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

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

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

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## INTRODUCTION

Plaintiffs cannot conceal the radical nature of their claims in this case. They are therefore forced either to concede or ignore the fundamental flaws with those claims identified in Defendants' initial memorandum. For the reasons below, those undisputed points make clear that the Court lacks subject-matter jurisdiction over a broad swath of this case. And to whatever extent Plaintiffs' claims are not foreclosed by the Supreme Court's holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), they indisputably lack merit. Plaintiffs thus preemptively seek leave to amend if Defendants' motion to dismiss is granted. See Opp. 30 n.32. Yet they have already amended their complaint once—after an initial motion to dismiss was filed—and they failed to correct the flaws identified. Further amendment would be futile and dismissal should be with prejudice. See, *e.g.*, *Morefield v. Bailey*, 959 F. Supp. 2d 887, 906–07 (E.D. Va. 2013).

## ARGUMENT

### I. Many of Plaintiffs' claims are barred under multiple jurisdictional doctrines

Sovereign immunity bars Plaintiffs' Readmission Act claims against all Defendants under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and it separately bars all Plaintiffs' claims against the Governor and Secretary of the Commonwealth. Plaintiff Bridging the Gap lacks standing to bring any claim against any Defendant. And Plaintiffs' Readmission Act claims are additionally barred by the political-question doctrine. Plaintiffs fail to show otherwise.

#### A. The *Pennhurst* doctrine bars Plaintiffs' Readmission Act claims against all Defendants

The theory behind Plaintiffs' Virginia Readmission Act claims is that the Act froze in place voting rights as they existed under Plaintiffs' reading of the 1869 Virginia Constitution, permitting disenfranchisement only for crimes that were then "felonies at common law." 16 Stat. 63 (1870); see Opp. 11–12. Plaintiffs accordingly seek an order "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." Am. Compl. at 39–40. Under Plaintiffs' own theory, this order would require Defendants to comply with voting rights as they existed *under Virginia law* at the time of the Readmission Act—in other words, it would effectively instruct "state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. Such an order would directly violate *Pennhurst*. Plaintiffs have no response to this basic fact.

Instead, they seek to shift focus from what they ask the Court to order (compliance with the 1869 Virginia Constitution) to what they purportedly ask the Court to "asses[s]": whether the 1971 Virginia Constitution complies with the Readmission Act. Opp. 3. Even under their theory, however, any standards that the Readmission Act imposed on voting rights were the standards that then existed *under Virginia law*. To remedy any supposed violation of those standards, the Court would need to order compliance with the 1869 Virgnia Constitution. This case is thus akin to *Bragg*, where, as Plaintiffs fail to note, federal law established standards for state law, but the state law was what an injunction would enforce. See *Bragg v. West Va. Coal Ass'n*, 248 F.3d 275, 296 (4th Cir. 2001). And this case is not akin to *Antrican*, on which Plaintiffs rely, where federal law supplied the source for any mandate. See *Antrican v. Odom*, 290 F.3d 178, 187–88 (4th Cir. 2002).

**B. Sovereign immunity separately bars all Plaintiffs' claims against the Governor and Secretary of the Commonwealth**

Plaintiffs also do not dispute the basic reasons why the Governor and Secretary are separately immune from all Plaintiffs' claims. To satisfy the exception to sovereign immunity announced in *Ex parte Young*, 209 U.S. 123 (1908), Plaintiffs must show that a given defendant has "*proximity to* and *responsibility for* the challenged state action." *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (quotation marks omitted). The "state action" that Plaintiffs seek

to enjoin is felon disenfranchisement. Yet they concede that "the Governor and Secretary play a role only in *re*-enfranchisement." Opp. 4 (emphasis added; quotation marks omitted). The *Ex parte Young* exception thus has no application to the Governor or Secretary here: the Court cannot enjoin them from disenfranchising felons because they do not disenfranchise felons. In Plaintiffs' own terms, that is done "automatically" by the Virginia Constitution. *Id*. at 1.

Plaintiffs are thus left to argue that the Governor and Secretary have a role in "*continued* disenfranchisement," given that Virginia felons may not vote until their re-enfranchisement applications are granted. *Id*. at 5 (emphasis added). The added adjective changes nothing. Plaintiffs argue that Virginia felons may not be disenfranchised *at all* under the Readmission Act (for crimes that were not common-law felonies in 1870) or the Eighth Amendment (for any crimes). By the time a re-enfranchisement application reaches the Governor or Secretary, that "challenged state action" has already occurred, and neither the Governor nor Secretary had a hand in causing that alleged injury. It would occur no matter who holds those offices. For the same reasons, that injury is neither traceable to the Governor or Secretary nor redressable by an injunction against them, and Plaintiffs lack standing to sue them—a point that Plaintiffs do not specifically dispute.

**C. Plaintiff Bridging the Gap lacks standing**

Plaintiffs admit that Bridging the Gap lacks associational standing on behalf of any member, Opp. 5 n.4, leaving organizational standing as its only possible jurisdictional basis. Yet Plaintiffs concede that an organizational plaintiff cannot manufacture standing by voluntarily diverting resources to advocacy and outreach, and thus they largely concede this argument, too.

After spending an entire page discussing Bridging the Gap's voluntary diversion of resources to advocacy and outreach, see Opp. 6, Plaintiffs go on to agree that, under *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), and related caselaw, organizational standing cannot be based "only on the diversion of resources," Opp. 7 (emphasis omitted). All that discussion is therefore

irrelevant unless Defendants' actions pursuant to Article II, Section 1 of the Virginia Constitution have "perceptibly impair[ed]" Bridging the Gap's mission and Bridging the Gap diverted resources as a "consequen[ce]." *North Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (quotation marks omitted). Defendants do not impair Bridging the Gap's efforts in any of the "three areas" on which it allegedly "focus[es]"—"career training, civil rights/criminal justice advocacy, and housing resources"—by enforcing Article II, Section 1. Am. Compl. ¶ 82. And though Plaintiffs also describe Bridging the Gap's mission to generally include "supporting [felons'] reintegration" to society, *id*. ¶ 80, any resources spent assisting felons with re-enfranchisement are resources *in furtherance* of that mission. The only resources allegedly "diverted" from that mission are the resources that Bridging the Gap spends advocating against felon disenfranchisement. *Id*. ¶ 85. Such advocacy does not create standing.

**D. The political-question doctrine additionally bars Plaintiffs' Readmission Act claims against all Defendants**

Defendants have not argued that Plaintiffs "advance a claim under the Guarantee Clause" as opposed to the Readmission Act. Opp. 8. Rather, under the political-question doctrine, the problem with Plaintiffs' Readmission Act claims is that the Act was passed pursuant to the Guarantee Clause.[1] As a result, the Act reflects Congress's judgment that the Virginia government was sufficiently "republican" in form under the 1869 Virginia Constitution to warrant Virginia's "representation in the Congress of the United States." 16 Stat. 62; see U.S. Const. art. IV, § 4. And as Plaintiffs do not dispute, those are quintessentially political judgments that only Congress can

[1] Citing a concurrence's discussion of the passage of the Fourteenth Amendment, Plaintiffs suggest that Congress had some other source of authority for the readmission acts. See Opp. 8 n.5. But the Guarantee Clause is where the Supreme Court located it at the time. See *Texas v. White*, 74 U.S. 700, 727 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885). In any event, Plaintiffs do not explain why sourcing the authority for the Act in the Fourteenth Amendment would mitigate political-question problems.

make. Plaintiffs' Readmission Act claims ask the Court to supplant Congress's judgment with its own—to hold that Virginia no longer satisfies the Act's conditions for readmission to representation in Congress and, consequently, to reject Congress's determination that Virginia's government remains sufficiently "republican" to this day. There is no way to grant relief on Plaintiffs' Readmission Act claims without thus weighing in on a political question. The Court therefore lacks jurisdiction over those claims under the political-question doctrine.

Plaintiffs again attempt to shift focus, arguing that "interpret[ing] and apply[ing] the Virginia Readmission Act" involves only "a process of statutory construction." Opp. 8 (quotation marks omitted). But the result of that process still entails rendering a judgment on a political question. For that exact reason, this Court found it "extremely doubtful" in *Butler* that, "even if Virginia ha[d] violated the conditions of this Act . . . [,] this presents a question justiciable in the courts." *Butler v. Thompson*, 97 F. Supp. 17, 20 (E.D. Va.), *aff'd*, 341 U.S. 937 (1951). Since the Readmission Act "only purports to set up a condition governing Virginia's right to admission to representation in Congress," this Court explained, whether a voting regulation violates the Act's conditions is "a matter peculiarly within the domain of the Congress alone." *Ibid.*[2]

Plaintiffs' Readmission Act claims are also nonjusticiable under many of the indicia listed in *Baker v. Carr*, 369 U.S. 186, 216 (1962). As Plaintiffs acknowledge, see Opp. 9, only one of these indicia must be present to subject a claim to the political-question doctrine. Plaintiffs wave off the "unusual need" in this case "for unquestioning adherence to [Congress's] political decision" over Virginia's continued compliance with the Readmission Act and resulting Congressional delegation, the "lack of the respect due" to Congress that the Court would show by contradicting

[2] True, as an alternative matter, the *Butler* Court also noted that the Readmission Act does not dictate Virginia election law and rejected a claim under that Act on the merits. See 97 F. Supp. at 20–21; Opp. 8–9. But that hardly helps Plaintiffs here.

that decision, and the "potentiality of embarrassment from multifarious pronouncements" on that question. *Baker*, 369 U.S. at 217. Yet these concerns are again plain from the very order that Plaintiffs seek: "a declaratory judgment finding that Defendants' enforcement of Article II, Section 1 of the Virginia Constitution violates the Virginia Readmission Act." Am. Compl. at 39. Congress passed that Act under the Guarantee Clause and can exercise its own power to ensure a "republican" form of government. Plaintiffs once again have no response to this basic fact.

## II. Plaintiffs' Readmission Act claims lack merit

Even if Plaintiffs' claims under the Virginia Readmission Act were not barred by multiple justiciability doctrines, those claims would still fail as a matter of law for three reasons. First, the 1971 Virginia Constitution cannot violate the Readmission Act by disenfranchising all felons, as opposed to only those convicted of crimes that were "felonies at common law" when the Act was passed. 16 Stat. 63. The 1869 Virginia Constitution, which the Act approved, *also* disenfranchised felons convicted of any "felony." Va. Const. art. III, § 1 (1869). Second, assuming the 1971 Virginia Constitution could violate the Readmission Act in this way, the Act is not enforceable by Plaintiffs or other private parties. And third, interpreting the Act to be privately enforceable would violate the canon of constitutional avoidance. Plaintiffs again have no valid responses.

### A. The 1971 Virginia Constitution does not violate the Readmission Act

Plaintiffs assert that they "have stated a claim" under the Readmission Act "regardless of the scope of disenfranchisement before the Act's passage." Opp. 11. Yet their Readmission Act theory is based on a clause providing that the Virginia Constitution "shall never be so *amended or changed* as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the [1869] Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law." 16 Stat. 63 (emphasis added). If the 1869 Virginia Constitution disenfranchised all felons, then the 1971 Constitution did not deprive felons of a right

to vote to which they were entitled under the 1869 Constitution. And the 1869 Constitution did already "exclude[] from voting" all "[p]ersons convicted of bribery in any election, embezzlement of public funds, treason *or felony*." Va. Const. art. III, § 1 (1869) (emphasis added).

Plaintiffs are thus forced to argue that "felony," as used in the 1869 Virginia Constitution, does not mean "felony." They offer two alternative interpretations. First, Plaintiffs contend that "felony" meant only the limited class of "common-law felonies." See Opp. 11–12. Their only justification is that, if "felony" meant both common-law and statutory felonies, other terms in the 1869 Constitution's disenfranchisement provision ("bribery in any election, embezzlement of public funds, treason or felony") would purportedly be rendered superfluous. "The canon against surplusage is not an absolute rule," and it "assists only where a competing interpretation gives effect to every clause and word." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quotation marks omitted). Plaintiffs' interpretation, however, would *remove* significant effect from the plain meaning of "felony" by excluding most statutory felonies from the ambit of the 1869 disenfranchisement provision—including all the statutory felonies codified by 1870 but not specifically listed in that provision. See Defs.' Mem. 14–15. Meanwhile, it is an absolute rule that courts "are not permitted to add words" to legal provisions, as Plaintiffs ask this Court to do by reading "felony" to mean "common-law felony" as opposed to a catchall term for felonies not otherwise listed in the provision. *United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015). And Plaintiffs do not dispute that court records show that this prior disenfranchisement provision was applied to felons generally. See Defs.' Mem. 15. These records are subject to judicial notice. See Fed. R. Evid. 201; see also, *e.g.*, *United States v. Townsend*, 886 F.3d 441, 444 (4th Cir. 2018).

Reading "felony" according to its plain meaning—as "felony"—does not create any more superfluity issues than Plaintiffs' own interpretation. As Plaintiffs note, "bribery in any election,"

one of the crimes listed in the 1869 disenfranchisement provision, was not a felony at the time. See Opp. 12 n.10. The 1869 Constitution also consistently treated "treason" as distinct from other felonies. Compare Va. Const. art. III, § 1 (1869) (disenfranchising "[p]ersons convicted of . . . treason or felony"), with Va. Const. art. V, § 11 (1869) ("The members of the General Assembly shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the sessions of their respective Houses[.]"). It is implausible that treason—the only crime expressly defined in the U.S. Constitution, see U.S. Const. art. III, § 3, cl. 1—would have been considered a mere statutory felony. True, Virginia law specified that it "shall be punished with death," but that does not mean that the statute created the crime. Opp. 12 (quotation marks omitted). Thus, defining "felony" to mean "felony" would not render either "bribery in an election" or "treason" superfluous. Plaintiffs' position is thus that the Court should give the word "felony" something other than its plain and ordinary meaning to avoid potential overlap with just one other term: "embezzlement of public funds." But even this term does not support Plaintiffs' reading of "felony" as "common-law (not statutory) felony" because even "common-law felony" would render the term superfluous. According to Plaintiffs, embezzlement was treated "as larceny," *ibid*., and larceny is one of the "nine '*common law*' felonies" listed in Plaintiffs' complaint. Am. Compl. ¶ 70 (emphasis added). And Plaintiffs' atextual interpretation creates an additional superfluity problem of its own: if "felony" in the 1869 Virginia Constitution already meant only "common-law felony," then the Readmission Act's "except" clause would do no work. Plaintiffs therefore offer no tenable basis to read "felony" not to include all felonies.

Second, Plaintiffs argue that, if "felony" includes all common-law and statutory felonies, the Court should nevertheless read it to include only those statutory felonies that existed in Virginia in 1869. Opp. 12–13. This argument has no basis in the text of the 1869 Constitution. Rather, it is

motivated by Plaintiffs' interpretation of *the Virginia Readmission Act*. And Plaintiffs do not explain how the terms in the 1869 Constitution could plausibly be understood to apply only to the objects (*e.g.*, the "felonies") that met their definitions at the time—a notion that violates basic principles of legal interpretation. See, *e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

Plaintiffs' argument is instead that it would be "absurd" if the Readmission Act approved a constitution that disenfranchised "persons convicted of any felony" while allowing Virginia to "expand[] the scope of crimes resulting in disenfranchisement in 1869" only to "felonies recognized at common law in 1870." Opp. 13 (emphases omitted). But the Readmission Act prohibited Virginia only from amending the 1869 Constitution to remove the right to vote from those "who *[were] entitled to vote*" under that constitution, except as to those convicted of any crimes that might have been common-law felonies in 1870 but not covered by that constitution. 16 Stat. 63 (emphasis added). The Readmission Act thus did not purport to determine who was entitled to vote under the 1869 Virginia Constitution. Congress expressly left that determination to Virginia law. Thus, the Act did not prevent Virginia from continuing to define felonies subject to that Constitution's disenfranchisement provision.[3] For example, though involuntary manslaughter was not a felony under Virginia law at the time, see *McWhirt v. Commonwealth*, 44 Va. 594, 604 (1846), it is "a common-law felony," 40 C.J.S. *Homicide* § 127 (Aug. 2023); accord Am. Compl. ¶ 70. Under the Readmission Act, therefore, Virginia could have amended its constitution to impose disenfranchisement for involuntary manslaughter, though it could not have done so for other non-felonies.

**B. The Readmission Act is not privately enforceable**

Plaintiffs concede that they lack a cause of action under the Readmission Act itself. See

[3] Regardless, Congress could not have created voting rights through the Readmission Act. See *Butler*, 97 F. Supp. at 20; see also *infra* Part II.C.

Opp. 14 n.13. Since *Ex parte Young* also does not create a cause of action,[4] the Readmission Act can be privately enforced, if at all, only through 42 U.S.C. § 1983 (and then only if Plaintiffs could meet the *Ex parte Young* exception to sovereign immunity). More specifically, this claim can proceed only if this Court, for the first time, infers a right under the Readmission Act in the absence of any "explicit right- or duty-creating language." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002) (quotation marks omitted). There is no basis for that "rare[]" and discouraged maneuver here. *Ibid*.

Plaintiffs attempt to locate a cause of action in the Readmission Act through the three-part test of *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997). Assuming that test remains good law, but see *Gonzaga*, 536 U.S. at 282–83, Plaintiffs' attempt fails for the same reason that they are forced to concede that the Readmission Act does not directly create a cause of action: no language in the Act "unambiguously confer[s]" any individual "right," *id.* at 283. Simply put, the Act does not entitle any Virginian to vote, including any Virginia felons convicted of crimes that were not common-law felonies in 1870. Rather, the Act entitles Virginia to representation in the U.S. Congress if Virginia satisfies the Act's conditions. And as seen above, "who [is] entitled to vote" remains a matter to be resolved by Virginia law, not by the Act. 16 Stat. 63.

Plaintiffs' cited cases serve only as contrasts to this one, showing that, when Congress

[4] Plaintiffs suggest that *Ex parte Young* creates a cause of action for preemption through the Supremacy Clause. See Opp. 2 n.3. But the Supremacy Clause "is not the source of any federal rights," either. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (quotation marks omitted). As Plaintiffs note, *Ex parte Young* may be used to prevent the enforcement of preempted state laws, specifically through "an equitable anti-suit injunction." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); accord *Armstrong*, 575 U.S. at 326. But where "the State is not threatening to sue anyone," the plaintiffs must assert a cause of action through Section 1983. *Michigan Corr. Org.*, 774 F.3d at 906. For in such a case, the plaintiff is "claiming a right." *Id*. at 899. That is what Plaintiffs are doing here. It thus does not matter whether a right under the Readmission Act would preempt contrary State enforcement action if it existed. The question is whether such a right exists, and it does not.

creates private rights enforceable through Section 1983, it does so through "clear[]" and "affirmative directive[s]" in federal statutes. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 694 (4th Cir. 2019). Accordingly, that the Readmission Act is "framed in terms of readmitting Virginia's representatives into Congress" is not "irrelevant," as Plaintiffs say, but makes all the difference. Opp. 15 n.15. The issue here is not whether the right to vote is an individual right that could be judicially enforced. The issue is that the Act—which they claim is the font of the right they seek to vindicate—does not confer that right on any Virginia felons. Unlike the rights enforced in *Baker* or *Talevski*, which came from federal statutes,[5] Virginia felons' right to vote is a matter of State, not federal, law. Thus, unlike the statutes in *Baker* or *Talevski*, the Readmission Act imposes no "binding obligation" with respect to Plaintiffs or any other individual felon, but only with respect to Virginia's admission to Congress. *Blessing*, 520 U.S. at 341. By the same token, if Plaintiffs could satisfy the *Blessing* factors, the resulting "rebuttable presumption" of private enforceability would be rebutted by the alternative scheme that Congress intended for enforcing the Readmission Act—namely, the political judgment that Congress has in fact exercised that Virginia has satisfied the requirements of the Act. *Ibid*. Plaintiffs tellingly cite no case recognizing a private right of action in any remotely similar context.

### C. The canon of constitutional avoidance precludes interpreting the Readmission Act as privately enforceable

Defendants agree that "there is no statutory ambiguity" in the Readmission Act, because, as just shown, the Act unambiguously does not create a private right of action. Opp. 17 (quotation marks omitted). But the premise of *Plaintiffs'* argument is that the Readmission Act is capable of

[5] In *Baker*, the Fourth Circuit construed 42 U.S.C. § 1396a(a)(23)(A). See 941 F.3d at 690. In *Talevski*, the Supreme Court construed 42 U.S.C. § 1396r(c)(1)(A)(ii). See *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 184–86 (2023). Both statutes illustrate the clear and affirmative rights-creating directives that the Readmission Act lacks.

a different reading, *i.e.*, that the Act is privately enforceable. If that reading were plausible, the canon of constitutional avoidance would foreclose it. Since no source supports the proposition that Congress may create private, judicially-enforceable rights through the Guarantee Clause, Plaintiffs assert only that they "are aware of no precedent holding that Congress is prohibited from" doing so. Opp. 17 (emphasis omitted). They can make this assertion only by largely ignoring Defendants' arguments and basic principles of federalism.

One provision of the Constitution speaks directly to Congress's authority to make rights enforceable against the States: Section 5 of the Fourteenth Amendment, which grants Congress the "power to enforce, by appropriate legislation," the Fourteenth Amendment's other provisions. U.S. Const. amend. XIV, § 5. But Congress may not "alter[]" or "chang[e]" the substance of those other provisions through legislation under Section 5. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). That means Congress cannot prohibit a State from disenfranchising anyone based on felon status, because another Fourteenth Amendment provision—Section 2—expressly allows States to disenfranchise all felons. See U.S. Const. amend. XIV, § 2; *Richardson*, 418 U.S. at 54.

Plaintiffs' only response is: maybe the Guarantee Clause is different. See Opp. 18 & n.18. True enough, the Guarantee Clause differs from the Fourteenth Amendment in material respects. As the Supreme Court has already held, the Guarantee Clause—which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4—is *not* "the source of a constitutional standard for invalidating state action." *Baker v. Carr*, 369 U.S. 186, 223 (1962). In other words, it cannot be a font of enforceable private rights. Plaintiffs' argument is thus that, even though Congress is expressly prohibited from compelling States to extend the franchise to felons under the constitutional provision that allows Congress to make rights enforceable against States, Congress could nevertheless have done the same thing

under a constitutional provision that has nothing to do with enforceable private rights. Plaintiffs believe that this maneuver is "necessary and proper," Opp. 18, but they cite no support for circumventing the specific limitations of the relevant constitutional provision (the Fourteenth Amendment) in favor of such amorphous arguments under an irrelevant constitutional provision (the Guarantee Clause). Section 2 is no less a relevant context for interpreting Congress's power under the Guarantee Clause as under Section 5. At the very least, the claim that Congress's obligation under the Guarantee Clause to ensure a republican form of government in every State gives Congress broad power to dictate voting rights within the States raises sufficiently "serious constitutional doubts" to activate the constitutional-avoidance canon and thus preclude Plaintiffs' interpretation of the Readmission Act. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

Plaintiffs' interpretation also raises serious constitutional concerns under the equal-footing and anti-commandeering doctrines. As to the first, Plaintiffs agree that, under *Coyle*, Congress did not have greater authority over readmitted States than over others. Opp. 18–19. When readmitting States, Congress could impose only those conditions that were within its normal "regulating power"—which, as explained, did not include requiring that any Virginia felons be permitted to vote. *Coyle v. Smith*, 221 U.S. 559, 574 (1911).[6] As to anti-commandeering, Plaintiffs lay out the problem in their own description of the Readmission Act: according to them, the Act "requires the state to refrain from . . . amending its constitution" in a particular way (to apply disenfranchisement beyond the common-law felonies of 1870). Opp. 19. Put differently, the Act "compel[s] the state to implement" a particular "regulatory scheme," *id*. at 20, which even Plaintiffs admit Congress

[6] Plaintiffs' discussion of *Shelby County v. Holder*, 570 U.S. 529 (2013), Opp. 19–20, amounts to a claim that Congress *could* prohibit felon disenfranchisement under Section 5 of the Fourteenth Amendment. That is refuted by the unrebutted points in Defendants' initial brief, see Defs.' Mem. 19–20, and is no support for individual rights under the Guarantee Clause.

cannot do, see *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

## III. Plaintiffs' cruel-and-unusual-punishment claims lack merit

Plaintiffs added these claims only after a Fifth Circuit panel became the first ever to uphold such a claim. See *Hopkins v. Hosemann*, 76 F.4th 378 (5th Cir. 2023). The Fifth Circuit has granted rehearing en banc, and that panel opinion has now been vacated. See *Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023). Plaintiffs' claims thus lack support, and they otherwise are meritless.

### A. These claims are foreclosed

As an initial matter, Plaintiffs continue to mischaracterize felon disenfranchisement under Article II, Section 1 of the Virginia Constitution as "permanent." *E.g.*, Opp. 1. It would be permanent if it were irrevocable. It is not. The Governor may restore felons' voting rights, as the current Governor has done for thousands of felons, and as his predecessor did once for Plaintiffs King and Johnson themselves. See Defs.' Mem., Ex. A, Decl. of Kelly Gee ¶¶ 4, 11. But more importantly, Plaintiffs' mischaracterization gets them nowhere. For even if disenfranchisement subject to discretionary restoration were properly considered "permanent," the Supreme Court upheld this form of felon disenfranchisement in *Richardson*, 418 U.S. at 26–27, 54.

Plaintiffs' only response is that *Richardson* specifically construed the Equal Protection Clause of Section 1 of the Fourteenth Amendment. Opp. 26. But *Richardson*'s reasoning is just as "demonstrably sound" here. 418 U.S. at 55. As the Court explained, it would have made little sense for the Equal Protection Clause "to bar outright a form of disenfranchisement"—namely, "for . . . crime," U.S. Const. amend. XIV, § 2—when a separate provision (Section 2) "expressly exempted" that form of disenfranchisement "from the less drastic sanction of reduced representation" in the U.S. House of Representatives, "which [Section 2] imposed for other forms of disenfranchisement." *Richardson*, 418 U.S. at 55. The same logic necessarily applies to Eighth Amendment claims, which are not really Eighth Amendment claims at all but rather claims brought

under the substantive component of Section 1's Due Process Clause. See, *e.g.*, *Martin v. Gentile*, 849 F.2d 863, 867 (4th Cir. 1988) (describing the Due Process Clause as the "source" of the "constitutional protection[ ]" against cruel and unusual punishments by the States); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 198 (1989) ("[T]he Eighth Amendment's prohibition against cruel and unusual punishment [is] made applicable to the States through the Fourteenth Amendment's Due Process Clause."). *Richardson* offers no basis to distinguish one clause of Section 1 from another. Along similar lines, the Court held in *Gregg* that the Eighth Amendment could not categorically bar capital punishment when "[t]he Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction." *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality op.). The Constitution must be read as a whole. See, *e.g.*, *State of R.I. v. Commonwealth of Mass.*, 37 U.S. 657, 12 Pet. 657, 673 (1838) (the "proper mode" of constitutional interpretation "is to take the constitution as a whole"). And as a whole, it permits States to disenfranchise felons, even "permanently."

**B. Felon disenfranchisement under Article II, Section 1 is not punishment**

In any event, felon disenfranchisement under Article II, Section 1 cannot violate the Eighth Amendment because it is not "punishment." Plaintiffs can cite no case holding that felon disenfranchisement is "punishment" under the Eighth Amendment because, as the Supreme Court has long recognized, felon disenfranchisement is "a nonpenal exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 97 (1958). Nakedly misconstruing *Trop*, Plaintiffs assert that "*Trop* discusses a hypothetical felony disenfranchisement statute as the quintessential example of a law that has both a penal and nonpenal effect," that may also have a penal purpose, and that can thus be considered penal. Opp. 23 (cleaned up). In fact, *Trop* noted that "*any* statute decreeing some adversity as a consequence of certain conduct *may have* both a penal and a nonpenal effect," but *Trop* concluded that "because the purpose of [the felon-disenfranchisement] statute *is to*

*designate a reasonable ground of eligibility for voting*," such a statute is "nonpenal." 356 U.S. at 96–97 (emphases added). Plaintiffs' misreading of *Trop* is adapted from the Eleventh Circuit's opinion in *Thompson v. Alabama*, 65 F.4th 1288, 1304 (11th Cir. 2023), but the Eleventh Circuit there affirmed that Alabama's felon-disenfranchisement provision is nonpenal. See *id*. at 1304. The court also acknowledged that the three other circuit courts to address the question since *Trop* have all stated that felon disfranchisement serves a nonpenal purpose as a matter of law. See *id*. at 1303–04 (quoting *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010); *Simmons v. Galvin*, 575 F.3d 24, 43 (1st Cir. 2009); *Green v. Board of Elecs. of City of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967)).[7] Plaintiffs have no response to any of these statements.

Even if felon disenfranchisement were not categorically nonpenal, the individualized intent-effects test would yield the same outcome. See *Smith v. Doe*, 538 U.S. 84, 92 (2003). Although Plaintiffs intimate that intent cannot be assessed "at the pleading stage," Opp. 21 n.19, they themselves note that "whether 'the legislature intended to inflict punishment . . . is a question of statutory interpretation,'" which can be answered on a motion to dismiss—as it was in the case they quote, *id*. at 21 (quoting *Doe v. Settle*, 24 F.4th 932, 945 (4th Cir. 2022)). That the purpose of Virginia's felon-disfranchisement provision is "to regulate the franchise," *Trop*, 356 U.S. at 97, is evident from the fact that the provision contains no punitive language, is situated among other nonpunitive voter regulations (in an article of the Virginia Constitution titled "Franchise and officers" and a section titled "Qualifications of voters," Va. Const. art. II, § 1), and is administered by registrars who lack criminal-enforcement authority. See Defs.' Mem. 24–25. These are all the same sorts of facts that indicated nonpenal intent in *Thompson*, 65 F.4th at 1304–05.

[7] Plaintiffs suggest that the Second Circuit's application of *Trop* in *Green* is somehow no longer good law, Opp. 24, but *Trop* itself remains the law, and *Green* has not been overturned.

Accordingly, the Virginia Supreme Court itself has construed disenfranchisement under Article II, Section 1 as a franchise regulation. Plaintiffs' sole argument for penal intent relies entirely on that court's decision in *Howell v. McAuliffe*, 292 Va. 320 (2016). See Opp. 21–22. Yet in that case, the court repeatedly referred to felon disenfranchisement as a "political disability"—in other words, as a "ground of eligibility for voting," *Trop*, 356 U.S. at 97—while nowhere referring to felon disenfranchisement as a "punishment." See also *In re Phillips*, 265 Va. 81, 87 (2003) (using "power of the Governor to restore a convicted felon's voting eligibility" and "power to remove the felon's political disabilities" interchangeably). Plaintiffs nevertheless argue that *Howell* supports their position because the Virginia Supreme Court also construed felon *re*-enfranchisement as one of the Governor's "clemency powers." 292 Va. at 341. Plaintiffs' argument is question-begging: they have not shown that the Governor's "clemency powers" extend only to punishments. The language of the Virginia Constitution's clemency provision contradicts that assumption. It gives the Governor the power both "to remit fines and penalties," and, separately, "to remove political disabilities consequent upon conviction." Va. Const. art. V, § 12. Pursuant to these powers, the Governor may "absolve[] [a] person" from "punishment *or other legal consequences* of a crime." *Blount v. Clarke*, 291 Va. 198, 210 (2016) (quotation marks omitted). When the Governor removes the specific political disability imposed by Article II, Section 1, he removes only a nonpenal "portion of the legal consequences of the crime," *ibid*., just as he does when he exercises clemency power to remove occupational debarments, which are also generally nonpenal, see *Hudson v. United States*, 522 U.S. 93, 104 (1997). Virginia's constitutional structure, including the clemency provision and Article II, Section 1, thus reflects that felony convictions have penal and nonpenal consequences, with disenfranchisement among the latter.

Plaintiffs offer even less argument on punitive effect. Disenfranchisement is a political

disability, but that does not render it "an affirmative disability or restraint" under the punishment inquiry. *Smith*, 538 U.S. at 97. Disenfranchisement is nothing like the restraint of imprisonment, "the 'paradigmatic' example of an affirmative restraint." *Settle*, 24 F.4th at 952 (quoting *Smith*, 538 U.S. at 100). That felon disenfranchisement is "deeply rooted in this Nation's history," Opp. 24 (quotation marks omitted), is certainly evidence that disenfranchisement cannot be considered a cruel or unusual punishment. But it is not evidence that disenfranchisement has historically been thought of *as a punishment*. Plaintiffs offer no response to the weight of evidence to the contrary, and they admit that felon disenfranchisement bears a rational connection to the nonpunitive purpose of regulating the franchise (while only conclusorily asserting that disenfranchising all felons is "excessive"). See *id*. at 24–25 & n.22.[8] Finally, that disenfranchisement "only applies to" those already punished for felonies, *id*. at 24, weighs *against* penal effect, as does the fact that no scienter is required for disenfranchisement, see *Thompson*, 65 F.4th at 1307. The purpose and effect of Article II, Section 1 is not to punish felons who have otherwise been punished. It is to remove from the political community those who have effectively taken themselves out of it by violating its laws, until they demonstrate to the Governor their capacity to participate once more.[9]

**C. Felon disenfranchisement under Article II, Section 1 is not cruel or unusual**

Plaintiffs do not deny that they seek a categorial rule against "permanent" felon disenfranchisement. Categorical rules exist only against sentences of death or of life without parole for juvenile offenders, and the Fourth Circuit has expressly declined to apply categorical rules outside those contexts. See *United States v. Cobler*, 748 F.3d 570, 580–81 (4th Cir. 2014).

[8] Plaintiffs mistakenly assert that these factors "bear little weight." Opp. 25 n.22; see *Settle*, 24 F.4th at 947 (listing these among the factors that "the Supreme Court has focused on").

[9] The Readmission Act's reference to disenfranchisement as "punishment" does not define its status under Virginia law. And for the reasons above, disenfranchisement under Article II, Section 1 does not violate the Readmission Act regardless of whether it constitutes punishment.

Plaintiffs misread that holding as well, suggesting that *Cobler* contradicted itself by "reaffirming" that categorical rules are available outside those two contexts. Opp. 25–26 (cleaned up). In fact, all that *Cobler* "reaffirm[ed]" was that courts will review a sentence under the Eighth Amendment for proportionality with the underlying crime even when the sentence is for less than life. 748 F.3d at 578–79. But as *Cobler* explained, such Eighth Amendment challenges can be made on either an as-applied or categorical basis. See *id*. at 575. And *Cobler* proceeded to reject the appellant's categorical challenge because it fell outside "the only two contexts in which the Supreme Court categorically has deemed sentences unconstitutionally disproportionate." *Id*. at 581. So few contexts exist precisely because proportionality review generally cannot be conducted on a categorical basis. Yet Plaintiffs bring a categorical proportionality challenge based on cases from those contexts, *i.e.*, the cases outlawing capital punishment or life without parole for juvenile offenders. See Opp. 25. As in *Cobler*, those cases cannot support this challenge.

Plaintiffs also establish no ground for a categorical rule even under those cases. Plaintiffs can identify a "national consensus" against Virginia's felon-disenfranchisement regime only by (mis)characterizing it in exceedingly narrow fashion. *Graham v. Florida*, 560 U.S. 48, 61 (2010); see Opp. 27 (claiming that Virginia is the only State that "permanently disenfranchises anyone convicted of any felony, absent individual restoration by the Governor"). This exercise simply illustrates that, as explained in the dissent from the now-vacated Fifth Circuit panel opinion, the differences among all States' voting laws provide "a dozen ways to divvy up states and find a national consensus against any particular practice." *Hopkins*, 76 F.4th at 424 (Jones, J., dissenting). And even on Plaintiffs' telling, Virginia felons are similarly situated to felons elsewhere, including those convicted of the many crimes that can warrant "permanent" disenfranchisement in several States, see Opp. 27 n.28, or felons with multiple convictions in others, see *id*. at 27 n.29.

Because no two States' felon-disenfranchisement regimes are exactly alike, the relevant question is not whether other States' regimes are exactly like Virginia's; otherwise, one could just as easily manufacture a national consensus against several States' regimes. The question is instead whether there is a consensus against felon disenfranchisement itself. Plaintiffs cannot contend that there is, nor can they identify any national trend in that direction. Unlike the cases they cite—where, as Plaintiffs note, most States had abandoned the challenged practices entirely, see *id*. at 28–29—felon disenfranchisement in some form is still in force in forty-eight States. See *Jones v. Governor of Fla.*, 950 F.3d 795, 801 n.3 (11th Cir. 2020).

As Plaintiffs also note, Opp. 29, a national consensus would not itself render Article II, Section 1 unconstitutional. Indeed, if Virginia and Virginia alone "permanently" disenfranchised felons, it would have the power to do so under the Fourteenth Amendment and *Richardson*. But Plaintiffs' claim fails even if a consensus against that regime existed and required the Court to exercise "independent judgment" as to proportionality. *Graham*, 560 U.S. at 61. Plaintiffs cannot both claim that felon disenfranchisement is disproportionate "as a matter of law" and ask the Court to refrain from assessing this claim at this stage. Opp. 29. Either this purported punishment is disproportionate on any facts, or it is not. And nothing in Rule 12 requires the Court to accept allegations that contradict themselves or judicially noticeable facts. See, *e.g.*, *Schmidt v. Synchrony Bank*, No. 22-CV-344, 2022 WL 18635838, at *1 (E.D. Va. June 14, 2022). A punishment's severity might *outweigh* its penological goals, as the Supreme Court has held in two contexts, yet Plaintiffs still fail to square their allegations that disenfranchisement is a severe punishment with *no* deterrent or other penological effects. And their own insistence on "intensive" fact development simply underlines that they cannot make this showing as a categorical matter. Opp. 29.

## CONCLUSION

The Amended Complaint should be dismissed.

Dated: November 9, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on November 9, 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.

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