No. 1051712

In the Supreme Court of Alabama

THE STATE OF ALABAMA, et al.,
Appellants,

v.

RICHARD GOODEN, et al.,
Appellees.

On Appeal from the Circuit Court of Jefferson County
(CV-2005-5778)

BRIEF OF APPELLEES

Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs Gooden and Thomas agree that this Court should hear oral argument. The voting rights of Alabamians present an important issue of public policy. Oral argument will aid the Court in deciding the case.

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I. STATEMENT OF THE CASE

This case arose because Alabama's Secretary of State advised county voter registrars throughout Alabama to violate the constitution and effectively deny the right to vote to eligible citizens. Defendants *concede* that the Secretary of State, as Alabama's chief election official, instructed voter registrars to defy Article VIII, Section 177 of the Alabama Constitution, Alabama's law for voting practices and procedures. Specifically, although Section 177 denies the vote *only* to those citizens convicted of felonies involving moral turpitude, the Secretary of State, in contravention of the fundamental rights of untold numbers of Alabamians, unlawfully advised county voter registrars to refuse registration to *all* individuals with felony convictions, including Plaintiffs and other eligible citizens convicted of felony offenses *not involving moral turpitude*. As a result of certain acts and omissions, voter registrars throughout Alabama, pursuant to the advice of the Secretary of State, have employed practices and procedures that are violative of Alabama's Constitution and laws.

While the Defendants assert that there is agreement as to the interpretation of the statutes and underlying facts at issue here, but for Circuit Court's ruling, the

right to vote of eligible Alabamians with felony convictions would continue to be threatened by the subjective judgments of the Secretary of State and voter registrars *statewide*. *See* the evidence described in Part II.C. The Circuit Court correctly recognized that that result was not acceptable and ordered relief designed to end the unjustifiable deprivation of the right to vote.

To vindicate the Plaintiffs' right to vote, the Circuit Court weighed the evidence, identified the nature of the problem, assessed the magnitude of the harm, and ordered appropriate relief. The Circuit Court granted relief essential to protect the right to vote against any further arbitrary encroachments by state and local officials.

The Defendants' Statement of the Case is generally accurate in its recitation of the pleadings filed and their dates.

II. STATEMENT OF THE FACTS

A. Legal Background to the Facts

State and federal courts have played an integral role in ensuring and vindicating the fundamental right to vote, which this Court recently recognized as "perhaps the most basic and cherished right of our democratic system." *Waltman v. Rowell*, 913 So.2d 1083, 1090 (Ala. 2005). Similarly, the United States Supreme Court has

characterized the right to vote as "the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and "a civil right of the highest order," *Oregon v. Mitchell*, 400 U.S. 112, 139 (1970).

Indeed, courts have played an important role in protecting the right to vote of people with felony convictions in Alabama. In *Hunter v. Underwood*, 471 U.S. 222, 229 (1985), the Supreme Court recognized that Alabama's Constitution of 1901 was, according to the president of the constitutional convention, designed to "establish white supremacy in this State," by denying the vote to blacks. 471 U.S. at 229 (quoting statement of John B. Knox). The 1901 Constitution included several provisions designed to ensure that whites would be exempt from difficult new registration requirements designed to prevent blacks from voting. *See Giles v. Harris*, 189 U.S. 475, 483 (1903) (describing voting provisions of Alabama Constitution). Specifically, Article VIII, Section 182 of the 1901 Constitution disfranchised individuals who had been convicted of any of an enumerated list of crimes, including any crime involving moral turpitude. It is estimated that, by 1903, this provision had disfranchised roughly ten times as many blacks as whites. *Hunter*, 471 U.S. at 227; *see also Giles v. Harris*, 189 U.S. 475, 483

(1903) (describing discriminatory voting provisions of Alabama Constitution).

In a unanimous opinion by then-Justice Rehnquist, the Court, in concluding that Section 182 violated the federal equal protection clause, held that the provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection. . . ." *Id.*, at 233.

Ten years after the Supreme Court's decision in *Hunter*, Alabama adopted a constitutional amendment to repeal the entirety of Article VIII of the Constitution of Alabama of 1901 (regarding "suffrage") and replace it with a new Section 177. C-499 (Stip. ¶ 2). Article VIII, Section 177 provides in pertinent part:

> (a) Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting. The Legislature shall, by statute, prescribe a procedure by which eligible citizens can register to vote.
>
> (b) *No person convicted of a felony involving moral turpitude*, or who is mentally incompetent, shall be qualified to vote until

> restoration of civil and political rights or removal of disability.

(emphasis added).

Act 2003-415, *codified at* Ala. Code § 15-22-36.1 (Supp. 2006), established a method by which individuals convicted of certain felonies that *do* involve moral turpitude may have their political rights restored. This law requires the Alabama Board of Pardons and Paroles ("Board" or "Board of Pardons") to entertain applications seeking a Certificate of Restoration of Voter Registration Rights ("Certificate of Restoration") and either issue the certificate or inform the applicant why the certificate could not be issued. C-509 (Stip. ¶ 41).

William Segrest, Executive Director of the Board of Pardons, requested an opinion from Attorney General Troy King concerning which potential voters could apply for a Certificate of Eligibility. Among other things, Segrest queried: "What specific felonies do not include moral turpitude? If an individual has been convicted solely of one of these crimes, does he or she remain eligible to vote?" On March 18, 2005, the Attorney General issued an opinion ("Opinion"), responding: "This Office has previously stated that a person convicted of a felony involving moral turpitude is disqualified from voting in Alabama. The phrase 'moral turpitude,' however, is not de-

fined in the Constitution of Alabama or in the Alabama Code." *See* Op. Atty. Gen. No. 2005-092 (March 18, 2005), 2005 WL 1121853, at *1 (Ala. A.G.). The Attorney General further explained that his "office cannot provide an exhaustive list of every felony involving moral turpitude." *Id.* The Attorney General did, however, specify a number of felonies that Alabama courts had found to involve moral turpitude, as well as a number of felonies that Alabama courts had found not to involve moral turpitude. Among others, "possession of marijuana [absent intent to distribute], and driving under the influence . . . have been held to be crimes that do not involve moral turpitude." *Id.*, at *2. (citing cases). The Attorney General also explained that, if "a person has been convicted of a felony that does not involve moral turpitude, that person remains eligible to vote and is therefore ineligible to apply [to the Board of Pardons] for a Certificate of Eligibility to Register to Vote." *Id.* at *3.

Two months later the Board of Pardons issued a press release to disseminate the Attorney General's analysis. The press release stated that individuals convicted of felony offenses not involving "moral turpitude," such as felony driving under the influence and felony possession of drugs, need not (and, in fact, cannot) apply for a

Certificate of Eligibility since such individuals never lost their right to vote. C-505 (Stip. ¶ 23).

On September 30, 2005, after this action was filed, the trial court granted Plaintiff Gooden's motion for registration (by stipulation of the parties). The court's order, however, contained the following proviso: "This relief is *interim relief only*, *does not constitute final relief in the case*, and shall be without prejudice to any other claims made in the complaint, or any defenses to those claims that may be duly raised." C-47 (Order of Sept. 30, 2005) (emphasis added).

B. Facts Related to Plaintiffs Gooden and Thomas

1. Plaintiff Richard Gooden

Plaintiff Richard Gooden is a 66-year-old African American, a citizen of the United States and a lifetime resident of Birmingham, Alabama. Plaintiff Gooden first registered to vote in the mid-1960s and remained a registered voter until 2000, when he was convicted of felony DUI. C-500 (Stip. ¶ 4).

On September 21, 2005, Plaintiff Gooden attempted to register with Defendant Jefferson County Registrar, but was informed that he was not eligible to vote because of his felony DUI conviction. Notwithstanding the Attorney General's March 2005 Opinion (Op. Atty. Gen. No. 2005-

092) stating that "a person . . . convicted of a felony that does not involve moral turpitude . . . remains eligible to vote and is therefore ineligible to apply for a Certificate of Eligibility" and that "driving under the influence" had been determined by the Alabama courts *not* to involve moral turpitude, Defendant Jefferson County Registrar instructed Plaintiff Gooden to apply to the Board of Pardons for a Certificate of Eligibility. C-506 (Stip. ¶ 29). In disregarding the Attorney General's Opinion, the Jefferson County Registrar was following the guidance provided by Defendant Secretary of State Worley. In response to the Attorney General's Opinion, Worley advised registrars not to make any changes to their long-standing practices until the Attorney General issued a response to legal questions posed by the Secretary and all the legal and administrative issues were properly resolved. C-505 (Stip. ¶ 25).

Later on September 21, 2005, an employee of the Board of Pardons informed Plaintiff Gooden that, because his felony DUI conviction did not involve moral turpitude, he need not apply for, and in fact could not obtain, a Certificate of Eligibility since he had never forfeited his voting rights. In addition, an employee of the Board telephoned Defendant Jefferson County Registrar, and ex-

plained that Plaintiff Gooden was not disqualified from voting since his felony conviction did not involve moral turpitude, and, therefore, he did not need a Certificate of Eligibility to register to vote. C-507 (Stip. ¶ 30).

Notwithstanding this explanation by the Board that Plaintiff Gooden's felony DUI conviction did not involve moral turpitude, and the fact that his conviction was expressly identified under Alabama caselaw and in the Attorney General's Opinion (Op. Atty. Gen. No. 2005-092) as not affecting his right to vote, the Jefferson County Registrar informed the Board of Pardons that the Secretary of State had advised registrars not to register *any* individual with a felony conviction who had not obtained a Certificate of Eligibility, without regard to whether or not the felony conviction involved moral turpitude. C-507 (Stip. ¶ 31).

2. Plaintiff Angela Thomas

Plaintiff Angela Thomas is a black female resident of Jefferson County, Alabama, who was registered to vote in the 1990s. In 2002, Plaintiff Thomas was convicted of felony possession of marijuana.[1] Notwithstanding a decision by the Alabama Supreme Court holding felony possession of marijuana "is not a crime involving moral turpi-

[1] Brief of Appellants at 12 (citing record).

tude," *Ex Parte McIntosh,* 443 So.2d 1283 (Ala. 1983), the Jefferson County Voter Registrar removed Thomas from the list of registered voters in August 2003 because of her conviction. Plaintiff Thomas applied to the Board of Pardons for a restoration of her right to vote in 2005, but the Board explained that after reviewing her "application for a Certificate of Eligibility to Register to Vote, we have determined that you were convicted of possession of a controlled substance," which is a felony "that does not appear to this agency to involve moral turpitude." C-992 (Fourth Amended Complaint).[2]

Ms. Thomas registered to vote just before the November 2006 election.

C. Facts Related to the Plaintiff Class

The Catch-22 experienced by Plaintiffs Gooden and Thomas — in which their county registrar told them to obtain a Certificate of Eligibility from the Board of Pardons, and the Board told them they could not obtain such a Certificate because they had not been convicted of a felony of moral turpitude — is not the result of isolated mistakes by registration officials. Rather, the problem arises because, in contravention of Article VIII, Section

[2] The Defendants have never filed an answer to the Fourth Amended Complaint, or any other complaint.

177 of the Alabama Constitution, the Secretary of State has published official registration forms stating that individuals convicted of *any* felony are prohibited from voting without a restoration of their political rights. C-501-02 (Stip. ¶¶ 10-15).

By order of the Alabama Supreme Court dated October 22, 1999, two voter registration forms were approved pursuant to Ala. Code § 17-4-122 (1995), as set out in the Alabama Code Commissioner's Notes following that section in the 2006 pocket part. The first form is entitled "State of Alabama Agency-Based Voter Registration Form" and is known at "NVRA-1." The second form is entitled "State of Alabama Postcard Voter Registration Form" and is known as "NVRA-2."[3] The Secretary of State makes available Form NVRA-1 (A/B) for use by the "voter registration agencies." Forms NVRA-1 and NVRA-2 both contain this statement: "To register to vote in the State of Alabama, you must: . . . have not been convicted of a felony, or if you have been convicted, you must have had your civil rights restored." C-502 (Stip. ¶ 14).

[3] Copes of those forms are attached as Appendix A. NVRA-2 is published on the Secretary of State's website (at http://www.sos.state.al.us/downloads/election/vr/nvra-2.pdf), and is made available for printing and use as a mail-in application for voter registration.

The Secretary of State adopted regulations on January 10, 2001, regarding voter registration. *See* Ala. Admin. Code Chapter 820-2-2. Section 820-2-2-.05 provides that the "voter registration agencies" shall use the voter registration form prescribed by the Secretary of State. Contrary to the State's assertion that the only evidence before the Circuit Court concerning registration practices was related to Jefferson and Houston counties, *see* Brief of Appellants ("State Brief") at 19, the parties have stipulated that registrars *throughout the State* use Forms NVRA-1 and NVRA-2, or one substantially similar, containing the statement that to be eligible to vote, the applicant must not have been convicted of a felony. C-502 (Stip. ¶ 15).

Consistent with these forms, the Jefferson County and the Houston County Board of Registrars had a practice for years prior to 2005 of denying the voting applications of all persons convicted of any felony, without first seeking to determine whether the felony they were convicted of had been determined by Alabama courts to "involve moral turpitude." The registrars instructed potential voters who had been convicted of any felony to seek a Certificate of Eligibility from the Board of Pardons. C-502 (Stip. ¶ 18).

As illustrated by the experiences of the named Plaintiffs, these registration practices continued even after the Attorney General's March 2005 Opinion and the related press release by the Board of Pardons in May 2005. In response to questions from various boards of registrars about the effect of the Attorney General's Opinion, the Secretary of State advised the registrars to continue their longstanding practices (of denying the vote even to eligible people with felony convictions) and not to make any changes until the Attorney General issues a response to legal questions posed by the Secretary of State. C-502, 505-06 (Stip. ¶¶ 14-15, 24-26). Moreover, in November 2005, two months *after* this lawsuit was filed, Secretary of State Worley hosted a series of regional meetings with registrars around the state at which time she distributed a document instructing registrars to continue their longstanding practices concerning felon disfranchisement, *see* C-506 (Stip. ¶ 26); C-536-37 (Stip. Exh. 12). This advice caused Jefferson County registration officials to continue their longstanding practice of categorically disfranchising individuals who had *any* felony conviction. *See* C-259-60 (Hunter Interrog. Ans.); C-270-72 (transcript/summary of Worley speech to voting officials); and C-278 (agenda for meeting). In other

words, what Defendants seek to characterize as innocuous advice to follow the "status quo" was effectively an instruction to continue disfranchising eligible Alabamians in violation of Section 177 of the Alabama State Constitution.

As a result of the Secretary's actions, numerous individuals — black and white — have been disfranchised based on a felony conviction that did *not* involve moral turpitude. Indeed, the misinformation spread by the Secretary of State has real world impact, and is not simply notional. The Board of Pardons has identified 330 individuals from across the State of Alabama who applied for a Certificate of Eligibility but were found to be already eligible to vote because they had been convicted of felonies *not* involving moral turpitude. C-510 (Stip. ¶ 42).

In response to the filing of this lawsuit, the Secretary of State and county registrars have implemented some limited reforms. It is undisputed, however, that, to this day, Defendants have not established a uniform policy concerning how the majority of felonies should be characterized — that is, whether or not they involve moral turpitude. For example, the Jefferson County Board of Registrars determines whether to purge an individual from the registration rolls by sending the monthly list

of all convictions from the Jefferson County Circuit Court to an assistant county attorney, who then decides — on the basis of his own judgments – whether the voter should be purged.

> To the extent he can, [the county attorney] relies on published appellate decisions that explicitly determine whether a particular crime [involves moral turpitude]. If the crime at issue does not fall within that category – *and most do not* – [the attorney] then reviews the elements of the crime at issue, comparing them to the elements of those crimes that have been determined to involve moral turpitude. [The attorney] determines whether, by analogy, the felon should be disqualified from voting.

C-795 (Final Order) (describing the undisputed testimony of Jefferson County Assistant Attorney Theo Lawson) (emphasis added). Jefferson County Registrar Hunter submitted to the Court a 165-page list of those who had been purged during the last decade because of conviction of a felony. C-587-751. Many of these crimes have never been determined by the Legislature or a court to be crimes involving moral turpitude. It is this type of ad hoc practice — and the unconstitutional disfranchisement that has and will continue to result this practice — that the lower court's order seeks to correct.

For their part, the Defendants (who, it is important to remember, confessed judgment with respect to Plaintiff

Gooden) effectively ask this Court to turn a blind eye to the Secretary of State's violation of Alabama's Constitution and laws — a request that the lower court refused to dignify. Indeed, but for the Circuit Court's ruling, the right to vote of Plaintiffs and similarly situated Alabamians would continue to be subjected to the *ad hoc* judgments of the Secretary of State and voter registrars. The relief provided to Plaintiffs and similarly situated citizens by the Circuit Court's ruling was designed to end the unjustifiable deprivation of the right to vote.

SUMMARY OF THE ARGUMENT

The argument section of this brief proceeds in five parts.

First, this appeal is justiciable for three independent reasons. Because it is about the right to vote, this case is a classic example of a controversy that is of "broad public interest." This Court's precedent is clear that such public interest cases do not become moot even if defendants voluntarily cease complained of conduct. In addition, this action is not moot because it is likely that Plaintiffs Gooden and Thomas will have registration problems in the future if this Court does not provide a ruling on the merits. Finally, because Plaintiffs Gooden

and Thomas have consistently sought to act as class representatives, the case is justiciable as a class action.

Second, we demonstrate that the Circuit Court did not abuse its discretion in certifying this case as a class action, or by expanding the scope of the Plaintiff class to include all adult Alabamians convicted of felonies and not registered to vote. By categorically disfranchising every person with a felony conviction without considering whether the felony in question involved moral turpitude, the Defendants have not only disregarded the substantive mandate of Section 177 of the Alabama Constitution, they have also violated the procedural requirements of the Alabama and federal constitutions. The resulting procedural harms apply to all class members, irrespective of the merits of their individual registration claims.

Third, this action is not barred by sovereign immunity. Plaintiffs have not sought monetary damages, but have requested declaratory and injunctive relief requiring Defendant state officials to cease acting outside the scope of their authority and to comply with their legal duties enshrined in the Alabama Constitution. Under these circumstances, the caselaw of this Court leaves no doubt that sovereign immunity is inapplicable.

Fourth, on the merits, the Circuit Court properly concluded that Plaintiffs were entitled to summary judgment, and then issued an order providing appropriate injunctive and declaratory relief. Acting based on the guidance of the Secretary of State, county registrars have categorically disfranchised individuals previously convicted of any felony, without considering whether the felony in question involved moral turpitude. This practice squarely contradicts Section 177 of the Constitution (and also violates the due process clause of the federal constitution). Therefore, the Circuit Court correctly granted declaratory and injunctive relief against this practice. The Circuit Court properly concluded that, unless and until the Alabama legislature declares which felonies involve moral turpitude and which do not, Alabama may not disfranchise anyone based on a felony conviction. Such legislative guidance is essential because the State's disfranchisement law is now unduly vague, in violation of the Alabama Constitution's due process protections, and presents an unreasonable risk of erroneous deprivations of a protected liberty interest, in violation of the federal due process clause.

Fifth, Plaintiffs are entitled to attorney's fees. In a case such as this in which Plaintiffs allege state

and federal causes of action and the court provides relief on the state claims without reaching the federal claims, 42 U.S.C. § 1988 authorizes recovery of attorney's fees so long as the unaddressed federal claims are substantially similar to the successful state claims.

III. ARGUMENT

A. This Appeal is Justiciable

The State argues that, because the individual Plaintiffs have obtained limited relief since filing this lawsuit, the case is now moot and should be dismissed. *See* State Brief at 36-41. At the time this lawsuit was filed, Plaintiff Gooden could not register to vote because of Defendants' actions. Therefore, there is no question that he had suffered an actual injury and had standing to file this lawsuit. The only issue is whether the case has since become moot. *See Town of Elmore v. Town of Coosada*, 2006 WL 2458816, *5 (Ala. Aug. 25, 2006) ("[T]o determine whether [plaintiff] has standing to challenge [defendant's action], we must determine whether [plaintiff] suffered an injury from [defendant's action] 'at the commencement of the litigation.'") (quoting *Pharmacia Corp. v. Suggs*, 932 So.2d 95, 98 (Ala. 2005)).

For three independent reasons, this case is not moot.

1. The Issues Raised by this Case are of "Broad Public Interest"

This Court has observed that, as a general rule, "if, pending an appeal, an event occurs which makes determination of the case unnecessary, the appeal will be dismissed." *Slawson v. Alabama Forestry Commission*, 631 So.2d 953, 957 (1994) (quoting *Adams v. Warden*, 422 So.2d 787, 790 (Ala.Civ.App. 1982)). However, "[a]n exception to this general rule exists where 'a broad public interest is involved.'" *Id.*, (quoting *Payne v. J.T.N.*, 568 So.2d 830, 831 (Ala.Civ.App. 1990)). Even assuming that the limited relief afforded to the individual Plaintiffs would otherwise render determination of this case unnecessary, *but see* Part III.A.2, *infra*, this case would remain justiciable because issues concerning right to vote are of broad public interest.

In *Slawson*, individual plaintiffs sued the Alabama Forestry Commission ("Commission") in connection with the Commission's support of an organization whose purpose was to protect private property rights. Among other things, the plaintiffs noted that, consistent with its practice at the time, the Commission had failed to provide public notice of a meeting at which the Commission passed a resolution approving the use of Commission resources to promote the organization. According to the plaintiffs, the Commission's failure to provide notice violated Ala-

bama's Sunshine Law and the due process clause of the federal Constitution. The plaintiffs sought declaratory and injunctive relief prohibiting the Commission from holding meetings without providing advance public notice. The trial court rejected plaintiffs' arguments, and the plaintiffs appealed to this Court. *See Slawson*, at 954-55.

By the time the case reached this Court, it was undisputed that the Commission was "providing notice of [its meetings] to the public once again." *Slawson*, at 957. Nonetheless, relying on the public interest exception, this Court held that the case was not moot: "We consider the public's interest in receiving notice of public meetings to be a 'broad public interest'; therefore, we may properly decide this issue." *Id*. The Court concluded that, while the trial court had correctly rejected plaintiffs' federal constitutional argument, the Sunshine Law requires the Commission to provide public notice of its meetings. *See Slawson*, at 957-59.

Slawson governs this case. In both *Slawson* and the case at bar, plaintiffs sought declaratory and injunctive relief seeking to require state officials to follow State law. In both cases, plaintiffs received limited relief during the course of the lawsuit. Put differently, in

both cases, by the time the suit reached this Court, "the actions Plaintiffs sought to compel [had] already happened." State Brief at 36. In both cases, the dispute involved questions of broad public interest. Indeed, if anything, the public interest at stake in this case is more important than it was in *Slawson*. The citizenry's right to vote, which is enshrined in Alabama's constitution, is surely at least as significant as the citizenry's right to receive notice of meetings, which is set forth in a state statute. Both rights help ensure citizen participation in democratic governance, but the right to vote is "perhaps the most basic and cherished right of our democratic system." *Waltman v. Rowell*, 913 So.2d 1083, 1090 (Ala. 2005). Because the right at issue in this case is at least as important as the right at issue in *Slawson*, this case falls within the rule that this Court will decide cases implicating broad public interests, even if an intervening event might otherwise render determination of the merits unnecessary. Thus, this case is not moot.

2. The Named Plaintiffs' Injuries are Likely to Recur Absent Judicial Intervention

The mere fact that Plaintiffs have been registered to vote does not mean that the controversy between the named Plaintiffs and Defendants is moot. Rather, "[t]his Court

has stated that in analyzing mootness we consider 'whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.'" *Town of Elmore v. Town of Coosada*, 2006 WL 2458816, *3 (Ala. Aug. 25, 2006), (quoting *Hornsby v. Sessions*, 703 So.2d 932, 938 (Ala. 1997) (in turn quoting 13A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3533, at 212 (1984)). In this case, there is a strong prospect that a decision on the merits will have an impact on the parties; hence, the controversy is not moot.

Plaintiff Gooden was denied registration on September 21, 2005 by the Jefferson County Registrar, who explained that the Secretary of State had advised her office (and registrars throughout the State of Alabama) to refuse registration to all people with felony convictions, whether or not the offense they were convicted of actually merited the loss of voting rights. C-507 (Stip. ¶ 31). On September 30, 2005, the trial court granted Plaintiff Gooden's motion for registration by stipulation of the parties, but its order contained the following proviso: "This relief is *interim relief only*, *does not constitute final relief in the case*, and shall be without prejudice to any other claims made in the complaint, or

any defenses to those claims that may be duly raised." C-47 (Order of Sept. 30, 2005) (emphasis added). Absent a ruling on the merits by this Court, there is a significant likelihood that Plaintiff Gooden's registration will only be temporary because the conduct of the Defendants responsible for depriving Gooden of his voting rights has not been cured. Indeed, there is no indication or guarantee about how the newly-elected Secretary of State intends to interpret Section 177 absent a clear judicial ruling and/or legislative action.

Secretary of State Worley did not issue any policy guidance instructing registrars that felony DUI is not a felony of "moral turpitude." Instead, even after the Attorney General's Opinion stating that felony DUI does not involve moral turpitude, Secretary Worley instructed county registrars not to change their longstanding practice of disfranchising all individuals with felony convictions.[4] As a result, the Jefferson County Registrar informed the Board of Pardons that, due to the Secretary's guidance, Plaintiff Gooden could not be registered.

[4] *See* C-506 (Stip. ¶ 26); C-536-37 (Stip. Exh. 12); *see also*, C-259-60, C-270-72, C-278 (Hunter Interrog. Ans.; transcript/summary of Worley speech to voting officials; and agenda for meeting).

Although Plaintiff Gooden is now registered in Jefferson County, absent clear guidance from the Secretary of State that felony DUI does not constitute a felony of moral turpitude, Jefferson County registration officials could purge him from the voter rolls on the basis of that felony — just as they improperly purged Plaintiff Thomas for a felony conviction that did not involve moral turpitude. Moreover, if Plaintiff Gooden moves to a different county, the registrar may decline to allow him to register. Indeed, Defendants have stipulated that, if Plaintiff Gooden moved to Houston County, the burden would be on him to prove that felony DUI is not a felony of "moral turpitude." C-503 (Stip. ¶ 20). Plaintiff Thomas is in no more secure position than Plaintiff Gooden, since Defendants have taken no action to ensure that her conviction for felony marijuana possession is not used as a basis to purge her (again) from the voter rolls.

While this suit was pending in the Circuit Court, the Secretary adopted a new voter registration form to be put into use after it obtained preclearance from the United States Department of Justice. The new form contains the following instructions:

> To register to vote in the State of Alabama, you must: . . . have not been convicted of a *disqualifying* felony, or if you

> have been convicted, you must have had your civil rights restored.

The addition of the word "disqualifying" is the only relevant change in the form, and it provides no assurances to the named Plaintiffs. The form is confusing: the most obvious reading of the term "a disqualifying felony" is that *any* felony is "disqualifying." Even if the phrase is read to mean something less than all felonies, it is still confusing because it fails to state which felonies are disqualifying and which are not. The addition hardly guarantees that Plaintiffs Gooden and Thomas, and all those similarly situated, will be permitted to vote.

Nor is Defendants' litigating position that Plaintiffs' crimes are not crimes of "moral turpitude" sufficient to render this case moot, because it does not in any way bind the Secretary of State or the county registrars. Rather, Defendants are "free to return to [their] old ways," which "together with a public interest in having the legality of practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).[5]

[5] The U.S. Supreme Court has held that defendants who seek to avoid judicial resolution of the merits (of an injunctive suit) by voluntarily terminating the complained-of conduct, "face a heavy burden to establish mootness."

Indeed, notwithstanding their litigating position, Defendants are seeking to overturn the portion of the Circuit Court's order that enjoins Defendants from categorically disfranchising citizens who have been convicted of any felony without inquiring into whether the felony involved moral turpitude. Defendants previously asked this Court to stay that portion of the Circuit Court order because, otherwise, county registrars' "executive discretion [would be] replaced by a fear of sanctions." Appellants' Motion for Stay, September 8, 2006 at 16.

The fact that Defendants continue to believe that county registrars have "executive discretion" to make their own decisions about whether to register individuals who were not convicted of felonies of "moral turpitude" indicates that there is a significant prospect that the named Plaintiffs will in the future face the same illegal disfranchisement they have previously experienced. Hence, there is a "sufficient prospect that [a] decision [in this case] will have an impact on the parties," and it is not moot. *Town of Elmore,* 2006 WL 2458816, at *3.

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 72 (1983) (per curiam). Specifically, defendants "must establish that 'there is no reasonable likelihood that the wrong will be repeated.'" *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

3. Because Plaintiffs Have Consistently Sought to Act as Class Representatives, Limited Relief on Their Individual Claims Cannot Render This Case Moot.

Even if *Slawson*'s public interest doctrine did not apply, and even if the individual claims of the named Plaintiffs would otherwise be moot, this case would be justiciable because Plaintiffs are representatives of a class, and it is undisputed that the claims of the class are not moot. Under these circumstances, *Jones v. Southern United Life Ins. Co.,* 392 So.2d 822 (Ala. 1981), establishes that Plaintiffs may continue to litigate this appeal on behalf of the class.

In *Jones v. Southern United*, the plaintiff's individual claim was rendered moot through monetary satisfaction after the filing of the lawsuit but prior to the certification of the class she sought to represent. The trial court then dismissed the plaintiff's complaint. This Court reversed. Relying in part on *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), this Court held that the defendants could not "bypass class action by tendering payment" to the class representative. *Jones v. Southern United*, at 823. The Court quoted approvingly the following passage from *Deposit Guaranty National Bank*:

> Requiring multiple plaintiffs to bring separate actions, which effectively could

> be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs.

Jones v. Southern United, at 823 (quoting *Deposit Guaranty National Bank,* at 339).

Thus, *Jones v. Southern United* held that "[n]otwithstanding the mootness of the suit as to [plaintiff], it is not moot as to other members of the class, and [plaintiff] can continue to litigate the issues as a representative of the class." *Id*. Put differently, "[plaintiff] was a proper representative of the class when the suit was filed, and she was not ousted as a representative of the class when her individual claim was mooted by [defendant's] payment of her claim. . . . " *Id*.

This Court recently considered a similar issue with a different set of facts in *Pharmacia Corp. v. Suggs*, 932 So.2d 95 (Ala. 2005). In that case, plaintiffs, after accepting the defendant's monetary settlement offer, "completely abandon[ed] the action . . . and then tr[ied]

to name new class representatives to take their place." *Pharmacia Corp.*, at 99. Distinguishing *Jones v. Southern United,* the Court held that plaintiffs' actions had mooted the case. "In *Jones*, the class representative sought to remain in the action and to proceed on behalf of the other class members. Here, the named Plaintiffs are completely abandoning the action after unequivocally accepting a settlement and then trying to name new class representatives to take their place." *Pharmacia Corp.*, at 99 (emphasis in original).

In this case, Plaintiffs clearly fall on the *Jones v. Southern United* side of the line this Court drew to distinguish *Jones v. Southern United* and *Pharmacia*. Notwithstanding the limited relief they obtained,[6] at trial and on appeal, the named Plaintiffs have sought to remain in this action and continue to proceed on behalf of other class members; they have not tried to name new class representatives to take their place. Accordingly, under

[6] Of course, as discussed in Part III.A.2, *supra*, the relief obtained by Plaintiffs in this case is *not* the complete relief received by the individual Plaintiff in *Jones*. In *Jones*, the individual plaintiff sought monetary damages; once she received those damages, any judicial opinion could have had no effect on the relief she requested, and her individual claim was moot. By contrast, in this case, there is a significant prospect that the named Plaintiffs will face disfranchisement in the future absent a favorable decision by this Court.

Jones v. Southern United and *Pharmacia*, Plaintiffs may continue to litigate this appeal on behalf of the certified class regardless of whether their individual claims have been mooted.[7]

Moreover, this case would not be moot even if Chief Justice Torbert's dissenting opinion had carried the day in *Jones v. Southern United*. In Chief Justice Torbert's view, if a named plaintiff's individual claim is mooted, the general rule is that the entire action is subject to dismissal even if the named plaintiff seeks to continue the action on behalf of a class. *See Jones v. Southern United*, 392 So.2d at 824. However, Chief Justice Torbert recognized several "well defined exceptions" to this rule. One of those exceptions is for cases that raise "issues involving important constitutional rights." *Id*. Unlike the rights at issue in *Jones v. Southern United*, *see id*., at 825, the right to vote is guaranteed by both the Alabama and United States constitutions, and is "perhaps the most basic and cherished right of our democratic system," *Waltman*, 913 So.2d, at 1090.

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[7] This case is also readily distinguishable from *Walding v. Blue Cross & Blue Shield of Alabama, Inc.*, 577 So.2d 853 (Ala. 1991). In *Walding*, after receiving a monetary settlement for their individual claims, plaintiffs entered a stipulation of dismissal without reserving any issues for appeal. In this case, Plaintiffs entered no such stipulation of dismissal.

In sum, under *Jones v. Southern United*, the limited relief obtained by the individual Plaintiffs does not moot this case because the Plaintiffs have sought to remain class representatives. Moreover, even under Chief Justice Torbert's dissenting opinion in *Jones v. Southern United*, this case is not moot because it involves deprivations of important constitutional rights.

B. The Circuit Court Did Not Abuse Its Discretion in Concluding That Plaintiffs Were Entitled to Class Certification

Under Rule 23, class representatives may sue on behalf of a class if they meet all the requirements of Rule 23(a), as well as at least one of the criteria of Rule 23(b).[8] *Allstate Ins. Co. v. Ware*, 824 So.2d 739, 744 (Ala. 2002). Since the Defendants have contested only adequacy and typicality of the class representatives, we will confine our response to those issues. *See Pardue v. Potter*, 632 So.2d 470, 473 (Ala. 1994) ("Issues not argued in the appellant's brief are waived.").

[8] Class certification is governed by Alabama Rule of Civil Procedure 23, which mirrors its federal counterpart. "Because the Alabama Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure, cases construing the federal rules are considered authority in construing the Alabama rules." *Cutler v. Orkin Exterminating Co., Inc.*, 770 So.2d 67, 70 n. 2 (Ala. 2000). Accordingly, in addition to its primary reliance on state caselaw, this section of the brief will address federal decisions where relevant.

"The question whether to certify a class is in the sound discretion of the trial court, and, so long as the trial court considers the correct criteria in making its determination, [this Court] review[s] its ruling only to determine whether the trial court abused its discretion." *Mitchell v. H & R Block, Inc.,* 783 So.2d 812, 815 (Ala. 2000).

1. The Plaintiffs Satisfied the Rule 23(a) Prerequisites to Class Certification

a. *Rule 23(a)(3) – Typicality*

As this Court has pointed out, "courts have held that "'the test for typicality . . . is not demanding.'" *Adams v. Robertson*, 676 So.2d 1265, 1298 (Ala. 1995) (citations omitted). Rather, "[t]he essence of the typicality requirement is that the relationship between the injury to the class representatives and the conduct affecting the entire class of plaintiffs must be sufficient for the court to properly attribute a collective nature to the challenged conduct." *Avis Rent a Car Sys. v. Heilman,* 876 So.2d 1111, 1117 (Ala. 2003) (internal citations and quotations omitted). The typicality requirement thus serves as a guidepost to determine whether the named Plaintiffs' claims and the class claims are sufficiently interrelated so that the interests of the class members will be fairly and adequately protected in their absence.

Atlanta Cas. Co. v. Russell, 798 So.2d 664, 666-67 (Ala. 2001). This requirement is typically satisfied where the same unlawful conduct was directed at the named class representatives and the class itself, even where the fact patterns underlying individual claims vary. *See Chemi-nova Am. Corp. v. Corker*, 779 So.2d 1175, 1180 (Ala. 2000) (quoting trial court's decision). Typicality is also satisfied where the alleged unlawful conduct is the same and may be redressed under the same theory of recovery. *Harbor Ins. Co. v. Blackwelder*, 554 So.2d 329, 335 (Ala. 1989).

That exact scenario applies to the Plaintiff class and the named class representatives. As the Circuit Court correctly held, the named Plaintiffs' injuries arise out of the Defendants' reliance on Section 177 of the Alabama Constitution to disfranchise all individuals convicted of a felony, and, Defendants' failure, even now, to implement sufficient guidance so that Alabama's felon disfranchisement statute is applied consistently with the rule of law. The due process requirements of the state and federal constitutions protect *all* Alabamians from being disfranchised based on a felony conviction, unless the disfranchisement occurs pursuant to standards defined by law and unless citizens have notice

that the deprivation will in fact be a collateral consequence of their conviction. "[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). For instance, if a student is suspended from public school without any process, his due process rights have been violated whether or not he would have been suspended if given the proper process. *See id.*

Therefore, even though the named Plaintiffs were convicted of felonies that (based on clear Alabama case law) do not involve moral turpitude, the due process problems with the current system are equally applicable to those members of the Plaintiff class who have been convicted of crimes that have not yet been categorized by any court or by the legislature as involving or not involving moral turpitude, and even to members of the Plaintiff class who have been convicted of crimes that Alabama courts have previously held to be crimes of moral turpitude. As explained in greater detail in Part III.D.2, *infra*, all of these individuals have been deprived of their right to due process regardless of whether they would have been able to vote, had they been given adequate process. *See Carey*, 435 U.S. at 266. Similarly, the relief ordered by

the Circuit Court will benefit all class members. Specifically, the relief will ensure that all members of the certified class will have their voting status determined in accordance with due-process principles, and those members of the class who did not commit felonies of moral turpitude will have their voting rights restored.

In sum, the trial court did not abuse its discretion in concluding that Plaintiffs satisfy the typicality requirement. *See Cheminova*, 779 So.2d at 1180; *Harbor Ins. Co. v. Blackwelder*, 554 So.2d at 335.

b. *Rule 23(a)(4) – Adequacy*

Adequacy of representation includes two aspects: (1) whether the proposed class representatives have interests antagonistic to those of the class; and (2) whether the class counsel are qualified, experienced and generally able to conduct the proposed litigation. The opponent of class certification bears the burden of demonstrating the inadequacy of counsel or the proposed class representatives. *Cheminova,* 779 So.2d at 1181 (affirming trial court order which held that "burden is on the Defendant to show inadequacy of representation"); *Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 668 (N.D. Ala. 1999) (citing *Lewis v. Curtis*, 671 F.2d 779, 788 (3d. Cir. 1982), cert. denied, 459 U.S. 880 (1982)). In this

case, the Circuit Court did not abuse its discretion in holding that Plaintiffs satisfy the adequacy requirement. Rather than argue these points, the Defendants argue that the Plaintiffs are not adequate class representatives because they "suffered no injury." State Brief at 65. This argument, which is about justiciability rather than adequacy of representation, is refuted in Part III.A, *supra*. Moreover, even if the individual claims of the named Plaintiffs were moot, it would have no effect on class certification because it is clear that the claims of the class as a whole have not been rendered moot. *See, e.g., Jones v. Southern United Life Ins. Co.*, 392 So.2d 822. 823 (Ala. 1981) (explaining that Defendants' tender of payment to a named plaintiff, which mooted her individual claims, did not prevent class certification).

In short, the interests of the class representatives do not conflict with those of the Plaintiffs' class. To the contrary, both have a shared interest in securing relief that would end Defendants' illegal practices and secure class members' ability to have their registration status determined in accord with law. The named Plaintiffs are adequate representatives of the class.

2. If this Court Concludes the Circuit Court Abused its Discretion Based on the Scope of its Class Certification Order, This Court Should Certify a Modified Class

For the above reasons, the Circuit Court did not abuse its discretion in concluding that Plaintiffs were entitled to class certification. Moreover, as the above discussion also demonstrates, the Circuit Court did not abuse its discretion in modifying the description of the class initially proposed by Plaintiffs. It is, of course, "within [the trial court's] discretion to modify or reformulate existing classes in the interest of manageability or other factors bearing upon class appropriateness." *Craft v. Vanderbilt University*, 174 F.R.D. 396, 403 (M.D. Tenn. 1996). Because Defendants' implementation of Section 177 of the Alabama Constitution violates the due process rights of all Alabamians with felony convictions, the Circuit Court did not abuse its discretion by modifying the proposed class description.

However, if this Court disagrees and concludes that the Circuit Court abused its discretion, the appropriate remedy would be for this Court to modify the certified class either: (1) along the lines originally proposed by Plaintiffs, or (2) to include all adult Alabamians who have been convicted of felonies that have: (a) already been determined by Alabama courts not to involve moral turpitude, or (b) have not yet been addressed by Alabama courts one way or the other. The named Plaintiffs

clearly satisfy the typicality and adequacy requirements regarding either class. *See Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213-15 (6th Cir. 1997) (concluding that class certified by trial court was too broad and amending the scope of the class accordingly).[9]

3. The Circuit Court Properly Certified a Defendant Class.

Even though Defendant Hunter (the Jefferson County Registrar designated by the Circuit Court to represent the Defendant Class) did not oppose certification of a Defendant class below, the Circuit Court undertook a "rigorous analysis" and decided to certify a Defendant Class. *See* Final Order (C-804-07). Defendants now claim that this certification was improper because there was insufficient evidence about the registration practices employed by different counties across Alabama. *See* State Brief at 66. However, Defendants have stipulated that county registrars throughout the State use registration forms stating that, to be eligible to vote, citizens must

[9] Of course, even if this Court overturned the Circuit Court's class certification order in its entirety, this case would not be subject to dismissal. The question of class certification is a procedural one distinct from the merits of the action. *Ex parte Gov't Employees Ins. Co.*, 729 So.2d 299, 303 (Ala. 1999). As explained above, *see* Parts III.A.1 & III.A.2, *supra*, the named Plaintiffs' individual claims would remain justiciable even in the absence of a class.

not have been convicted of a felony (unless they also have obtained a Certificate of Eligibility). C-502 (Stip. ¶14). Indeed, as noted above in Part II.C, *supra*, the Secretary has promulgated a regulation, Ala. Admin. Code § 820-2-2-.05, requiring registrars to use the forms prescribed by the Secretary. Clearly, then, the Secretary of State's incorrect guidance concerning Section 177 has been applied by county registrars throughout the State. Accordingly, Defendants' challenge to the certification of the Defendant class is unpersuasive.

C. The Circuit Court Correctly Decided that Sovereign Immunity Does Not Bar this Action.

The State's contention that this suit is barred by sovereign immunity, as set forth in Article I, Section 14 of the Alabama Constitution is meritless. As the Circuit Court correctly recognized, this Court has distinguished between suits that seek to recover money — either directly or indirectly — from the state treasury, and suits that do not. The former are barred by sovereign immunity; the latter are not. *See Patterson v. Gladwin Corp.*, 835 So.2d 137, 142 (Ala. 2002).[10]

[10] Suits in which a favorable decision for the plaintiffs would directly affect a contract or property right of the State are also barred by sovereign immunity. *See, e.g. Alabama A&M Univ. v. Jones*, 895 So.2d 867, 873 (Ala. 2004). The present litigation does not implicate any state contract or property right.

More specifically, this Court has identified a number of situations in which Article I, Section 14 sovereign immunity does not apply: (1) actions brought to compel state officials to perform their legal duties; (2) actions brought to enjoin state officials from enforcing an unconstitutional law; (3) actions to compel state officials to perform ministerial acts; and (4) actions brought under the Declaratory Judgments Act, seeking construction of a law and its application to a given situation. *See Ala. A&M Univ. v. Jones*, 895 So.2d 867, 873 (Ala. 2004). Under any of these four exclusions, the action is not "'against the State' for §14 purposes," and thus is not barred by sovereign immunity. *Patterson*, 835 So.2d at 142. In addition, "actions for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of the law" are "not prohibited by § 14" sovereign immunity. *Ex Parte Carter*, 395 So.2d 65, 68 (Ala. 1980).

In this case, three of these five exclusions undermine Defendants' sovereign immunity claim.[11] First,

[11] The Defendants drag a red herring across the trail by arguing two exclusions under which Plaintiffs have never sought relief, State Brief at 30-33, and do not even ad-

Plaintiffs are seeking to compel Defendants to perform their legal duties. Second, Plaintiffs' suit requests declaratory relief concerning their rights under the Alabama and federal Constitutions. Third, Plaintiffs have alleged (and the Circuit Court agreed) that Defendants have acted beyond their authority or in a mistaken interpretation of the law.

1. The District Court Correctly Held That This Is an Action Brought to Compel State Officials to Perform Their Legal Duty, and, Therefore, Sovereign Immunity Does Not Apply.

The "legal duty" exclusion applies where, as here, Plaintiffs seek to compel state officials to perform their legal duties, and "a law, a regulation, or a validly enacted internal rule commands a specific course of conduct [by the state defendants]." *Rodgers v. Hopper*, 768 So.2d 963, 968-69 (Ala. 2000). In this case, Plaintiffs' Fourth Amended Complaint asked the Circuit Court to, among other things, "require Defendant Secretary of State to provide effective notice to the Defendant Registrars and the voter registrars of each of the other counties promptly that individuals with felony convictions not involving moral turpitude, as enumerated by Alabama

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dress whether state officials acted "beyond their authority."

law and the Attorney General, are eligible to register and vote, and are not required to apply for or obtain a Certificate of Eligibility from the Board of Pardons and Paroles." C-997-998 (Pls.' Fourth Am. Compl., ¶ 101). Plaintiffs' request does no more than ask the Court to require the Secretary of State and other Defendants to perform their legal duties.

The Defendants repeatedly state that the Plaintiffs seek a court order requiring the Secretary of State to give "advice." State Brief at 20, 24, 26, 29. However benign "advice" may sound, the Secretary is something more than "Dear Abby." Under the Alabama Code, the Secretary of State, as "chief elections officer," "*shall* provide uniform guidance for election activities." Ala. Code § 17-1-8 (Supp. 2006) (emphasis added). The Alabama Code also provides that the "Secretary of State may promulgate rules for the receipt of applications for voter registration and the expedient administration of those applications." Ala. Code § 17-4-136 (Supp. 2006). Acting pursuant to this authority, the Secretary promulgated a regulation requiring voter registrars to use registration forms published by the Secretary, *see* Ala. Admin. Code § 820-2-2-.05, which, as explained above, incorrectly stated that, to be eligible to vote, individuals

must not have been convicted of a felony (or must have had their civil rights restored).[12]

The State argues that the Alabama Code only requires that the Secretary provide *uniform* guidance, and that Plaintiffs may not bring an action seeking to compel the Secretary to alter guidance that conflicts with State law, so long as that guidance is disseminated uniformly. *See* State Brief 29-30. The State's counterintuitive argument is squarely foreclosed by this Court's jurisprudence, which establishes that the "legal duty" imposed on administrative officials who are delegated authority by acts of the legislature includes a duty not to contravene

[12] As a practical matter, the fact that the Secretary of State, the chief election official, has the authority to *remove* voter registrars makes Defendant Secretary of State's inquiry into the precise nature of her authority over voter registrars largely academic in nature. *See* Ala. Code § 17-4-151 (Supp. 2006) ("The registrars appointed under this article may be removed for cause by the Secretary of State at any time before the end of their term of office, upon submitting written reasons therefore to the registrar removed and the members of the appointing board."). In the words of the Circuit Court: "in practice, the Secretary of State exercises considerable authority over the State's voter registrars in an effort to promote a uniform administration of the State's voting laws." Final Order, at 13-14 (C-797-98). *See also id.*, at 14 (C-798) ("It is . . . clear from both the facts and the law that the Secretary of State plays an authoritative role in promulgating the general policies and procedures employed by the voting registrars of this State to decide voter qualification.")

State law. *See, e.g., Ex parte Jones Mfg. Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) ("An administrative regulation must be consistent with the statutes under which its promulgation is authorized. An administrative agency cannot usurp legislative powers or contravene a statute.") (citation omitted).

Because Plaintiffs are seeking to compel the Secretary to adhere to the Alabama Constitution, under *Rodgers*, the "legal duty" exception applies to the instant case, and sovereign immunity does not bar this suit.

2. Because Plaintiffs Seek a Declaratory Judgment, the District Court Correctly Held Sovereign Immunity Does Not Bar this Suit.

Lawsuits seeking to construe a law and direct the parties as to what is required of them are not barred by sovereign immunity, even where one of the parties is a state official. *See, e.g., Curry v. Woodstock Slag Corp.*, 6 So.2d 479, 481 (Ala. 1942) (holding that actions for declaratory judgment do not implicate sovereign immunity, as they only "pray for guidance both to complainant and the State officers trying to enforce the law so as to prevent them from making injurious mistakes through an honest interpretation of the law."). In this case, the Defendants concede that Plaintiffs sought declaratory relief. *See* State Brief at 33-34. *See also Randall v. Wa-*

ter Works & Sewer Bd., 885 So.2d 757, 762 (Ala. 2003) ("Controversies touching the legality of acts of public officials or public agencies challenged by parties whose interests are adversely affected is one of the favored fields for declaratory judgment."). Moreover, as explained above, *see* Part III.A, *supra*, Defendants are incorrect in arguing that Plaintiffs' claims for declaratory relief are moot. Thus, as the Circuit Court concluded, Plaintiffs' claims seeking declaratory judgment pertaining to class members' voting rights are not barred by sovereign immunity. C-797-98 (Final Order).

3. Because Defendants Have Acted Outside of Their Authority, Sovereign Immunity Does Not Bar this Suit.

The four exclusions from the sovereign immunity doctrine listed in *Ala. A&M Univ. v. Jones* are not a "comprehensive final list of those actions not barred by [the] Section 14" grant of sovereign immunity. *Gill v. Sewell*, 356 So.2d 1196, 1198 (Ala. 1978). *See also Milton v. Espey*, 356 So.2d 1201, 1203 (Ala. 1978) (the four exclusions to the sovereign immunity doctrine "do[] not purport to list all classes of cases not within the prohibition of Section 14."). Article I, Section 14 also permits actions against state officials in their official capacities that allege that the officials have acted

"fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law." *Ex parte Carter*, 395 So.2d at 68 (Ala. 1980). *See also Curry*, 6 So.2d at 480 ("Nor when officers under a mistaken interpretation of the law acting in the name of the State commit acts not within their authority which are injurious to the rights of others [is the action barred by sovereign immunity.] . . . [T]he acts of officials that are not legally authorized or that exceed or abuse the authority of discretion conferred upon them are not acts of the state.") (citations and internal quotations omitted).

In *Hawkins v. James*, 411 So.2d 115, 117 (Ala. 1982), for instance, this Court held that Section 14 did not protect the governor from suit where the plaintiff alleged that the governor acted beyond his authority by issuing an executive order that conflicted with legislatively enacted provisions of the Alabama Code. In light of the plaintiff's allegations, the "action f[e]ll without the prohibition of § 14." *Id.* Similarly, *Gunter v. Beasley*, 414 So.2d 41, 42 (Ala. 1982), upheld a suit brought by the lieutenant governor against the state treasurer and comptroller after the defendants refused to issue certain payments to the lieutenant governor. This Court held that, because the treasurer and comptroller

were acting under a mistaken interpretation of the law in refusing to release the funds in question, Section 14 did not bar the lieutenant governor's suit. *Id.* at 48-49.

Under these cases, Section 14 is no bar to Plaintiffs' claims. As in *Hawkins* and *Gunter*, Plaintiffs have alleged that Defendants have acted outside of their authority by disfranchising eligible voters. *See* C-985 (Pls.' Fourth Am. Compl. ¶ 44). *Hawkins* is particularly instructive, as the Alabama Supreme Court found Section 14 inapplicable when the defendant acted in conflict with a state statute and thus outside of his legal authority. *Hawkins*, 411 So.2d at 117. In this case, Plaintiffs allege — and the Circuit Court agreed — that Defendants have acted in conflict with the Alabama Constitution and thus beyond their legal authority. C-825 (Final Order). Accordingly, the sovereign immunity doctrine is not a bar to Plaintiffs' claims.

D. The Circuit Court Correctly Granted Summary Judgment and Provided Appropriate Relief to Plaintiffs

On the merits, the Circuit Court concluded that Defendants have violated State law. The court thus granted Plaintiffs summary judgment and issued an order providing related declaratory and injunctive relief (C-831-34). Because Defendants do not maintain that there are any

disputed material facts in this case, the only issue is whether the Circuit Court correctly applied the law to the undisputed facts. *See Downey v. Mobile Infirmary Med. Ctr.*, 662 So.2d 1152, 1153 (Ala. 1995) (two-tiered test for summary judgment under Ala. R. Civ. P. Rule 56(c)(3) requires that (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law).

Because the merits issues underlying different portions of the Circuit Court's order are distinct, the following discussion is divided into two sections. The first analyzes the law supporting paragraph 7 of the Circuit Court's order (C-832) (providing declaratory and injunctive relief against Defendants' practice of disfranchising voters based on their conviction of any felony, without regard to whether the felony involved moral turpitude).[13] The second analyzes the law supporting paragraphs 8 through 10 of the Circuit Court's order (C-832-33) (providing declaratory and injunctive relief prohibiting Defendants from using any felony conviction as a

[13] Contrary to Appellants' assertion that the Circuit Court "did not grant the relief requested by the Plaintiffs," State Brief at 7, paragraph 7 of the Circuit Court's order provided precisely the relief requested by the Plaintiffs. *See* C-996-97 (Pl. 4th Am. Comp. at ¶¶ 99-102).

basis to disfranchise voters, unless and until Alabama passes and preclears a statute identifying which felonies involve moral turpitude). As this discussion demonstrates, both parts of the Circuit Court's order were based on a correct application of governing law.[14]

1. Paragraph 7 of the Circuit Court's Order Is Mandated by Governing Law

Contrary to Section 177 of the Alabama Constitution, the Defendant Secretary of State has advised and instructed registrars to refuse to register *any* individual with a felony conviction who does not possess a Certificate of Eligibility. As can be seen by the experiences of Plaintiffs Gooden and Thomas, this puts members of the Plaintiff class in a Catch-22: the registrar demands a Certificate of Eligibility, but the Board of Pardons will not give a Certificate of Eligibility to a person who has not been convicted of a felony involving moral turpitude. As a result, citizens throughout Alabama have been disfranchised even though they have not been convicted of

[14] Paragraphs 1-4, and 11-12 (C-831-33) are not in dispute. We defended paragraph 5 of the Circuit Court's order (C-832) (certifying the plaintiff class), in Part III.B.1, *supra* and paragraph 6 of the Circuit Court's order (C-832) (certifying the defendant class) in Part III.B.2, *supra*. We defend paragraph 13 of the Circuit Court's order (C-833) (providing attorney's fees), in Part III.E, *infra*.

felonies involving moral turpitude, and thus illegally denied their constitutional right to vote.

Notwithstanding that Defendant Secretary of State knew at least by September 29, 2005, the date on which this action was filed, that registrars across Alabama were relying on her unlawful advice and guidance to disfranchise Plaintiffs and other eligible voters, she continued to encourage voter registrars to defy Alabama law. Indeed, at several regional meetings, Secretary Worley informed county registrars that they should "[c]ontinue long-standing practice until we receive a response from the Attorney General." C-505-06 (Stip. ¶¶ 25-26); C-536-37 (Stip. Exh. 12). The Secretary has not cured her misstatements of the law.

The effect of these practices is to deny the vote to the named Plaintiffs and to a substantial but undetermined number of similarly situated citizens across the State of Alabama, in violation of State law. Indeed, in this litigation, counsel for Defendants correctly conceded that, under Section 177, the named Plaintiffs should have been registered to vote because their convictions were not for felonies of moral turpitude. Therefore, Defendants Secretary of State, and the Defendant class of county registrars represented by Jefferson

County Registrar Nell Hunter, violated Section 177 of the Alabama Constitution by causing the named Plaintiffs and similarly situated class members to be disfranchised.

In addition, and contrary to Defendants' assertion that Plaintiffs have not stated a claim under federal law, *see* State Brief at 44, Defendants' practices have violated Plaintiffs' federal due process rights. For two reasons, the right to vote is a liberty interest entitled to the procedural protections of that provision. First, "[v]arious courts have recognized that the fundamental nature of the right to vote gives rise to a liberty interest entitled to due process protection." *Doe v. Rowe*, 156 Supp.2d 35, 47 (D.Me. 2001) (citing cases). Second, even apart from the fundamental nature of the franchise, the Alabama Constitution unambiguously recognizes that adult citizens of this State have the right to vote unless they have been convicted of a felony involving moral turpitude. Therefore, the Alabama Constitution has created a protected liberty interest in that right.[15]

[15] *See, e.g., Paul v. Davis*, 424 U.S. 693 (1976) (majority opinion by then-Justice Rehnquist) (explaining that one way interests protected by the due process clause "attain this constitutional status [is] by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status") (footnote omitted). *See also*

Because Alabama citizens have a protected liberty interest in voting, the due process clause of the Fourteenth Amendment prevents Defendants from "arbitrarily abrogat[ing]" this liberty interest. *Vitek v. Jones*, 445 U.S. 480, 489 (1980) (citation omitted). By categorically disfranchising individuals who have committed felonies that do not involve moral turpitude, notwithstanding the plain command of the Alabama Constitution that only individuals who committed felonies that do involve moral turpitude shall be disfranchised, Defendants have done precisely that. *See* Merriam-Webster's Collegiate Dictionary, Tenth Edition (1997) (defining "arbitrary" as, among other things, "not restrained or limited in the exercise of power[;] ruling by absolute authority[;] marked by or resulting from the unrestrained and often tyrannical exercise of power").

In sum, Paragraph 7 of the Circuit Court's order simply requires Defendants to stop a practice that even their counsel concedes is illegal. Defendants do not, and cannot, dispute that this portion of the Circuit Court's order was justified by a straightforward applica-

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Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462 (1989) ("Stated simply, a State creates a protected liberty interest by placing substantive limitations on official discretion.") (citation omitted).

tion of the Alabama Constitution.[16] In addition, this portion of the Circuit Court's order was justified by the federal due process clause. Accordingly, we respectfully submit that paragraph 7 of the Circuit Court's order must be affirmed.

2. Paragraphs 8-10 of the Circuit Court's Order Are Mandated by Governing Law

"The right to due process is guaranteed to the citizens of Alabama under the Alabama Constitution of 1901, Article I, Sections 6 and 13." *Ross Neely Express, Inc. v. Alabama Dep't of Environmental Mgmt.*, 437 So.2d 82, 83 (Ala. 1983). This right applies in civil and criminal proceedings, and it "is violated when a statute is unduly vague, unreasonable, or overbroad." *Id.* Applying this standard, the Circuit Court correctly held that Defendants could not, consistent with state due process protections, continue to disfranchise individuals convicted of felonies unless and until the Alabama legislature promulgates a law setting forth which crimes involve moral turpitude and which do not. C-833 (Final Order, ¶ 11).[17]

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[16] Defendants do raise the non-merits defenses of nonjusticiability and sovereign immunity. These defenses are considered and rejected in Parts III-A and III-C, *supra*.

[17] It was, of course, fully within the Circuit Court's discretion to expand the scope of the injunction proposed by the plaintiffs. *See Petroleum Equipment Tool Co. v.*

"Vague laws are objectionable as transgressions of due process guarantees on two grounds: (1) they fail to provide fair warning to citizens charged with their observance, and (2) by failing to provide clear guidelines, they lend themselves to arbitrary application by those charged with their enforcement." *Scott & Scott, Inc. v. City of Mountain Brook*, 844 So.2d 577, 589 (Ala. 2002) (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 n. 8 (5th Cir.1980)) (additional quotation omitted). *See*

State Bd. of Health, 575 So.2d 587, 589 (Ala. 1991) ("[T]he decision to enter, apply, modify, extend, or dissolve an injunction rests within the wide discretion of the circuit court.") *See also* State Brief at 49 (citing A.R.C.P. 54(c)). In addition, the Plaintiffs requested "such other, further, and different relief as the facts and circumstances may warrant." C-998 (Pl. 4th Am. Comp. at ¶ 107).

In addition, contrary to Defendants' conclusory assertions, *see* State Brief at 49-50, they were not prejudiced by the Circuit Court's action. Plaintiffs' Complaint explicitly alleges that the registration process violated the Due Process Clauses, because the Secretary's forms used by registration officials were misleading and discouraged registration. *See* C-995-96 (Pl. 4th Am. Comp. at ¶¶ 93-96). Thus, Appellants are incorrect when they assert that they had "no notice of any claim that the procedure to register to vote was unconstitutional." State Brief at 50. Moreover, although Appellants devote ten pages of their brief to disagreeing with the merits of the Circuit Court's order, *see* State Brief at 51-61, they fail to identify any evidence or legal argument that they did not have an opportunity to develop because of the Circuit Court's decision to expand the scope of the injunction.

also Ross Neely, 437 So.2d at 84 (identifying similar concerns with vague laws). Until and unless the Alabama legislature takes further action, the State's felon disfranchisement scheme, which turns on the correct interpretation of "moral turpitude," suffers from both of the vagueness problems identified in *Scott & Scott, Inc.*

According to a leading evidence treatise quoted favorably by this Court, "Moral turpitude signifies an inherent quality of baseness, vileness, and depravity. It is immoral in itself, regardless of the fact that it is punished in law. [It is] *mala in se* and not *mala prohibitium*." C. Gamble, *McElroy's Alabama Evidence*, § 145.01(7) (3d ed. 1977), quoted with approval in *Ex Parte McIntosh*, 443 So.2d 1283, 1284 (Ala. 1983). This definition of moral turpitude does not provide a fixed standard. Rather, "[t]he concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times." *In re Higbie*, 6 Cal.3d 562, 570, 99 Cal.Rptr. 865, 869, 493 P.2d 97, 101 (1972), quoted with approval in *Johnson v. State*, 629 So.2d 708, 711 (Ala. Crim. App. 1993). Accordingly, whatever value this definition of moral turpitude may have in other contexts, it fails to provide sufficient notice to Alabama residents about whether they will be disfranchised due to

a felony conviction, and it does not provide registrars with the clear guidelines necessary to avoid arbitrary enforcement of the State's felon disfranchisement scheme.

Consider an individual convicted of using "wires or signals . . . for the purpose of communicating with the occupants of [a] gaming house," a felony in violation of Ala. Code § 13A-12-50 (2006). How is this individual to know in advance whether this is a felony of moral turpitude? Post-conviction, how can the Secretary of State or voting registrars know whether the individual is eligible to vote without having obtained a Certificate of Eligibility? The felony's status is not defined by statute, addressed by any Alabama court decision, or closely analogous to any crimes that have been so addressed. Moreover, in his official guidance on this issue, the Attorney General has acknowledged that he "cannot provide an exhaustive list of every felony involving moral turpitude," Opinion, 2005 WL 1121853, at *1, and has simply pointed out those court decisions that do classify a relatively small number of felonies as involving or not involving moral turpitude, *see id.*, at *3.

Perhaps registration officials may be tempted to look at decisions in other, nearby jurisdictions for guidance. This, too, offers little help. The Virginia Supreme

Court of Appeals has held that a "conviction of operating a lottery or numbers game" is not a crime involving moral turpitude, *Parr v. Com.*, 198 Va. 721, 725-26, 96 S.E.2d 160, 164 (Va. 1957). On the other hand, the Tennessee Supreme Court held just six years later that being a "professional crooked gambler" involved moral turpitude. *State v. Fowler,* 373 S.W.2d 460, 465-66 (Tenn. 1963). Florida has also held that "bookmaking" is a crime of moral turpitude. *Carp v. Florida Real Estate Commission,* 211 So.2d 240 (Fla.App. 1968).

Or, consider an individual convicted of unlawful distribution of a controlled substance that is neither marijuana nor cocaine. As the Circuit Court noted: "Selling marijuana is a crime of moral turpitude. *Jones v. State*, 527 So.2d 795 (Ala.Crim.App. 1988). Selling cocaine isn't, at least not according to *Pippin v. State*, 197 Ala. 613, 73 So. 340 (Ala. 1916)." C-819 (Final Order). How should registration officials determine if the controlled substance is closer to marijuana or to cocaine? Does the answer depend on the perceived dangerousness of the drug in question, with the sale of an arguably less dangerous substance being *more* immoral?

Finally, consider individuals who are convicted of criminally negligent homicide while driving a vehicle un-

der the influence of alcohol. *See* Ala. Code § 13A-6-4(c) (2006). On one hand, this seems no more "*mala in se*" than driving under the influence of alcohol generally, which is not a felony of moral turpitude, as it is largely a matter of chance whether a driver under the influence of alcohol commits criminally negligent homicide. On the other hand, the Alabama Code groups criminally negligent homicide, along with murder, as one type of criminal homicide. *See* § 13A-6-1(a)(1). Does this mean it is more akin to murder, which is a crime of moral turpitude under *Johnson v. State*, 91 So.2d 476 (1956)? How are potential voters and registration officials to know?

These are only three examples of the "numerous serpents [of uncertainty]," C-818 (Final Order), that will continue to characterize Alabama's felon disfranchisement scheme unless and until the Alabama legislature provides guidance as to which felonies involve moral turpitude and which do not. And, as the Circuit Court recognized, this uncertainty will prevail regardless of the intentions of registration officials:

> In entering this order, this Court does not intend to disparage the dedication or good faith of the named defendants, or of the defendant class members, in any way. To the contrary, this order is with the assumption that the defendants are dedicated, well-intentioned servants of the public.

> Given the overriding importance of the civil rights at stake, however, a system that deprives citizens of those rights based on the guesses of even such well-intentioned public servants fails to pass constitutional muster. In the absence of meaningful standards on which the defendants can base their decisions, the refusal to register members of the plaintiff class would violate their due process rights under the Alabama Constitution.

C-825 (Final Order). In other words, the fundamental problem is that, absent further guidance from the Alabama legislature, Alabama's felon disfranchisement scheme, (1) fails to provide fair warning to citizens about who will be affected, and (2) lends itself to arbitrary enforcement from one county to the next.[18] Thus, the scheme is unconstitutionally vague. *See Scott & Scott, Inc.,* 844 So.2d at 859.

Finally, this unconstitutional infirmity injures all individuals who have been disfranchised pursuant to the scheme, regardless of whether the individuals would have been enfranchised under a proper scheme. Just as suspended students are injured by a school's failure to provide due process before their suspension regardless of whether they would have been suspended absent the due

[18] This county-to-county variation may also present equal protection problems. *See Bush v. Gore,* 531 U.S. 98, 107 (2000) (per curiam).

process violation, Alabama voters who are disfranchised based on a disfranchisement system that does not satisfy due process are injured regardless of whether they would have been disfranchised had appropriate procedures been in place. "[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

In addition to the due process violations under the Alabama Constitution in the implementation of Section 177, the State's felon disfranchisement system currently violates the federal due process clause, and it will continue to do so until and unless the Alabama Legislature provides guidance concerning which felonies involve moral turpitude and which do not. As explained above, *see* Part III.D.1, *supra*, because of the fundamental nature of the franchise, and because of the clear mandate of Section 177, Alabama citizens have a protected liberty interest in the right to vote. Therefore, the State may only deprive Plaintiffs of the franchise if the deprivation occurs pursuant to constitutionally sufficient procedures. *See Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). To determine whether existing procedures are adequate, courts must examine three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the possible value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id., at 334-35. As the Circuit Court recognized, applying the *Mathews* test to the facts of this case demonstrates the constitutional inadequacy of the procedures currently in place to determine whether an individual with a felony conviction is eligible to vote. C-823-25 (Final Order).

First, the private interest at stake is exceedingly important. The United States Supreme Court has characterized the right to vote as "the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and "a civil right of the highest order," *Oregon v. Mitchell*, 400 U.S. 112, 139 (1970). Similarly, as noted above, this Court has characterized the right to vote as "perhaps the most basic and cherished right of our democratic system." *Waltman v. Rowell*, 913 So.2d 1083, 1090 (Ala. 2005).[19]

[19] The State points to other parts of the Alabama Code that employ the term "moral turpitude." *See* State Brief,

Second, and despite the State's conclusory assertions to the contrary, *see* State Brief at 47 and 56, the risk of erroneous deprivation based on the procedures currently in place is high. The Secretary of State has not provided any guidance to county registrars that they can rely upon in determining whether a specific felony involves moral turpitude. There is no statute addressing this issue, and the most the Attorney General could do in providing official guidance was to point to the decisions of Alabama courts classifying certain felonies as involving or not involving moral turpitude. Yet, according to the undisputed testimony of the Jefferson County assistant attorney, with regard to *most* felonies, there are no state judicial decisions addressing whether or not the felony involves moral turpitude. Moreover, notwithstanding the Supreme Court's admonition almost a century ago that "[t]he fundamental requisite of due process is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), registration officials make their dis-

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Appendix B. In none of the cited examples is the private right at stake nearly as important as the fundamental right to vote. Accordingly, the due process balancing test would not necessarily be resolved the same manner with regard to these provisions. In addition, there is no evidence in the record concerning the administration of these other provisions, and whether, in practice, they raise the same vagueness problems as does the State's felon disfranchisement regime.

franchisement decisions without providing any sort of opportunity — written or oral — for citizens to explain why they are entitled to vote. Under these circumstances — and particularly in light of the specific examples discussed above in which analogizing from existing judicial decisions is very difficult — the *ad hoc* determinations by county registration officials will cause numerous voters to be disfranchised improperly, and disfranchisement decisions will vary greatly from year to year and from county to county. The additional procedural requirement contained in the Circuit Court's order — clear, statewide guidance about which felonies involve moral turpitude and which do not — would eliminate, or at least greatly reduce, this risk.

Defendants argue, however, that the second *Mathews* factor does not favor Plaintiffs because "[e]ven if a registrar gets it wrong and decides that a felony involves moral turpitude when it does not, the applicant can go to Circuit Court, and ultimately to this Court, to fix it . . . ." State Brief at 56. Supreme Court precedent forecloses Defendants' argument that the *postdeprivation* procedure provided by Ala. Code § 17-4-124 (1995) is sufficient to satisfy the State's obligation to pro-

vide adequate *predeprivation* procedures before disfranchising voters.

"[T]he root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loundermill*, 470 U.S. 532, 542 (1985) (citations and internal quotations omitted). The limited exceptions to this rule do not apply here. As explained above, this is not a case in which the possibility of an erroneous disfranchisement is "insignificant" or the resulting deprivation of a liberty interest is not "serious." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1978).

Nor is this a case in which any erroneous disfranchisement can be easily rectified post-deprivation. The time that it takes to file suit in Circuit Court and perhaps appeal to this Court under § 17-4-124 means that, even if the courts conclude the voter has not committed a felony of moral turpitude, the voter could be disfranchised from participating in at least one election. This is a "final deprivation," *Memphis Light*, at 20, that cannot be rectified by a later determination that the voter should not have been disfranchised. Finally, any disfranchisement that occurs under the current system re-

sults not from "a random and unauthorized act by a state employee," but from an "established state procedure." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982) (citations and internal quotations omitted). In sum, none of the exceptions to the general rule that the Due Process Clause requires a predeprivation hearing applies to the circumstances of this case. Therefore, the post-deprivation procedures set forth by Ala. Code § 17-4-124 do not cure the vagueness problems that infect the disfranchisement decisions made by registration officials. *See, e.g., Cleveland Bd. of Educ.*, at 542 (citing cases); *Memphis Light*, at 19 (same).

Turning to the third *Mathews* factor, the additional procedural requirement at issue would not impose a financial burden on the State. The Legislature need only make a one-time investment in evaluating different felonies to determine whether they involve moral turpitude.[20] Defendants, however, argue that the legislature would "have to consider not only Alabama's code, but also the United States Code, the codes of all fifty states, and foreign law." State Brief at 57. This is not so. The judiciary

[20] If the legislature creates entirely new felonies in the future, the legislature would also determine whether the new felony involves moral turpitude. Any resulting burden would surely be *de minimis*.

could simply evaluate out-of-state felonies based on whether the conduct they proscribe is a felony of moral turpitude under Alabama law. *Cf. Lopez v. Gonzales*, 549 U.S. ___, 127 S.Ct. 625, 630-31 (2006) (holding that, under a provision of the Immigration and Nationality Act that attaches consequences to certain kinds of "felony" convictions, the relevant inquiry in analyzing a state offense is whether it proscribes conduct punishable as a felony under federal law).

In fact, the State will save money because, after the Legislature acts, in most cases county officials will no longer be required to devote substantial resources to determining whether a specific felony involves moral turpitude. In sum, each of the three *Mathews* factors supports paragraphs 8 through 10 of the Circuit Court's order. Therefore, although the Circuit Court did not reach Plaintiffs' federal claims, the federal due process clause provides an independent legal basis under which this Court should affirm the decision below. *See Liberty Nat. Life Ins. Co. v. University of Alabama*, 881 So.2d 1013 (Ala. 2003) ("[T]his Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court.")

3. If this Court Concludes that any Portion of the Circuit Court's Order was Unjustified, the Proper Remedy is to Vacate that Provision and Affirm the Remainder of the Order

For the reasons stated above, this Court should affirm paragraphs 7-10 of the Circuit Court's final order. However, if the Court concludes that any portion of the Circuit Court's order was not supported by governing law, the proper remedy would be to vacate that portion of the order and modify the injunction accordingly. *See Brunson Construction and Environmental Servs. v. City of Prichard*, 664 So.2d 885, 894 (Ala. 1995) (concluding that one aspect of a Circuit Court's injunction was not supportable, modifying the injunction, and affirming the judgment as modified). We respectfully submit that, at a minimum, this Court must enter an order preventing Defendants from using any felony that has not already been determined by Alabama courts to involve "moral turpitude" as a basis for disfranchisement. Otherwise, individual citizens will lack sufficient notice, and decisionmakers will lack sufficient guidance, whether a specific felony is disfranchising in order to satisfy the due process problems discussed above.

E. The District Court Did Not Abuse Its Discretion in Granting Plaintiffs Attorneys' Fees

As the Circuit Court explained, this Court has held that plaintiffs may recover attorneys' fees under 42 U.S.C. § 1988 even when their federal claims are not addressed, so long as plaintiffs prevail on substantially similar state claims with no specific or affirmative denial of their federal claims. C-827-28 (Final Order) (discussing *Davis v. Everett*, 443 So.2d 1232 (Ala. 1983) and *Federation of City Employees v. City of Birmingham*, 492 So.2d 1304 (Ala. 1986)). *See also Lowery v. Thomas*, 575 So.2d 1030, 1032 (Ala. 1991) (holding that, when a plaintiff makes both federal and state claims, "[i]f the [42 U.S.C.] § 1983 claim and the state law claim arise out of a 'common nucleus of operative fact,' then in determining the plaintiff's status as a 'prevailing party' under § 1988 it is immaterial upon which claim or claims the judgment is based, unless the § 1983 claim is specifically denied").[21] In this case, the Circuit Court correctly held that, applying the standard set forth by this Court's decisions, Plaintiffs were entitled to at-

[21] It is well-established that sovereign immunity does not bar an award of attorneys' fees under 42 U.S.C. § 1988. *See Hutto v. Finney*, 437 U.S. 678, 695-96 (1978); *Ex Parte Town of Lowndesboro*, 2006 WL 1304902, at *8 (Ala. 2006) (discussing *James v. Alabama Coalition for Equity, Inc.* 713 So.2d 937, 950 (Ala. 1997)).

torneys' fees: "[T]he plaintiffs' equal protection/due process claims under Count Six were not reached, with the Court's ruling instead premised on its analysis of state constitutional rights. The claims of Count Six, and the due process analysis used in resolving the other claims in the plaintiffs' favor, however, certainly suggest that at least to some extent, relief to the plaintiffs could have been based on federal constitutional claims." C-828. Indeed, as explained in Parts III.D.1 and III.D.2, *supra*, the federal constitution provides an independent ground upon which this Court should affirm the Circuit Court's decision.

IV. CONCLUSION

We respectfully request this Honorable Court to affirm the Circuit Court's judgment in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on 17 January 2007

- the original and twelve copies of the foregoing was mailed by **certified mail** to

Hon. Robert Esdale
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- a copy of the foregoing was delivered by first class mail to the following:

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Appendix A –
copies of voter registration forms