Article II, Section 1 of the Virginia Constitution violates the Virginia Readmission Act because it disenfranchises Virginia citizens convicted of numerous crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870—including those felonies for which Plaintiffs King and Johnson were convicted and stripped of their voting rights.

97. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has disqualified Plaintiffs King and Johnson from voting in Virginia because they were convicted of felonies, despite the fact that those underlying felonies were not felonies at common law when the Virginia Readmission Act was enacted in 1870.

98. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore unlawfully deprived and continues to deprive Plaintiffs King and Johnson of their right

to vote as established in the Virginia Constitution of 1870 and protected by the enfranchisement provision of the Virginia Readmission Act.

99. As a direct and proximate result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiffs King and Johnson have been and continue to be injured because they are unable to register to vote or vote in elections in Virginia.

100. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also frustrated Plaintiff Bridging the Gap's mission to help previously incarcerated individuals overcome barriers that hinder their effective transition into mainstream society. Voting is the basic means by which citizens participate in the democratic process and, without the right to vote, such individuals are barred from full participation in mainstream society.

101. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore caused Plaintiff Bridging the Gap to divert significant resources on rights restoration efforts for Virginians who have been impermissibly disenfranchised because of convictions for crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870, as described above.

102. Under 42 U.S.C. § 1983, Plaintiffs are entitled to (1) prospective injunctive relief prohibiting Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870, including Plaintiffs King and Johnson, and (2) a declaratory judgment that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Virginia Readmission Act, in order to address Defendants' ongoing violation of the Virginia Readmission Act.

SECOND CAUSE OF ACTION

Violation of Virginia Readmission Act, Actionable Under Principles of Federal Equity and *Ex parte Young*

103. Plaintiffs hereby reallege and incorporate the foregoing paragraphs as if fully set forth herein.

104. The Supremacy Clause of the U.S. Constitution states that the "Laws of the United States . . . shall be the supreme Law of the Land."[49]

105. Defendants, at all times relevant to this action, were acting under the color of state law in overseeing, managing, and administering the voter registration system and elections for Virginia.

106. Article II, Section 1 of the Virginia Constitution provides: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."

107. Defendants have enforced and continue to enforce Article II, Section 1 of the Virginia Constitution in connection with their ongoing oversight, management, and administration of the voter registration system and elections for Virginia.

108. As a result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution in violation of the Virginia Readmission Act, Plaintiffs King and Johnson have been disqualified from voting in Virginia because they were convicted of crimes that were not felonies at common law in 1870 and their voting rights have not been restored.

109. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also frustrated Plaintiff Bridging the Gap's mission to help previously incarcerated individuals

[49] U.S. CONST. art. VI, cl. 2.

overcome barriers that hinder their effective transition into mainstream society. As a result, Bridging the Gap has expended significant resources to help restore voting rights to Virginians who have been unlawfully disenfranchised because of convictions of crimes that were not felonies at common law in 1870, and diverted its scarce organizational resources away from its core mission. Voting is the basic means by which citizens participate in the democratic process and, without the right to vote, such individuals are barred from full participation in mainstream society.

110. The Virginia Readmission Act explicitly and unambiguously forbids Defendants from enforcing Article II, Section 1 of the Virginia Constitution, to the extent that it disenfranchises any citizens for crimes that were not felonies at common law in 1870.

111. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has disenfranchised Plaintiffs King and Johnson from voting in Virginia because they were previously convicted of felonies, despite the fact that those underlying felonies were not felonies at common law when the Virginia Readmission Act was enacted in 1870.

112. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore unlawfully deprived and continues to deprive Plaintiffs King and Johnson of their right to vote in violation of the enfranchisement provision of the Virginia Readmission Act.

113. As a direct and proximate result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiffs King and Johnson have been and continue to be injured because they are unable to register to vote or vote in elections in Virginia.

114. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also caused Plaintiff Bridging the Gap to expend and divert significant resources on rights restoration efforts for Virginians who have been impermissibly disenfranchised because of

convictions of crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870, as described above.

115. Plaintiffs have suffered and will continue to suffer irreparable injury if this violation of federal law is not declared unlawful and enjoined, and Plaintiffs have no adequate remedy at law.

116. As a court of equity, this Court has the inherent power to review and enjoin violations of federal law by state officials. Congress has not evidenced an intent to limit equitable relief for violating the enfranchisement provision of the Virginia Readmission Act.

117. Plaintiffs are entitled to (1) prospective injunctive relief prohibiting Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870 in violation of the Virginia Readmission Act, including Plaintiffs King and Johnson, and (2) a declaratory judgment that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Virginia Readmission Act, in order to address Defendants' ongoing violation of the Virginia Readmission Act.

THIRD CAUSE OF ACTION

Violation of the Eighth Amendment, Actionable Under 42 U.S.C. § 1983

118. Plaintiffs hereby reallege and incorporate the foregoing paragraphs as if fully set forth herein.

119. Defendants, at all times relevant to this action, were acting under the color of state law in overseeing, managing, and administering the voter registration system and elections for Virginia.

120. Article II, Section 1 of the Virginia Constitution states: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."

121. Defendants have enforced and continue to enforce Article II, Section 1 of the Virginia Constitution in connection with their ongoing oversight, management, and administration of the voter registration system and elections for Virginia.

122. As a result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution in violation of the Eighth Amendment, Plaintiffs King and Johnson were disqualified from voting in Virginia because they were convicted of felonies.

123. As an additional result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiff Bridging the Gap has been impeded in its mission to help previously incarcerated people overcome barriers that hinder their effective transition into mainstream society. As a result, Bridging the Gap has expended significant resources to help restore voting rights to Virginians who have been permanently disenfranchised because of felony convictions, and diverted its scarce organizational resources away from its core mission, as detailed above.

124. The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishments." The Eighth Amendment is applicable to Virginia through the Fourteenth Amendment.

125. Article II, Section 1 of the Virginia Constitution violates the Eighth Amendment because it permanently disenfranchises Virginia citizens with felony convictions. This is cruel and unusual punishment under contemporary standards of decency.

126. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution disqualified Plaintiffs King and Johnson from voting in Virginia because they were convicted of felonies.

127. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore inflicted and continues to inflict cruel and unusual punishment on Plaintiffs King and Johnson in violation of the Eighth Amendment.

128. As a direct and proximate result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiffs King and Johnson have been and continue to be injured because they are unable to register to vote or vote in elections in Virginia.

129. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also frustrated Plaintiff Bridging the Gap's mission to help previously incarcerated individuals overcome barriers that hinder their effective transition into mainstream society. Voting is the basic means by which citizens participate in the democratic process and, without the right to vote, such individuals are barred from full participation in mainstream society.

130. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore caused Plaintiff Bridging the Gap to divert significant resources on rights restoration efforts for Virginians who have been disenfranchised because of felony convictions, as described above.

131. Under 42 U.S.C. § 1983, Plaintiffs are entitled to (1) prospective injunctive relief prohibiting Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of any felony, including Plaintiffs King and Johnson, and (2) a declaratory judgment that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Eighth Amendment with respect to citizens of

the Commonwealth of Virginia convicted of any felony, in order to address Defendants' ongoing violation of the Eighth Amendment.

FOURTH CAUSE OF ACTION

Violation of the Eighth Amendment, Actionable Under Principles of Federal Equity and *Ex parte Young*

132. Plaintiffs hereby reallege and incorporate the foregoing paragraphs as if fully set forth herein.

133. The Supremacy Clause of the U.S. Constitution states that the "Laws of the United States . . . shall be the supreme Law of the Land."[50]

134. Defendants, at all times relevant to this action, were acting under the color of state law in overseeing, managing, and administering the voter registration system and elections for Virginia.

135. Article II, Section 1 of the Virginia Constitution provides: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."

136. Defendants have enforced and continue to enforce Article II, Section 1 of the Virginia Constitution in connection with their ongoing oversight, management, and administration of the voter registration system and elections for Virginia.

137. As a result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution in violation of the Virginia Readmission Act, Plaintiffs King and Johnson have been disqualified from voting in Virginia because they were convicted of felonies and their voting rights have not been restored.

[50] U.S. CONST. art. VI, cl. 2.

138. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also frustrated Plaintiff Bridging the Gap's mission to help previously incarcerated individuals overcome barriers that hinder their effective transition into mainstream society. As a result, Bridging the Gap has expended significant resources to help restore voting rights to Virginians who continue to be permanently disenfranchised due to a felony conviction, and diverted its scarce organizational resources away from its core mission. Voting is the basic means by which citizens participate in the democratic process and, without the right to vote, such individuals are barred from full participation in mainstream society.

139. The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishments." The Eighth Amendment is applicable to Virginia through the Fourteenth Amendment.

140. Article II, Section 1 of the Virginia Constitution violates the Eighth Amendment because it permanently disenfranchises Virginia citizens with felony convictions. This is cruel and unusual punishment under contemporary standards of decency.

141. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has disenfranchised Plaintiffs King and Johnson from voting in Virginia because they were previously convicted of felonies.

142. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has therefore unlawfully deprived and continues to deprive Plaintiffs King and Johnson of their right to vote in violation of the Eighth Amendment.

143. As a direct and proximate result of Defendants' enforcement of Article II, Section 1 of the Virginia Constitution, Plaintiffs King and Johnson have been and continue to be injured because they are unable to register to vote or vote in elections in Virginia.

144. Defendants' enforcement of Article II, Section 1 of the Virginia Constitution has also caused Plaintiff Bridging the Gap to expend and divert significant resources on rights restoration efforts for Virginians who remain permanently disenfranchised because of felony convictions.

145. Plaintiffs have suffered and will continue to suffer irreparable injury if this violation of federal law is not declared unlawful and enjoined, and Plaintiffs have no adequate remedy at law.

146. As a court of equity, this Court has the inherent power to review and enjoin violations of federal law by state officials. Congress has not evidenced an intent to limit equitable relief for violating the Eighth Amendment.

147. Plaintiffs are entitled to (1) prospective injunctive relief prohibiting Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of any felony, including Plaintiffs King and Johnson, and (2) a declaratory judgment that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Eighth Amendment with respect to citizens of the Commonwealth of Virginia convicted of any felony, in order to address Defendants' ongoing violation of the Eighth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

A. Issue a declaratory judgment finding that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Virginia Readmission Act;

B. Issue injunctive relief enjoining Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of

Virginia convicted of crimes that were not felonies at common law when the Virginia Readmission Act was enacted in 1870;

C. Issue a declaratory judgment finding that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Eighth Amendment with respect to citizens of the Commonwealth of Virginia convicted of any felony;

D. Issue injunctive relief enjoining Defendants from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of any felony;

E. Award Plaintiffs' attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1983; and

F. Grant any such other relief as this Court deems just and proper.

Dated: August 31, 2023

Respectfully submitted,

/s/ Brittany Blueitt Amadi

Vishal Agraharkar (VSB No. 93265)
Eden Heilman (VSB No. 93554)
Andrea Fenster* (D.C. Bar No. 1736549)
ACLU Foundation of Virginia
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
(804) 523-2151
vagraharkar@acluva.org
eheilman@acluva.org
afenster@acluva.org

Jared Fletcher Davidson*
Protect Democracy Project
3014 Dauphine Street, Suite J
New Orleans, LA 70117
(202) 579-4582
jared.davidson@protectdemocracy.org

Benjamin L. Berwick*
Protect Democracy Project
15 Main Street, Suite 312
Watertown, MA 02472
(202) 579-4582
ben.berwick@protectdemocracy.org

Brittany Blueitt Amadi (VSB No. 80078)
L. Alyssa Chen*
Aryn A. Frazier*
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Ave NW
Washington, DC 20037
(202) 663-6000
brittany.amadi@wilmerhale.com
l.alyssa.chen@wilmerhale.com
aryn.frazier@wilmerhale.com

Robert Kingsley Smith*
Jason H. Liss*
Robert Donoghue*
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000
robert.smith@wilmerhale.com
jason.liss@wilmerhale.com
robert.donoghue@wilmerhale.com

Matthew Wollin*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007
(212) 230-8800
matthew.wollin@wilmerhale.com

Counsel for Plaintiffs
**admitted pro hac vice*

EXHIBIT A

Moines river a public highway.

ment of the navigation of the Des Moines river, in said Territory," as makes said river a public highway be, and the same is hereby, repealed.

APPROVED, January 20, 1870.

Jan. 20, 1870.

CHAP. VIII. — *An Act making Appropriations to defray the Expenses of the Committee on Banking and Currency incurred in Pursuance of Investigations ordered by the House of Representatives.*

Appropriation for certain expenses of the committee on banking and currency.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sum of three thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the treasury not otherwise appropriated, for the purpose of defraying the expenses of the committee on banking and currency, incurred in fulfilment of the order of the House of Representatives.

APPROVED, January 20, 1870.

Jan. 21, 1870.

CHAP. IX. — *An Act relating to retired Officers of the Army.*

Pub. Res. No. 32. *Post*, p. 372.

Retired officers of the army not to be assigned to duty, &c.

Former assignments to terminate.

Repealing clause.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no retired officer of the army shall hereafter be assigned to duty of any kind, or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade; and all such assignments heretofore made shall terminate within thirty days from the passage of this act.

SEC. 2. *And be it further enacted*, That all laws and parts of laws inconsistent with the provisions of this act be, and the same are hereby, repealed.

APPROVED, January 21, 1870.

Jan. 26, 1870.

CHAP. X. — *An Act to admit the State of Virginia to Representation in the Congress of the United States.*

Preamble.

WHEREAS the people of Virginia have framed and adopted a constitution of State government which is republican; and whereas the legislature of Virginia elected under said constitution have ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith was a condition precedent to the representation of the State in Congress: Therefore,

Virginia declared entitled to representation in Congress.

Members of State legislature and State officials to take one of two oaths before, &c.

Oaths, form of;

[Oath to include affirmation, ch. 12, p. 63.]

before whom to be taken.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said State of Virginia is entitled to representation in the Congress of the United States: *Provided*, That before any member of the legislature of said State shall take or resume his seat, or any officer of said State shall enter upon the duties of his office, he shall take, and subscribe, and file in the office of the secretary of state of Virginia, for permanent preservation, an oath in the form following: "I, —— ——, do solemnly swear that I have never taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterward engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof, so help me God"; or such person shall in like manner take, subscribe, and file the following oath: "I, —— ——, do solemnly swear that I have, by act of Congress of the United States, been relieved from the disabilities imposed upon me by the fourteenth amendment of the Constitution of the United States, so help me God"; which oaths shall be taken before and certified by any officer lawfully authorized to administer oaths. And any person

who shall knowingly swear falsely in taking either of such oaths shall be deemed guilty of perjury, and shall be punished therefor by imprisonment not less than one year, and not more than ten years, and shall be fined not less than one thousand dollars, and not more than ten thousand dollars. And in all trials for any violation of this act the certificate of the taking of either of said oaths, with proof of the signature of the party accused, shall be taken and held as conclusive evidence that such oath was regularly and lawfully administered by competent authority: *And provided further*, That every such person who shall neglect for the period of thirty days next after the passage of this act to take, subscribe, and file such oath as aforesaid, shall be deemed and taken, to all intents and purposes, to have vacated his office: *And provided further*, That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, 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, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, 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 school rights and privileges secured by the constitution of said State.

Perjury in taking either oath, how punished.

Certificate of taking, &c. to be evidence.

Neglect for thirty days to take, &c. the oath, to vacate office.

Fundamental conditions of the admission of Virginia to representation in Congress.

No citizen or class to be deprived of right to vote, except, &c.

or to hold office on account of race, color, &c.;

or of school rights and privileges.

APPROVED, January 26, 1870.

CHAP. XI. — *An Act to protect Officials in Government Employ.*

Feb. 1, 1870.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no officer or clerk in the United States government employ shall at any time solicit contributions of other officials or employees in the government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors receive any gift or present offered or presented to them as the contribution of those in government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Any officer or clerk violating any of the provisions of this bill shall be summarily discharged from the government employ.

Contributions, &c. not to be solicited for, nor received by, United States officials or clerical superiors.

Presents.

Penalty.

APPROVED, February 1, 1870.

CHAP. XII. — *An Act to amend an Act entitled "An Act to admit the State of Virginia to Representation in the Congress of the United States."*

Feb. 1, 1870.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That wherever the word "oath" is used in the act entitled "An act to admit the State of Virginia to representation in the Congress of the United States," it shall be construed to include an affirmation; and every person required by said act to take either of the oaths therein prescribed, who has religious or conscientious scruples against taking an oath, may make and file an affirmation to the same purport and effect: *Provided*, That all the pains and

"Oath" to include "affirmation" in the act to admit Virginia.

See ch. 10, p. 62.

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

TATI ABU KING, et al., Plaintiffs, v. GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Glenn Youngkin, Kelly Gee, John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Donald W. Merricks, Matthew Weinstein, Susan Beals, Eric Spicer, and Shannon Williams (collectively, the Defendants), by counsel, respectfully move this Court to dismiss Plaintiffs' Amended Complaint for lack of jurisdiction and move to dismiss Plaintiffs' Amended Complaint with prejudice for failure to state a claim upon which relief can be granted. In support, the Defendants rely on the Memorandum in Support and accompanying Exhibits filed herewith.

Dated: September 28, 2023

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE
JOHN O'BANNON
ROSALYN R. DANCE
GEORGIA ALVIS-LONG
DONALD W. MERRICKS
MATTHEW WEINSTEIN
SUSAN BEALS
ERIC SPICER
SHANNON WILLIAMS

By: *__/s/ Andrew N. Ferguson__*

Andrew N. Ferguson (VSB #86583)
Solicitor General

Jason S. Miyares
Attorney General

Steven G. Popps (VSB #80817)
Deputy Attorney General

Erika L. Maley (VSB #97533)
Principal Deputy Solicitor General

Kevin M. Gallagher (VSB #87548)
Deputy Solicitor General

Travis S. Andrews (VSB #90520)
Assistant Attorney General

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

Charles J. Cooper (*Pro Hac Vice*)
Haley N. Proctor (VSB #84272)
Joseph O. Masterman (*Pro Hac Vice*)
John D. Ramer (*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

Counsel for Defendants Glenn Youngkin, Kelly Gee, John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Donald W. Merricks, Matthew Weinstein, Susan Beals, Eric Spicer, and Shannon Williams

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on September 28, 2023, 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.

/s/ Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

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

TATI ABU KING, et al., Plaintiffs, v. GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DECLARATION OF KELLY GEE

I, Kelly Gee, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I currently serve as the Secretary of the Commonwealth of Virginia. I have held this office since September 1, 2023.

2. As outlined in the Code of Virginia, the Secretary of the Commonwealth's office administers the process for restoration of civil rights. See Va. Code §§ 53.1-231.1, 53.1-231.2. That process begins with the submission of an application through my office's website. The felon discloses the nature of his or her conviction, whether the conviction was for a violent crime, whether he or she has finished serving all terms of incarceration, whether he or she is serving on probation, parole, or other state supervision (and, if so, the expected end date), and whether he or she has paid or currently is paying all fines, fees, and restitution pertaining to the conviction. My office reviews each application and works with other various state agencies to consider who may be eligible to have their rights restored.

3. Upon approval of an application, the Governor, through my office, issues a personalized restoration order. These orders are sent to the applicants via the United States Postal Service and made available to the applicants via the online application portal.

4. Since 1971, Virginia's governors have re-enfranchised over 330,000 felons. Governor Youngkin's administration has re-enfranchised 6,277 felons since he took office in January 2022.

Plaintiff Tati King

5. I understand that Plaintiff Tati King alleges that he was convicted of a drug possession felony in Fairfax County, Virginia in December 2018; that he served 11 months in prison and was released in June 2019; and that he "has applied for his voting rights to be restored." Amend. Compl. ¶¶ 14–18 (ECF No. 58).

6. Based on these allegations, my office conducted a thorough search of our records. We have located what we believe to be Plaintiff King's restoration application.

7. Plaintiff King's restoration application was filed with my office on April 5, 2023. Since May 2023, my office has been communicating with Plaintiff King about additional information needed to complete his application.

8. In preparing this declaration, I also reviewed Department of Corrections records relating to Plaintiff King.

9. In 1988, Plaintiff King was convicted of felony robbery.

10. In 2000, Plaintiff King violated his probation, and his sentence for felony robbery was reimposed.

11. Plaintiff King was again released from custody in 2011, and Governor McAuliffe granted his re-enfranchisement application in 2016.

12. Plaintiff King committed another felony and was convicted of possession of marijuana with intent to distribute in 2018.

13. Plaintiff King was released from custody in 2019.

Plaintiff Toni Johnson

14. I understand that Plaintiff Toni Heath Johnson alleges that she was convicted of felony "drug possession and distribution crimes, as well as child endangerment" in Washington County in 2021; that she was released from incarceration in 2022; that she is currently on probation; that she applied for re-enfranchisement; and that she learned in June 2023 that her application had been denied. Compl. ¶¶ 19–22, 78.

15. Based on these allegations, my office conducted a thorough search of our records. We have located what we believe to be a restoration application filed by Plaintiff Johnson.

16. Plaintiff Johnson's restoration application was filed with my office on September 1, 2022.

17. In preparing this declaration, I also reviewed Department of Corrections records relating to Plaintiff Johnson.

18. Johnson has been convicted of the following felonies: felony uttering in 1984, felony forgery in 1988, felony attempt to utter a forged check in 1988, felony credit card theft in 1991, felony bigamy in 1999, felony identity fraud in 2002, and felony grand larceny in 2003.

19. In 2021, she was also convicted of two counts of felony abuse and neglect of a child with reckless disregard for life, and three counts of felony drug possession. For those five felonies, she received suspended sentences and supervised probation.

20. My office deemed her to be currently ineligible for re-enfranchisement, and her application was therefore denied.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on September 28, 2023.

Kelly Gee
Secretary of the Commonwealth of Virginia

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

TATI ABU KING, et al., Plaintiffs, v. GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DECLARATION OF SUSAN BEALS

I, Susan Beals, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I currently serve as the Commissioner of Elections for the Commonwealth of Virginia. I have been in this role since March 18, 2022.

2. In my capacity as Commissioner of Elections, I serve as the principal administrative officer of the Virginia Department of Elections (ELECT).

3. I make this declaration to place certain information before the Court regarding the process by which an individual convicted of a felony becomes disenfranchised in Virginia.

4. Every month, the Virginia State Police's Central Criminal Records Exchange sends a report of all felony convictions to ELECT. This report contains felony convictions in Virginia general district and circuit courts. ELECT also receives the Secretary of State Report from the U.S. Attorney's Office for Felony Sentences, which identifies felony convictions in the federal district courts within Virginia.

5. ELECT uses these reports to identify currently registered voters and to populate the "felon hopper" for each relevant locality in the Virginia Voter registration system. These records

are also added to the "prohibited table" within the Virginia voter registration system. These actions do not automatically cancel a felon's voter registration.

6. General registrars receive the relevant information in their locality's "felony hopper" within the Virginia voter registration system and process the cancellation of voter registrations of felons who reside within their jurisdiction.

7. If a felon who was not previously registered to vote attempts to register, the voter registration system alerts the general registrar of the match to the "prohibited table," and the general registrar will deny the registration.

8. ELECT also routinely receives information from the Secretary of the Commonwealth concerning restoration-of-rights orders and pardons. After receiving the Secretary of the Commonwealth's report, ELECT staff update the Virginia voter registration system concerning those who have been re-enfranchised, removing the felon designation. As described above, general registrars receive this information in the Virginia voter registration system, such that an individual who has been re-enfranchised will be able to register to vote subject to the qualifications imposed on all individuals.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on September 27, 2023.

Susan Beals
Commissioner of Elections

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

TATI ABU KING, et al., Plaintiffs, v. GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.	No. 3:23-cv-408-JAG Hon. John A. Gibney

BRIEF OF AMICI CURIAE GREGORY P. DOWNS AND KATE MASUR IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

STEVEN A. HIRSCH
Calif. Bar No. 171825
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
(415) 391-5400
shirsch@keker.com

STEPHEN B. PERSHING
Virginia Bar No. 31012
KALIJARVI, CHUZI, NEWMAN & FITCH, P.C.
818 Connecticut Ave., N.W., Suite 1000
Washington, D.C. 20006
(202) 331-9260
spershing@kcnlaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Other Authorities

SOURCE ABBREVIATIONS USED IN THIS BRIEF

CC = *Constitutional Convention (1901-1902)*, ENCYCLOPEDIA VIRGINIA, *available at* https://encyclopediavirginia.org/entries/constitutional-convention-virginia-1901-1902/

Dailey = JANE DAILEY, BEFORE JIM CROW: THE POLITICS OF RACE IN POSTEMANCIPATION VIRGINIA (2000)

D&M = Gregory P. Downs & Kate Masur, *The Era of Reconstruction, 1861–1900: A National Historical Landmarks Theme Study* (2017), *available at* http://www.npshistory.com/publications/nhl/theme-studies/reconstruction-era.pdf.

Disfranchisement = *Disfranchisement*, ENCYCLOPEDIA VIRGINIA, *available at* https://encyclopediavirginia.org/entries/disfranchisement/

Downs = GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015)

Drug War = Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* (June 2015), *available at* https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf.

Egerton = DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA (2014)

Ford = Matt Ford, *The Racist Roots of Virginia's Felon Disenfranchisement*, THE ATLANTIC (Apr. 27, 2016), *available at* https://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072/

Gibson = Helen A. Gibson, *Felons and the Right to Vote in Virginia: a Historical Overview*, 91 THE VIRGINIA NEWS LETTER 1 (2015), *available at* https://vig.coopercenter.org/sites/vig/files/VirginiaNewsLetter_2015_V91-N1.pdf

Holloway = PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP (2014)

Key = V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1984)

Kousser = J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974)

Manza = JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006)

McIver = John McIver, *Voter Turnout*, *in* HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ON LINE (Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines,

Alan L. Olmstead, Richard Sutch & Gavin Wright, eds., 2006)

Nunn = Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CENTER FOR JUSTICE, available at https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained

NWM = *No White Man to Lose His Vote in Virginia*, ENCYCLOPEDIA VIRGINIA, *available at* https://encyclopediavirginia.org/no-white-man/

Perman = MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908 (2001).

Pildes = Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONSTITUTIONAL COMMENTARY 295 (2000).

Riser = R. VOLNEY RISER, DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908 (2010)

Smith = J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA (2002)

Uggen et al. = Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENTENCING PROJECT (Oct. 25, 2022), *available at* https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/

VC = *The Virginia Constitution of 1971*, ENCYCLOPEDIA VIRGINIA, *available at* https://encyclopediavirginia.org/entries/the-virginia-constitution-of-1971/#:~:text=Among%20other%20changes%2C%20the%20Constitution,added%20an%20article%20on%20conservation.

War on Drugs = History.com, *War on Drugs* (updated Dec. 17, 2019), *available at* https://www.history.com/topics/crime/the-war-on-drugs.

Williams = KIDADA E. WILLIAMS, THEY LEFT GREAT MARKS ON ME: AFRICAN AMERICAN TESTIMONIES OF RACIAL VIOLENCE FROM EMANCIPATION TO WORLD WAR I (2012)

I. STATEMENT OF INTEREST[1]

Amici curiae are university professors with decades of experience and scholarship concerning the era of the American Civil War and Reconstruction. They submit this brief to help the Court evaluate the history and intent behind, and ultimately the legality of, Virginia's felon-disenfranchisement clause (Article II, § 1 of the Virginia Constitution).

Gregory P. Downs is Professor and Chair of the History Department at the University of California, Davis. Professor Downs studies the political and cultural history of the United States in the nineteenth and early twentieth centuries, particularly the transformative impact of the Civil War, the end of slavery, and the role of military force in establishing new meanings of freedom. He is the author of three scholarly books on Reconstruction—*Declarations of Dependence: The Long Reconstruction of Popular Politics in the South, 1861–1908* (2011); *After Appomattox: Occupation and the Ends of War* (2015); and *The Second American Revolution: The Civil War Era Struggle Over Cuba and the Remaking of the American Republic* (2019)—and is the co-creator of *Mapping Occupation*, an interactive digital history of the U.S. Army's occupation of the South (www.mappingoccupation.org). In 2018, he was elected to the Society of American Historians and given UC Davis's Distinguished Scholarly Public Service Award.

Kate Masur is the Board of Visitors Professor of History at Northwestern University, where she specializes in the history of race, politics, and law in the United States. Her recent book, *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction* (2021), was a finalist for the Pulitzer Prize in History and winner of several other book prizes. Masur's other published scholarship includes *An Example for All the Land: Emancipation and the Struggle Over Equality in Washington, D.C.* (2010), and a new edition of the first book-length treatment of Lincoln's relationships with African Americans, John E. Washington's *They Knew Lincoln* (1942). Masur recently coordinated a team that produced the

[1] No party's counsel authored this brief in whole or in part; and no person, party, or party's counsel contributed money that was intended to fund preparing or submitting this brief, which was prepared on a *pro bono* basis.

web exhibit *Black Organizing in Pre-Civil War Illinois: Creating Community, Demanding Justice*. Part of the Colored Conventions Project, this online exhibit highlights early Black communities and Black activism in Illinois.

Professors Downs and Masur are frequent professional collaborators. They are co-authors of the National Park Service's only major study of Reconstruction, the *National Historic Landmarks Theme Study of the Era of Reconstruction* (2017), and they helped edit the Park Service's handbook on Reconstruction. They are co-editors of a scholarly volume on the post-Civil War world and co-editors of the preeminent scholarly journal in their field, the *Journal of the Civil War Era.* They have also consulted extensively on documentaries and museum projects, including serving as scholarly advisors to the 2019 documentary *Reconstruction: America after the Civil War*. Together and separately, they have published op-eds in many publications, including the *New York Times,* the *Washington Post,* the *Atlantic Monthly,* and the *San Francisco Chronicle*.

II. INTRODUCTION[2]

The United States is unique among the world's major democracies and industrialized nations for its broad, automatic loss of voting rights for people with felony convictions, even those who have completed their sentences. (Gibson 1.)[3] In 2022, an estimated 4.6 million people—two percent of the total U.S. voting-eligible population—were disenfranchised due to a felony conviction. Three-fourths of them had fully completed their sentences or remained supervised on probation or parole. And the racial disparity in disenfranchisement is stark. One in 19 African Americans of voting age is disenfranchised, a rate 3.5 times that of non-African Americans. Among the adult African American population, 5.3 percent are disenfranchised compared to 1.5 percent of the adult non-African American population. In eight states—

[2] Throughout this brief, unless otherwise indicated, emphases were added to quotations.

[3] Maine and Vermont, and most countries, allow incarcerated felons to vote. (Gibson 1.)

Alabama, Arizona, Florida, Kentucky, Mississippi, South Dakota, Tennessee, and Virginia—more than one in 10 African American adults is disenfranchised. (Uggen et al.)

In this brief, amici curiae historians examine how felon disenfranchisement developed in Virginia and throughout the former Confederate states after the Civil War as a method specifically designed to disenfranchise black voters *en masse*. Amici show that the Virginia Constitution's felon-disenfranchisement clause not only violates the federal statute that readmitted Virginia to the Union but also is grounded in racism and explicit racial discrimination. And amici specifically refute defendants' erroneous argument that Virginia's current Constitution complies with federal law because "it imposes no restrictions on the franchise beyond those imposed by [Virginia's] 1869 Constitution."[4]

III. DISCUSSION

A. Historical context of the felon-disenfranchisement provision

Article II, § 1 of the Virginia Constitution provides that "[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." This phrase carried forward an illegal program of felon disenfranchisement dating back the Virginia constitutional amendment of 1876 and to the Virginia Constitution of 1902. The purpose, significance, and blatant illegality of the Virginia Constitution's felon-disenfranchisement clause can be appreciated only when viewed in the context of history—specifically, the history of African American enfranchisement and disenfranchisement that followed the Civil War and led to this provision's inclusion in the state constitution.

In the years 1867–1908, African American men were first enfranchised by Republican Reconstruction policies and legal changes and then, in three distinct phases, were

---

[4] Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint Under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) at 18 (Doc. 54) [hereinafter "MTD Brief"]. *See* Part III.B.2., *infra*.

disenfranchised again. (Perman 10-12.) To sum up the tumultuous developments of that period: Although the United States (along with Haiti) led the way among former slave societies for almost immediately enfranchising previously enslaved men, by the early twentieth century it had become a laggard, with lower voter turnouts than many comparable countries and more restrictive poll access. The United States also was remarkable for its volatility—for having extended the right to vote to a vast new group, the freedmen of the South, and then having largely taken it away again. (D&M 52.) Indeed, during the 50 years after the Civil War, Americans remade the country's political system not once, but twice. (D&M 40.)

Below, amici provide an overview of that series of events, followed by a more specific discussion of felon disenfranchisement. Along with literacy tests and poll taxes, felon disenfranchisement played a central role in southern politicians' systematic efforts to eliminate Black men from the electorate.

1. Black enfranchisement during the early Reconstruction.

Almost 40 percent of residents of the former Confederate states were Black, and in some states they constituted an actual or near majority. Granting them voting rights thus had the potential to totally upend the southern political order. (D&M 40.) In 1865–1866, Black men's enfranchisement emerged as a pivotal issue for Reconstruction policymaking in Washington and for politics on the ground in the South. (D&M 43.) Following Lincoln's assassination, the question passed to his successor, Andrew Johnson. (D&M 43.) Disappointing the hopes of freedpeople and anti-slavery advocates, Johnson in late 1865 issued proclamations reorganizing state governments and allowing them to restrict the vote to whites eligible under old state constitutions. (D&M 43-44.)

Organizations of freedpeople lobbied Congress to include suffrage in the Fourteenth Amendment, which was then moving through Congress. (D&M 44.) But Johnson fiercely opposed Black suffrage, and the Fourteenth Amendment did not include it. (D&M 44-45.) After Republicans won a crushing victory in the fall 1866 elections, however, Congress overrode

Johnson's veto to pass the Military Reconstruction Acts, which ordered the army to register both Black and white male citizens (but not some high-ranking Confederates) to vote for new state constitutions. (D&M 45; Downs 174.) At conventions held in almost all former rebel states—despite a wave of white violence that included invading homes, raping women, and attacking children (Downs 196)—freedpeople and white allies wrote biracial suffrage into state constitutions. (D&M 45; Perman 16.) Virginia adopted a new constitution in 1869 that granted suffrage to Black men.[5] (Smith 20.)

Between 1867 and 1870, the governments that had been established under universal male suffrage transformed Southern politics, bringing Black men into elected and appointed office in many cities and spurring the modernization of legal, educational, and infrastructure systems in the South. But Black suffrage in the South hung on the narrow thread of state constitutions and statutes. (D&M 46.) After Ulysses S. Grant was elected president in 1868, Republicans seized upon the opportunity of a lame-duck Congress to push through the Fifteenth Amendment, a legislative compromise that again failed to enact a positive right to vote but barred restrictions based on race, color, or previous condition of servitude. (D&M 46-47.) The Amendment, ratified in 1870, nevertheless left the states responsible for determining the specific qualifications for voting. (Perman 16.) Literacy tests, property qualifications, the exclusion of women, and even religious limitations all remained constitutional. (D&M 46-47.)

Still, the Fifteenth Amendment was a milestone in U.S. history. During the Constitution's first 80 years of existence, states had exercised virtually limitless authority to determine who could vote. The Fifteenth Amendment made it illegal to bar people from voting based on their race. (D&M 48.)

---

[5] The document was known as the "Underwood Constitution" after New York native John C. Underwood, a Republican judge who dominated the convention in the absence of boycotting Democrats. The document that he helped to draft included full suffrage for all males 21 years or older, including African Americans. CC.

2. The Great Rollback, Phase One (1866–early 1870s): White terror tactics and Northern exhaustion effectively terminate Reconstruction reforms

In the late 1860s, the Ku Klux Klan and other paramilitary clubs in the South mounted a campaign of violence, terror, and political assassinations to nullify Black men's right to vote. (D&M 48-49.) The years 1866–1867 were marked in the South by a string of massacres of and atrocities against African Americans. (D&M 55-58.) In response, Congress passed a series of voting-rights enforcement acts, most notably the Ku Klux Klan Act of 1871, which authorized the president to declare counties to be in a state of insurrection, suspend the writ of habeas corpus, and use the military to arrest and hold vigilantes and terrorists for trial in federal court. (D&M 49-50, 58-61.)

In the late 1860s and early 1870s there were notable enforcement successes, but the federal government's resources were effectively overwhelmed in the first half of the 1870s as so-called red shirts, rifle clubs, and the White League, serving as paramilitary arms of the Democratic party, targeted individuals and communities before elections to make it clear to Black citizens that engaging in politics meant risking death. (D&M 61; *see* Williams 17-54 (describing in detail the testimony of terrorized African Americans).) White Southerners' violent resistance to emancipation and the rise of Black political power, and the triumph of Democrats in the 1874 midterm elections, eventually wore down the Northern Republicans' resolve to enforce Reconstruction policy. (D&M 62.)

By 1875, the Grant administration had largely stopped trying to intervene to protect freedpeople's rights in the former Confederacy. (D&M 62.) And in 1878, the Democrats, resurgent in national politics, passed what became known as the Posse Comitatus Act, which attempted to limit the army's ability to intervene to protect voters. (D&M 50.)[6]

---

[6] The Posse Comitatus Act consists of just one sentence: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." This means that members of the military who are subject to the Act may not participate in civilian law enforcement unless expressly authorized to do so by a statute or by the Constitution. "Despite the ignominious

3. The Great Rollback, Phase Two (mid-1870s to mid-1890s): Suffrage restriction through election-day fraud and intimidation

In the period from the mid-1870s to the mid-1890s, the South carried out disenfranchisement through fraud, tricks, and legal stratagems, frustrating the Black voter at election time by physical or verbal intimidation to prevent him from voting, or, if he did vote, by destroying his ballot, tallying his vote for a different candidate from the one he actually voted for ("counting out"), stuffing ballot boxes with phony ballots, or printing ballots containing false names similar to those of Republican candidates. (Perman 14; Dailey 160.) Laws passed in this period played a role, too, by "mak[ing] dishonesty and fraudulence possible and then protect[ing] the perpetrators. In effect, election laws and election fraud were essential and interdependent parts of the South's electoral system by the early 1890s." (Perman 19.) In a cruel perversion of Brandeis's "laboratory of democracy" model of federalism,[7] Southern states learned from each other's successes in eliminating the Black vote. (Kousser 39-40.)

Virginia absorbed lessons from this exchange, too. In 1883, Virginia Democrats regained control of both houses of the General Assembly. The following year, they passed the Anderson-McCormick Act, whose purpose was to complete the destruction of the Readjuster coalition that had won control of the state in 1879 and 1881. (*Disfranchisement*; Dailey 160-61.)[8] The Act effectively granted Democratic Party workers control of voter registration, the conduct of elections, and the compilation and reporting of election results. Under the Anderson-McCormick

---

origins of the law itself, the broader principle that the military should not be allowed to interfere in the affairs of civilian government is a core American value." (Nunn.)

[7] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[8] "The Readjuster Party . . . was the most successful interracial political alliance in the postemancipation South. An independent coalition of black and white Republicans and white Democrats, the Readjusters governed Virginia from 1879 to 1883. . . A black-majority party, the Readjusters legitimated and promoted African American citizenship and jury service. To a degree previously unseen in Virginia and unmatched elsewhere in the nineteenth-century South, the Readjusters became an institutional force for the protection and advancement of black rights and interests." (Dailey 1-2.)

Act, Virginia's election corruption became so notorious[9] that a decade later the General Assembly passed the Walton Act of 1894, which for the first time required the state to supply official ballots that listed all of the candidates. (*Disfranchisement*.)

Although the secret ballot often is thought of as a reform, its adoption in the South of the late nineteenth century was intended to depress voting by illiterate Black and white voters, who needed help to fill out the confusing ballots that were presented to them. (Perman 19-21; Kousser 51-56.) Thus, the Walton Act, although touted as an anti-corruption measure, achieved the same purpose as the Anderson-McCormick Act but by other means. (*Disfranchisement*.) Besides "secrecy," it required that the mandated state-printed ballots omit the party names and symbols that helped illiterate and barely literate voters determine how to mark their ballots. Voters were granted just two-and-a-half minutes to makes their choices and had to draw a line exactly three-fourths of the way through the printed name of every candidate they did ***not*** wish to vote for. (Perman 196; Dailey 160-61.) The *New York Times* reported on October 29, 1894, that the Act's "most effective, as well, possibly, as its most repugnant, feature is that providing for the appointment of a special constable. This officer is practically the ballot reader for the physically disqualified and the illiterate. It is within his power to disqualify or neutralize the votes of as many of the latter class as he may see fit." (CC.) The Walton Act was so effective that it is said to have "ended most actual black voting in Virginia." (Kousser 175.) Between 1888 and 1896, aggregate voter turnout in federal elections in Virginia fell from an estimated 83.2% of eligible voters to 71%. (McIver 5:165-66.)

---

[9] "In precincts with large numbers of Republican and African American voters, the Democratic officials could stuff ballot boxes, lose or destroy boxes or ballots, slow down voting so much that men were left standing in line when the polls closed, and employ other techniques to steal elections. A popular trick was for Democratic voters to bring ballots, or tickets, printed on tissue paper and deposit several ballots in the box at once. When the box was opened the judges would find more ballots than there were voters. Under the law, a blind-folded judge would then remove from the box enough ballots to make the numbers of voters and ballots equal; but because parties supplied their voters with tickets printed on various kinds of paper or in different sizes, a dexterous judge could easily remove mostly Republican ballots and allow Democratic candidates to win." (*Disfranchisement*.)

Mississippi, the pacesetter in disenfranchisement, faced the U.S. Supreme Court's judgment in *Williams v. Mississippi*, 18 S.Ct. 583 (1898), which upheld its disenfranchisement laws on the grounds that they did not "on their face discriminate between the races, and it ha[d] not been shown that their actual administration was evil; only that evil was possible under them." *Id*. at 225. (*See* D&M 50.)[10] Spurred on by the ruling, other states soon copied the Mississippi model, sometimes expanding on it through the use of the grandfather clause[11] and the deliberately confusing practice of handing voters different ballots for different races and requiring that each ballot be deposited in the correct ballot box. (D&M 50; Holloway 62-63; Kousser 50.)

Despite these tactics, Black male political participation remained surprisingly high, even after the loss of Republican control in southern state governments. In 1880, two-thirds of adult Black men voted in the Presidential election. Even in the 1890s, half of Black men still voted in key governor's races in southern states. Between 1867 and the early 1900s, Black officials also held around 2,000 political offices in the South, ranging from state supreme courts, to the U.S. Senate, down to the county and local levels. (Pildes 300.) But southern elites would not long tolerate that state of affairs.

4. The Great Rollback, Phase Three (1890–1908): "Lawful" constitutional disenfranchisement by preventing the registration of Black voters

After Congress failed to enact new voting-rights legislation in 1890–91 (D&M 50, Perman 38-43, Kousser 29-33), and then repealed all federal election laws in 1893–94 (Perman 43-47), the third and final phase of the Great Rollback commenced. (Perman 21-22, 31.) White

---

[10] Williams alleged that, in violation of the Fourteenth Amendment, he had been indicted by a grand jury from which African Americans were effectively excluded because Mississippi's 1890 constitution and implementing statutes had been designed to, and did, confer unconstitutional discretion on election officials to prevent African Americans from registering to vote and thus from sitting on grand or petit juries. 170 U.S. at 213–15.

[11] Grandfather clauses exempted from newly imposed suffrage restrictions those eligible to vote as of 1866 and their lineal descendants. (Pildes 298 n.15.)

southern elites now sought "a decisive and final solution to the suffrage problem" by "removing the black vote altogether and restoring the electorate to its pre-Reconstruction form and composition. In other words, the objective in [the] third phase, when the southern Democrats embarked on disfranchisement, was restoration of the status quo prior to the introduction of black suffrage during Reconstruction." (Perman 17.)

The focus now shifted from "deprivation of the *ability* to vote at *elections*" to "deprivation of the *right* to vote at *registration*." (Perman 15 (emphases in original).) In this period, starting with Mississippi in 1890 and ending with Georgia in 1908 (Pildes 301), "the vote was *eliminated* by constitutional means rather than being *manipulated* and controlled as before." (Perman 6.) "One by one, over a period of two decades, each state in the former Confederacy set in motion complicated and hazardous electoral movements aimed at *removing* large numbers of its eligible voters." (Perman 1.) By these means, "the forces of elite, conservative, white political control, through the organized vehicle of the Democratic party," engaged in a "step-by-step process eventually culminat[ing] in sufficient white control to produce new constitutional conventions, or suffrage-restricting constitutional amendments through referenda,[[12]] in every former Confederate state." (Pildes 301.)

The "avowed purpose of these new constitutions was to restore white supremacy, but that was not their only aim." (Pildes 301-02.) The "Framers of disfranchisement were typically the most conservative, large landowning, wealthy faction of the Democratic Party," and their favored laws "remov[ed] the less educated, less organized, more impoverished whites from the electorate as well," ensuring one-party Democratic rule over the South through most of the twentieth century (Pildes 302) and eliminating the dangerous influence of bi-racial populist coalitions (Kousser 33-39). "The white-supremacy purposes of these new constitutions were not

[12] Democrats in North Carolina, Texas, and Georgia avoided the risks and expense of calling constitutional conventions by amending the suffrage clauses of their constitutions in referenda. (Kousser 182.)

disguised (though the concomitant aim of reducing populist white political influence was)." (Pildes 302.)[13]

Another purpose of the constitutional conventions was to reverse the plummeting reputation of southern electoral systems and, by extension, of southern government generally. Democrats "turned increasingly to methods that actually struck voters from the lists" because the "flagrant chicanery" of ballot-stuffing and similarly fraudulent election-day methods had "eroded popular confidence in government, supplied grist for Republican campaign mills, and kept alive national GOP hope that they could regain power in the South if only they could obtain a fair count." (Kousser 47, *see also id*. at 262-65.) In Virginia, some delegates characterized the shift from fraudulent local-election administration to formalized constitutional disenfranchisement as a "reform" that would clean up and increase respect for Virginia's electoral system while still disenfranchising Black people. (Perman 14-16; Dailey 162-63; Smith 25.) Virginia Senator John Daniel thought suffrage restrictions would allow the white Southerner to rule with "decency and with the association of that law and order which will command the respect not only of himself but of the whole civilized world." (Kousser 263.) And future Senator Carter Glass, addressing the Virginia constitutional convention, explained the legal formalization of disenfranchisement in starker terms:

> [Disfranchisement] by fraud, no; by discrimination, yes. But it will be discrimination within the letter of the law, and not in violation of the law. Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate. (Smith 26.)

---

[13] "The framers [of the disenfranchising state constitutions] could not have openly avowed a desire to disfranchise whites without courting defeat in the referenda on calling conventions or ratifying amended documents." (Kousser 69.)

5. The constitutional disenfranchisement process in Virginia (1901–1902)

As discussed above, the former Confederate states amended their constitutions in 1890–1908 to eliminate Black suffrage. In Virginia, the constitutional "reform" process was itself spawned in perfidy, as the May 1900 referendum on whether to hold a constitutional convention was rigged in favor of holding one. (Perman 204-05.) A second referendum yielded a convention composed of 11 Republicans, one independent, and 88 Democrats, the latter group including a U.S. Senator, six former congressmen, one incumbent, and 64 lawyers, most of whom were past or present officeholders as judges or commonwealth attorneys. (Perman 205; CC.)

A broadside circulated in 1901 by Democratic leaders left no doubt as to the convention's purpose and intent.[14] State Democratic party chairman J. Taylor Ellyson gave his "personal and official assurance" that the convention had "the fixed and inalterable intention of enacting a clause which will . . . forever remove the negro as a factor in our political affairs and give to the white people of this Commonwealth the conduct and control of the destinies which they have the right to shape and determine." (NWM.) John Goode, the convention's president, reminded the public that the Democratic party had "pledged . . . to eliminate the ignorant and worthless negro as a factor from the politics of this State without taking the right of suffrage from a single white man[.]" (NWM.) And Democratic gubernatorial candidate A. J. Montague reassured whites that the convention was "slowly, but surely, framing a law that will so effectually exclude the idle, shiftless and illiterate of the negro race from the suffrage that the gates of republican wrath cannot prevail against it," and that "no white man will be disfranchised." (NWM.)

Throughout the chaotic and divisive year-long convention, delegates struggled with the seemingly intractable problem of how to eliminate the Black vote categorically and forever by legal means that were **(1)** facially neutral and thus apparently compliant with the Fifteenth Amendment, **(2)** fixed by rule and not dependent upon existing methods that involved the

---

[14] The broadside is reproduced after the signature blocks in this brief.

embarrassingly fraudulent exercise of discretion by local officials on election day, and **(3)** consistent with the Democratic pledge not to disenfranchise white men. (Perman 215-21; NWM.) In the end, Article II of the proposed constitution required would-be voters to fight their way through a maze of financial and educational impediments.

- An adult male applying in 1902–1903 to register to vote had to be **(1)** a veteran of the Confederate or Union army or navy or his son; or **(2)** a person who owned property for which state taxes of at least one dollar had been paid for the coming year; or **(3)** a person able to read and give a "reasonable explanation" of any section of the new Virginia constitution submitted to him by the registrars or, if unable to read that section, able to "understand and give a reasonable explanation" of it when a registrar read it to him.[15] On election day, a voter who registered before January 1, 1904 would forever be entitled to assistance from the election officer of his choice when preparing his ballot.[16] These temporary "loopholes" were designed to help poor whites. The third loophole—the so-called "understanding clause"—prolonged the embarrassingly corrupt election-day discretion of local officials just long enough to give any illiterate white people who were willing and able to pay the poll tax a last shot at permanent voter registration before the door closed in their faces. (Perman 214-23.)
- For those applying to register after January 1, 1904, the white-friendly loopholes evaporated and the applicant must **(1)** pay, at least six months before the election, all state poll taxes assessed or assessable against him under the new constitution for the three years preceding the year of the election in which he was offering to vote (but Civil War veterans were exempted from all poll taxes);[17] **(2)** unless

---

[15] VA. CONST., art, II, § 20 (1902).

[16] *Id*., art. II, § 21.

[17] *Id*., art. II, §§ 21–22. Poll taxes could not be collected by legal process until three years past due. *Id*., art. II, § 22. The official list of persons who had failed to timely pay their poll tax must

physically unable, apply to register in his own handwriting without aid, stating his name, age, date, and place of birth, residence, and occupation at the time of applying and for the two preceding years, and whether he had previously voted and, if so, the state, county, and precinct in which he last voted; and **(3)** answer under oath any and all questions put to him by the registrars about his qualifications as a voter, with his sworn answers being reduced to writing and kept on file.[18] In addition, on every election day for the rest of his life he must "prepare and deposit his ballot without aid[.]"[19]

- The General Assembly would provide ballots "without any [of the] distinguishing mark[s] or symbol[s]" that illiterate and near-illiterate voters had relied upon to determine a candidate's party affiliation.[20]
- The General Assembly was authorized to prescribe a property qualification not exceeding $250 for voters in any county or subdivision thereof, or city or town, as a prerequisite for voting in any election other than one for members of the General Assembly, upon the initiative of the representative of that county, city, or town affected, but could exempt anyone from the property qualification so long as the exemption would not violate the federal constitution.[21]

These byzantine rules were to be enforced by local registration boards invariably composed of three Democrats and zero Republicans. (Perman 221-22.)[22] Having approved these

---

"state the white and colored persons separately[.]" *Id*., art. II, § 38.

[18] *Id*., art, II, § 19.

[19] *Id*., art, II, § 21.

[20] *Id*., art. II, § 28.

[21] *Id*., art. II, § 30.

[22] In the immediate aftermath of the constitutional-disenfranchisement movement, the Democratic Party throughout the South instituted direct all-white primaries as a mechanism for enforcing party discipline on insurgent white candidates who might otherwise try to overthrow the Democratic machine by courting whatever remained of the Black vote. This completed the disenfranchisement project in the South. (Perman 302-03; *but see* Kousser 82 ("Despite its name,

measures, the constitutional convention—fearful that the public might not vote to disenfranchise itself—broke a Democratic Party pledge to submit the proposed constitution to a referendum. Instead, it simply proclaimed the document to be law. (Kousser 180-81.)

6. The effects of constitutional disenfranchisement on Black and white voter participation

The effect of the new disenfranchising state constitutions throughout the South, combined with statutory suffrage restrictions, was "immediate and devasting." (Pildes 303.) The number of registered African Americans plummeted to a few thousand in each state. (Perman 319.) In Virginia, there was a *100% drop—to zero*—in estimated Black voter turnout between the elections of 1900 and 1904. (Pildes 304.)[23] Disenfranchisement also extended to poor, illiterate whites, causing a sharp decline in overall voter turnout. Between 1901 and 1904, the voting electorate in Virginia was halved, cementing Democratic control of the state because "the black vote had dropped so massively that the party could absorb the simultaneous loss of many of its own [white] voters." (Perman 221-22.)[24] Not until the abolition of the poll tax in the 1960s and the adoption of the federal Voting Rights Act of 1965 did Black men and women register and vote in substantial numbers in Virginia, outside of a few urban precincts. (*Disfranchisement*.) Indeed, the Virginia electorate as a whole was "so thoroughly eviscerated" that throughout the first half of the twentieth century, Democratic gubernatorial candidates where regularly elected with the support of less than 10% of the adult population, and state employees and officeholders

---

the white primary had virtually no effect on Negro voting in the period from 1880 to 1910.")).

[23] *But see* CC ("Although as many as 15,000 African Americans managed to vote after 1902, they were significantly disempowered politically.").

[24] Similar results obtained in Louisiana, where Black registered voters dropped from 130,334 in 1896 to 5,320 in 1900, two years after the state's disenfranchising constitution was enacted. (Pildes 303.) In Alabama, there were 181,471 eligible Black voters in 1900, but only 3,000 were registered after the new constitutional provisions took effect. (Pildes 303–04.) In South Carolina, where Black legislators had constituted the majority in the lower house during Reconstruction, only 5,500 Black voters registered. (Pildes 303.)

accounted for one-third of the votes in state elections. Political scientist V.O. Key wrote that, by contrast with Virginia, "Mississippi [was] a hotbed of democracy." (Smith 26 (quoting Key 20).)

The Supreme Court effectively blessed the disenfranchising constitutions in the case of *Giles v. Harris*, 189 U.S. 475 (1903), a "momentous" decision that scholar Richard Pildes has characterized as "wed[ding] legalism with realpolitik into one of the most fascinatingly repellent analyses in the Court's history." (Pildes 297-98.) Giles alleged that "the whole registration scheme of the Alabama Constitution [was] a fraud upon the Constitution of the United States"; and for his remedy, he asked the court to **(1)** declare the Alabama voter-registration scheme illegal and void and **(2)** order that he and over 5,000 similarly situated Black men be registered to vote. 189 U.S at 486. When the case reached the Supreme Court, Justice Oliver Wendell Holmes's opinion for the Court disposed of Giles's claims on the grounds that "[t]he traditional limits of proceedings in equity have not embraced a remedy for political wrongs" and that Giles had sought remedies that were both improper[25] and impossible for the court to enforce in the face of widespread white hostility. *Id*. at 486–87.

"[O]nce the Supreme Court [in *Giles*] effectively blessed the disfranchising constitutions, those constitutions then created an electorate in their own image." (Pildes 313; *see also* Riser.) Southern politics turned sharply repressive, falling under the sway of large landowners and textile manufacturers. (D&M 50-51.) In Virginia, the disenfranchising constitution of 1902 remained in effect throughout most of the twentieth century until a new state constitutional

---

[25] As to the first remedy sought by Giles—declaring the registration scheme void—declaratory judgment was not then available in equity and would not become available in federal courts for another three decades. *Id*. at 486; *see* Borchard, *The Next Step Beyond Equity—The Declaratory Action*, 13 U. CHICAGO L. REV. 145 (1946); WRIGHT & MILLER, 10B FED. PRAC. & PROC. Civ. § 2752 (4th ed. 2023) (setting forth history of federal Declaratory Judgment Act).

As to the second remedy—the request to be registered—the court employed reasoning that Professor Pildes rightly denounces as specious: If the registration scheme was fraudulent and illegal as Giles alleged, "how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?" 189 U.S. at 486.

commission sought to revise it, resulting in the Virginia Constitution of 1971. (CC.) As discussed below, however, the 1971 Constitution perpetuated felon disenfranchisement.

B. Felon disenfranchisement

Along with poll taxes and literacy tests, crime-based disenfranchisement played a central role in the South's system for eliminating the Black electorate. (Holloway *x*, *xiv*–*xv*.) Recognizing this, the Reconstruction Congress made the containment of crime-based disenfranchisement a "fundamental condition" for readmitting former Confederate states, including Virginia, to the Union. But obedience to that condition would prove to be another victim of the Great Rollback.

1. Attempts by Congressional Republicans to restrict crime-based disenfranchisement in the former Confederate states

In the immediate aftermath of the Civil War—before newly freed African Americans had even been granted voting rights—southern whites wielded criminal conviction as a weapon to ensure that Black people would be "disqualified in advance" from being able to exercise any voting rights that the proposed Fourteenth Amendment might later confer on them. The disenfranchisers spotted their opportunity in Section Two of the proposed amendment, which allowed states to deny suffrage for any reason but punished those that did so with a loss of congressional representation—***unless*** suffrage was denied for "participation in rebellion, ***or other crime***." (Holloway 33-34, 173 n.39.)

North Carolina led the way in exploiting this "other crime" loophole. Under existing North Carolina law, individuals who had received whippings as criminal punishments were permanently barred from voting. So North Carolina rounded up as many Black men as possible for petty offenses and then engaged in a campaign of mass whippings that went on every day for a month. (Holloway 33-36.) With the same motive of achieving "disqualification in advance," South Carolina enacted a law authorizing judges to disenfranchise those convicted of felonies for 10 to 20 years—and the law also reclassified as felonies many types of petty theft previously considered to be misdemeanors. (Holloway 36.)

Republicans in Congress, aware of these developments, included a countermeasure in the first Reconstruction Act (the statute, passed on March 2, 1867, that set the basic terms for restoring former Confederate states to the Union). The Act affirmed that former Confederate states (except Tennessee) remained under military rule; established a new form of military governance; and delineated the process by which states would be readmitted after holding new constitutional conventions. Rather than deferring to prior state law, Congress set the parameters for who could vote in elections for delegates to the new conventions. The Act therefore provided that delegates must be elected by "the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion *or for felony at common law*."[26]

Two judgments shaped that provision. *First*, the Reconstruction Act acknowledged that states had the right to disenfranchise people convicted of the very small number of felonies that states had classed as infamous or as rising to the level of precluding people from participating in political life (though in some states the list of disenfranchising felonies did not even include murder). *Second*, the statute—written by legislators cognizant of Southern political developments—specified the precise conditions under which states could disenfranchise people who had committed crimes: Individuals could be disenfranchised for "felony at common law" but not, the statute implied, for other criminal convictions. That is, states could not manipulate or expand the list of disenfranchising felonies to exclude Black voters. In sum, when Congress approached Reconstruction, it acted to preserve the traditional state power over infamous felonies[27] while preventing the extension of disenfranchisement to broader lists of felonies.

---

[26] An Act to Provide for the More Efficient Government of the Rebel States, enacted March 2, 1867, ch. 153, 14 Stat. 428, § 5 (1868).

[27] Pippa Holloway explains that white southerners seized upon the ancient notion of "infamy" as "a means to disfranchise a portion of the African American population, and [as] a rationale for making distinctions between different kinds of criminal convictions." (Holloway 2-3.) "Infamy," in Holloway's account, inverts the normal understanding that the criminal conduct justifies the punishment; instead, it asserts that the degrading or humiliating nature of the punishment—e.g.,

Southern Democrats tried to end-run the Reconstruction Act's requirement in various ways—for example, by disenfranchising Black people who had been *accused* of felonies but never properly tried and convicted. But federal administrators in the South pushed back, limiting disenfranchisement to those convicted of a felony by a "court of competent jurisdiction." (Holloway 38-40.) The state constitutions that emerged from the Congressionally mandated 1868 conventions protected (or failed to protect) African Americans from felon disenfranchisement to varying degrees, depending mainly on the balance of power between radical and moderate Republicans in those conventions. In Virginia, as in Florida and Alabama, the "moderates" won out and the resulting constitution of 1869 failed to rein in crime-based disenfranchisement. (Holloway 44-45.)

Based on what had occurred in North and South Carolina, some congressional Republicans surmised that southern Democrats would try to subvert the Reconstruction Act's restrictions on crime-based disenfranchisement. Accordingly, they persuaded Congress to use the Readmission Acts passed in 1868 and 1870 to further limit such disenfranchisement. For instance, in summer 1868, when Congress passed measures readmitting seven former Confederate states, it imposed various "fundamental conditions," including a requirement that the state not deny the vote to any citizen "entitled to vote by the constitution thereof . . . *except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of the state*."[28] This language echoed both the Reconstruction Act's limiting of conviction-related disenfranchisement

---

whipping, branding, pillorying, confinement to hard labor (*id*. at 169 n.6)—proves the degraded and inferior nature of the person punished and thereby justifies their mistreatment. (*See id*. at 6-7.) This perversely circular notion served as a means to "disenfranchise the [Black] race—by associating African Americans with criminality, degrading them through legal and extralegal violence, and denying the newly freed slaves the dignity traditionally associated with those deserving of suffrage." (*Id*. at 3.) The North Carolina mass-whipping campaign described earlier is an example of "infamy" at work. (*See id*. at 33-36.)

[28] *See, e.g.*, An Act to Readmit the State of Arkansas to Representation in Congress, enacted June 22, 1868, ch. 69, 15 Stat. 72 (1868).

to "felonies at common law" and the Thirteenth Amendment, which likewise made due conviction of a crime the prerequisite for slavery or involuntary servitude.[29]

In Virginia's Readmission Act, signed by President Grant on January 26, 1870, Congress adopted the same language it had used earlier, making it a condition of readmission that "the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the right to vote . . . *except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State*[.]"[30]

One proponent of the Virginia Readmission Act's felon-disenfranchisement restriction, Ohio Republican William Lawrence, called that restriction a "fundamental condition" of Virginia's readmission and an enforceable exercise of Congress's constitutional duty to "guarantee to each state a republican form of government."[31] He further explained that the "fundamental condition" regarding felon disenfranchisement was "designed to secure equality of rights and equal protection for all."[32] When questioned about the condition's enforceability, Lawrence replied:

> The "fundamental condition" . . . is designed to secure forever the equal right of all citizens having the proper qualifications to vote and hold office beyond the reach of denial by the State, and only liable to be changed by Congress or an amendment of the national Constitution. This condition will become a part of the fundamental law of Virginia, as high and as sacred as her constitution. . . .
>
> The "fundamental condition" fixes the rights of citizens, and the courts will furnish redress for their violation. If further legislation in aid of the remedy shall be necessary it can be had. The national courts are or may be clothed with the requisite power to enforce this fundamental law. . . .

---

[29] *See* U.S. CONST. amend. XIII, § 1.

[30] Act of January 26, 1870, ch. 10, 16 Stat. 63 (1871).

[31] CONG. GLOBE, 41st Cong., 2d Sess. 432 (1870); *see* U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government[.]").

[32] *Id*.

> [I]f Virginia should change her constitution so as to deny to citizens the right secured by this "fundamental condition," her constitution in that respect would itself be unconstitutional or at least void, and the national courts would so declare it.[33]

Others who spoke in favor of the "fundamental condition" affirmed Congress's power to impose such conditions on readmitted states and emphasized the practical need to do so in order to prevent those states from enacting laws that disenfranchised Black voters while complying facially with the Fifteenth Amendment.

As to Congress's constitutional power to impose conditions on newly admitted states, speakers pointed out that Congress recently had done so with respect to Nebraska[34] and all of the former Confederate states readmitted to the Union before Virginia (Arkansas, Alabama, Florida, Georgia, Louisiana, and North and South Carolina).[35] Senators also explained why the Congress must try to prevent states from abridging certain individual rights. Republican Senator Richard Yates of Illinois pointed out that the Civil War had settled the issue whether "states' rights" included the "right" to infringe upon individual rights enshrined in the Constitution. In the wake of the Civil War, he argued, those rights were now understood to be national in character and beyond the reach of state determination, much less state curtailment:

> The time has come when it has been decided by the American people that we are not to have thirty-six or forty state governments each legislating for itself and in contrary directions upon the innate principles and the inherent rights of men . . . . We have to draw distinctions now between what are *termed* State rights and what *are* State rights. There is a different construction placed by the American people upon that question from that which was formerly placed upon it. . . . We want Virginia to understand that if she is reconstructed she is reconstructed upon the plan of the American people, not upon the plan of the State of Virginia.[36]

---

[33] *Id*. at 433. Others went further, asserting the right of Congress, if Virginia violated the "fundamental condition," to eject the state from the Union and—as it had done in Georgia in late 1869—to reinstitute military supervision. *See id*. at 717 (Rep. Butler), 353 (Sen. Morton).

[34] *Id.* at 357 (Sens. Drake and Sumner).

[35] *Id*. at 465, 597–98 (Sens. Drake, Wilson, and Harlan).

[36] *Id*. at 354.

As for the practical need to enact the "fundamental condition," Senators Harlan and Howard spoke presciently about the likelihood that, absent such a condition, readmitted states would enact superficially race-neutral voting restrictions that disproportionately affected Black citizens.[37] And senators voiced concerns about other facially neutral schemes, such as literacy tests and property-ownership requirements.[38]

The "fundamental condition" enacted as part of the Readmission Acts thus attempted to thwart the expansion of crime-based disenfranchisement as a facially neutral scheme for negating the voting rights that Black men had acquired during Reconstruction. Unfortunately, as discussed below, enacting the fundamental condition failed to deter the former Confederate states from using crime-based disenfranchisement to decimate the Black electorate.

2. Felon disenfranchisement after the Readmission Acts

In the wake of the Readmission Acts, the readmitted states adopted a variety of schemes for wielding criminal law to deprive Black men of the vote. Some states upgraded misdemeanor property crimes to felonies, which were classed as disenfranchising offenses in most states. Others amended or revised their constitutions to expand disenfranchisement to include larceny and/or petit larceny. And southern courts interpreted existing laws to include misdemeanor-grade offenses as disenfranchising crimes. (Holloway 57, 60-61.)

By the mid-1880s, nearly every southern state had expanded its crime-based disenfranchisement laws to include a far greater array of minor property crimes. (Holloway 78.) Petit larceny in particular was "believed to be a crime to which former slaves were prone (or of which they could be easily accused and convicted)." (Gibson 3.)[39] This led to the bizarre result in Mississippi that the state constitution was amended to disenfranchise persons convicted of the

---

[37] *Id*. at 598 (Harlan), 600 (Howard).

[38] *Id*. at 598 (Harlan), 600 (Howard).

[39] Petit larceny, or petty theft, refers to the act of stealing from another person an object or sum of money currently defined in the Virginia Code as having a value of less than $5 when taken directly from another person or $1,000 for stolen property not physically attached to a person. *See* VA. CODE § 18.2-96 & Gibson 3, 8 n.23.

petty "furtive" offenses associated with Black people (burglary, theft, arson, and obtaining money under false pretenses) but ***not*** to disenfranchise persons convicted of "the more robust"—that is, violent—"crimes of the whites," such as robbery, rape, and murder. (Manza 42 (quoting *Williams v. Miss.*, 170 U.S. 213, 222 (1898) (quoting in turn *Ratliff v. Beale*, 74 Miss. 247, 20 So. 865, 868 (1896))). As intended, these expanded laws were enforced disproportionately against Black men, in practical violation of the fundamental conditions imposed by the Readmission Acts.[40] Thus, the result that prescient congressmen had sought to avoid had come to pass. (Holloway 66.)

Virginia was no exception to this pattern. In fact, the historical record flatly refutes defendants' contention that "[t]he 1971 Virginia Constitution does not violate the [Readmission] Act because it imposes no restrictions on the franchise beyond those imposed by the 1869 Constitution."[41] The reality is that Virginia's violations of the Readmission Act began as early as 1876 and continue to this day. That year, an amendment to Virginia's constitution added "petit larceny" to the list of criminal convictions that disqualified people from voting (a list that already included "bribery in any election, embezzlement of public funds, treason, or felony" (Gibson 8 n.22)).[42] Petit larceny later was made punishable by whipping, rendering the crime "infamous" and helping to justify subsequent disenfranchisement. (Gibson 3.)

---

[40] At the polls, lists of convicted felons were used not only for their obvious purpose of striking convicted felons from the rolls but also to delay and thus discourage voting by *all* African Americans, who were forced to wait in race-segregated lines while each Black voter was laboriously vetted. (Holloway *ix-x*; Gibson 3.) In one notorious case, this practice resulted in a Democrat's "winning" a race to represent an area of Richmond, Virginia that had a large Black population. Democratic precinct judges had challenged nearly every African American as having a prior conviction, leaving 557 of them still waiting in line when the precincts closed—more than the Democrat's margin of victory. (Holloway 70-71.)

[41] MTD Brief at 18.

[42] VA. CONST. (1870, amended 1876), art. 3, § 1. Plaintiffs' opposition to defendants' pending motion to dismiss explains why "felony" as used in the 1869 constitution could only refer to felonies then recognized at common law. *See* Plaintiffs' Opposition to Motion to Dismiss (Doc. 78) at 11–14.

Virginia's 1902 constitution went well beyond the 1876 constitutional amendment in openly violating the "fundamental condition" of Congress's 1870 Virginia Readmission Act. The delegates to Virginia's constitutional convention were "well aware of the racial imbalances in the state's criminal-justice system" and of how these could be used to facilitate racial disenfranchisement. (Ford.) Democratic delegate R. L. Gordon told the convention that in the South, six whites out of 10,000 were in prison compared to 29 blacks out of 10,000, "showing that since these people have been made free, instead of improving, the record of crime show that they are retrograding." (Ford.)

The result of the convention's labors was a 1902 constitution notable for "the breadth of crimes it included" as grounds for lifelong disenfranchisement. (Ford.) Whereas the 1876 amendment had illegally added petit larceny to the list of disenfranchisable crimes, the 1902 constitution now illegally disqualified persons from registering and voting if they **(1)** had been disqualified before the constitution's adoption or **(2)** were convicted thereafter for "***any*** felony"[43] or for treason, bribery (not, as before, only election-related bribery), petit larceny, obtaining money or property under false pretenses, embezzlement (not, as before, only embezzlement of public funds), forgery, perjury, dueling with a deadly weapon, or facilitating such a duel.[44] This expanded list went far beyond the federally approved "common law" disenfranchisable felonies, placing Virginia in flagrant violation of federal law. Moreover, the list of disenfranchising crimes could be infinitely expanded by the General Assembly, which was granted the power,

---

[43] The capacious term "any felony" would have stark racial ramifications. For example, most of the controlled-substance felonies that have contributed so heavily to the mass incarceration of Black people did not exist before 1909. *See War on Drugs*. Those laws have affected Black people disproportionately. In 2013, Black people comprised 13 percent of the U.S. population and were consistently documented by the U.S. government to use drugs at similar rates to people of other races; yet they comprised 30 percent of those arrested for drug-law violations and nearly 40 percent of those incarcerated in state or federal prison for drug-law violations. *See Drug War*. Disenfranchisement for "any felony" thus resulted in a vast expansion of crime-based disenfranchisement of Black people based on drug-related convictions.

[44] VA. CONST., art. II, § 23 (1902); Ford.

with respect to both existing criminal offenses and those prescribed in the future, to provide that "persons convicted of them shall thereafter be disqualified from voting or holding office."[45]

Although Federal election law was transformed between 1957 and 1965, those changes had no impact on felon disenfranchisement. The Virginia Constitution of 1971 featured many improvements. It omitted the obsolete and unconstitutional poll tax; required approximate equality of population in all legislative and congressional districts; banned governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin; empowered the Assembly to reform the state's court system; guaranteed all children in the state the right to a high-quality public education; and added an article on conservation. Voters subsequently ratified 54 amendments to the Constitution of 1971. (VC.)

Yet Virginia's felon-disenfranchisement clause persists despite its indisputable violation of the "fundamental condition" that Congress placed on the state's readmission to the Union. Carrying forward the illegal "any felony" language of the 1902 Constitution, the 1971 Constitution provides that "[n]o person who has been convicted of ***a felony*** shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."[46] Even today, that provision bars over 20 percent of Virginia's African American voting-age population and more than seven percent of its total adult population from voting—one of the highest disenfranchisement rates in the nation. (Holloway *x*; Gibson 1.) These statistics reflect both the extent of Virginia's felon-disenfranchisement laws and the fact that African Americans in Virginia are incarcerated at a rate roughly six times greater than the white population. (Gibson 1-2.) Although Virginia enacted some reforms in 2014, the state continues to have one of the most restrictive felon-disenfranchisement regimes, reaching inmates, parolees, probationers, and some or all ex-felons. (Gibson 2, 6.)

---

[45] VA. CONST., art. II, § 36 (1902).
[46] VA. CONST., art. II, § 1.

In sum, the disenfranchising policies of the 1890s and 1900s—including those embodied in Virginia's 1902 constitution—were driven by racism, even when couched in facially race-neutral terms. Systematic disenfranchisement of Black southerners in particular was precisely what Congress had hoped to prevent in passing statutes like the Reconstruction Act and the Readmission Acts. Knowing that state authorities would likely try to use criminal law to unjustly disenfranchise Black citizens, Congress adopted policies designed to restrain the states. Yet those policies proved ineffective.

Fortunately, "our society has set its face against permanent disenfranchisement as a punishment."[47] Indeed, "[i]n the last fifty years, a national consensus has emerged among the state legislatures against permanently disenfranchising those who have satisfied their judicially imposed sentences and thus repaid their debts to society. Today, thirty-five states plus the District of Columbia disavow [that] practice[.]"[48] For this and other reasons, a federal appeals court recently held that permanent felon disenfranchisement violates the Eighth Amendment's ban on cruel and unusual punishments.[49] To disenfranchise in violation of a clear Congressional prohibition is doubly reprehensible. Amici therefore respectfully submit that the time has come to eliminate this illegal and anachronistic vestige of racist oppression.

---

[47] *Hopkins v. Sec'y of State*, 76 F.4th 378, 408 (5th Cir. 2023).

[48] *Id*. at 387.

[49] *Id.* at 387–88.

Respectfully submitted,

STEVEN A. HIRSCH
California Bar No. 171825
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400
shirsch@keker.com

STEPHEN B. PERSHING
Virginia Bar No. 31012
KALIJARVI, CHUZI, NEWMAN & FITCH, P.C.
818 Connecticut Ave., N.W., Suite 1000
Washington, D.C. 20006
(202) 331-9260
spershing@kcnlaw.com

Counsel for *amici curiae*
Gregory P. Downs and Kate Masur

^ ^ ^

CERTIFICATE OF SERVICE

I certify that on this 2nd day of November, 2023, I caused the foregoing motion for leave, with attached proposed brief of *amici curiae,* to be filed with the Court's electronic case filing (ECF) system, through which it will be distributed to all counsel of record.

Stephen B. Pershing

NO WHITE MAN TO LOSE HIS VOTE IN VIRGINIA.

This Assurance Given by Men Who Are Most Competent to Speak with Authority.

A Meeting was Held in Richmond on October 17, 1901, at which Chairman Ellyson Presided and Hon. John Goode and Mr. Montague Made Speeches—All Three Declared the Policy of the Convention in Language That Cannot Be Mistaken. Great Enthusiasm Aroused.

STATE CHAIRMAN ELLYSON.

"The best men in this Commonwealth have been selected as the representatives of their people in the convention. They will not fail to be responsive to the wishes of their constituents, for every Democrat in that convention knows that the convention would never have been held but for the desire of the white people of this Commonwealth to have enacted such a constitutional provision as would take away from the negro the right to vote, and, at the same time preserve to the white men of the Commonwealth their right of suffrage.

"I have enjoyed the best opportunities for frequent conferences and consultation with the members of the convention on this question. I think I know their views as well as any other man in the State, and I do not hesitate to give to you and through you to the white men of this Commonwealth both my personal and official assurance that that convention has the fixed and unalterable intention of enacting a clause which will accomplish the end I have just mentioned and which will forever remove the negro as a factor in our political affairs and give to the white people of this Commonwealth the conduct and control of the destinies which they have the right to shape and determine.

"The Democrats of Virginia have always kept the pledges made to the people and they will not fail to do so in this instance."—Hon. J. Taylor Ellyson, Chairman of the State Democratic Committee.

HON. JOHN GOODE.

"The Democratic party is pledged in its platform to eliminate the ignorant and worthless negro as a factor from the politics of this State without taking the right of suffrage from a single white man, and speaking for my colleagues in the convention, I solemnly declare to you that they will keep that pledge to the letter."—President Goode of the Constitutional Convention.

HON. A. J. MONTAGUE.

"The Democratic party, through its representatives in the convention, is slowly, but surely, framing a law that will so effectually exclude the idle, shiftless and illiterate of the negro race from the suffrage that the gates of republican wrath cannot prevail against it. The trouble with our opponents is that they realize now that we will accomplish this and keep the pledge that no white man will be disfranchised. I stand here and declare it, for I do know it is the truth."—Hon. A. J. Montague, Democratic nominee for Governor.

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

TATI ABU KING, et al.,

Plaintiffs,

versus 3:23 CV 408

GLENN YOUNGKIN, Governor of the

Commonwealth of Virginia, et al.,

Defendants

Before: HONORABLE JOHN A. GIBNEY, JR.
United States District Judge

November 22, 2023

Richmond, Virginia

GILBERT F. HALASZ
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, VA 23219

APPEARANCES

WILMER CUTLER PICKERING HALE & DORR LLP

by: Brittany Blueitt Amaddi, Esq.
Li-tsung Alyssa Chen, Esq.
Nicholas Werle, Esq.
Matthew Wollin, Esq.
for the plaintiffs

Andrew N. Ferguson, Esq.
Solicitor General
Kevin M. Gallagher, Esq.
Deputy Solicitor General
For the defendants

THE CLERK: Case number 3:23 CV 408.

Tati Abu King, et al. versus Glenn Younkin, et al.

Plaintiffs are represented by Ms Brittany Blueitt Amadi, Mr. Nicholas Werle, Mr. Matthew Wollin and Ms Li-tsung Chen.

Defendants are represented by Mr. Andrew Ferguson and Mr. Kevin Gallagher.

Are counsel ready to proceed?

MS AMADI: Yes, Your Honor.

MR. FERGUSON: We are.

THE COURT: All right. Where is Mr. Popps today?

MR. FERGUSON: I drew the short straw today, Your Honor, so I think he is with his family on Thanksgiving.

THE COURT: Okay. All right. We are here today on motions to dismiss by essentially the State in this case, which involves the disenfranchisement of felons.

So, Mr. Ferguson, are you going to handle the argument today?

MR. FERGUSON: I am, Your Honor.

THE COURT: All right. I will hear from you first.

MR. FERGUSON: I do it from here or the rostrum.

THE COURT: That is where you have to go, yes, sir. I will be happy to hear you.

MR. FERGUSON: Good morning, Judge Gibney, may it please The Court Andrew Ferguson for the defendants. And I am joined by Kevin Gallagher.

We have filed motions under both rule 12(b)1 and 12(b)(6), so I will start with our 12(b)1 arguments. And I think that they can be divided up into to tranches. We have arguments that would dismiss all of the claims with respect to the Governor and the Secretary, and that would dismiss the organization Bridging The Gap from the case entirely. And then we have arguments that relate only to the Virginia readmission act claim.

So I will start with the relating to the Governor and the Secretary. In order to pierce the sovereign immunity to which the Governor and the Secretary are entitled under Ex Parte Young the Governor, Secretary, has to have a special relationship to the challenged provision, and here they don't have any relationship at all. Their only role in any of this sort of atmospherically, is that they are the Governor and he has tasked the Secretary with this, is responsible for the re-enfranchisement of felons under certain circumstances. But the challenge here is to the disenfranchisement ad monitio, and on their own theory re-enfranchisement provisions are irrelevant.

THE COURT: Who is responsible? Tell me who the right defendant is.

MR. FERGUSON: We aren't asking for the dismissal on Ex Parte Young grounds, at least with regard to the special relationship prong of the other defendants, which include statewide election officials and local registrars who do play an administrative role in ensuring that article one section two's disenfranchisement provision sort of reaches the ground in the actual elections. But the Governor and Secretary don't play any role in that process at all. In fact, the only role that the Governor could conceivably play is precisely the role that the Fourth Circuit held in McMaster. It doesn't make governors good defendants in cases like this. He, of course, is responsible for execution of the law, but the Fourth Circuit has held in McMaster that that is categorically insufficient to establish the special relationship that Ex Parte Young requires.

So again, we have a separate Ex Parte Young argument for the Virginia readmission act claim, but the special relationship we are making only for the Governor and the Secretary.

THE COURT: Do you have an Ex Parte Young claim for the other defendants? What is that?

MR. FERGUSON: So that's right, Your Honor. Our Ex Parte Young argument with regard to all of the defendants is only for the Virginia Readmission Act claim. And our argument there is a Penhurst argument. Under Penhurst --

THE COURT: Penhurst says you can't use the federal courts to enforce state defendants to enforce state law, correct?

MR. FERGUSON: That's right, Judge Gibney.

THE COURT: Well, that is not what they are trying to do, is it?

MR. FERGUSON: I think --

THE COURT: I have read your brief twice on this. I am just a simple guy. I don't quite get it. Would you explain it to me? The readmission Act is state law?

MR. FERGUSON: So the readmission act is federal law, and the franchise rules state law. I think that the analogous case is Bragg versus West Virginia Coal Association. In Bragg, West Virginia promulgated the relevant surface coal mining regulations. They did so pursuant to a federal statute that authorized West Virginia to do those regulations, and then imposed limits and boundaries on how West Virginia could conduct its regulation.

But the court held, look, just because the federal government maintains an interest, a lawful interest in how West Virginia does its coal mining regulations doesn't transform West Virginia's coal mining regulations into federal law. The same is true here. Under our constitutional system the states are responsible for policing the franchise. The Virginia readmission act imposes some limitations on the plaintiffs' theory. We disagree with it. But on the plaintiffs' theory the Virginia readmission act imposes some limitations on how Virginia can regulate the franchises.

THE COURT: How is this different between the Clean Water Act? Under the Clean Water Act E P A promulgates regulations that explain how people are supposed to run what used to be known as the N P D E S. system.

MR. FERGUSON: Right.

THE COURT: And the state, however, through what used to be called the State Water Control Board -- now the Department of Environmental Quality -- issues permits and enforces that law against people who might be termed polluters. But you could sue the State under the statute. So how is that different from what we have here?

MR. FERGUSON: I will point back to Brag because Bragg drew precisely the distinction that Your Honor is identifying here. It said the Surface Coal Mining Safety Act is different from the Clean Water and other cooperative federalism provisions. Because under the S M C S A when the State promulgates regulations, if the state elects to handle coal mining regulations it is promulgating state law whereas the Fourth Circuit in Bragg said under other cooperative federalism schemes, the State isn't promulgating state law, it is promulgating federal law, basically --

THE COURT: But that's not true about the Clean Water Act.

MR. FERGUSON: The court in Bragg said it was true about the Clean Water Act. I agree, Your Honor has correctly described the Clean Water Act. I don't dispute that at all.

THE COURT: There are regulations under the Clean Water Act that are state law.

MR. FERGUSON: Yes, but -- I'm sorry -- the Fourth Circuit in Bragg said --

THE COURT: In some circumstances.

MR. FERGUSON: In some circumstances they are. But the Fourth Circuit said in Bragg that the Surface Coal Minging Act is different from the Clean Water Act

because the Surface Coal Mining Act says there is an initial choice that the State can make. They can promulgate the laws entirely on their own, or they can just the Federal Government do it here; whereas under cooperative federalism schemes -- and it identified the Clean Water Act as one of those -- they are promulgating federal law and state law hybrid. I think as between the Clean Water Act system and the system described for the Surface Coal Mining Act in Bragg, what we have here is much closer to Bragg than it is to the Clean Water Act.

THE COURT: But they say there are certain things you can not do in your constitution. And whether they are right or not the plaintiffs say you are doing the things that they say you are not allowed to do under the state constitution. I don't understand why it is that there is -- how it is that violating that federal law is violating state law.

MR. FERGUSON: For the same reason as Bragg, Your Honor.

THE COURT: Well, tell me what state law is violated.

MR. FERGUSON: So it is not --

THE COURT: Tell me what state law. That is what Penhurst is about, right?

MR. FERGUSON: It's about compelling state officials to comply with state law.

THE COURT: Tell me who is not complying with state law.

MR. FERGUSON: I think that their argument is that the 1971 constitution --

THE COURT: No. You tell me who is not violating -- who is violating state law.

MR. FERGUSON: I think their argument is that the election --

THE COURT: No, not their argument. Your argument.

MR. FERGUSON: I don't think anyone is violating state law.

THE COURT: Okay. Okay.

MR. FERGUSON: I think -- I think we are correct on the merits. I think that their argument for purposes Ex Parte Young is that they are in violation of the 18 --

THE COURT: Tell me what state law is allegedly violated.

MR. FERGUSON: I think the 1869 constitution.

THE COURT: How is that violated?

MR. FERGUSON: Because the 1971 constitution has departed from it in the same way that arguments in

Bragg was that the state regulations are inconsistent with federal rules limiting how they can regulate. Ultimately, Your Honor, you know, and I can address the other 12(b)1 arguments before --

THE COURT: Do that in a minute.

So I should have told you. The way I propose to do this is for you to raise your points on a particular area, and you guys can respond to it. And you can rebut.

And then we will go on to the next points.

MR. FERGUSON: Should I address the remaining jurisdictional arguments or just leave this one?

THE COURT: We will deal with the justiciable stuff in a few minutes.

MR. FERGUSON: Then the last point on actual article three jurisdiction I want to make is that Virginia Gap lacks standing for the same reason that Your Honor held --

THE COURT: That is justiciable. We will get to that in a minute.

MR. FERGUSON: Very good, Your Honor.

THE COURT: All right.

So let me hear from you about Pennhurst versus Halderman.

Hold on. You are Alyssa Chen?

MS AMADI: No, Your Honor, Brittany Amadi on behalf of the plaintiff.

THE COURT: Sorry. I got my -- I apologize for that, Ms Amadi. Go ahead.

MS AMADI: Thank you, Your Honor. Just if Your Honor is agreeable, we have decided to split the argument. So I think I can address here the Ex Parte Young issue that was being addressed with respect to the Pennhurst issue. Ms Chen will be addressing the Virginia Gap organizational standing issues as well as the the Governor and Secretary.

And Mr. Werle will be addressing any issues related to the eighth amendment claim.

I will address the reminder of the issues regarding the readmission act claim.

THE COURT: Let me hear about Ex Parte Young and Pennhurst v Halderman.

MS AMADI: Thank you, Your Honor.

May it please The Court. Pennhurst, as Your Honor recognized, Pennhurst is related to trying to enforce state law and trying to enforce state officials to comply with the provisions of state law. Bragg was a situation where the federal government has laid out a framework by which either the state could adopt its own regulation of the particular conduct at issue there, or

it could go to the default, which was the federal standard.

THE COURT: Right.

MS AMADI: So in Bragg the state, West Virginia in that case, elected to go the route of adopting its own statutory requirements there. And that was the law that was alleged to be violated. So I think that is a really important distinction here whereas here we are alleging a violation of the federal readmission act. We are not contending that there is any violation of a state law or of the 1869 constitution. That is an argument that the state has brought into play. We disagree with that. But we are alleging a straight forward invocation of federal law by state conduct. And that comes within the scope of Ex Parte Young under established precedent.

THE COURT: All right.

Okay. What about this argument they make Governor Youngkin and the Secretary of the Commonwealth don't actually enforce the statute -- are they -- and the correct defendants are somebody else?

MS AMADI: With Your Honor's permission Ms Chen will address that argument.

THE COURT: Okay.

MS CHEN: May it please the court, Alyssa Chen on

behalf of the plaintiff.

With regard to the Governor and Secretary, Ex Parte Young requires that there be a special relationship between the defendants and the challenged state law.

THE COURT: They have got to do something.

MS CHEN: Well, correct, Your Honor. And so the special relationship is typically a bar to Ex Parte Young jurisdiction when the relationship is significantly attenuated. For example, in the case that opposing counseling cited, McMaster, the only relationship between the governor and the challenged law was that isn't the case here. We are challenging the provision of the Virginia constitution that provides that no person convicted of a felony shall have the right to vote unless the governor restores that right. So we are challenging not just the disenfranchisement provision but the kind of sentence as a whole. The governor's role here is, let me kind of -- in two ways. First --

THE COURT: The Governor doesn't disenfranchise. I guess the court does that.

MS CHEN: The Governor would not be involved in the individual kind of initial disenfranchisement. Our understanding kind of based on their declaration is

that that happens through some other defendants. However, when an individual applies to the governor to have their rights restored and that application is denied, the governor is effectively responsible for that person's continuing disenfranchisement, like one of our plaintiffs, Ms Johnson.

The other point that I would make, Your Honor, is that we say claims not only under --

THE COURT: Didn't King apply for status, rights restored?

MS CHEN: His application is pending, Your Honor.

THE COURT: All right.

MS CHEN: The last point I would like to make is that in response to our eighth amendment claim --

THE COURT: Her application was denied?

MR. GALLAGHER: Ms Johnson's application was denied. Mr. King's application is pending.

THE COURT: And do we know why hers was denied?

MS CHEN: Ms Johnson?

THE COURT: Yes.

MS CHEN: Not that I know of off the top of my head, Your Honor.

THE COURT: They don't really give you one.

MS CHEN: I believe that is correct, Your Honor.

THE COURT: That is part of the problem.

MS CHEN: That is, it is not ideal, Your Honor. I will admit that.

THE COURT: Go ahead.

MS CHEN: Sorry.

The other point I would like to make is that in response to our eighth amendment claim the defendants have brought up the governor's power to --

THE COURT: We will deal with the eighth amendment in a little while.

What were you going to say?

MS CHEN: Just my understanding is that their argument with regard to the governor and the secretary would apply to both our Virginia readmission act and eighth amendment claim. And so I wanted to point out that for our eighth amendment claim they have brought up the governor's power to restore rights as kind of part of their defense, and so the fact that they are bringing that up kind of indicates why the defendant, the governor and secretary, are proper parties in this case.

And I think that the Johnson decision in the Eleventh Circuit is helpful in that. There they were challenging kind of Florida's similar constitution provision, which disenfranchised people convicted of felonies unless they had their rights restored. And

there both the governor and secretary of Florida were defendants but their only connection was also to their ability to restore rights. And there the case went on to the merits. And the court just kind of considered them as part of the case.

THE COURT: Thank you. All right.

Do you want to respond to that, Mr. Ferguson?

Are you going to handle all the arguments?

MR. FERGUSON: I am, Your Honor.

THE COURT: So, have you actually read Ex Parte Young?

MR. FERGUSON: I have, Your Honor.

THE COURT: Do you purport to understand that case on reading it?

MR. FERGUSON: I understand the doctrine that it has spawned.

THE COURT: You and me both. I taught federal courts and nobody can understand.

MR. FERGUSON: I agree with you. I also taught federal courts, Your Honor, and my advice to my students was understand the doctrine and largely ignore the case itself. I also studied under John Harris at UVA, who has written sort of a seminal article about why Ex Parte Young both makes some sense in the common law, but makes, the doctrine makes no sense. So I am

with you, you Your Honor.

THE COURT: Does he think -- my opinion is that Ex Parte Young is necessary because they misconstrued the 11th amendment.

MR. FERGUSON: His position is that Ex Parte Young has analogues in the English common law that allows potential criminal defendants to bring basically anti-suit injunctions against the government. But that is all it should be permitted for. And that the doctrine spawned, which is sort of the free-floating exception to sovereign immunity doesn't have any basis in the common law that the courts said it was relying on in 1908 for what it is worth.

THE COURT: Well, okay. So, a lot of angels on the head of that pin.

MR. FERGUSON: I won't try to count them, Your Honor.

THE COURT: Okay.

MR. FERGUSON: I think the only rebuttal point I would like to make is just about the governor and the secretary's involvement. The claims that are raised here, the injuries that they allege, all fully accrue at the moment of disenfranchisement. And the governor and the secretary don't play any role in the disenfranchisement. The re-enfranchisement on their

theory is sort of beside the point. It doesn't cure -- it might fall under the standing purposes cure their injury in fact, but it doesn't cure what they claim is the legal injury, which is the act of disenfranchising a felon, which, Your Honor is correct, the court does it through the conviction and then it is administered by the other election official defendants in the case.

So, again, our Ex Parte Young argument with regard to the governor and secretary is just limited to them. The case would still proceed even if The Court dismissed them from the case.

THE COURT: Thank you.

I think with respect to the Ex Parte Young argument -- I don't think that at this stage I am going do dismiss it on Pennhurst grounds. I have serious doubts about whether the Governor and the Secretary of the Commonwealth are correct defendants here. But, what they actually do is kind of a factual question. What do they do? I understand there are affidavits and declarations on that, but I think that theoretically that is probably not factually developed at this time, although, I do recognize that it is a jurisdictional question, and the burden of that is on the plaintiffs in this case first to establish that. But, I am not going to dismiss them at this time.

On the standing issue, your Bridging the Gap argument is the same one that I decided in the other case, the name of which escapes.

MR. FERGUSON: Hawkins, Your Honor.

THE COURT: Hawkins.

And unless you have something to add to what I decided there I will hear from them on that.

MR. FERGUSON: I have noting to add.

Thank you, Your Honor.

THE COURT: So clearly they don't have standing to litigate on behalf of disenfranchised people because the disenfranchised people can bring the suit themselves. In fact, they have.

MS CHEN: Right.

THE COURT: The question is whether an organization that is established to deal in this area suddenly can give itself standing by saying this is our purpose. That is what I see going on. I will be happy to hear from you on.

MS CHEN: Understood. Thank you, Your Honor.

So, as Your Honor mentioned, we are only bringing a standing claim as to Bridging Gap in their own rights. And the only element of standing that defendants are challenging is the injury prong. Then here I think that the PETA case out of the Fourth

Circuit in 2021 is instructive. There the Fourth Circuit held PETA's mission of protecting animal abuse was impaired by the challenged conduct, which involved the particular abuse, mistreatment, of animals. PETA was required by its mission to devote its resources to combating the challenged activity and away from the activities of challenging other views. That is the same as Bridging the Gap here. Bridging the Gap's mission is to help people, including those experiencing homelessness, veterans and formerly incarcerated persons fully integrate back into society. As a result of Virginia's unlawful disenfranchisement scheme many people who have been convicted of felonies do not have the right to vote. So, while Bridging the Gap has several kind of key areas, for example to help people with finding transitional housing, they help them with job training, they now have had to spend more time on their rights restoration effort. So their mission has been frustrated by the defendants' conduct and they have had to divert resources.

THE COURT: Isn't that true of any advocacy group that deals with members' rights who have been violated? If they have a case, wouldn't they all be harmed if they have go to hire lawyers and things like that?

MS CHEN: Your Honor, we don't argue about their

injuries because they have to litigate or that they had to hire a lawyer. And I think it is important that we are kind of choosing. It is not only their injury, but also the frustration of their mission. And that kind of tested is grounded in the Fourth Circuit's opinion in PETA, and that was originally from the Haven Supreme Court decision as well.

THE COURT: Okay. Anything else?

MS CHEN: I would also just ask Your Honor to look at the Lee opinion as well, which we cited in our case. And there it is a similar situation where the Democratic Party of Virginia was found to have standing. The challenge of voter ID law. Because their mission of having more democrats elected was being impaired by the voter ID law. And they had to divert their resources to educate people about that. So I would ask The Court to look at those two cases.

Thank you, Your Honor.

THE COURT: Thank you very much.

Okay.

I think I had it right in the last case on the NOLEF Turn plaintiff in the other case. I am probably going to stick by that. I will write an opinion dealing with all these issues.

My clerk will probably do that Friday. So we will

have something for you forthwith or fifthwith.

But right now I just don't see cognizable injury.

All right. Let's go on to whatever is next. Cover the political question doctrine next?

What are you going to talk about?

MR. FERGUSON: I'm going to cover very briefly the political question doctrine.

THE COURT: Okay.

MR. FERGUSON: So the contours of the argument are relatively simple. The Virginia Readmission Act is Congress's public declaration that Virginia's constitution satisfied the requirements of the guarantee clause, and on the basis of that satisfaction re-admitted its congressional delegation to Congress. I think --

THE COURT: I don't know there is a declaration of that. It says you can have a constitution, but it has to have certain provisions in it, and it can't have certain other provisions.

MR. FERGUSON: Exactly, Your Honor. I don't think that is correct. The way that all the readmission acts from 1868 to 1971 work was the state would submit its Constitution to Congress, and the opening lines of the Readmission Act say that the Constitution submitted is a republican constitution. The congressional

delegation is readmitted on the condition that the constitution is not subsequently changed except for these permissible changes.

THE COURT: Okay.

MR. FERGUSON: But that means that the crux of the readmission act is Congress' declaration that the guarantee clause is satisfied and therefore readmission of the congressional delegation is appropriate.

THE COURT: So, if Congress concludes that Virginia's constitution doesn't comply with the readmission act the constitution should -- or the Congress should vote Senators Kaine and Warriner and Congressman Spanberger and everybody else should --

MR. FERGUSON: We certainly don't think they should, and we don't think they should because we think that the 1971 constitution complies with the --

THE COURT: How does Congress -- so what is Congress supposed to do then? If Congress is the entity that is enforcing this, I guess maybe is not exactly the correct word, but if Congress is charged with administering this, making this decision, what do they do? They just say, sorry, Virginia, you are not a state any more?

MR. FERGUSON: No, Your Honor, it is not that you are not a state any more. Texas against White said it

is impossible for states to leave. But congress would do the same thing that it was doing between 1861 and 1870, which is forbidding Virginia's congressman and senators from entering the capitol and representing that government because that government wasn't a republican government. And that is -- sorry, Your Honor.

THE COURT: Go ahead.

MR. FERGUSON: That is what Congress had in fact had done for all of the states in rebellion between 1861 and their subsequent readmission in the late 1860s and early 1870s was tell them, you are a state, you are a state in rebellion, but you are a state, however because your government isn't republican we are not admitting your congressional delegation to this body. And we won't readmit them until you have re-established a republican government.

So I tink the answer to the question, Judge Gibney, is they would do what they were doing in the middle of the 19th century, which is keeping congressional delegations out of the capitol until a republican government is re-established.

Now, we think that is sort of the point of the readmission act is Congress exercising its guarantee clause power to insure that the republican guarantee

clause is enforced in this state, by telling those governments we won't admit your congressional delegations unless the government sending them is republican in form. The readmission act is congress' statement that the constitution is republican in form and therefore they would be readmitted, and only if the constitution is changed in particular ways that are prohibited by the readmission act will they be kicked back out. But that means that the appropriate enforcement mechanism, and the one that Congress was actually using for a decade in the 1860s and 1870s is to eject non-compliant congressional delegations.

I think if this court exercises jurisdiction it triggers a lot of the concerns that were animating in Baker against Carr and the Baker factors. If Congress has admitted congressional delegations from Virginia, as as it did in January 3rd of 2023, but this court nevertheless concludes that Virginia's Constitution is not complying with the Virginia Readmission Act, we have a court of the Eastern District of the United States and Congress disagreeing on whether Virginia's government is currently republican in form. That is exactly the sort of multi nefarious pronouncement that Baker was so desperately concerned about. I think that is the sort of crux of our argument is that it is

impossible for this court to exercise jurisdiction without running the very severe risk of; A, stepping into an arena that the Supreme Court has consistently held belongs exclusively to Congress since Luther against Borden; and B, running the very real risk of the judiciary and Congress --

THE COURT: Luther versus Borden was the one involved the government of Rhode Island?

MR. FERGUSON: That is right, Your Honor.

Yes. So I think one of the things that animated the Supreme Court's decision in that case is it would be very very ugly if Congress reached the conclusion that this is the legitimate government of the Rhode Island; but the judiciary said, no, it is not. There is no obvious way to solve this conflict. I think that is the same problem that this case presents. Congress has admitted Virginia's congressional delegation once again on January 3rd. If this court concludes, however, that Virginia is in violation of the Readmission Act then we have the two branches disagreeing over whether Virginia's government is republican in form, and I think that is exactly the sort of thing that Baker wanted to avoid.

THE COURT: In Luther v Borden did they tell congress to decide what the correct government of Rhode

Island was, or did they tell the people of Rhode Island to figure it out themselves?

MR. FERGUSON: So my recollection is in Luther v Borden the government, the government that had lost, for lack of a better term, was challenging the legitimacy, the government is seeking an injunction, and what the court said is Congress admitted the senators from this government and the congressional delegation. It is just not the role of the federal judiciary to counterman Congress' choice in this area. If Congress thinks this isn't a republican government, they have steps they can take to enforce the guarantee clause. But this is not the role of the judiciary. And we run, as I said, the very real risk that Baker was so concerned about, about the judiciary, congress, disagreeing over a question that the constitution can exclusively go to Congress.

Thank you, Your Honor.

THE COURT: Who is going to deal with the political question doctrine?

MS AMADI: Thank you, Your Honor. I will be handling this, Your Honor.

THE COURT: Tell me this. Before this law suit had you ever heard about this statute that reinstates the states into the union? I had no clue that this law

existed until these two -- until this case came up. Did you? How did you find it?

MS AMADI: We were aware of the Virginia readmission act, what you are referring to? Yes. We were aware of it. It is still good law. It has never been repealed or otherwise overruled. I think --

THE COURT: I practiced law for almost 50 years, and I never heard of it until this. You obviously must study legal history more.

MS AMADI: In my spare time, maybe.

THE COURT: All right. Go ahead.

MS AMADI: So with respect to the political question doctrine, Your Honor, we had prepared a few slides that we think might be helpful here. Particularly with respect to some of the arguments that were being made by the state.

THE COURT: Slides?

MS AMADI: Yes, Your Honor.

THE COURT: Slides like you have a Power Point on that?

MS AMADI: Yes, Your Honor.

Maybe display that with Your Honor's permission?

THE COURT: Well, sure, but maybe you can tell me. I don't see how any of the Baker factors, except maybe embarrassment of the legislative branch, weigh in the

favor of the defendants in this case.

MS AMADI: We agree, Your Honor. We don't think that any of the --

THE COURT: Do you have something to add to that in the slide?

MS AMADI: I can address that without the slide. I think there is three points to be made here. First --

THE COURT: I will look at the slides. Go ahead. I will look at them.

MS AMADI: Thank you, Your Honor.

I think we need permission from the courtroom deputy to display them.

THE COURT: Have you given them to the other side already? Do you -- did you give it to them before we came here today?

MS AMADI: We did not.

THE COURT: Okay. Then you can't show them.

MS AMADI: Thank you, Your Honor.

THE COURT: We are not going to play that.

MS AMADI: Okay.

Your Honor, with respect to the particular points that were being made, we are not seeking a declaration that Virginia's government is not a republican form of government. That is not the relief we are seeking. We

are seeking a declaration that the current Virginia Constitution violates the readmission act. We don't think that implicates any of the Baker factors, as Your Honor noted. And the fact that Congress could expel members of representatives of Virginia from, or potentially or in theory, expel members of Virginia from Congress doesn't preclude the remedy that we are seeking here. I think that is true under the court's 1983 case law, as well as the Ex Parte Young case law.

The fact that there are other avenues for addressing a particular violation of a federal statute doesn't undermine the fact that you can come into court and seek relief for individual rights. This is sort of merging the 1983 issues. But I do think that that is instructive here, particularly where, and we cited this in our briefing, the legislative history makes clear that Congress at the time that they passed the Virginia readmission act anticipated that one remedy could be expulsion of members of Virginia from Congress. But a separate remedy could be to protect individual rights by coming into court.

We believe that that is a proper remedy here, and it doesn't implicate the political question doctrine for the reason that we are not seeking a declaration that Virginia's government is not republican in form or

asserting any violation of the guarantee clause here.

THE COURT: Okay.

All right. Thank you very much.

MS AMADI: Thank you, Your Honor.

THE COURT: I don't think this is a political question doctrine in the case going forward. Again, I will put that in an order. I am sorry. I should have told you this earlier.

If you are going to come -- we are going to have other hearings in this case I am sure. If you are going to come to court with documents to present either in paper form or on computer, you need to show that, both sides need to share that before you get here so we don't have surprises in court. It is my fault. I should have told you that earlier. But I didn't.

Let's move on to the whatever is next. I guess it is your merit argument.

MR. FERGUSON: Judge, unless you have a different proposed approach, I am just going to start with the readmission act claim, and then move for the eighth amendment.

So I will start with the readmission act.

THE COURT: Readmission act. They will respond to that, and then we will go to the eighth amendment. They will respond to that.

MR. FERGUSON: Absolutely.

I will start, I think that the principal argument that defendants make is that Virginia's, the 1971 Constitution is complying with the Virginia readmission act, and that alone is sufficient to dismiss the case. We have additional procedural arguments about why this isn't enforceable under section 1983, but I think the principal argument is on the merits the 1971 constitution is complying with the readmission act.

Let me explain why.

THE COURT: Yes.

MS AMADI: The Virginia readmission act does two things. The first thing that it does is say the current Constitution that Virginia has submitted for approval to Congress is republican in form and lawful. And then it says, if, however, you are going to change that constitution it will remain republican in form only if you change it in the following ways: But the first thing, and the most important part of the statute, is that it says the station 1869 constitution is republican in form and lawful. And that means that if Virginia has not amended its Constitution subsequently in a way that diminishes the franchise that was available in the 1869 constitution, then the 1971 Constitution is lawful. That is why the 1971

Constitution is lawful. The franchise available under the 1971 Constitution is in fact broader than what was available in 1869 Constitution. The 1869 -- article three section one of the 1869 Constitution defines the franchise, and and it imposed limitations on the franchise. One of the limitations that it imposed on the franchise is that it disenfranchised someone who was conducted of a felony. That is also true under the 1971 Constitution. Because the 1971 Constitution is disenfranchising the same class of person that Congress blessed in blessing the 1869 Constitution, which are felons, the 1971 Constitution is not violating the Virginia readmission act.

THE COURT: But they sort of focus on this felony, common law. Tell me how that fits in all this.

MR. FERGUSON: Sure. So there are two uses of word "felony" that matter in this case. The first is the use of the word "felony" in 1869 Constitution. I am going to start with that because that defines the class of persons that Virginia was lawfully disenfranchising in 1869 with Congress' approval. There is no reason at all to interpret the word "felony" unadorned as it is in the 1869 Constitution to be limited to common law felonies. It doesn't include the adjective, Judge Gibney, and contemporaneous

interpretive evidence that we provided, that we cited and provided for the parties and The Court, demonstrate that at the time that the 1869 Constitution was being enforced it was understood to apply felonies both to common law felonies and to statutory felonies.

That makes sense. At the time the distinction between common law felonies and statutory felonies was well established. So if legislating body, in this case the people of the Commonwealth, were going to limit the word "felony" to one species of felony or the other, they would have used the limiting language that Congress did in the readmission act. But, using the word "felony" without any limiting language necessarily encompasses both statutory and common law felonies. The same is true of the 1971 constitution. In other words, there is a perfect match in the class of persons being disenfranchised on the basis of conviction in the 1869 Constitution and the 1971 Constitution.

THE COURT: Well, the same word.

MR. FERGUSON: That is right, Your Honor.

THE COURT: There are a lot more felons.

MR. FERGUSON: That is true, Your Honor. And my friends on the other side have made that argument. But the argument, which is that the word "felony" freezes in time the stains that felons of the category felony

is a form of interpretation that the Supreme Court has described as "close to frivolous." And here is why. If that sort of motive interpretation were true, that the use of a categorical word at time one limited at time two only to the things that fell within that category at time one, search in the fourth amendment would be limited only to searches that were done in 1791. Speech in the first amendment would be limited only to modes of speech available in 1791; and religion in the first amendment would exclude the Church of Jesus Christ of Later Day Saints, which was not created until well after the adoption of the first amendment. The Supreme Court has said over and over and over that when we are interpreting words enacted earlier in time the word keeps its meaning going forward even if the number of objects that satisfy that definition change over the course of time.

The court just decided this again in Jam against International Finance in 2019. The use of the phrase at time one means that it remains, keeps the same use even if the category it is describing broadens over time. So I think --

THE COURT: That is true in the second amendment?

MR. FERGUSON: I'm sorry, Your Honor.

THE COURT: That is true in the second amendment?

MR. FERGUSON: It is, Your Honor. In fact, the case in which the Supreme Court described this motive interpretation as close to frivolous was Heller. And if The Court relied on fourth amendment cases in first amendment cases, rejecting this sort of argument, because, again, if this were true then the word "search" would be limited to the types of searches available in 1791.

THE COURT: Not electronic.

MR. FERGUSON: That's right, Your Honor. And in speech logs, photographs, movies, all would be excluded from the protection of the speech clause because none of them existed in either 1791 or --

THE COURT: That is what Justice Thomas --

MR. FERGUSON: I clerked for Justice Thomas. I don't think that is what -- I don't think that is what he would do. He said that is what he wouldn't do. Of course he wrote Bruen, which rejected this sort of analysis as well. But in any event, I think notwithstanding that there are certainly more species of conduct that fall within the category of felony today. Felony at the framing of the Virginia readmission act necessarily included common law felonies and statutory felonies. And just because the legislature has exercised its undoubtedly lawful

authority to include new conduct in the category of felony doesn't exclude it from compliance with the 1869 Constitution and the readmission act.

THE COURT: You know, no one gave me a copy of the whole readmission. Is it a long statute?

MR. FERGUSON: It is not a particularly long, Your Honor.

THE COURT: Would you send me a copy of that?

MR. FERGUSON: It was attached, I believe I am correct, it was attached to the plaintiff's second amended complaint. I have a copy if you would like it.

THE COURT: Well, let me look at my second amendment papers.

Okay. I left all of the text -- I have got it.

MR. FERGUSON: Okay.

THE COURT: Okay. Go ahead.

MR. FERGUSON: Another point to make about that, Your Honor. So then in the second use of the word "felony" in this case is felony at common law in the readmission act.

A couple points to make about that, Your Honor. The ultimate question that The Court needs to decide is whether the 18 -- I'm sorry -- the 1971 Constitution is disenfranchising a class of citizens that couldn't be disenfranchised under the 1869 Constitution. The

answer to that is no. So we don't even need to go to the exceptions clause of the readmission act because there is perfect match between the 1869 constitution and the 1971 constitution. And ultimately that is the command of the readmission act is don't disenfranchise a class of citizens you aren't currently disenfranchising except for these classes we would otherwise allow you to do. And the Commonwealth has not. Felons were disenfranchised in 1869, they are disenfranchised today. There is perfect match, there is no non compliance with the Virginia readmission act. So the exceptions clause in the Virginia readmission act sort of falls away once you make that point.

THE COURT: Okay. Thank you. Anything else?

MR. FERGUSON: I don't think so.

Well, just briefly. I am sorry. Briefly.

Just to point out, we have also raised arguments that this isn't enforceable under 1983. Very briefly. The Supreme Court said in Talevski just last term that Gonzaga University is the standard for determining whether a federal statutory right can be enforced under section 1983. It requires clear rights conferring language and it can't have an alternate enforcement scheme. Here, as we discussed -- I'm not sure Your Honor agrees with me -- but we discussed there is an

alternative enforcement scheme contemplated by the readmission act, which is the exclusion of the representatives and senators from Virginia as congress was in fact doing up until 1970.

THE COURT: But in Gonzaga and Talaverde and the Jackson case last --

MR. FERGUSON: Talevski.

THE COURT: There was a little bit more of a formal scheme in the statute to enforce it because there was sort of an administrative process, which we don't have here.

MR. FERGUSON: That is true, Your Honor. I don't deny that. I don't think that that, I don't think that that affects the Gonzaga analysis in the sense that there is another enforcement scheme here and it is so sort of like politically importance to our constitutional system to make sure that congress is policing the guarantee clause. But in any by event, we don't think there is sufficient rights-conferring language here.

And one, just one very brief point, there is a quotation from what is a quite lengthy legislative history in this case in which one of the sponsors of the legislation suggested that judicial enforcement might be an alternative. If you just go to the

subsequent paragraphs he acknowledges that it is not clear whether this is judicially enforceable. And in any event, the statute that they are relying on to enforce this judicially is from the 1971 Klan Act which was not a law when the Virginia readmission act was written.

THE COURT: 1871.

MR. FERGUSON: You are exactly right, Your Honor. 1871. I don't think that that quote helps them here on this question, because the law they are relying couldn't have been a law that was being referred to in the legislative history.

THE COURT: Right. So, 0okay.

There is an interesting connection between the question of an implied cause of action under the statute and whether something is enforceable under 1983. It looks to me like in deciding whether something is enforceable under 1983 the Supreme Court has said that the implied cause of action pretty much apply, except that we don't have to figure out whether Congress intended for there to be an enforcement mechanism, because -- a private enforcement mechanism -- because we have 1983. Is that right?

That is what Professor Nemaz says.

MR. FERGUSON: So I think that is basically

correct. I don't think it is a coincidence that Sandoval and Gonzaga were decided very close to each other, and it was part of The Court's sort of cabining in federal judicial discretion to recognize new implied causes of action. So I think you are right that the new Sandoval statutory interpretation analysis for implied causes of action, and Gonzaga are basically getting at the same thing. And if you wouldn't find an implied cause of action under Sandoval in a statute, I think Gonzaga quite intentionally makes it difficult to use 1983 to do the enforcing.

THE COURT: Thank you.

MR. FERGUSON: Thank you, Your Honor.

THE COURT: Who is going to respond to this one?

MS AMADI: Your Honor, Ms Amadi again.

Your Honor, I will start with 1983 issue, Your Honor. I think that Talevski is actually instructive here. In that case there was involved a federal nursing home reform act. There was a remedial scheme that was laid out in some detail in the statute. The court nonetheless found that there was relief under 1983 because there was right creating language as well as a mandatory requirement on the state. So here --

THE COURT: The question is whether it is a right that is more than kind of an amorphous right, whether

it is a right that applies to an individual.

MS AMADI: That's correct, Your Honor.

We think the language of the readmission act is crystal clear on that front, Your Honor. If you take a look at, and I know Your Honor doesn't have it in front of you, but the language of the readmission states 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, except as a punishment for such crimes as are now felonies at common law. So we think that the latest language, any citizen or class of citizens and the right to vote very clearly fall within Talevski and other cases addressing 1983.

THE COURT: Okay.

MS AMADI: And then with respect to -- and I will turn to the merits argument that were made by Mr. Ferguson -- I think there is three important points here. First with respect to the interpretation that the readmission act or the 1869 Virginia constitution essentially allowed Virginia to set forth any felonies that could fall within the scope of the felony even if adopted after the passage of that statute. Really would undermine the fundamental purpose of the

readmission act.

I think looking at the historical context surrounding the readmission act is important in interpreting that language. You have at the end of the civil war, congress passed the reconstruction, the military reconstruction act of 1867, which expressly stated that the constitution to be adopted by the state would provide for enfranchisement of all citizens and classes of citizens, except for felonies at common law. So use of felonies at common law language in 1867, Congress used that language in giving directives to the state. Virginia then passed its Constitution in 1869. And Congress followed up with the readmission act in 1870, stating that that Constitution should never be amended to disenfranchise for crimes other than felonies at common law.

THE COURT: Does the 1869 statute say "felonies at common law" or just say "felony?"

MS AMADI: So the 1869 constitution uses the word "felony," but I think when you look at the historical context of the 1867 reconstruction act which says that the constitution that would be adopted by the former confederate states was required to only disenfranchise for felon -- conviction of felony at common law. And when you look at the fact that the reason why Congress

enacted that statute as well as the readmission act was because the former confederated states were enacting legislation referred to as Black Code with the express purpose of disenfranchising the newly-freed citizens. So when you look at that historical context you look at legislative history that congress was specifically trying to curtail that conduct of creating minor offenses, labeling those offenses as felonies, and then using them as a basis for disenfranchising, you look at all that historical context as well as what preceded the 1869 constitution and what came after, the only reasonable interpretation is that Congress intended that Virginia should not amend or change its constitution to disenfranchise for felonies or crimes other than felonies at common law, which is expressly laid out in the constitution.

THE COURT: Did it change -- his point is that Virginia didn't change their constitution. The constitution says the same thing in 1901 and 1971. Felonies. It says "felonies."

MS AMADI: It is true that the word "felony" is the same in the 1869 constitution, and there is also the word "felonies" in the 1971 constitution.

THE COURT: Statutory felony even in 1869.

MS AMADI: I believe they said it in their papers

a couple examples of statutory felonies in 1869, but even --

THE COURT: So that is not a felony at common law.

MS AMADI: I think when you read the context surrounding the passage of the 1869 constitution and the passage of the readmission act, the only reasonable way to read that term "felony" is that it is referring to felonies that then existed.

THE COURT: But the statute says you can't change the constitution to bring in new felonies, felonies that are not at common law. So, how has the constitution been changed in a meaningful way?

MS AMADI: Well, I think the language, the actual disenfranchisement provision has changed in --

THE COURT: Not with respect to felonies, has it?

MS AMADI: Well, I think you do have to look at the entire provision because in 18 -- I mean, sorry, in 1869 that provision listed out a series of crimes, and then had and/or felonies. And so we laid this out in our papers, but if take you a look at those particular crimes, several of the crimes, including treason and embezzlement, were statutory felonies. And so if you read felony to encompass any felony, felony at common law or a statutory felony, it would essentially render that language superfluous. So that we believe that is

an additional reason why the 1869 constitution should not be interpreted to encompass any felony that may later come down the line. In addition to the historical context and the specific purpose of the readmission act. As well as the reconstruction act, which preceded the 1869 constitution.

But I think even if Your Honor were to believe that interpreting the 1869 Constitution is necessary here, the readmission act states that it shall never be so amended or changed as to deprive any citizen or class of citizen of the United States of the right to vote who are entitled to vote by the constitution here recognized.

There is no dispute that, in particular we cited, we cited as an example in our papers, that drug crimes were not even criminalized in 1869, let alone labeled as a felony in 1869. So citizens, any citizen -- and that is the language of the readmission act -- citizen who had a drug offense would have been entitled to vote under the 1869 constitution. And so even if you accept their reading of this, there has been a violation of the readmission act because the constitution has now been amended or changed to disenfranchise a citizen or class of citizen who was entitled to vote under the 1869 constitution, including the individual plaintiffs

in our case here, Mr. King and Ms Johnson.

So we do believe that there is a violation of the readmission act either under the government's interpretation where felonies could be read to encompass any felony that might later come down the line as well as as under what we believe is the correct interpretation where felonies should be read in the context of what was happening at the time the reconstruction act and the readmission act and the intent of Congress in passing the readmission act in 1870.

THE COURT: Thank you.

MS AMADI: Thank you, Your Honor.

THE COURT: Mr. Ferguson, do you want to respond to that?

MR. FERGUSON: Just two brief points, Your Honor. On the historical context surrounding the Virginia readmission act. My friend on the other side has discussed the military reconstruction act of 1867 and then the Virginia Constitution in 1869. Omitted from that history is what happened in 1868, which was the ratification of the 14th amendment, which expressly authorizes the states to disenfranchise anyone who has committed a crime. That is at least as important, and probably substantially more important part of the

historical context than what was said in the military reconstruction.

Of course Virginia right before the Virginia readmission act was adopted had ratified the 14th and 15th amendments. In fact, that was one of the requirements congress had imposed. So at the time that the Virginia reconstruction acts was adopted it was understood by the whole country because it had just become our supreme law that the state had the affirmative authority to disenfranchise all felons.

The second point, and only very briefly, is just to buttress our position on 1983, we think there are good reasons to avoid reading the statutes to create an individual enforcement right under 1983 because we think it would create Constitutional problems. And therefore the Jennings constitutional avoidance canon comes into play.

But other than that, Your Honor, unless Your Honor has additional questions about the Virginia readmission act question, I am happy to move on to cruel and unusual punishment.

THE COURT: Go to cruel and unusual punishment.

You know, I sort of -- when we are talking about -- you mentioned Justice Thomas a little while ago -- "unusual" sort of means, torture and things like

that. He says, and that is I think why they have it. And, you know, it has been extended to medical care and to housing problems in prison, over crowding. But I am not sure it goes so far as disenfranchise.

Do you have anything else to add?

MR. FERGUSON: Not particularly. If you give me one minute, I want to make our three major points.

The first is, I don't think that Your Honor really needs to get into the doctrine of the cruel and unusual punishment clause. First off, let me say, I think you have correctly identified Justice Thomas' view on the original meaning of the eighth amendment. Is that it is limited to punishments that are sentences that are torturous. You are exactly correct about that. He would be very pleased to know this is being talked about in the court today.

THE COURT: It has come a hundred miles south. Tell him that.

MR. FERGUSON: That's right. I absolutely will.

The second point is, I don't think The Court needs to engage in sort of the, is it punishment, is it cruel and unusual doctrinal analysis because, as the court held in Richardson, the Constitution gives states the affirmative sanction of disenfranchising felons, and it cannot possibly be that section two of the 14th

amendment is incontrovertibly inconsistent with section one of 14th amendment, which, of course, is how we get to cruel and unusual punishment applications of the state at all.

Second, very briefly, it isn't punishment. Every court of appeals who have considered this question has concluded that it's not punishment; either because the Supreme Court said in Trop against Dulles that it isn't punishment, or because they did the normal Smith and Doe, Mendoza-Martinez analysis, and concluded that it isn't punishment.

The only court of appeals that ever reached an alternative conclusion had that opinion almost immediately vacated by the en banc court just a couple weeks ago.

And finally, it isn't cruel and unusual -- and we think this is an important point for framing up the entire question -- there are two ways to address cruelty and unusualness; either the as-applied approach where you just take a particular sentence and determine whether it is proportional, or the categorical approach.

My friends on the other side have asked for a categorical rule prohibiting all felon disenfranchisement. The Fourth Circuit has said

unequivocally that categorical rules are available only for death sentences and for life imprisonments without parole for juvenile offenders. Because this doesn't fall into either of those categories, they aren't entitled to a categorical rule. And that is sufficient for dismissal.

THE COURT: Well, what if you -- would it be a punishment if you said felons, part of your -- part of being a felon is you are not allowed to get married. Suppose that was something that Virginia said went with a felony. You can't get married. We don't want you having spouses and children.

Would that be a punishment?

MR. FERGUSON: The answer to that, Judge Gibney, is it depends because Smith against Doe says that the two questions that you have to ask are; first, as a matter of statutory interpretation did the legislature or the people who adopted the statute or constitutional provision intend for it to be punitive? That is Doe against Settle. It is difficult for me to answer that in the abstract. And then the second is, even if they didn't intend for it to be punitive under the Mendoza-Martinez factors does it operate in a punitive way? I can't answer the first question because we would need more facts. The second, I think it is

probably a closer call. This one I think it is a quite straight forward call mostly because every court who have applied the Mendoza-Martinez factors to this question, including the 11th Circuit with regard to Alabama's almost identical constitutional provision just this year have concluded that it isn't, it doesn't have punitive effect under Mendoza-Martinez.

THE COURT: It just seems to me that almost every state says you can't vote at least for a while if you commit a felony. And it is like the state chooses, if you view this as a punishment, like one state has punishment of six months for grand larceny, another state has two years. That is just the way it works in our country. The states get to pick.

MR. FERGUSON: I agree, Your Honor.

If I can make one more point about your marriage question that I think is very important here. Denying a criminal convict, a felon convict, the right to marry implicates unequivocally the fundamental constitutional right to marry that the Supreme Court has recognized at least three times. But, the 14th amendment makes it very clear, and the Supreme Court has made it clear, that felons don't have a fundamental right to vote because of the affirmative sanction in section two of 14th amendment excluding them from the franchise.

States of course can exercise legislative grace as many have in some circumstances to extend the franchise, but Your Honor is absolutely correct, 48 of the 50 states deny the franchise to someone who is serving a term of years in prison. And I just don't think you can say there is a national consensus against life-time disenfranchisement when 48 of the states would disenfranchise someone for life if that person were serving a life sentence.

THE COURT: All right.

What about the argument they make about the proportionality, and given the fact, and it is a pretty interesting discussion about, historical discussion about it, they tried to make what we now think of as misdemeanors felonies in order to bar African-Americans from voting. Graham says you have to have some proportionality in punishment to the offense. And they point out there is no proportionality with the franchise to vote. You either have it or you don't. You may have it for a while, you may not have it for a while. Could you revoke somebody's right to vote for shoplifting?

MR. FERGUSON: I am going to answer your question. I want to make sure we are talking about the same thing. Is the question, could it be rejected for

shoplifting consistent with section two of the 14th amendment? I think that the answer is yes, because section two of the 14th amendment, as the Supreme Court interpreted in Richardson, is the affirmative sanction of disenfranchisement for a crime. And that is a crime.

THE COURT: An allowable proportional punishment.

MR. FERGUSON: Well, we don't think it is -- it isn't a a punishment because -- if Your Honor disagrees, if Your Honor disagrees with it, I think it depends on the way the case is being litigated -- this isn't a dodge if Your Honor will let me explain -- there are two ways to litigate eighth amendment claims. The first is as applied where you just take the particular defendant's sentence and you do a proportionality analysis. The Supreme Court has only blessed that once in the last 40 years. It is very difficult to do an as applied claim under the eighth amendment.

The second is a categorical rule. It is difficult for me to answer your question on the categorical approach because the Fourth Circuit has held that the categorical rule is available only for a life sentence without parole for juveniles. And for death sentences.

So I think the answer would be, no, but only

because the fourth Circuit said if you ask categorical rule, it better be because you are a juvenile defendant with a life sentence or you have a death sentence. And that is it.

THE COURT: All right. Thank you.

MR. FERGUSON: Thank you, Your Honor.

THE COURT: All right.

Who is going to respond to this one? We have someone else. You are who, sir?

MR. WERLE: Nick Werle from Wilmer Hale for the plaintiff.

THE COURT: All right. Let's hear from you, sir.

MR. WERLE: May it please The Court, the eighth amendment necessarily embodies a moral judgment that must look beyond historical conceptions, the evolving standards of decency that mark progress of a maturing society. That is what Graham said and what Trop said, and what the Supreme Court has been saying for more than fifty years.

Today Virginia's felony disenfranchisement regime violate that standard. I want to start by just referring to your comment that the cruel and unusual punishment clause is meant to address issues only like torture and extreme imprisonment.

THE COURT: Well, that is clearly not the rule any

more. That is what Justice Thomas said the law ought to be. But clearly it addresses a lot of different things in terms of prison conditions and so forth.

MR. WERLE: That is right, Your Honor. But it goes even outside the prison's walls. So there are numerous cases where the Supreme Court and federal courts and state supreme courts have held that what are generally understood to be civil collateral consequences of conviction are prohibited by the cruel and unusual punishment clause. So in Trop versus Dulles considered denaturalization of a convicted deserter under the immigration laws. The United States in Cafagean, which is cited in our papers, considers civil asset forfeiture. Mandatory life-time sex offender registration of juvenile offenders has been held to violate the Eighth Amendment by three state supreme courts; Colorado, Ohio and Kansas.

Illinois one address per statute aspect of their sex offender registration residency restriction was found to violate the eight amendment in Murphy versus Raoul. That 380 F Sup 3d 731.

So I submit, Your Honor, that the proper comparison here is to those types of cases, and not to the type -- and no just saying does this, is this cruel and unusual as compared to execution of people with IQs

below 70?

So I think there is a national consensus about, against life-time felony disenfranchisement after people finish their sentences. Virginia stands alone. It has the most punitive felony disenfranchisement regime in the entire country, and despite the fact the defendants tried to muddy the waters on how to count the states, they don't deny this fact.

Even -- I would submit that even in a conservative, from our perspective, the most conservative counting 39 states re-enfranchise all convicted felons after they have completed their sentences. That is far more than the national consensuses that were found in Graham and, sorry, in Atkins and Roper, which is at 30, but the bar, actually the bar is much lower than 30. Graham had only 13 sates that prohibited life without parole sentences for juvenile non-homicide offenders. When it was decided the number was 21. They also haven't denied that there is a single direction of change among state laws. The only other state that had a provision that is similar to article two, section one, was Florida. And it was abolished by amendment four to the Florida Constitution just a few years ago.

Amendments where I think is significant is because

it spawned a lot of litigation in the 11th circuit. My friend on the other than side is wrong in saying that, no, that every circuit has found that all felon disenfranchisement is necessarily non-penal. The eleventh circuit and the second circuit have both had decisions where they have concluded that disenfranchisement is a form of punishment. And that it is a punitive device historically stemming from criminal law. The eleventh circuit en banc said that in Johnson versus Governor of the State of Florida. And the Second Circuit said that in Muntaqim versus Coombe, 366 F 3rd 102 at page 123, which was later vacated en banc for unrelated jurisdictional reasons.

Now, applying, I submit that applying the required intent of that framework to article two section one, the history is clear that this particular felony disenfranchisement regime was intended to punish people for criminal conviction.

Now, defendants rely on three arguments concerning felony disenfranchisement in general to avoid having The Court have to contend with the common law specific disenfranchisement regime. But none of those arguments is meritorious.

I will address all three here in argument. The first, they argue that Trop versus Dulles declared that

felony disenfranchisement is per se non penal. But Trop declared no such rule.

Second. They argue that Richardson versus Ramirez confers on states an unconstrained power to disenfranchise defendants for criminal conviction. But the Supreme Court, among other courts, has recognized that Richardson does not insulate felony disenfranchisement laws from challenge under other Constitutional provisions.

And third, the misread of United States versus Cobler to preclude categorical challenges under the eighth amendment other than to execution or life imprisonment, but Cobler itself rejects defendant's argument in footnote.

Unless The Court would prefer to start elsewhere I will start by addressing why disenfranchisement was intended to be penal in Virginia.

THE COURT: Well, I am pretty much with you on that.

MR. WERLE: Thank you, Your Honor. I just want to --

THE COURT: Whether it is, I think the question is whether it's cruel and unusual.

MR. WERLE: Thank you, Your Honor. I just want to make one point on the question of whether it is penal.

THE COURT: When I said, I was with you, I sort of --

MR. WERLE: I won't snatch defeat from the jaws of victory and I will move on.

So turning to the question of -- let's turn to Richardson, then. So defendants argue that Richardson versus Ramirez forecloses any challenge to state felony disenfranchisement laws. But this is a fundamental misreading of Richardson and of section two of the 14th amendment. They double down in reply on their misreading of Richardson. Their position is that it grants states carte blanch to enact any policy they plead to disenfranchise for criminal conviction, and that is not subject to any constitutional review. That can't possibly be right. And the Supreme Court in fact expressly rejected this position in Hunter versus Underwood, 471 U.S. 222 at page 233. In Hunter the court invalidated an aspect of the Alabama constitution's disenfranchisement provision under the equal protection clause because it was enacted with a racially invidious purpose.

The final paragraph of Hunter states that without revisiting its construction of section two in Richardson, it was confident that section two of the 14th amendment did not authorize Alabama to enact and

enforce a law which "Otherwise violates section one of the 14th amendment." The court stated, "Nothing in Richardson suggests the contrary."

I would also point out that your Honor agreed with its position ten years ago in El Amin versus McDonnell case, which --

THE COURT: What is that? I may have written that decision, but what did I say?

MR. WERLE: You said that Hunter versus Underwood means that the same exact Richardson argument they are making here is wrong.

THE COURT: What was case about?

MR. WERLE: That case was also about the eighth amendment. The eighth amendment as applied to the Virginia State disenfranchisement.

THE COURT: Was this --

MR. WERLE: I want to, I want to raise --

THE COURT: Let me just say, I have decided a lot of cases in my life in my 13 years on the bench. I don't remember them all. Tell me what that case was about.

MR. WERLE: That case was a pro se. That was a pro se plaintiff.

THE COURT: El Amin was a pro se plaintiff?

MR. WERLE: El Amin was pro se plaintiff. Many of

the issues that are at play in this case were not even briefed, such as the question of whether it is punitive. So we can draw Your Honor has a right to take a fresh look at it today.

THE COURT: Did he complain about being disenfranchised?

MS AMADI: Yes.

THE COURT: Was this Sa'ad El Amin?

MR. WERLE: I am not sure of his first name, Your Honor.

I want to just take a step back on the Richardson case and point out that the historical record is unambiguous that the purpose of section two of the 14th amendment was to promote the franchise by establishing a penalty for any state that would seek to disenfranchise its black population.

THE COURT: I read your brief.

MR. WERLE: I know, Your Honor --

THE COURT: You don't need to repeat.

MR. WERLE: I'm sorry, Your Honor.

I also want to point out that Justice O'Connor sitting by designation on the Ninth Circuit in the Harvey versus Brewer case, which they on in their motion at pages 14 and 18, also rejects the Richardson argument.

So on the merits of the -- I also want to briefly address the Cobler argument where my friend said that the Fourth Circuit held that categorical challenges are only available to life imprisonment and execution cases. That is, he is exactly the opposite of what Cobler held. Cobler expressly foreclosed their argument at footnote three, which is at page 579 of that opinion by rejecting language from a prior Fourth Circuit panel opinion in Ming Hong, which "Wrongly suggested that any judicial review of proportionality challenges less than life imprisonment without the possibility of parole would be foreclosed.

Cobler expressly reaffirmed a prior Fourth Circuit panel ruling which said that eighth amendment challenges were available required to be heard as to every form of punishment because no form of punishment is per se constitutional.

Their briefs are also wrong in saying Cobler rejected the categorical challenge in that case because it wasn't life imprisonment or execution. The actual holding of that case was on two case-specific grounds; first, there was nothing in the record to support a national consensus in that case; and second, it rejected the category that had been proposed for the categorical rule. So Cobler just doesn't stand for

what they say.

On the question of national consensus, they are resting their argument on the idea people that who are convicted to life imprisonment are somehow -- and disenfranchising those people -- is somehow equivalent to automatically disenfranchising all people convicted of any felony, even after they have completed all parts of their sentence. That, I just don't think that that is a fair comparison in any way.

They also --

THE COURT: I agree with you.

MR. WERLE: Thank you.

Then on the independent judgment prong. I think at this juncture it is very easy to deny their motion. Because they do not identify any cognizable fact, whether from the pleadings or from a judicially noticeable fact from which it is plausible to infer that there is any litigate penological purpose for the specifically harsh disenfranchisement regime that Virginia enacted under article two section one, and under Graham, the absence of any legitimate penological justification means that the punishment is as a matter of law disproportionate. So whether a full assessment of all of the fact-intensive assessment of how this actually operates in practice, they rested in their

motion, they have relied heavily on this, on the governor's right restoration powers.

THE COURT: Would it be a legitimate penological reason to say, well, we are going to take away your right to vote, so you better not commit a crime? A deterrent factor?

MR. WERLE: Well, they have --

THE COURT: Is that legitimate?

MR. WERLE: Deterrence is certainly legitimate.

THE COURT: You know, people, most people -- well not most people, current election results show a lot of people think voting is a valuable aspect of being a citizen. If you take that away from people, isn't it likely to make them not commit crime?

MR. WERLE: We agree that taking away someone's voting rights for their entire life is incredibly severe punishment. Their argument on why it is deterrence consists entirely of saying well, if it is so severe how could it not deter? That is, that logic has been rejected numerous times by the Supreme Court when it found that punishments that were extremely severe did not in fact deter. This is in Graham, Roper, Miller and many other cases. Particularly in the juvenile offender context. The reason is because deterrence is not just about severity of the

punishment. It is also about how salient it is before a crime is committed, and how present in the mind of potential offenders it is. They provide no reason in their briefing as to why when there is the threat of prison for felony why there is any marginal deterrent value.

THE COURT: Well, that is like saying the Federal Sentencing Guidelines don't deter people from doing things. I had a partner who used to joke the guidelines are for felons who go look at the guidelines before they commit a crime so they make sure they commit that in the right way of cutting their losses if they got caught.

You know, I think that it a little naive to think that there is no deterrence, because criminals don't think about their voting rights before they go hold up a 7-Eleven.

MR. WERLE: Well, if they were to think about it, then --

THE COURT: You and I before we go hold up a 7-Eleven would think about that. And we are the people who are being deterred.

MR. WERLE: I would submit, Your Honor, two points. First, even if there were some marginal deterrent value, some degree, the question is whether

the punishment is not grossly disproportionate to that and at this juncture when they have made no factual showings on this fact-intensive prong, I submit the proper way, the proper time to make that decision would be later in the case after there has been some fact development. They have presented no record.

THE COURT: You are absolutely right. God knows marijuana laws are changing, possibility of punishment doesn't keep people from buying and smoking marijuana.

MR. WERLE: You are right, Your Honor.

And the question, and the proper question here is not whether the entire package of punishment that you might have is deterrence, but it is whether this particular, this particular punishment, the punishment of losing ones voting rights, adds anything to the mix, and whether what it adds in deterrence can justify the extreme sanction of a life time disenfranchisement.

THE COURT: What about this? Why can't the state say, anybody that is anti-social enough to commit a felony ought to not be allowed to pick who runs the state. Why isn't that a legitimate state interest?

MR. WERLE: That would be, that could be a legitimate state interest, but that would go to the question of whether or not it is punishment. That doesn't come into the question of whether -- that is

not one of the four recognized penological interests that can justify a punishment once you get to the eighth amendment merits. Those four are deterrence, retribution, rehabilitation and incapacitation. I think that, if anything, that would fall under retribution. But as a matter of law retribution can't justify this punishment because in Tyson versus Arizona the court held, and it has been reaffirmed numerous times afterwards in Graham and other cases that retribution can only help justify a punishment where "the criminal sentence is directly related to the personal culpability of the criminal offender." And the mandatory nature of article two section one means that all people, all people convicted of any felony are subject to disenfranchisement. So it precludes having any direct relations between life time disenfranchisement and personal culpability.

I think Miller versus Alabama is --

THE COURT: I read your brief on all that.

MR. WERLE: Okay.

If there are no other questions, we ask The Court deny their motion to dismiss.

Thank you .

THE COURT: Thank you very much.

Do you want to respond to that.?

MR. FERGUSON: Very brief points unless Your Honor has questions.

The first is on the question of national consensus. They have identified, and we disagree with it, they have identified a national consensus against post carceral disenfranchisement. That is sort of beside the point because the injunction that they have requested is an injunction prohibiting the disenfranchisement of any felon. So on the injunction they have requested would allow a felon convicted of capital murder in prison to cast a ballot. That is reason enough to dismiss the complaint in its entirety.

They argue even if Your Honor --

THE COURT: You know, I can modify. Courts do that all the time.

MR. FERGUSON: That is true, but the point remains that the categorical rule that they have articulated is you can't disenfranchise felons. Their request for declaratory relief was a declaration the eighth amendment prohibits the disenfranchisement of any felon. That just simply can't be the case. That is sufficient to dismiss.

The second is -- and it sounded like Your Honor isn't with us on this -- but I will take one last shot at it. No court of appeal has concluded that this is,

except for the recently vacated fifth circuit, has concluded that this is punishment for purposes of the cruel and unusual punishment clause.

THE COURT: It seems to me like when it comes about as a result of your conviction, it is pretty close to being punishment.

MR. FERGUSON: I will just, Judge, finally in Green address that argument and said, look, the point of this rule that the Supreme Court has acknowledged is a permissible way to decide voter qualifications for a long time, is exactly what, Judge Gibney, you just identified, which is, it makes good sense for society in deciding who will get to pick the laws and the law makers, to exclude from that decision, at least not to give them the same footing as law-abiding people. That is, that is why it is in section two of the 14th amendment. That is how Judge Friendly understood it as a lawful exercise of the state franchise regulating power. And the case that they have identified earlier as having said that this a form of punishment, Johnson from 2005 in the 11th Circuit, was disclaimed just this year by the 11th Circuit in Thompson which said that was passing dicta, that doesn't bind us, and we conclude that Alabama's almost identical disenfranchisement provision is not punitive for

purposes of Smith against Delf.

Unless Your Honor has additional questions we ask the motion be granted.

Thank you.

THE COURT: Thank you all very much for very good arguments on this. It was interesting to read the comments of Carter Glass in the 1901 Constitutional convention. I guess his great grandson is who I went to law school with. He is a lawyer at what is now Troutman for a long time. I think he was splendid.

Okay. Anything else? So let me just ask you, Mr. Wollin, do you have anything to add?

MR. WOLLIN: Not beyond what my colleague already said. Your Honor.

THE COURT: Okay. Mr. Gallon, how about you?

MR. GALLAGHER: No, Your Honor.

THE COURT: Okay.

Well, thank you all very much. This has been -- these are -- the briefs on this were terrific. And this is an interesting case that posses a lot of questions that deal in two areas that I find interesting; one is civil rights of citizens, but the other is what is the proper role of federal courts in our country.

That sounds like an exam question.

That is what I ask my students. What do you think are the purposes of federal courts?

Have a great day. Thank you.

HEARING ADJOURNED.

Certified true and correct transcript

GILBERT FRANK HALASZ, RMR

OFFICIAL COURT REPORTER

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

TATI ABU KING, et al.,
Plaintiffs,

v. Civil Action No. 3:23cv408

GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al.,
Defendants.

OPINION

Article II, Section 1 of the Virginia Constitution automatically disqualifies all persons convicted of any felony from voting. Felons, including the individual plaintiffs, Tati Abu King and Toni Heath Johnson, may not vote unless and until their "civil rights have been restored by the Governor or other appropriate authority." *See* Va. Const. art. II, § 1 (1971). In their Amended Complaint, the plaintiffs assert that Article II, Section 1 of the Virginia Constitution violates both a federal statute—the Virginia Readmission Act ("VRA") of 1870—and the Eighth Amendment of the United States Constitution. They have sued several state and local officials, including Governor Glenn Youngkin and Secretary of the Commonwealth Kelly Gee. The plaintiffs ask the Court to issue a declaratory judgment in their favor and to enjoin the defendants from enforcing Article II, Section 1 against individuals convicted of crimes that were not felonies at common law in 1870.

The defendants have moved to dismiss the plaintiffs' Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 76.) For the reasons discussed below, the Court will grant in part and deny in part the defendants' motion. First, because Bridging the Gap, Inc. ("Bridging the Gap") has not alleged an injury-in-fact, it lacks

standing to sue, so the Court will dismiss it from this case. Next, because *Ex parte Young* permits the plaintiffs to pursue their sought-after relief, none of the defendants may successfully assert their Eleventh Amendment immunity. Third, because the VRA does not create a private right enforceable under § 1983, the Court will dismiss Count One. But because the plaintiffs need not assert a private right in pursuing equitable relief, and the Amended Complaint plausibly presents an *Ex parte Young* action, the Court will not dismiss Count Two. Finally, because felon disenfranchisement is not a punishment under the Eighth Amendment, the Court will dismiss Counts Three and Four.

I. BACKGROUND

A. Virginia's Constitution and the VRA

Following the Civil War, Congress passed the VRA, which admitted Virginia

> to representation in Congress as one of the States of the Union upon the following fundamental condition[]: . . . 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 [Virginia] Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law . . . .

An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870). The VRA thus readmitted Virginia's representatives to Congress on the "fundamental condition" that Virginia never alter its Constitution to disenfranchise citizens who could vote under Virginia's then-controlling Constitution. *See id.* This condition came with one exception: the Virginia Constitution could be amended to disenfranchise those convicted of crimes that, in 1870, were common law felonies.[1]

[1] "[A]t common law[,] murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies." *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (citing Wharton, Criminal Law § 26 (12th ed.)).

When Congress enacted the VRA, Virginia's Constitution disenfranchised specific "persons": those "convicted of bribery in any election, embezzlement of public funds, treason or felony." Va. Const. art. III, § 1 (1869). In 1902, Virginia amended its Constitution, disenfranchising "persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime . . . whose disabilities shall not have been removed" and "persons convicted after the adoption of this Constitution . . . of treason, or of any felony, bribery, petit larceny, obtaining money or property under false preten[s]es, embezzlement, forgery, or perjury." Va. Const. art. II, § 23 (1902). Virginia's current Constitution, last amended in 1971, no longer specifies certain felony convictions that disqualify a prospective voter. Instead, it disenfranchises all persons "convicted of a felony" from voting; convicted felons may vote only if their "civil rights have been restored by the Governor." Va. Const. art. II, § 1 (1971).

B. The Defendants' Role in Felon Disenfranchisement

The plaintiffs sue several state actors involved in the disenfranchisement process in their official capacity: Governor Youngkin; Secretary Gee; Chairman of the State Board of Elections John O'Bannon; Vice Chair of the State Board of Elections Rosalyn R. Dance; Secretary of the State Board of Elections Georgia Alvis-Long; Board of Elections member Donald Merricks; Board of Elections member Matthew Weinstein; Commissioner of the Department of Elections Susan Beals; General Registrar of Fairfax County, Virginia, Eric Spicer; and General Registrar of Smyth County, Virginia, Shannon Williams.

Virginia's Constitution proscribes those with felony convictions from voting unless and until Governor Youngkin or another "appropriate authority" restores their voting rights. *See id.* "The Secretary of the Commonwealth administers the process for the restoration of civil rights, including the right to vote." (ECF No. 58 ¶ 26.) "Individuals who have had their civil rights

taken away due to a felony conviction may apply to have their rights restored by the Governor," and Governor Youngkin uses discretion in assessing voting rights restoration applications. (*Id.* ¶ 24.) Governor Youngkin either grants or denies those applications, and Secretary Gee's office communicates with applicants once Governor Youngkin has reached a decision. If Governor Youngkin denies "an application to restore voting rights, [he] ensures that individuals who have been disenfranchised pursuant to Article II, Section 1 of the Virginia Constitution remain permanently disenfranchised." (*Id.*)

The Board of Elections "is authorized to prescribe standard forms for voter registration and elections, and to supervise, coordinate, and adopt regulations governing the work of local electoral boards, registrars, and officers of election." (*Id.* ¶ 28.) The Department of Elections "conducts the Board of Elections' administrative and programmatic operations and discharges the Board's duties consistent with delegated authority." (*Id.* ¶ 34.) In doing so, "[t]he Department of Elections is authorized to establish and maintain a statewide automated voter registration system to include procedures . . . to require cancellation of records for registrants no longer qualified." (*Id.*) The Department of Elections "requires the general registrars to delete from the record of registered voters the name of any voter who has been convicted of a felony." (*Id.* ¶ 35.) General registrars "process voter registration applications for residents in their particular locality . . . determining whether an applicant has ever been convicted of a felony, and if so, under what circumstances the applicant's right to vote has been restored." (*Id.* ¶ 37.) Within thirty days of learning that a registered voter has a felony conviction and has not had their voting rights restored, the general registrar must delete that voter from the record.

C. The Plaintiffs' Injuries

Two individuals, King and Johnson, and a nonprofit organization, Bridging the Gap, allege that Virginia's Constitution unlawfully disenfranchises those convicted of felonies that were not common law felonies in 1870.

In 2018, King was convicted of a felony drug-possession offense and lost his voting rights. (ECF No. 58 ¶¶ 15–16.) After King completed his sentence, he submitted a voting rights restoration application to Secretary Gee's office. That application remains pending. In 2021, "Johnson was convicted of drug possession and distribution crimes, as well as child endangerment," and she, too, lost her right to vote. (*Id.* ¶¶ 20–21.) While on probation, Johnson submitted her voting rights restoration application. "Johnson learned in June 2023 that her restoration application ha[d] been denied." (*Id.* ¶ 21.)

Bridging the Gap's "mission is to empower formerly incarcerated persons and to help these individuals overcome barriers that hinder their effective transition into mainstream society following incarceration." (*Id.* ¶ 23.) The organization "focus[es] on three main areas: career training, civil rights/criminal justice advocacy, and housing resources." (*Id.* ¶ 82.) "As a central component of that work, Bridging the Gap assists previously incarcerated Virginians who have been disenfranchised—including Virginians disenfranchised because of convictions for crimes that were not felonies at common law in 1870 . . . [and] felonies more generally—in having their voting rights restored." (*Id.* ¶ 23.) "Due to the time and effort it has expended supporting thousands of individuals with rights restoration as a result of Defendants' conduct, Bridging the Gap has forgone investment into other core areas of its organizational goals and services, and even delayed or suspended other projects and programs vitally important to its mission." (*Id.* ¶ 86.) Specifically, the organization has reduced the frequency of its trainings for formerly

incarcerated individuals to learn how to install solar panels, and it "has substantially reduced the time and resources it puts toward connecting people leaving incarceration with transitional housing." (*Id.* ¶¶ 86–87.) Additionally, Bridging the Gap has forgone applying for "at least three grants . . . because of the time the organization has needed to spend countering Virginia's unlawful disenfranchisement regime." (*Id.* ¶ 88.)

II. THE DEFENDANTS' 12(B)(1) MOTION[2]

A. Bridging the Gap Lacks Standing to Sue

The plaintiffs bear the burden of establishing that Bridging the Gap has standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," and courts "accept as true [the plaintiffs'] allegations for which there is sufficient 'factual matter' to render them 'plausible on [their] face.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (second alteration in the original) (first quoting *Lujan*, 504 U.S. at 561; then quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Courts "do not, however, apply the same presumption of truth to 'conclusory statements' and 'legal conclusions.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. "First, the plaintiff must have suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent,

---

[2] A motion to dismiss under Rule 12(b)(1) usually places the burden on the plaintiff to prove the court has subject matter jurisdiction. *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982). A defendant's Rule 12(b)(1) motion may challenge subject matter jurisdiction facially, contending that the plaintiff's complaint fails to allege facts upon which the Court may base its subject matter jurisdiction. *Id.* "[W]hen a defendant asserts that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6) and assume the truthfulness of the facts alleged." *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). If the defendant asserts that the Eleventh Amendment bars a plaintiff's suit, however, the defendant bears the burden of proving its immunity under that Amendment. *See Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 542–43 (4th Cir. 2014).

not conjectural or hypothetical." *Id.* (internal quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotations omitted). "[A] plaintiff can satisfy the injury-in-fact requirement for prospective relief either by demonstrating a sufficiently imminent injury in fact or by demonstrating an ongoing injury." *Garey v. James S. Farrin, P.C.*, 35 F.4th 917, 922 (2022) (alteration in original) (internal quotations omitted) (quoting *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 189 (4th Cir. 2018)).

The plaintiffs assert that automatic disenfranchisement impairs felons' successful transition to active citizenship and "hinders Bridging the Gap's mission 'to support the successful transition of formerly incarcerated persons to active citizenship.'" (ECF No. 78, at 12 (quoting ECF No. 58 ¶ 80).) They argue that Bridging the Gap has organizational standing because the defendants' "enforcement of Article II, Section 1 of the Virginia Constitution has 'perceptibly impair[ed]' [its] ability to carry out its mission and 'consequent[ly] drain[ed] . . . [its] resources.'" (*Id.* (quoting *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (alterations in original)).) But "a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). And "[a]lthough a diversion of resources might harm the organization by reducing the funds available for other purposes, it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (alterations in original) (internal citations omitted).

Bridging the Gap has simply made a budgetary choice among its focus areas. The organization therefore lacks standing, and the Court will dismiss Bridging the Gap it from this case.

B. Sovereign Immunity Does Not Bar the Plaintiffs' VRA Claims

Sovereign immunity "protects a state's dignity and fiscal integrity from federal court judgments and acts as a limitation on the federal judiciary's Article III powers." *Beaulieu v. Vermont*, 807 F.3d 478, 483 (2d Cir. 2015) (citation omitted). Although the Eleventh Amendment provides that a state is immune from suit in federal court brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State," the Supreme Court has extended its applicability to private citizens' suits against their own states. U.S. Const. amend. XI; *see, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

A plaintiff may overcome a state's Eleventh Amendment immunity and sue a state in federal court if: (1) the state has expressly consented to suit, (2) Congress has abrogated the state's immunity from suit, or (3) the plaintiff seeks only prospective injunctive relief against the state's violation of federal law. *See Garrett*, 531 U.S. at 363; *Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Ex parte Young*, 209 U.S. 123, 159–60 (1908). The first and second routes around the Eleventh Amendment do not apply here, but the doctrine of *Ex Parte Young* does. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit [against a State], a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (second alteration in original) (internal quotation marks omitted). The *Ex parte Young* doctrine applies only to ongoing federal violations; it does not apply to suits in which a plaintiff asks the court to

compel a state to comply with state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

The defendants assert that *Pennhurst* controls because although the plaintiffs "characterize their claims as premised on a violation of federal law—the Virginia Readmission Act—they are state-law claims in substance." (ECF No. 77, at 18.) They contend that, "[i]n essence, Plaintiffs ask this Court to order Defendants to comply with the 1869 Virginia Constitution." (*Id.*) But the plaintiffs do not ask for such relief. They assert that the defendants are enforcing Article II, Section 1 of Virginia's Constitution. And they contend that such enforcement is in violation of a federal law's "fundamental condition" that Virginia never alter its Constitution to disenfranchise citizens who could vote under Virginia's 1869 Constitution, "except as a punishment for such crimes as are now felonies at common law." (ECF No. 78, at 10, 23); *see* An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870).

The plaintiffs aim to prevent the defendants from enforcing Article II, Section 1 of the Virginia Constitution against those convicted of felonies that were not felonies at common law in 1870 and request a declaratory judgment confirming their legal allegations. Thus, their sought-after relief is "properly characterized as prospective." *Verizon Md., Inc.*, 535 U.S. at 645. Accordingly, the plaintiffs' VRA claims fall squarely within the *Ex parte Young* exception to the defendants' Eleventh Amendment immunity, and the Court will deny the defendants' motion to dismiss on *Pennhurst* grounds.

C. The Plaintiffs Have Alleged That Governor Youngkin and Secretary Gee Have a "Special Relationship" to Felon Disenfranchisement

"The *Ex parte Young* exception is directed at 'officers of the state [who] are clothed with some duty in regard to the enforcement of the laws of the state, *and* who threaten and are about

to commence proceedings . . . to enforce against parties affected [by] an unconstitutional act.'" *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (alterations in original) (quoting *Ex parte Young*, 209 U.S. at 155–56). Thus, courts must find a "'special relation' between the officer being sued and the challenged statute before invoking the exception." *Id.* A state actor has a "special relation" to a challenged state action if it has "*proximity to* and *responsibility for* the challenged state action." *Id.* (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008)).

The defendants contend that "[n]either the Governor nor the Secretary of the Commonwealth play any role in enforcing Virginia's disenfranchisement of convicted felons. Rather, as Plaintiffs' allegations make clear, the Governor and Secretary play a role only in the re-enfranchisement of felons." (ECF No. 77, at 19.) But under Virginia's voting rights restoration scheme, these defendants may enforce the permanent disenfranchisement of certain individuals. Thus, on the record before the Court, the Governor and Secretary bear a "special relation" to the challenged law, and the Court will not dismiss Governor Youngkin and Secretary Gee from the case at this time.

D. The Plaintiffs' VRA Claims Do Not Present a Political Question

The Court lacks jurisdiction to adjudicate political questions. *See Baker v. Carr*, 369 U.S. 186, 210 (1962). In *Baker*, the Supreme Court articulated six circumstances in which an issue could present a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id* at 217. "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* More recent cases focus on the first two factors and assess whether an issue reveals a textual commitment to a coordinate branch or a lack of judicially manageable standards. *See Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Nixon v. United States*, 506 U.S. 224, 228 (1993).

As discussed above, the plaintiffs ask the Court to assess whether Virginia's Constitution violates a federal statue. Accordingly, neither a "textually demonstrable constitutional commitment of the issue to a coordinate political department," nor "a lack of judicially discoverable and manageable standards" exists. *See Baker*, 369 U.S. at 217. Indeed, "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [courts] cannot shirk this responsibility merely because [their] decision may have significant political overtones." *Id.* The Court therefore finds that the plaintiffs' VRA claims do not present a political question, and it will deny the defendant's motion to dismiss on justiciability grounds.[3]

[3] The defendants also argue that the canon of constitutional avoidance and the anticommandeering doctrine preclude the plaintiffs' VRA claims. (*See* ECF No. 77, at 26–31.) But "[t]he canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)). The defendants seem to assert that, under the plaintiffs' theory, Congress violated the United States Constitution when it passed the VRA. But they have not identified any "statutory ambiguity" in the VRA necessary to trigger the Court's consideration of the constitutional-avoidance canon. *See United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021). The

II. THE DEFENDANTS' 12(B)(6) MOTION[4]

A. VRA Claims

1. Section 1983 Provides No Remedy for Purported Violations of the VRA

The plaintiffs bring Count One under 42 U.S.C. § 1983,[5] asking the Court to (1) enjoin the defendants "from enforcing Article II, Section 1 of the Virginia Constitution with respect to citizens of the Commonwealth of Virginia convicted of crimes that were not felonies at common law when the [VRA] was enacted in 1870" and (2) issue a declaratory judgment that the defendants' enforcement of this Section violates the VRA. (ECF No. 58, at 31.) To seek such redress, the plaintiffs must establish that the VRA creates a private right enforceable under § 1983. In other words, they must "assert the violation of a federal *right*, not merely a violation of federal *law*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (2007)). Because § 1983 "is not an independent source of substantive rights, but simply a vehicle for vindicating preexisting constitutional and statutory

---

anticommandeering doctrine is similarly inapplicable here: the plaintiffs ask the Court to enjoin the defendants from enforcing Article II, Section 1 of Virginia's Constitution, and they have not asked the Court to compel the defendants' action.

[4] A Rule 12(b)(6) motion gauges the sufficiency of a complaint without resolving any factual discrepancies or testing the evidentiary merits of the claims. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In considering the motion, a court must accept all allegations in the complaint as true and must "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). The principle that a court must accept all allegations as true, however, does not extend to legal conclusions. *Iqbal*, 556 U.S. at 678. To survive a Rule 12(b)(6) motion to dismiss, a complaint must therefore state facts that, when accepted as true, state a claim to relief that is plausible on its face. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

[5] "To state a claim under U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation of that right was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

rights," the Court must begin its analysis by identifying "the specific right that has been infringed." *Safar v. Tingle*, 859 F.3d 241, 245 (4th Cir. 2017) (citing *Graham v. Connor*, 490 U.S. 386, 393–94 (1989)).

To determine whether the plaintiffs have asserted a private right actionable under § 1983, the Court must look for "rights-creating language" in the text of the VRA. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). The Supreme Court identified three factors that courts should consider in assessing whether a statute creates a right enforceable under § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340–41 (citations omitted). The Supreme Court later clarified that, as to the first factor, "anything short of an unambiguously conferred right" cannot support a private remedy under § 1983; it is not enough for plaintiffs to fall "within the general zone of interest" of a federal statute. *See Gonzaga*, 536 U.S. at 283. If all "three factors are satisfied, there is 'a rebuttable presumption that the right is enforceable under § 1983.'" *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 696 (4th Cir. 2019) (quoting *Blessing*, 520 U.S. at 341).

Whether the VRA contains rights-creating language is an issue of first impression, and the parties dispute only whether the VRA satisfies the first and third *Blessing* factors. As to the first *Blessing* factor, the plaintiffs contend that the VRA "expressly refers to individual voting rights—*i.e.*, '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.'" (ECF No. 78, at 22 (emphasis omitted) (quoting An Act to Admit the State of Virginia to Representation in the

Congress of the United States, ch. 10, 16 Stat. 62 (1870)).) They liken the VRA's language to the Medicaid Act's free-choice-of-provider provision, which states:

> A State plan for medical assistance must—provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . . .

42 U.S.C. § 1396a(a)(23). The Fourth Circuit found that this provision "unambiguously gives Medicaid-eligible patients an individual right" because "Congress's use of the phrase 'any individual' is a prime example of the kind of 'rights-creating' language required to confer a personal right on a discrete class of persons." *Baker*, 941 F.3d at 696–97 (first quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012); and then citing *Sandoval*, 532 U.S. at 288). The Fourth Circuit further explained that Congress had "left no doubt that it intended to guarantee each Medicaid recipient's free choice of provider." *Id.* at 697.

Although both the Medicaid Act's free-choice-of-provider provision and the VRA identify those who may benefit from the statute, the overall text and structure of the VRA differs greatly from that of the free-choice-of-provider provision. The VRA's sole purpose is clear: to readmit the Commonwealth's representatives into Congress upon certain fundamental conditions. The VRA, officially entitled the "Act to admit the State of Virginia to Representation in the Congress of the United States," first declares that Virginia's citizens had 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 to the Constitution of the United States; and . . . the performance of these several acts in good faith was a condition precedent to the representation of the State in Congress." An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62

(1870). The Act then explains that "Virginia is entitled to representation in the Congress of the United States," provided in part that Virginia's Constitution "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." *Id.*

Here, the plaintiffs contend that this language is "precisely the type of 'rights-creating' language" necessary to pursue relief under § 1983. (ECF No. 78, at 22.) But the defendants' argument—that the VRA "does not entitle any Virginian to vote, including any Virginia felons convicted of crimes that were not common-law felonies in 1870"—wins the day. (*See* ECF No. 82, at 16.) Although the VRA identifies "citizen[s]" who may benefit from the Act, the Supreme Court has explicitly cautioned courts against "allowing plaintiffs to enforce a statute under § 1983 so long as [they] fall[] within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S. at 283. Accordingly, the Court finds that the Act functions to impose conditions upon which Virginia legislators could participate in Congress, and it lacks language that explicitly confers any individual rights. *See id.* at 274, 286 ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . ."). Because the VRA does not "unambiguously confer" rights on individuals such as the plaintiffs in this case, the Court need not analyze the second and third *Blessing* factors. The Court concludes that the VRA does not create a private right enforceable by an individual civil litigant under § 1983, and it will dismiss Count One.

2. The Plaintiffs May Seek Prospective Relief Under Ex parte Young

In Count Two, the plaintiffs ask the Court to, using its equitable powers, (1) enjoin the defendants "from enforcing Article II, Section 1 of the Virginia Constitution with respect to

citizens of the Commonwealth of Virginia convicted of crimes that were not felonies at common law when the [VRA] was enacted in 1870" and (2) declare that such enforcement violates the VRA. (ECF No. 58, at 34.) The defendants assert that Counts One and Two "ultimately collapse into one theory" and ask the Court to consider the plaintiffs' claims "as a single cause of action under § 1983 that must meet the requirements of § 1983 and *Ex parte Young*. (ECF No. 77, at 17 n.3.) Because § 1983 actions differ from equitable preemption suits, the Court declines the defendants' request and proceeds in analyzing Count Two.

The Supreme Court long ago recognized an equitable exception to Eleventh Amendment immunity, permitting plaintiffs to seek prospective relief against state officials who violate federal law. *Ex parte Young*, 209 U.S. at 123; *see supra* Part II.B. And although the defendants are correct in asserting that the Supremacy Clause "is not the source of any federal rights," they incorrectly argue that "the Readmission Act can be privately enforced, if at all, only through 42 U.S.C. § 1983." (ECF No. 82, at 16 & n.2 (first quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).) Indeed, the Supreme Court has "long recognized [that] if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong*, 575 U.S. at 326 (citing *Ex parte Young*, 209 U.S. at 155–56). Importantly, "the principles that [the Supreme Court] ha[s] developed to determine whether a statute . . . is enforceable through § 1983[] are not transferable to the *Ex parte Young* context." *Id.* at 340 (Sotomayor, J., dissenting).

Rather than pointing to rights-creating statutory language, litigants pursuing relief under *Ex parte Young* rely on a Court's equitable powers that are "subject to express and implied statutory limitations." *Id.* at 327 (majority opinion). To assess Congress's "'intent to foreclose' equitable relief," courts should (1) consider whether Congress had provided a "sole remedy . . .

for a State's failure to comply with [a federal statute]" and (2) assess whether the provision at issue has a "judicially unadministrable nature." *Id.* at 328 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)). Thus, the plaintiffs may seek equitable relief under *Ex parte Young* unless the Court determines that (1) the VRA provides a sole remedy for the Commonwealth's failure to comport with federal law, and (2) it is "judicially unadministrable." *See id.*[6] The defendants have not argued the presence of, and the Court does not find, any identifiable remedy within the text of the VRA. And unlike the "broad and nonspecific" provision at issue in *Armstrong*, the VRA states that Virginia may not alter its Constitution "to deprive any citizen . . . of the right to vote who are entitled to vote by [Virginia's 1869 Constitution] except as a punishment for such crimes as are now felonies at common law." *Compare* 575 U.S. at 333 (Breyer, J., concurring in part and concurring in the judgment), *with* An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870). As discussed above, Count Two falls squarely within the doctrine of *Ex parte Young*. *See supra* Part II.B. Applying the "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," the Court concludes that the plaintiffs appropriately seek equitable relief. *See Verizon Md.*, 535 U.S. at 645 (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in

[6] Before *Armstrong*, the Supreme Court held that courts confronted with a "detailed remedial scheme" in a federal statute "should hesitate" before exercising their equitable powers. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."). It is unclear whether *Armstrong* supplants—or simply clarifies—the "detailed remedial scheme" test set forth in *Seminole Tribe*. Here, the VRA lacks language suggesting Congress's intent to foreclose equitable relief, as it does not present a remedy and certainly does not reveal a "detailed remedial scheme." *See id.*

judgment)). Specifically, the plaintiffs allege that Virginia's Constitution has been amended to disenfranchise persons who could have voted under the 1869 Constitution, and that the defendants' ongoing enforcement of Article II, Section 1 of Virginia's Constitution thus violates the VRA. The Court will allow Count Two to proceed to summary judgment.

B. Eighth Amendment Claims

1. Richardson v. Ramirez *Does Not Foreclose the Plaintiffs' Eighth Amendment Claims*

In Counts Three and Four of the Amended Complaint, the plaintiffs contend that the defendants' role in felon disenfranchisement violates the Eighth Amendment. As an initial matter, the defendants argue that *Richardson v. Ramirez*, 418 U.S. 24 (1974), forecloses the plaintiffs' Eighth Amendment claims. In *Richardson*, the Supreme Court ruled that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." 418 U.S. 24, 54 (1974). There, the Court explained that § 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 [of the Fourteenth Amendment] imposed for other forms of disenfranchisement." *Id.* at 55. In other words, because § 2 of the Fourteenth Amendment implicitly authorizes felon disenfranchisement, § 1 could not be interpreted to prohibit it. But this holding addresses only whether felon disenfranchisement is constitutional in the abstract, and the Supreme Court has "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another. . . . The proper question is not which Amendment controls but whether either Amendment is violated." *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993).

The Supreme Court's subsequent decision in *Hunter v. Underwood* illustrates that, following *Richardson*, courts may hold unconstitutional a felon disenfranchisement provision of a state's constitution. 471 U.S. 222, 233 (1985). There, the Court explained that,

> [w]ithout again considering the implicit authorization of § 2 to deny the vote to citizens 'for participation in rebellion, or other crime,' *see Richardson v. Ramirez* . . . , we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the felon disenfranchisement provision of Alabama's 1901 Constitution] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary.

Id. Thus, *Richardson* does not preclude the plaintiffs' assertion that felon disenfranchisement is cruel and unusual punishment in violation of the Eighth Amendment.

2. Felon Disenfranchisement Is Not a "Punishment"

The Eight Amendment provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "Because the Clause only regulates 'punishments,'" the Court must first determine whether felon disenfranchisement is a "punishment." *See Doe v. Settle*, 24 F.4th 932, 945 (4th Cir. 2022). "[U]nless it is a punishment, the Eighth Amendment does not apply." *Id.*

"The Supreme Court has created a two-part test for determining whether a statute [or constitutional provision] imposes punishment. First, [a court] must ask if the legislature intended to inflict punishment, which is a question of statutory interpretation." *Id.* (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)). If the court finds punitive intent, "that is the end of the inquiry." *Id.* But if it finds no punitive intent, that court "must look to the effects of the law." *Id.* "If the effects are punitive, they may override the legislature's intent, but [a court] must give deference to the legislature on this point, and [it] will require 'the clearest proof' to overturn those intentions." *Id.* (citing *Smith*, 538 U.S. at 105).

Accordingly, the Court begins its analysis by considering the Virginia legislature's intent behind Article II, Section 1 of the Virginia Constitution. If the purpose of this Section "is to designate a reasonable ground of eligibility for voting," then it is "a nonpenal exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion). To assess the Virginia legislature's intent, the Court considers this Section's "text and its structure." *See Smith*, 538 U.S. at 92. Article II of the Virginia Constitution, entitled "Franchise and Officers," addresses every corner of the voting process, from voters' and elective candidates' necessary qualifications to the General Assembly's power to establish a voter registration system and regulate elections. Va. Const. art. II (1971). Section 1 of this Article, entitled "Qualifications of Voters," explains,

> In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished.

Va. Const. art. II, § 1 (1971). The felon disenfranchisement provision of Article II, Section 1 immediately follows several nonpunitive requirements for the franchise, including citizenship, age, residency, and registration. And it precedes another nonpunitive provision that disqualifies all persons "adjudicated . . . mentally incompetent . . . until [their] competency has been reestablished." *Id.* The plain text of Article II, Section 1 suggests no intent to sanction those who may not vote in Virginia. Instead, it simply provides how a Virginian can qualify to vote. The Court thus concludes that the Virginia legislature ratified this Section to "designate a reasonable ground of eligibility for voting" and intended it to be a nonpenal regulation of the franchise. *See Trop*, 356 U.S. at 97. Finding no punitive intent, the Court must next assess

whether the disenfranchisement provision's "punitive effect is so overwhelming that it negates the State's intentions." *See Settle*, 24 F.4th at 947.

"To assess punitive effect, [courts] look to the list of seven factors first compiled in *Kennedy v. Mendoza-Martinez*, 372 U.S. [144, 168–69 (1963)] . . . . These factors have been used in a handful of constitutional contexts – Ex Post Facto Clause, Sixth Amendment, and Eighth Amendment – and they create a framework for a general, constitutional theory of a 'punishment.'" *Settle*, 24 F.4th at 947. The *Mendoza-Martinez* factors are: (1) whether a sanction "involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) whether it operates to promote "retribution and deterrence"; (5) whether it applies to behavior that "is already a crime"; (6) whether it rationally relates to a nonpunitive purpose; and (7) whether it "appears excessive" compared to that alternative purpose. 372 U.S. at 168–69. The Court addresses each factor in turn.

First, the plaintiffs contend that "disenfranchisement constitutes 'an affirmative disability' because it permanently severs individuals from the body politic, strips them of their right to participate in governance, and precludes them from enjoying full citizenship." (ECF No. 78, at 31.) But Article II, Section 1 does not include "an affirmative disability or restraint as that term is normally understood." *See Thompson v. Alabama*, 65 F.4th 1288, 1306 (11th Cir. 2023) (internal quotation marks omitted) (quoting *Hudson v. United States*, 522 U.S. 93, 104 (1997)). Indeed, it "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *See id.* at 100; *cf. Smith*, 538 U.S. at 101–02 (finding that the affirmative duty of registration imposed on sex offenders does not constitute an affirmative restraint). In *Thompson v. Alabama*, the Eleventh

Circuit likened felon disenfranchisement to occupational disbarment because "[b]oth remove the civil rights of individuals due to their criminal behavior as part of the State's regulatory power" before explaining that the Supreme Court has found occupational disbarment to be nonpunitive.[7] The Court finds the *Thompson* court's reasoning persuasive and thus concludes that this factor weighs in favor of finding that Article II, Section 1 is nonpunitive in effect.

"The second factor, whether felon disenfranchisement has been historically regarded as punishment, is neutral." *Thompson*, 65 F.4th at 1306. Some courts have determined that felon disenfranchisement does not function as a penalty. *E.g.*, *Simmons v. Galvin*, 575 F.3d 24, 45 (1st Cir. 2009) ("[F]elon disenfranchisement has historically not been regarded as punitive in the United States, as the Supreme Court indicated in *Trop v. Dulles*."). Others have noted that "[f]elon disenfranchisement laws are unlike other voting qualifications. These laws are deeply rooted in this Nation's history and are a punitive device stemming from criminal law." *E.g.*, *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005).

The plaintiffs contend that the third factor—whether a sanction requires a finding of scienter—weighs in favor of finding felon disenfranchisement's punitive effects. They argue that "in Virginia almost all felonies require proof of criminal intent." (ECF No. 78, at 25.) But "[t]here is no scienter requirement for felon disenfranchisement; it is sufficient that the person be convicted of a disqualifying felony." *Thompson*, 65 F.4th at 1307. Relatedly, "felon disenfranchisement only sanctions behavior that is already criminal." *Id.* The fifth factor thus

[7] *Thompson*, 65 F.4th at 1306; *see Hudson*, 522 U.S. at 95–96 (concluding that occupational disbarment does not impose an "affirmative disability or restraint" because disbarment is "certainly nothing approaching the infamous punishment of imprisonment" (internal quotation marks omitted) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); *see also Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) ("Disenfranchisement during the period of incarceration imposes no additional term of imprisonment and is not as enduring as permanent occupational debarment, which the Court has held is nonpunitive." (internal citations omitted)).

also weighs against a finding that felon disenfranchisement punitive because a "tie[] to criminal activity" is "insufficient to render [the provision] punitive." *See United States v. Usery*, 518 U.S. 267, 292 (1996).

As to the fourth, sixth, and seventh factors, the defendants concede that disenfranchisement may "promote[] the traditional aims of punishment." (ECF No. 77, at 35 (quoting *Settle*, 24 F.4th at 947).) But they assert that felon disenfranchisement nonetheless has "a strong 'rational connection to a nonpunitive purpose,' namely to regulate the franchise by excluding individuals who have shown a disregard for the law—the very output of the political process in which they would otherwise be participating." (*Id.*) And although the plaintiffs admit that disenfranchisement of certain felons "may be rationally connected to regulating the franchise," they argue that "automatically banishing people from the civic body for life" following a felony conviction "is excessive." (ECF No. 78, at 25 n.22.) The Court finds that Article II, Section 1 "has a rational connection to a nonpunitive purpose"—regulating the franchise—and is not "excessive with respect to this purpose." *See Smith*, 538 U.S. at 97. "[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (2d Cir. 1967). This Section excludes from the franchise certain persons who have broken laws "sufficiently important to be classed as felonies," *see Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978), until Governor Youngkin or another "appropriate authority" restores their voting rights. *See* Va. Const. art. II, § 1 (1971). Thus, these three factors reveal the nonpunitive effect of Article II, Section 1.

Taken together, the *Mendoza-Martinez* factors weigh in favor of finding that the felon disenfranchisement provision within Article II, Section 1 of Virginia's Constitution demonstrates no punitive effect, "especially considering the deference [the Court] must give to the legislature's intent." *See Settle*, 24 F.4th at 953. The Court thus concludes that the felon disenfranchisement provision in Article II, Section 1 of the Virginia Constitution is not a "punishment" under the Eighth Amendment. Accordingly, the Court will dismiss the plaintiffs' Eighth Amendment claims.

III. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part the defendants' motion to dismiss. (ECF No. 76.) First, because Bridging the Gap lacks standing, the Court will dismiss it from this action. Second, because the VRA does not contain rights-creating language, the Court will dismiss Count One. Third, because felon disenfranchisement is not "punishment" for purposes of the Eighth Amendment, the Court will dismiss Counts Three and Four. Accordingly, Count Two, which asks the Court to use its equitable powers to review the defendants' alleged violation of the VRA, is the sole remaining count.

The Court will issue an appropriate Order.

Let the Clerk send a copy of this Opinion to all counsel of record.

/s/
John A. Gibney, Jr.
Senior United States District Judge

Date: 18 March 2024
Richmond, VA

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

TATI ABU KING, et al.,
Plaintiffs,

v. Civil Action No. 3:23cv408

GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al.,
Defendants.

ORDER

This matter comes before the Court of the defendants' motion to dismiss, (ECF No. 76). For the reasons stated in the accompanying Opinion, the Court GRANTS IN PART and DENIES IN PART the motion. (ECF No. 76.) The Court ORDERS as follows:

1. The Court DISMISSES the plaintiff, Bridging the Gap, Inc., for lack of standing.

2. The Court DISMISSES Counts One, Three, and Four.

3. The Court DENIES the motion as to Count Two. This case will proceed as to Count Two only.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/
John A. Gibney, Jr.
Senior United States District Judge

Date: 18 March 2024
Richmond, VA

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

TATI ABU KING, et al., Plaintiffs, v. GLENN YOUNGKIN, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

NOTICE OF APPEAL

Notice is hereby given that the defendants in the above-captioned matter, Glenn Youngkin, Kelly Gee, John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Donald W. Merricks, Matthew Weinstein, Susan Beals, Eric Spicer, and Shannon Williams (collectively, the Defendants), appeal to the United States Court of Appeals for the Fourth Circuit from the March 18, 2024 Opinion (ECF No. 88) and Order (ECF No. 89) denying Defendants' assertion of sovereign immunity as raised in Defendants' Motion to Dismiss the First Amended Complaint (ECF No. 76).

This appeal is taken pursuant to the collateral order doctrine under 28 U.S.C. § 1291.

Dated: March 26, 2024

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE
JOHN O'BANNON
ROSALYN R. DANCE
GEORGIA ALVIS-LONG
DONALD W. MERRICKS
MATTHEW WEINSTEIN
SUSAN BEALS
ERIC SPICER
SHANNON WILLIAMS

By: */s/ Erika L. Maley*
Erika L. Maley (VSB #97533)
Solicitor General

Jason S. Miyares
Attorney General

Steven G. Popps (VSB #80817)
Deputy Attorney General

Kevin M. Gallagher (VSB #87548)
Principal Deputy Solicitor General

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

Charles J. Cooper (*Pro Hac Vice*)
Haley N. Proctor (VSB #84272)
Joseph O. Masterman (*Pro Hac Vice*)
John D. Ramer (*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

Counsel for Defendants Glenn Youngkin, Kelly Gee, John O'Bannon, Rosalyn R. Dance, Georgia Alvis-Long, Donald W. Merricks, Matthew Weinstein, Susan Beals, Eric Spicer, and Shannon Williams

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on March 26, 2024, 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.

/s/ Erika L. Maley
Erika L. Maley (VSB #97533)
Solicitor General