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-408 (JAG)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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Under Article II, Section 1 of the Virginia Constitution, "[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." Virginia is one of ***only*** three states that automatically strips all citizens of their right to vote as a punishment for ***any*** felony conviction. And of the three, Virginia is the ***only*** state that does not have an automatic restoration process, thus permanently disenfranchising citizens who do not apply for rights restoration, or whose applications are denied at the Governor's sole discretion.[1] Article II, Section 1 violates both the Virginia Readmission Act and the Eighth Amendment.

The Virginia Readmission Act is a federal statute that prohibits Virginia from amending its Constitution to disenfranchise citizens for crimes that were not felonies at common law in 1870. The Virginia Constitution's disenfranchisement provision—rewritten twice since 1870—strips citizens of voting rights for the conviction of ***any*** felony, regardless of whether it was a felony at common law in 1870. It thus violates the Virginia Readmission Act, a binding federal law.

The Eighth Amendment prohibits cruel and unusual punishment. Article II, Section 1 punishes conviction for any felony with a mandatory, lifetime disenfranchisement. That punishment, which Virginia alone inflicts, is categorically disproportionate and cruel and unusual.

Defendants' efforts to evade judicial review of Article II, Section 1 should be rejected and Defendants' Motion to Dismiss should be denied in its entirety.

LEGAL STANDARD

Under Rule 12(b)(6), the court "accept[s] as true all well-pleaded allegations and view[s] the complaint in the light most favorable to the plaintiff." *Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016). The motion must be denied if the complaint

[1] Under the Eighth Amendment, the prospect of executive clemency does not render an otherwise-irrevocable forfeiture impermanent. *See Graham v. Florida*, 560 U.S. 48, 70 (2010); *infra* p. 28.

contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Likewise, under Rule 12(b)(1), "the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).[2]

ARGUMENT

I. This Court Has Jurisdiction Over All Claims.

A. Plaintiffs' Claims Fall Within The *Ex Parte Young* Exception.

Defendants do not argue that sovereign immunity bars Plaintiffs' Eighth Amendment claims (Counts III and IV). Nor do Defendants contest that *Ex parte Young* permits a federal court to "issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law." Mot. 8. Instead, Defendants contend that Plaintiffs' Readmission Act claims (Counts I and II) fall outside the scope of *Ex parte Young*. According to Defendants, Plaintiffs' claims are "state-law claims in substance" because Plaintiffs "ask this Court to order Defendants to comply with the 1869 Virginia Constitution." Mot. 9.[3] Not so.

"To satisfy [the *Ex parte Young*] exception, a court need only conduct a straightforward

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[2] All emphases added, and all internal quotations and citations omitted, unless otherwise indicated.

[3] Contrary to Defendants' suggestion (Mot. 8 n.3), *Ex parte Young* does "create a cause of action." As the Supreme Court explained in *Armstrong v. Exceptional Child Center*, "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." 575 U.S. 320, 326 (2015). *Michigan Corrections Organization v. Michigan Department of Corrections*, an out-of-circuit case which predates *Armstrong*, is not to the contrary. Mot. 8. There, the Sixth Circuit reasoned that although *Ex parte Young* is not a "cause-of-action-creating sword," "[p]rivate parties who act in compliance with federal law may use *Ex parte Young* as a shield against the enforcement of contrary (and thus preempted) state laws." 774 F.3d 895, 906 (6th Cir. 2014). Here, Plaintiffs use *Ex parte Young* as a shield against enforcement of Article II, Section 1 because that provision violates federal law. *See CareFirst, Inc. v. Taylor*, 235 F. Supp. 3d 724, 740-41 (D. Md. 2017) (declining to apply *Michigan Corrections* to dismiss a cause of action where the plaintiffs used *Ex parte Young* as a shield); *cf. Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc) (recognizing a freestanding "cause of action against [state officials] *at equity*") (emphasis in original); *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018) (same).

inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Indus. Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 163 (4th Cir. 2023). The Amended Complaint meets both requirements. It alleges that Defendants are continuing to violate federal law (the Virginia Readmission Act) because the Virginia Constitution's disenfranchisement provision, amended twice since 1870, deprives citizens of the right to vote for convictions for offenses that were not felonies at common law in 1870. Dkt. 58 (First Am. Compl.) ("FAC") ¶¶ 7, 62, 95-96, 110. The Amended Complaint also seeks, *inter alia*, prospective relief "enjoining Defendants from enforcing Article II, Section 1 … 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." FAC at 39. Because the Amended Complaint alleges ongoing violations of federal law and seeks prospective injunctive relief, Plaintiffs' claims fall squarely within the scope of *Ex parte Young*.

Contrary to Defendants' assertion (Mot. 9), assessing whether Virginia's current Constitution violates federal law does not require an "order [that] Defendants … comply with the 1869 Virginia Constitution." It instead requires an assessment of whether Article II, Section 1 violates ***federal law***—*i.e.*, the Virginia Readmission Act. *Pennhurst State School & Hospital v. Halderman*, on which Defendants rely (Mot. 8-9), does not suggest otherwise. *Pennhurst* held that *Ex parte Young* could not be invoked to require state officials to comply with a ***Pennsylvania*** statute because a "federal court's grant of relief against state officials on the basis of state law … does not vindicate the supreme authority of federal law." 465 U.S. 89, 106 (1984). Similarly, in *Bragg v. West Virginia Coal Association* (*see* Mot. 9), the Fourth Circuit applied *Pennhurst* to reject an action to enforce ***West Virginia's*** own surface mining regulations. 248 F.3d 275, 295-98 (4th Cir. 2001). By contrast, Plaintiffs seek to promote "the supreme authority of the United

States," *Pennhurst*, 465 U.S. at 108 n.17, by enforcing the Virginia Readmission Act—a ***federal*** law. Because Plaintiffs are "seeking to enforce [] directly applicable federal standards," "*Pennhurst* and *Bragg* do not apply." *Antrican v. Odom*, 290 F.3d 178, 187-88 (4th Cir. 2002).

B. The Governor And Secretary Of The Commonwealth Bear A "Special Relation" To Virginia's Disenfranchisement Scheme.

Defendants next claim that *Ex parte Young* does not apply to the Governor or Secretary because neither bear a "'special relation' to the *disenfranchisement* of felons, as opposed to their re-enfranchisement." Mot. 10 (emphasis in original). Defendants' argument lacks merit.

A defendant has a "special relation" to the challenged conduct if they have "proximity to and responsibility for the challenge state action." *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (emphasis removed). Plaintiffs allege that the Governor and Secretary enforce Article II, Section 1 by setting and applying the criteria by which the voting rights of citizens convicted of felonies may (or may not) be restored. FAC ¶¶ 12, 25-27. And a denial of rights restoration by the Governor or the Secretary ensures that such individuals remain ***permanently*** disenfranchised. *Id.* ¶ 26; *cf. Howell v. McAuliffe*, 292 Va. 320 (2016) (holding Governor's exercise of restoration authority is necessary to preserve Article II, Section 1's policy of default disenfranchisement). Nor can there be any doubt that these officials in fact "act[]" to enforce Article II, Section 1; indeed, the Governor and Secretary are ***directly responsible*** for Plaintiff Toni Johnson's continued disenfranchisement because they denied her rights restoration application. FAC ¶ 22.

That the Governor and Secretary "play a role only in re-enfranchisement" does not suggest otherwise. Mot. 10. The question this case presents is whether Article II, Section 1—which includes ***both*** an automatic disenfranchisement provision ***and*** a rights restoration provision—violates federal law, and Defendants concede that the Governor and the Secretary bear a "special relation" to the rights restoration provision of Article II, Section 1. *Cf. Johnson v. Governor of*

State of Fla., 405 F.3d 1214, 1216 n.3 (11th Cir. 2005) (en banc) (considering on the merits the plaintiffs' claim that the Florida Governor and Secretary of State violated the Constitution's Equal Protection Clause given their responsibility for discretionary re-enfranchisement pursuant to the Florida Constitution's felony disenfranchisement provision). Because the Governor and Secretary bear a "special relation" to the continued disenfranchisement of citizens with felony convictions under Article II, Section 1, Defendants' request for their dismissal should be denied.

C. Plaintiff Bridging The Gap Has Organizational Standing.

Despite Defendants' conclusory assertions (Mot. 11), Plaintiff Bridging the Gap has demonstrated a cognizable injury by plausibly alleging that Defendants' enforcement of Article II, Section 1 has "'perceptibly impair[ed]' [its] ability to carry out its mission and 'consequent[ly] drain[ed]…[its] resources.'" *N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).[4]

Bridging the Gap's interest in challenging Virginia's unlawful disenfranchisement regime is more than a "mere[] abstract concern[.]" Mot. 11. As Plaintiffs have pled, by denying the fundamental right to vote and thus full participation in society, Virginia's automatic disenfranchisement of all persons convicted of felonies directly hinders Bridging the Gap's mission "to support the successful transition of formerly incarcerated persons to active citizenship." FAC ¶ 80; *see Havens*, 455 U.S. at 379 (finding organizational standing for equal housing group to sue those whose racial steering practices had "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers"). Indeed, automatic disenfranchisement erects an additional—and unlawful—impediment to the successful transition of formerly incarcerated persons to active citizenship. *See* FAC ¶¶ 80-88.

[4] Plaintiff Bridging the Gap has not asserted associational standing. Defendants' arguments on that issue (Mot. 11) are irrelevant to organizational standing.

In addition, Defendants' enforcement of Article II, Section 1 has drained Bridging the Gap's resources. Due to Defendants' actions, Bridging the Gap has diverted significant resources away from other areas of its organizational work and toward community outreach and education regarding the impact of Virginia's felony disenfranchisement provision. FAC ¶¶ 85-87. Given the time and effort Bridging the Gap has expended supporting thousands of individuals with rights restoration due to Defendants' conduct, the organization has been forced to forego investment into other core areas of its organizational goals and services, including its transitional housing work (which has nearly halted in 2023 because of the time the organization has needed to dedicate to rights restoration), its provision of career services (beginning in 2023, Bridging the Gap needed to reduce the frequency of its solar panel installation trainings from every six weeks to every eight weeks as a direct consequence of spending additional time on rights restoration efforts), and its grant applications (at the time of filing, Bridging the Gap had forgone at least three grant applications because of the time it had to spend countering Virginia's unlawful disenfranchisement regime). FAC ¶¶ 85-88; *see also Lee v. Virginia State Bd. of Elections*, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016) (finding organizational standing where organization "expended time and resources to educate voters and party members on the requirements of [the challenged Voter ID bill]" and hired "a voter protection director whose responsibilities included the identification and education of voters potentially burdened by identification requirements"); *see also People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park*, 843 F. App'x 493, 496 (4th Cir. 2021) ("*PETA*") (finding organizational standing where organization had to devote "its resources to submit complaints about Defendant[] to government agencies, compile and publish information about [its] treatment of its animals, and to investigate and monitor [it]" "as require by [plaintiff's] mission to protect and rescue animals").

Neither *Lane* nor *Association for Retarded Citizens of Dallas*, on which Defendants rely, supports dismissal of Bridging the Gap. Mot. 11. In both cases, the organizations asserting standing relied ***only*** on the diversion of resources. *See Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (explaining that unlike in *Havens*, the only asserted injury was that the organization's "resources are taxed by inquiries into the operation and consequences" of the challenged legislation); *Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. Of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994) ("*ARCD*") ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). Indeed, *Lane* expressly recognized that "[a]n organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." 703 F.3d at 674. The Fourth Circuit has subsequently found the *Havens* requirements satisfied where "Defendants' actions impaired [the organization's] ability to carry out its mission ***combined with*** a consequent drain on [the organization's] resources," *PETA*, 843 F. App'x at 497, which is precisely what Bridging the Gap alleges. Moreover, the organizational plaintiffs in *Lane* and *ARCD* could in fact achieve their missions despite the challenged laws: advocacy for, education on, and litigation in favor of gun rights and the rights of persons with mental disabilities, respectively. *See Lane*, 703 F.3d at 671; *ARCD*, 19 F.3d at 244. By contrast, Bridging the Gap's mission is to help formerly incarcerated individuals fully reintegrate into civil society—a mission directly impeded by Article II, Section 1's violation of federal law. *See* FAC ¶¶ 23, 80.

D. Plaintiffs' Virginia Readmission Act Claims Are Justiciable.

Defendants make two arguments for why Plaintiffs' Virginia Readmission Act claims are nonjusticiable: (1) they are supposedly "Guarantee Clause claims" and (2) they purportedly "implicate" certain *Baker v. Carr* factors. Mot. 11-13. But the first argument mischaracterizes

Plaintiffs' claims and the second misapplies *Baker*. Both should be rejected.

First, Plaintiffs neither advance a claim under the Guarantee Clause nor argue that Virginia's government is not "republican in form;" the Guarantee Clause is nowhere invoked in the Amended Complaint. Rather, Plaintiffs allege that Virginia's disenfranchisement for conviction of offenses that were not common law felonies as of 1870 violates ***the Virginia Readmission Act***. FAC ¶ 13. Defendants' reliance on cases asserting violations of the ***Guarantee Clause*** is therefore misplaced. *See* Mot. 12 (citing *City of Rome v. United States*, 446 U.S. 156, 183 n.17 (1980)); *Luther v. Borden*, 48 U.S. 1, 42 (1849); *Pac. States Tel. & Tel. Co. v. State of Oregon*, 223 U.S. 118, 137 (1912)).

Second, that the Guarantee Clause provides one possible source of Congressional authority for the Virginia Readmission Act does not render any claim alleging a violation of the Virginia Readmission Act itself nonjusticiable.[5] Resolution of these claims requires only that the Court interpret and apply the Virginia Readmission Act, a process of "statutory construction" that "involves familiar principles [] such as careful examination of the textual, structural, and historical evidence put forward by the parties." *Cawthorn v. Amalfi*, 35 F.4th 245, 256 (4th Cir. 2022) (courts may not "refus[e] to adjudicate a straightforward [] question based on the generalized idea that the case might involve 'an area of decisionmaking' committed to another branch"). *Butler v. Thompson*, 97 F. Supp. 17 (E.D. Va. 1951), on which Defendants rely (Mot. 12), is not to the contrary. Although *Butler* expressed "doubt" whether compliance with the Virginia Readmission Act is justiciable, it cited no authority for the purported "doubt" and instead reached the merits of

[5] The Guarantee Clause is not the only source of authority for the Virginia Readmission Act, as Congress' "power to interfere with state voter qualifications … was said to exist in a variety of constitutional provisions, including Art. I, s 2, Art. I, s 4, the war power, the power over territories, the guarantee of a republican form of government and s 2 of the Thirteenth Amendment." *Oregon v. Mitchell*, 400 U.S. 112, 192 (1970) (Harlan, J. concurring in part and dissenting in part).

the Virginia Readmission Act claims by applying principles of judicial review.[6] *Id.* at 21.

Finally, Defendants misapply *Baker v. Carr* by arguing that Plaintiffs' claims "implicate numerous other factors the Supreme Court has held make questions political," Mot. 12-13. *Baker* established six factors that bear on justiciability: 1) textual commitment of the issue to a coordinate political department; 2) lack of judicially discoverable and manageable standards; 3) the impossibility of deciding without an initial nonjudicial policy determination; 4) the impossibility of resolving without disrespecting coordinate government branches; 5) an unusual need for unquestioning adherence to a political decision; 6) potential embarrassment from multifarious pronouncements by various departments. 369 U.S. 186, 217 (1962). But *Baker* held that cases should not be dismissed as non-justiciable "[u]nless one of the [six factors] is ***inextricable*** from the case at bar," *id.*—not, as Defendants suggest, if one of the factors is merely "***implicate[d]***," Mot. 12-13. The Supreme Court has thus "repeatedly rejected the view that [the *Baker*] thresholds are met whenever a court is called upon to resolve the constitutionality or propriety of the act of another branch of Government." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 204 (2012) (Sotomayor, J., concurring).

Defendants have not shown ***any*** of the *Baker* factors to be inextricable, and ignore the first three entirely. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("These tests are probably listed in descending order of both importance and certainty."). Defendants identify no "textually demonstrable constitutional commitment of the issue to a coordinate political department"—the Virginia Readmission Act contains no such language. *Id.* at 277. Defendants also identify no "lack of judicially discoverable and manageable standards for resolving" the Virginia Readmission

[6] Defendants also cite *Merritt v. Jones*, but *Merritt* relied only on *Butler* in relevant part. *See* 259 Ark. 380, 389 (1976).

Act claims—resolution requires only interpreting and applying the statute's clear terms. *Id.* at 267. And Defendants identify no request for an "initial policy determination of a kind clearly for nonjudicial discretion"—the policy determination Plaintiffs seek was expressed by Congress when it enacted the Virginia Readmission Act. *Id.* at 278.

Defendants' reliance on the least important *Bakers* factors is unavailing. Adjudicating a Readmission Act claim does not evidence "lack of the respect due Congress's continuing determination that Virginia has a republican government" (Mot. 13)—Defendants identify no such "determination,"[7] and enforcement of a federal statute is inherently ***respectful*** of Congress's will.[8] Likewise, Defendants identify no "political decision" requiring "unquestioning adherence" or "potentiality of embarrassment from multifarious pronouncements." Mot. 13. Put simply, there is nothing "unusual" or "embarrass[ing]" about enforcing a statute Congress enacted—especially where, as here, the statute sets forth a clear standard for determining whether it is violated. [9]

II. Plaintiffs' Virginia Readmission Act Claims Are Plausibly Pled Under *Twombly*.

A. Article II, Section 1 Of The Virginia Constitution Violates The Virginia Readmission Act.

[7] Defendants cite only *Butler*'s dicta speculating that the conditions of the Virginia Readmission Act "might well be considered as waived by Congress in view of the fact that Virginia has continued to be admitted to representation in Congress." Mot. 13 (quoting *Butler*, 97 F. Supp. at 20). "Waiver" is the ***absence*** of a "continuing determination," and as noted above, the *Butler* court reached the merits of the Virginia Readmission Act claims.

[8] As one proponent of the Virginia Readmission Act explained, "[t]he 'fundamental condition' fixes the rights of citizens, and the courts will furnish redress for their violation … if 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***." CONG. GLOBE, 41st Cong., 2d Sess. 432 (1870).

[9] Defendants cite *Georgia v. Stanton* as an example of "an unusual need for unquestioning adherence to [Congress's] political decision." Mot. 13. Even to the extent Virginia's continued representation may be considered a "political decision" on the part of Congress, that "decision" bears no resemblance to the post-Civil War decision "to erect another and different government in" Georgia and other states (including Virginia) because "no legal State governments or adequate protection for life or property [then] existed." *Georgia v. Stanton*, 73 U.S. 50, 50-51 (1867).

Defendants do not dispute the core allegations underlying Counts I and II of Plaintiffs' Complaint: (1) since the Virginia Readmission Act was passed in 1870, Virginia has twice amended its Constitution; and (2) the amended Virginia Constitution disenfranchises every "person who has been convicted of a felony" (Mot. 2), regardless of whether that felony existed at common law in 1870 or whether conviction of that felony was a basis for disenfranchisement when the 1869 Virginia Constitution was adopted. The Virginia Readmission Act's plain language bars an amended Constitution that disenfranchises Virginia citizens "except as a punishment for such crimes as [were] felonies at common law," so Plaintiffs have stated a claim regardless of the scope of disenfranchisement before the Act's passage. Defendants' concessions are, therefore, fatal.

Nonetheless, Defendants argue that Article II, Section 1 of the current Virginia Constitution does not "disenfranchise a class of citizens admitted to the franchise" under the 1869 Virginia Constitution because that Constitution disenfranchised persons convicted of ***all*** felonies including, Defendants argue, felonies subsequently recognized by Virginia and of which Congress was neither aware nor could conceive (*see* FAC ¶ 71 (explaining that drug offenses were not criminalized until the 1900s)). Mot. 14. Defendants' argument simultaneously misinterprets the 1869 Virginia Constitution and reads out the Virginia Readmission Act's "fundamental condition" that Virginia not adopt an amended Constitution that disenfranchises persons convicted of felonies other than those recognized at common law in 1870; it should be rejected.

First, settled principles of constitutional interpretation require interpreting the word "felony" in the 1869 Virginia Constitution as only disenfranchising persons convicted of felonies then recognized ***at common law***. It is black letter law that constitutional language "cannot be" rendered "completely superfluous." *Commonwealth v. Virginia Elec. & Power Co.*, 214 Va. 457, 465 (1974); *Funkhouser v. Spahr*, 102 Va. 306, 310 (1904) ("[I]t is our duty in expounding" the

Virginia Constitution "to give due effect to every word …."); *cf. Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning…."). As Defendants acknowledge, the 1869 Virginia Constitution "excluded from voting … [p]ersons convicted of bribery in any election, embezzlement of public fuds, treason or felony." 1869 Va. Const. Art. III, § 1. Each word in that provision must be given effect. "[E]mbezzlement of public funds" and "treason" were each ***statutory***—not common law—felonies in Virginia in 1869.[10] *See* 1860 Code of Virginia Title 54 Ch. 192 §§ 21-22 (treating embezzlement as larceny); *id.* Ch. 190 § 1 (stating that treason "shall be punished with death," which rendered it a felony); *id.* Ch. 199 § 1 ("[s]uch offences as are punishable when committed by free persons, with death or confinement in the penitentiary, are felonies"). Thus, reading the word "felony" in the 1869 disenfranchisement provision to include ***all*** felonies—whether common law or statutory—as Defendants suggest[11] would render superfluous the words "embezzlement of public funds" and "treason" within that same provision.[12]

Second, even if the word "felony" in the 1869 Virginia Constitution were interpreted to include felonies beyond those then recognized at common law, it nonetheless cannot be read to include felonies (like drug crimes) not recognized as statutory felonies in Virginia in 1869. It is

[10] "[B]ribery in any election"—which triggered disenfranchisement under the 1869 Virginia Constitution—was not a felony. *See* 1860 Code of Virginia Title 54 Ch. 198 § 40.

[11] Defendants appear to suggest that the Virginia Constitution has not been "amended or changed" in relevant part. Mot. 14. But the 1869 and current disenfranchisement provisions indisputably differ—the current provision no longer refers to embezzlement or treason, in effect eliminating the distinction between common law and statutory felonies. Further, the Virginia Constitution was amended in 1902 in order to suppress the voting rights of Black citizens, and the 1971 Constitution was designed to retain the essence of the 1902 disenfranchisement scheme. *See* FAC ¶¶ 59-62.

[12] Accordingly, Defendants' reliance on authority showing that Virginia defined certain crimes as "statutory" felonies is irrelevant. *See* Mot. 14-15 (citing *Parrish v. Commonwealth*, 81 Va. 1 (1884); *Hardy v. Commonwealth*, 58 Va. 592 (1867); *Lee v. Commonwealth*, 144 Va. 594 (1926); *Canada v. Commonwealth*, 63 Va. 899 (1872)).

well-settled that a federal statute must not be given "an unjust or an absurd" reading. *United States v. Davis*, 53 F.3d 638, 642 (4th Cir. 1995). The Virginia Readmission Act cannot be rationally construed to approve of Virginia's disenfranchisement of persons convicted of ***any*** felony—including all crimes it defines to be felonies in the future—and to also impose on Virginia the "fundamental condition" that it not adopt an amended Constitution that disenfranchises persons convicted of felonies ***other than*** those then recognized at common law in 1870.

Yet that is precisely the reading that Defendants advance. According to Defendants, Congress simultaneously: (1) forbade Virginia from ***expanding*** the scope of crimes resulting disenfranchisement in 1869, other than for felonies recognized at common law in 1870; (2) referred to that prohibition as a "fundamental condition" of readmission to Congress; and (3) ***negated*** that very "fundamental condition" by approving a constitution that disenfranchised persons convicted of ***any*** felony—including numerous felonies that did not exist in 1869 and of which Congress in 1870 was neither aware nor could conceive. In addition to contradicting the plain language of the Virginia Readmission Act, which expressly forecloses an amended constitution that disenfranchises certain citizens, Defendants' reading is impermissibly absurd because it would undermine the very purpose of the "fundamental condition" of the Virginia Readmission Act. Allowing Virginia to disenfranchise its Black citizens for being convicted of newly-concocted "felonies"—such as the drug crimes for which the individual plaintiffs were convicted—is precisely the behavior that Congress was intending to prevent. *See* FAC ¶¶ 43-55.

None of the purported authority upon which Defendants rely (Mot. 14-15)—which neither concerns the current Virginia Constitution nor purports to interpret the constitution in place at the time of the Virginia Readmission Act—suggests otherwise. *Merritt v. Jones* interpreted the language of a later-adopted Arkansas constitution, and did not address the meaning of "felony" as

used in the pre-Readmission Act Arkansas constitution approved by that Act; rather, *Merritt* rejected an argument regarding the meaning of "felony" "as used in Amendment 51," adopted in 1964. 259 Ark. 380, 387 (1976); Ark. Const. amend. LI, § 11 (1964). Similarly, *Harvey v. Brewer* addressed the meaning of "other crime" as used in the Fourteenth Amendment—not the term "felony" as used in the 1869 Virginia Constitution. 605 F.3d 1067, 1072 (9th Cir. 2010).[13]

B. Plaintiffs Sufficiently Plead A Claim Under 42 U.S.C. § 1983.

As Defendants acknowledge (Mot. 17), *Blessing* established the following three-factor test to assess whether a statute creates a federal right enforceable under Section 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 v. Freestone, 520 U.S. 329, 340-41 (1997). Defendants do not dispute that "the right to vote" protected by the Virginia Readmission Act satisfies the second *Blessing* factor (and have therefore waived the argument); instead, they wrongly argue that the Section 1983 Virginia Readmission Act claim fails the first and third factors. Mot. 17.[14]

First, the enfranchisement provision of the Virginia Readmission Act satisfies the first *Blessing* factor because it was unambiguously intended to benefit Plaintiffs. A statute is intended

[13] Relying on evidence outside the pleadings, Defendants assert that the Corporation Court of Alexandria disenfranchised Virginians for conviction of statutory felonies in the 1870s. Mot. 15. But unlawful conduct ***after*** the Virginia Readmission Act's passage does not alter its proper interpretation, and is irrelevant to statutory felonies that did not then exist (such as drug crimes).

[14] Defendants' argument that the Virginia Readmission Act "creates no private right of action," Mot. 16, is a strawman. The Amended Complaint does not assert a cause of action under the Virginia Readmission Act. Rather, Counts I and II are brought under Section 1983 and *Ex parte Young*, respectively. And—as Defendants acknowledge—the question whether the violation of a federal right is actionable under Section 1983 is a different inquiry from whether a statute itself creates a private cause of action. *See* Mot. 17.

to benefit the plaintiff when it contains "the kind of 'rights-creating' language required to confer a personal right on a discrete class of persons." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 697 (4th Cir. 2019). "[P]rime example[s]" of such "rights-creating language" include statutory references to entitlements belonging to "any individual," *see id.* (holding that Congress's use of the phrase "***any individual***" in the Medicaid Act was a "prime example" of the kind of "rights-creating language" required to confer a personal right on Medicaid beneficiaries), or express references to "rights," *Health & Hosp. Corp. v. Talevski*, 143 S. Ct. 1444, 1457 (2023) (holding that statutory "[r]equirements ***relating to residents' rights***" were "indicative of an individual 'rights-creating' focus") (emphasis in original). That is precisely the type of "rights-creating" language that appears in the Virginia Readmission Act, which 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***"—evidencing a clear intent to protect the voting rights of Virginia citizens, like the individual Plaintiffs here. In fact, as one Congressional proponent of the Virginia Readmission Act explained: "The 'fundamental condition' ***fixes the rights of citizens***, and the courts will furnish redress for their violation … if Virginia should change her constitution so as to ***deny to citizens the right secured by this 'fundamental condition***.'" CONG. GLOBE, 41st Cong., 2d Sess. 432 (1870).[15]

Second, the Virginia Readmission Act's enfranchisement provision satisfies the third *Blessing* factor because it "unambiguously impose[s] a binding obligation" on the Commonwealth

[15] That the Virginia Readmission Act is framed in terms of readmitting Virginia's representatives into Congress is irrelevant. The Act has an "unmistakable focus" on protecting individual voting rights. *See* FAC ¶¶ 47-58 (explaining that the Virginia Readmission Act was "intended to ensure that all citizens, regardless of the color of their skin, are entitled to equal application of the voting eligibility standard"); *cf. Talevski*, 143 S.Ct. at 1458 (holding that provision stating facilities "must not transfer or discharge [a] ***resident***" unless certain enumerated preconditions are met was focused on the rights of the benefitted class, *i.e.*, "individual residents") (emphasis in original).

to not disenfranchise Virginia citizens convicted of crimes that were not felonies at common law in 1870. 520 U.S. at 341. Contrary to Defendants' assertion, the Virginia Readmission Act does not "merely set[] conditions for Virginia's readmission to Congress" (Mot. 17); it instead instructs that "the Constitution of Virginia ***shall never*** be so amended or changed" to deprive any citizens of the right to vote, except as a punishment for crimes that were then felonies at common law. Act of Congress of 1870, 16 Stat. 62. The Virginia Readmission Act is thus "couched in ***mandatory***, rather than precatory, terms," satisfying the third *Blessing* factor. *Planned Parenthood S. Atl.*, 941 F.3d at 697 (provision requiring that states "must" provide Medicaid recipients with their choice of provider qualified to perform the service at issue was "mandatory" provision under *Blessing*).

None of Defendants' cited cases (Mot. 17) demonstrates otherwise. In *City of Rancho Palos Verdes v. Abrams*, the statute at issue undisputedly "create[d] individually enforceable rights."[16] 544 U.S. 113, 121 (2005). In *Planned Parenthood South Atlantic*, the Fourth Circuit held that the Medicaid Act supports Section 1983 claims under *Blessing* based on its identification of specific rights intended to benefit a specific class of beneficiaries (as does the Virginia Readmission Act). 941 F.3d at 696-98. The Section 1983 claims in *Carey v. Throwe* failed due to the statute's "precatory rather than mandatory language." 957 F.3d 468, 479 (4th Cir. 2020) (statute stated that certain qualified officers "may" carry concealed firearms under certain circumstances). And the statute at issue in *Gonzaga University v. Doe* "speak[s] only to the Secretary of Education" in terms of distributing funds to educational institutions; therefore, its "focus is two steps removed from the interests of individual students and parents." 536 U.S. 273, 287 (2002). Similarly, in *Alexander v. Sandoval*, the statute exhibited a "focus … twice removed

[16] The statute at issue in *City of Rancho Palos Verdes* did not give rise to Section 1983 claims because it "expressly authorized" a specific "judicial remedy." 544 U.S. at 121.

from the individuals who will ultimately benefit from [its] protection." 532 U.S. 275, 289 (2001). Here, in stark contrast, the Virginia Readmission Act speaks in mandatory language of "the right to vote" guaranteed to "any citizen or class of citizens" then entitled to exercise it.

C. The Canon of Constitutional Avoidance Does Not Apply.

Despite devoting a full five pages to arguing that "[t]he canon of constitutional avoidance precludes Plaintiffs' interpretation of the Virginia Readmission Act" (Mot. 17-22), Defendants never identify that canon's prerequisite: "more than one plausible construction" of the Virginia Readmission Act. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). Where, as here, there is no "statutory ambiguity," the canon of constitutional avoidance "has no application." *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021). Rather than addressing any specific language in the Virginia Readmission Act supposedly susceptible to "more than one plausible construction," Defendants' advance a grab-bag of arguments suggesting that the Act was unconstitutional when passed or is unenforcable now. Mot. 17-22. Each argument is wrong.

First, Defendants incorrectly argue that the Virginia Readmission Act falls "outside Congress's authority under the Guarantee Clause" to the extent it creates "an individual, judicially enforceable right." Mot. 20-21. The admission of representatives to Congress upon certain conditions necessary to guarantee a republican form of government is squarely within Congress' legislative authority under the Guarantee Clause. "[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress." *Texas v. White*, 74 U.S. 700, 730 (1868). And "[i]n the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed." *Id.* at 729. Defendants' contrary argument (Mot. 20) flips that principle on its head; Plaintiffs are aware of no precedent holding that Congress is ***prohibited*** from "creat[ing] individual, judicially enforceable federal rights" pursuant to the Guarantee Clause. *See Armstrong*, 575 U.S. at 325

("Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'"). And Defendants—who bear the burden on their Motion—cite no authority holding that protecting voting rights is not a necessary and proper means for Congress to guarantee a republican form of government.[17]

Second, there is nothing "peculiar[in] contending that Congress can prohibit under the Guarantee Clause what the Fourteenth Amendment affirmatively permits." Mot. 20.[18] Section 2 of the Fourteenth Amendment does not grant Virginia an unfettered right to disenfranchise its citizens for the commission of any crime. Rather, Section 2 is a remedial measure addressing apportionment of congressional representation that recognizes states might disenfranchise citizens following criminal conviction. *See Richardson v. Ramirez*, 418 U.S. 24, 44-52 (1974). But the recognition of state regulation of the franchise does not mean that Congress lacks the power to restrict such regulation pursuant to its powers under ***other*** constitutional provisions. It is black letter law that state laws must give way to legislation passed by Congress pursuant to authority granted by the Constitution. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("Under the Supremacy Clause … state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid.").

Third, Defendants misread *Coyle v. Smith*, 221 U.S. 559 (1911), in arguing that the

[17] Defendants' only authority is the First Circuit's decision in *Largess v. Supreme Judicial Ct. for State of Mass.*, 373 F.3d 219 (1st Cir. 2004). But *Largess*—and the Supreme Court precedent it relied upon—considered only the justiciability of the Guarantee Clause itself, not Congress' legislative authority under the Guarantee Clause. *See id.* at 226.

[18] Defendants argue (Mot. 18-19) that Congress lacks authority under the Fourteenth Amendment to prohibit Virginia from disenfranchising citizens convicted of felonies other than those at common law in 1870. But that argument is irrelevant given Defendants' claim that the Virginia Readmission Act was enacted pursuant to Congress's power under the ***Guarantee Clause***.

Virginia Readmission Act presents "constitutional problems under the 'equal footing' doctrine." Mot. 21. *Coyle* confirms that Congress may impose conditions of admission onto states that bind the admitted state in the future so long as the condition is "within the scope of the conceded powers of Congress over the subject." *Id.* at 568. As discussed above, at a minimum the Guarantee Clause authorizes Congress to prohibit a state from disenfranchising citizens in a manner that would preclude its government from having a republican form. *See also* Mot. 20 (conceding same).

Shelby County v. Holder changes nothing. *See* Mot. 19 n.5. *Shelby County* involved the ***reauthorization*** of the Voting Rights Act's preclearance requirement without considering current needs or circumstances. 570 U.S. 529, 534-36 (2013). The Virginia Readmission Act, however, has not and has never needed to be reauthorized, rendering the "current needs" aspect of the *Shelby County* test irrelevant, or—at most—properly assessed in 1870, when the Virginia Readmission Act was passed, and when preventing disenfranchisement of Black voters was obviously justified. And in any event, *Shelby County* expressly acknowledged that Congress "may draft" a law that imposes burdens and limitations on a particular state where that law and its accompanying burdens and limitations were justified by current political and social realities. *Id.* at 557. Here, the burden imposed by the Virginia Readmission Act is minimal. Indeed, the provision at issue merely requires the state to refrain from taking a single action: amending its constitution to disenfranchise citizens for conviction of crimes that were not felonies at common law in 1870. And unlike the Voting Rights Act's coverage formula and preclearance requirements, which the *Shelby County* Court concluded were so effective that they purportedly solved the problem at which the Voting Rights Act was aimed, *see id.* at 553, there remains a need to enforce the enfranchisement provision of the Virginia Readmission Act. As Plaintiffs have pled—and Defendants do not deny—Virginia's felony disenfranchisement provision continues to disproportionately impact the Black,

voting age population. FAC ¶¶ 73-75. As a result, the problem the Act sought to address—the suppression of the Black vote through use of felony disenfranchisement—persists. *Id.*

Fourth, Defendants' arguments regarding the anticommandeering doctrine are simply inapplicable. Mot. 22. Under the anticommandeering doctrine, Congress may not commandeer the legislative process or agencies of the States "by directly compelling them to enact and enforce a federal regulatory program." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018). But that is not what the Virginia Readmission Act purports to do, nor is it the relief that Plaintiffs seek. Instead, Plaintiffs ask this Court to find that part of the existing Virginia Constitution violates federal law and to enjoin Defendants from further enforcement of that provision. This is a Supremacy Clause issue—not an anticommandeering issue. "Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." *Wisconsin Pub. Intervenor*, 501 U.S. at 604; *see also* FAC ¶¶ 104, 133. This includes state constitutions. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964). And Plaintiffs seek an injunction against state officials from enforcing Virginia law that violates federal law—relief well within the purview of this Court. *See Armstrong*, 575 U.S. at 326 ("we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law"). Because the federal government is not compelling the state to implement a regulatory scheme or action, Plaintiffs' claims do not implicate the anticommandeering doctrine.

III. Automatic, Lifetime Disenfranchisement Of All Those Convicted Of A Felony Is A Cruel And Unusual Punishment.

Article II, Section 1 of the Virginia Constitution permanently disenfranchises every person convicted of ***any*** felony, subject only to an undefined and opaque rights restoration process that is subject to the Governor's whim. FAC ¶ 12. This draconian practice amounts to a "cruel and

unusual punishment[]" prohibited by the Eighth Amendment. Defendants' arguments against reaching the Eighth Amendment claims—that these claims are foreclosed by precedent and that disenfranchisement after felony conviction is not punishment—are unsupported. And on the merits, Defendants rely on disputed facts and ignore the Rule 12(b)(6) standard of review.

A. Disenfranchisement Under Article II, Section 1 Is Punitive.

"Felon disenfranchisement laws are unlike other voting qualifications in that they are deeply rooted in this Nation's history and are a punitive device stemming from criminal law." *Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020). But to determine if a particular provision of law is punitive, and therefore limited by the Eighth Amendment, a court first examines whether "the legislature intended to inflict punishment, which is a question of statutory interpretation." *Doe v. Settle*, 24 F.4th 932, 945 (4th Cir. 2022). If the intent was not punitive, the statute's operation may nonetheless constitute a punishment if there is "the clearest proof" that its "effects are punitive." *Id.* Contrary to Defendants' arguments (Mot. 23-27), Virginia's felony disenfranchisement is punitive in both intent and effect.

As Plaintiffs have pled, the textual and historical evidence confirms that disenfranchisement under Article II, Section 1 was intended to operate as a component of criminal punishment rather than as an exercise of nonpenal regulatory authority.[19] The Virginia Supreme Court confirmed as much when it declared *ultra vires* Governor McAuliffe's executive order re-enfranchising all citizens convicted of a felony who had completed their sentences. *Howell* held that the Governor's Article II, Section 1 rights-restoration authority is one of the "clemency powers" established in Article V, Section 12, "including pardons, reprieves, commutations, and

[19] Defendants' motion provides no historical evidence or judicial interpretation probative of Virginia's intent in enacting the current version of Article II, Section 1. Even if it had, Defendants cite no authority holding it would be appropriate to decide the intent behind a constitutional provision at the pleading stage.

restorations." *Howell*, 292 Va. at 341-42. In doing so, the Court held that the current version of Article II, Section 1 should be read *in pari materia* with the 1870 constitutional provision authorizing executive clemency "to remove political disabilities consequent upon conviction for offenses committed." Va. Const. Art. V § 12; *see Howell*, 292 Va. at 342-43. Because the Governor's rights restoration authority was intended as a species of executive clemency for relief of criminal penalties, it follows that the political disability imposed by Article II, Section 1 was likewise intended to be a punishment for criminal conviction.[20] *Cf. United States v. Murray*, 275 U.S. 347, 357 (1928) ("Executive clemency must … cover every form of relief from punishment."). Defendants argue (without citation) that Article II, Section 1's position alongside other voter qualification provisions means it was enacted with nonpunitive intent (Mot. 24), but *Howell's* holding that Article II, Section 1 applies a "political disabilit[y] consequent upon conviction," Va. Const. Art. V § 12, forecloses their position. *See Howell*, 292 Va. at 342-43.

Moreover, Defendants' claim that Article II, Section 1 was enacted with non-penal intent (Mot. 24-25) would confirm that its enactment violated the Virginia Readmission Act. *See supra* § II.A. The Virginia Readmission Act establishes as a "fundamental condition[]" of readmission to Congress 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 punishment*** for such crimes as are now felonies at common law." In other words, the "Readmission Act … authorized felon disenfranchisement ***only*** as punishment." *Jones*, 950 F.3d at 819 (emphasis in original) (construing disenfranchisement under state constitutional provision as punishment in light of

[20] Nor do Defendants explain why it matters that registrars play a role in enforcing Article II, Section 1, particularly since they perform ministerial functions after receiving lists of individuals with felony convictions from the Virginia State Police and federal law enforcement authorities. *See* Dkt. 77-2 (Beals Decl.) ¶ 4.

identical language in the Florida Readmission Act).[21]

Defendants also misread *Trop v. Dulles*, 356 U.S. 86 (1958), in arguing that felony disenfranchisement is necessarily "nonpenal." Mot. 23. *Trop* discusses a hypothetical felony disenfranchisement statute as the quintessential example of a law that has "***both*** a penal and a nonpenal effect," such that "[t]he controlling nature of such statutes normally ***depends*** on the evident purpose of the legislature." 356 U.S. at 96. *Trop* explains that if, under the applicable law, disenfranchisement "were imposed for the purpose of punishing [those convicted of felonies], the statute[] authorizing [that] disabilit[y] would be Penal." *Id.* Therefore, as the Eleventh Circuit has held, *Trop* does not stand for the principle "that felon disenfranchisement is always nonpenal." *Thompson v. Sec'y of State for the State of Ala.*, 65 F.4th 1288, 1304 (11th Cir. 2023).

Defendants ignore *Thompson*. And only one of the three circuit decisions Defendants cite supports their claim that "disenfranchisement is categorically nonpenal"—and that decision (*Green*) is no longer good law on that point. Mot. 24. Neither the Sixth Circuit in *Johnson v. Bredesen*, nor the First Circuit in *Simmons v. Galvin* addressed whether automatic, lifetime felony disenfranchisement is categorically nonpenal. *Bredesen* concerned a Tennessee "re-enfranchisement statute" that restored voting rights to persons convicted of felonies "upon … discharge from custody," and it conducted a full intent-effects analysis rather than relying solely on *Trop*'s supposed categorical classification of all felony disenfranchisement laws as nonpenal. 624 F.3d 742, 745, 753 (6th Cir. 2010). *Simmons* concerned Massachusetts laws that "disqualify currently incarcerated felons from voting" but that do "not disqualify convicted felons from voting once they are released from prison;" it accordingly relied on *Trop* only "with respect to

[21] A panel of the Fifth Circuit reached the same conclusion in an opinion that has been vacated pending rehearing *en banc*. *See Hopkins v. Sec'y of State Delbert Hosemann*, 76 F.4th 378, 402-04 (5th Cir. 2023), *reh'g en banc granted, opinion vacated* 2023 WL 6304869.

incarcerated felons." 575 F.3d 24, 26, 28, 43 (1st Cir. 2009). Only *Green v. Board of Elections of City of New York* reads *Trop* as Defendants urge. 380 F.2d 445, 449-450 (2d Cir. 1967). But since *Green*'s reasoning relied on social contract theory, *see id.* at 451, rather than *Smith v. Doe*'s now-controlling intent-effects test for whether a consequence of conviction amounts to punishment, *Green* is no longer good law on this issue. Indeed, the Second Circuit has not subsequently relied on *Green*'s reading of *Trop*.

Because "the intent" in enacting Article II, Section 1 "was punitive, that is [the] end of the inquiry." *Settle*, 24 F.4th at 945. But even were the Court to find that Article II, Section 1 was intended as a nonpunitive regulation of the franchise, the provision would still constitute punishment because there is the "clearest proof" of its punitive effect. *See id*. (quoting *Smith*, 538 U.S. at 105). Courts consider the *Kennedy v. Mendoza–Martinez* factors when assessing whether a statute has a punitive effect. 372 U.S. 144, 168-69 (1963). The relevant factors weigh in favor of finding that automatic, lifetime disenfranchisement of citizens convicted of felonies has a punitive effect. First, disenfranchisement constitutes "an affirmative disability," *Mendoza-Martinez*, 372 U.S. at 168, 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. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (voting is a "fundamental political right" of citizens). Second, as explained above, disenfranchisement has "historically been regarded as a punishment," *Mendoza-Martinez*, 372 U.S. at 168. *See, e.g.*, *Jones*, 950 F.3d at 819 (holding that "disenfranchisement laws … are deeply rooted in this Nation's history and are a punitive device stemming from criminal law"). Moreover, disenfranchisement under Article II, Section 1 only applies to those convicted of felonies, *see United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (finding forfeiture of currency a punishment where the statute "requires conviction of an

underlying felony, and it cannot be imposed upon an innocent" person)—and in Virginia almost all felonies require proof of criminal intent. Defendants also do not deny that disenfranchisement "promotes the traditional aims of punishment." Mot. 26.[22]

B. Automatic, Lifetime Felony Disenfranchisement Constitutes Cruel And Unusual Punishment.

The Eighth Amendment "[e]mbodie[s] … the precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham*, 560 U.S. at 59. In assessing whether a particular punishment is prohibited "as it applies to an entire class of offenders who have committed a range of crimes," a court "first considers 'objective indicia' of society's standards, as expressed in legislative enactments and state practice," to determine whether a national consensus exists against the sentencing practice at issue. *Id.* at 61. The court must then "exercise … independent judgment" to determine whether the punishment is disproportionate in consideration of its severity, the individual defendants' culpability, and the extent to which it serves legitimate penological justifications for punishment. *Id.* at 67-71.

Defendants urge this Court to avoid reaching the merits of the Eighth Amendment claims by incorrectly arguing two threshold points.

First, they assert that this Court is precluded from examining whether lifetime disenfranchisement is categorically disproportionate if automatically applied to all persons convicted of felonies. But Defendants misstate Fourth Circuit law by suggesting that the *Graham* standard is "inapplicable" beyond the particular punishments the Supreme Court has already prohibited. Mot. 27-28. *United States v. Cobler*, 748 F.3d 570 (4th Cir. 2014), Defendants' sole

[22] As Defendants acknowledge (Mot. 27), the other *Martinez-Mendoza* factors bear little weight. While disenfranchisement for certain felonies may be rationally connected to regulating the franchise, automatically banishing people from the civic body for life for ***any*** felony conviction is excessive in relation to that purpose. *See Mendoza–Martinez*, 372 U.S. at 168-69.

cited authority, holds to the contrary. *Cobler* considered a defendant's "categorical challenge" to his term-of-years sentence after expressly ***rejecting*** the position Defendants advance here, "reaffirm[ing] the vitality" of Fourth Circuit law that "compel[s] [courts] to review challenges … under the Eighth Amendment." *Id.* at 579.

Second, Defendants argue (Mot. 22-23) that state-law felony disenfranchisement provisions are necessarily constitutional under *Richardson*. But that argument misreads *Richardson* and conflicts with principles of constitutional interpretation. *Richardson* construed the scope of the Equal Protection Clause of Section 1 of the Fourteenth Amendment in light of Section 2. 418 U.S. at 53-54. But *Richardson* says nothing about the scope of ***other*** individual rights set forth in the Constitution; for example, it never mentions the Eighth Amendment.[23] And because any grant of state legislative authority is necessarily constrained by other constitutional provisions, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993); *see supra* p. 18. Nor can *Richardson* be read to narrow rights incorporated against the states through the Fourteenth Amendment's Due Process Clause, because the Supreme Court has rejected the idea that incorporation attenuates substantive protection of individual rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

In assessing "whether there is a national consensus against" mandatory, lifetime disenfranchisement, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 560 U.S. at 61-62 (quoting *Atkins*

[23] Defendants' citation (Mot. 23) to *Gregg v. Georgia*, 428 U.S. 153, 176-78 (1976)—which expressly considers the interplay of multiple constitutional amendments, including the Eighth and Fourteenth, in the context of adjudicating the constitutionality of the death penalty—demonstrates, by its contrast, the limited scope of *Richardson*'s holding.

v. Virginia, 536 U.S. 304, 312 (2002)). The practice of automatically and permanently disenfranchising anyone convicted of a felony has been abandoned by "a large majority of the state legislatures," and the draconian framework employed by Virginia has not been "affirmatively and unequivocally endorsed" by any state. *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring in the judgment). Two states and the District of Columbia never strip anyone convicted of a felony of the franchise—even during their incarceration.[24] Another twenty-three states prohibit those convicted of a felony from voting while incarcerated but then automatically restore citizens' voting rights upon release from incarceration.[25] Fourteen other states automatically restore voting rights upon completion of a person's sentence.[26]

Virginia is an outlier even compared to the ten other states that do not automatically re-enfranchise all people convicted of a felony upon completing their sentence.[27] Some automatically re-enfranchise people convicted of certain felonies.[28] Others automatically restore rights to first-time offenders[29] or a certain time after the sentence was completed.[30] Virginia's is the ***only*** disenfranchisement regime that ***permanently*** disenfranchises ***anyone*** convicted of ***any*** felony, absent individual restoration by the Governor.

Eighth Amendment precedent forecloses Defendants' attempt to mitigate the harshness of

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[24] *See* D.C. Code § 24-211.08(a-1)(1); 28 V.S.A. § 807; Me. Rev. Stat. tit. 21-A, § 111.
[25] *See* Brennan Center for Justice, Can People Convicted of a Felony Vote? Felony Voting Laws By State, https://www.brennancenter.org/our-work/research-reports/can-people-convicted-felony-vote-felony-voting-laws-state (Updated July 5, 2023). These states are: CA, CO, CT, HI, IL, IN, MD, MA, MI, MN, MT, NV, NH, NJ, NY, NM, ND, OH, OR, PA, RI, UT, WA. Maryland permanently disenfranchises people convicted of buying or selling votes. *See id.*
[26] *See id.* These states are: AK, AR, GA, ID, KS, LA, MO, NC, OK, TX, SC, SD, WV, WI.
[27] *See id.* These states are: AL, AZ, DE, FL, IA, KY, MS, NE, TN, WY, VA.
[28] *See* Miss. Const. Art. 12, § 241 (MS); Exec. Order 2019-003 (KY); Exec. Order 7 (2020) (IA); Fla. Stat. Ann. § 98.0751 (FL); Del. Const., Art. 5, § 2 (DE); Ala. Code § 17-3-30.1 (AL); T.C.A. § 40-29-101 (TN); Mo. Ann. Stat. § 561.026 (MO).
[29] *See* A.R.S. § 13-907 (AZ); W.S. § 7-13-105 (WY).
[30] *See* Neb. Rev. St. § 29-2264 (NE).

Virginia law by claiming that Virginia "provide[s] a path to re-enfranchisement and thus do[es] not 'permanently' disenfranchise convicted felons." Mot. 29. The possibility of receiving "executive clemency … does not mitigate the harshness" of a punishment that otherwise "alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69-70.

That 39 states and the District of Columbia have rejected automatic, permanent felony disenfranchisement clearly qualifies as a national consensus. In *Atkins*, thirty states had prohibited executing mentally disabled persons when the Court determined that action violated the Eighth Amendment. 536 U.S. at 314, 321. So too had thirty states outlawed executing people convicted as juveniles when the *Roper* Court declared that punishment cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005). Indeed, in *Graham*, the Court found a national consensus against imposing life-without-parole sentences on people convicted as juveniles for nonhomicide offenses, even though thirty-seven states, the District of Columbia, and federal law still permitted it. 560 U.S. at 62. Similarly, in *Miller v. Alabama*, the Court prohibited imposing mandatory life without parole on juveniles despite twenty-nine states still engaging in the practice. 567 U.S. 460, 486 (2012).

As important as "the number of … States" prohibiting a particular punishment is "'the consistency of the direction of change' in state law." *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315). Here, there is a consistent, five-decade trend of states abandoning lifetime disenfranchisement, and momentum has increased significantly in the past fifteen years. When *Richardson* was decided, twenty-seven states disenfranchised people convicted of felonies unrelated to elections or good governance and who had completed their sentences. *See Hopkins*,

76 F.4th at 412 (appendix). Since then, sixteen states have abandoned this practice.[31] *See id.*; *see also Atkins*, 536 U.S. at 314-15 (noting that sixteen states had abandoned a sentencing practice since *Penry*). *Roper* and *Atkins* also squarely reject Defendants' claim that there is no national consensus because states have varied in ***how*** they abandoned automatic, lifetime disenfranchisement. *See* Mot. 29; *Roper*, 543 U.S. at 564-65 (finding a national consensus from consistent change, where four states abandoned execution of juvenile offenders by legislation and one by judicial decision); *Atkins*, 536 U.S. at 315-17 (considering those states permitting execution of those with intellectual disabilities where "the practice [wa]s uncommon").

Even with a national consensus, the Court must still "exercise … independent judgment" to determine whether automatic, lifetime disenfranchisement is categorically disproportionate. *Graham*, 560 U.S. at 67. Assessing and weighing the relevant considerations is a fact-intensive exercise ill-suited to a motion to dismiss, yet Defendants cite not a single allegation from the Amended Complaint nor any judicially noticeable evidence relevant to the applicable test. *See* Mot. 30. Defendants thus fail to prove that the detailed factual allegations—especially when read in the light most favorable Plaintiffs—cannot establish disproportionality as a matter of law. Indeed, Defendants rely heavily on a self-serving characterization of the Governor's rights-restoration regime to mitigate the apparent severity of Article II, Section 1's application, but their depiction runs counter to the Amended Complaint's well-pleaded factual allegations, which must be accepted as true at this juncture. *Compare* Mot. 30, *with, e.g.*, FAC ¶¶ 82-87.

In any event, the principles articulated in *Graham* weigh strongly in favor of finding that mandatory, lifetime disenfranchisement violates the Eighth Amendment. Permanently losing the

[31] In 2023 alone, two states—New Mexico and Minnesota—passed laws restoring voting rights to citizens on parole. *See* New Mexico H 4, Minn. HF 28.

right to vote is a severe penalty. *See* FAC ¶ 67; *Reynolds*, 377 U.S. at 560 ("No right is more precious in a free country" than the right to vote.). But Section II, Article 1's ***automatic*** application to all felony convictions precludes any consideration of an individual's culpability, prior punishment, or rehabilitation, so the punishment is disproportionate for many.

Moreover, punishment "lacking any legitimate penological justification is by its nature disproportionate to the offense," and thus prohibited under the Eighth Amendment. *Graham*, 560 U.S. at 71. Defendants' concession that Section II, Article 1 "has no penological goals … to weigh against any defendant's culpability" is therefore fatal to their position. Mot. 30. It is implausible to infer that disenfranchisement serves any cognizable goal. The provision's automatic application precludes retribution from serving as a penological justification, because "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Defendants' argument that permanent disenfranchisement cannot be severe "enough to constitute cruel and unusual punishment but not enough to have a deterrent effect" (Mot. 30) is nonsensical; the reasoning would apply equally to ***any*** punishment, nullifying *Graham's* logic. Finally, that some Virginians have regained their right to vote (Mot. 30) is not probative of whether disenfranchisement supports rehabilitation. Disenfranchisement in fact does the opposite, preventing people from fully participating in and reintegrating into society. *See* FAC ¶¶ 80, 100, 109, 129, & 138.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.[32]

[32] Should Defendants' Motion to Dismiss be granted, Plaintiffs respectfully request leave to amend. *See* Fed. R. Civ. P. 15(a).

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Respectfully submitted,

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