FELON DISENFRANCHISEMENT — NOTICE REQUIREMENTS — DISTRICT COURT FINDS NO IRREPARABLE INJURY FROM THE STATE'S LACK OF NOTICE TO PEOPLE WITH FELONY CONVICTIONS UPON RE-ENFRANCHISEMENT. — *Thompson v. Alabama*, No. 2:16-CV-783, 2017 U.S. Dist. LEXIS 118606 (M.D. Ala. July 28, 2017).

The Alabama Constitution disenfranchises individuals convicted of felonies involving moral turpitude.[1] Until 2017, Alabama did not define which crimes involve "moral turpitude," leaving the standard for disenfranchisement open to the interpretation of individual registrars.[2] Under this vague system, Alabama has had one of the nation's highest rates of disenfranchisement, with seven percent of the total voting-age population and fifteen percent of the black voting-age population ineligible to vote.[3] In May 2017, the Alabama legislature passed House Bill 282 (H.B. 282), which recognized the eligibility of tens of thousands of ex-felons to vote.[4] However, with the state not required to provide notice of H.B. 282, many ex-felons were unaware of the law and their newly recognized eligibility in advance of Alabama's special election for the U.S. Senate. Recently, in *Thompson v. Alabama*,[5] the U.S. District Court for the Middle District of Alabama denied plaintiffs' motion for a preliminary injunction that would have required the state to notify eligible ex-felons of their right to vote.[6] Among other factors, the court reasoned that plaintiffs did not face irreparable injury through the lack of notice because they were entitled to vote.[7] However, the court should have recognized that, despite technical enfranchisement, there was nonetheless de facto disenfranchisement, working an irreparable harm. To address such harm in the future, legislatures should require notice to re-enfranchised felons at least when (1) they face de facto disenfranchisement; (2) the harm was created by the state; and (3) that harm was racially discriminatory.

In *Thompson*, Alabama residents with felony convictions challenged the state constitution's section 177(b), which provides that "[n]o person

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[1] ALA. CONST. art. VIII, § 177(b), *amended by id.* amend. 579.

[2] Class-Action Complaint for Declaratory and Injunctive Relief at 38, Thompson v. Alabama, No. 2:16-CV-783 (M.D. Ala. Sept. 26, 2016).

[3] *See id.* at 2. Nationally, all but two states — Maine and Vermont — disenfranchise convicted felons, with laws ranging from disenfranchisement during one's time in prison to lifelong disenfranchisement regardless of the length of the criminal sentence. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 tbl.1 (2017), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf [https://perma.cc/LH44-ZNEQ].

[4] *See* H.B. 282, 2017 Leg., Reg. Sess. (Ala. 2017); *see also* 2017 Ala. Adv. Legis. Serv. 209 (LexisNexis).

[5] No. 2:16-CV-783, 2017 U.S. Dist. LEXIS 118606 (M.D. Ala. July 28, 2017).

[6] *Id.* at *6.

[7] *Id.* at *35.

convicted of a felony involving moral turpitude . . . shall be qualified to vote until restoration of civil and political rights."[8] Plaintiffs challenged the "moral turpitude" standard on due process, racial discrimination, and void for vagueness grounds, among others.[9] Because of their felony convictions, each individual plaintiff either had a voter registration application denied, had been removed from registration rolls, or had not attempted to register due to uncertainty over eligibility.[10] Section 177(b) was enacted in 1996 as an amendment to the 1901 Alabama Constitution's section 182,[11] which the Supreme Court invalidated in *Hunter v. Underwood*.[12] The *Hunter* Court found that the Alabama Constitutional Convention enacted section 182 out of racial animus — given its belief that blacks were more likely to commit crimes of "moral turpitude" — as part of an effort to disenfranchise blacks across the South following Reconstruction.[13] While section 177(b) amended the invalidated 1901 provision, it reintroduced the "moral turpitude" standard[14] and provided no definition of crimes of "moral turpitude." Instead, individual state registrars made case-by-case determinations of whether an applicant's conviction barred the person from voting.[15]

Amidst ongoing litigation in *Thompson*, on May 25, 2017, Alabama enacted H.B. 282, the Felony Voter Disqualification Act, which enumerated forty-seven felonies that constitute crimes of moral turpitude for the purposes of disenfranchisement.[16] H.B. 282 provided part of the relief sought by plaintiffs by resolving the century-old ambiguity of the "crime of moral turpitude" language. However, following the passage of H.B. 282, the state took few steps to notify the public about the changed law. Over a month after the legislation was enacted, no notices had been posted on the Secretary of State's website or issued to eligible ex-felons whose voter applications had been erroneously denied.[17]

On June 30, 2017, with the voter registration deadline for Alabama's August 15 special election approaching, plaintiffs moved for a preliminary injunction to compel the state to notify the public about the

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[8] ALA. CONST. art. VIII, § 177(b), *amended by id.* amend. 579.

[9] Class-Action Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 39–56.

[10] *Id.* at 9–14.

[11] ALA. CONST. art. VIII, § 182, *repealed by id.* amend. 579.

[12] 471 U.S. 222, 233 (1985).

[13] *Id.* at 229, 232.

[14] The 1996 amendment enacted the same language verbatim as a 1973 proposal to simplify section 182 without substantively changing it. Class-Action Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 29–32.

[15] *Id.* at 38. While Alabama's attorneys general have occasionally issued clarifications of the "moral turpitude" standard, registrars at times have not followed such direction. *See, e.g.*, Chapman v. Gooden, 974 So. 2d 972, 978 (Ala. 2007).

[16] H.B. 282, 2017 Leg., Reg. Sess. (Ala. 2017).

[17] Motion for Preliminary Injunction and Brief in Support at 7, *Thompson*, No. 2:16-CV-783, ECF No. 56.

changed law.[18] Specifically, plaintiffs sought that the state notify "H.B. 282 voters" — ex-felons who were mistakenly considered ineligible to vote under section 177(b) and whose voting rights were affirmed by H.B. 282 — of their eligibility.[19] Plaintiffs called for the state to: (1) provide notice of H.B. 282 eligibility standards on Alabama voter registration forms; (2) post notice on the Secretary of State's website and at county registrars and DMV offices; (3) request that notice be added to federal voter registration forms; and (4) reinstate recently denied H.B. 282 voters to registration rolls and provide them with individualized notice.[20] Otherwise, plaintiffs argued, H.B. 282 would be an "empty gesture."[21]

On July 28, 2017, Chief District Judge Watkins denied the motion for a preliminary injunction.[22] The court concluded that none of the four factors required for a preliminary injunction[23] weighed in plaintiffs' favor, particularly given the heightened burden of persuasion for a mandatory preliminary injunction.[24] Judge Watkins first found that plaintiffs' claims challenging the "moral turpitude" standard were unlikely to succeed on the merits because they were rendered moot by the passage of H.B. 282, the relief requested in the preliminary injunction motion was of a different character than that originally requested, and a federal court directing state officials on compliance with state law would undercut the Eleventh Amendment.[25]

Next, the judge found that plaintiffs had not demonstrated a substantial threat of irreparable injury, a showing that is the "sine qua non of injunctive relief."[26] Judge Watkins explained that H.B. 282 voters are no longer disenfranchised — given that they were recognized as eligible and could discover their eligibility simply by looking at the list of crimes provided in H.B. 282 — and that they could not claim irreparable injury after being granted the right to vote.[27] Moreover, as plaintiffs conceded, many H.B. 282 voters are low income and have limited internet access, and therefore public notice procedures would likely be unsuccessful, absent individualized notice.[28] Plaintiffs' delay in filing the

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[18] *Id.* at 2–3.

[19] *Id.* at 2.

[20] *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *5. The original motion called for additional measures and was orally amended by plaintiffs at the hearing. *Id.* at n.1.

[21] Motion for Preliminary Injunction and Brief in Support, *supra* note 17, at 21.

[22] *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *6.

[23] A preliminary injunction requires: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that [the movant's] own injury outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest." *Id.* at *12 (quoting Siegel v. LePore, 234 F.3d 1163, 1179 (11th Cir. 2000) (Anderson, C.J., concurring specially)).

[24] *Id.* at *12–13.

[25] *Id.* at *13–27.

[26] *Id.* at *27 (quoting *Siegel*, 234 F.3d at 1176).

[27] *Id.* at *28–30.

[28] *Id.* at *32–33, *33 n.11.

preliminary injunction also weighed against a finding of irreparable injury.[29] Finally, the court found that plaintiffs' injury did not outweigh the harm of an injunction to defendants, and that an injunction would not serve the public interest.[30]

Although it may not have affected the outcome of *Thompson*, the court nevertheless should have found that Alabama's eligible ex-felons faced de facto disenfranchisement — and thus irreparable injury — even after the passage of H.B. 282. This finding would have supported the legislative creation of an affirmative duty for the state to inform ex-felons of their voter eligibility when certain criteria are met. Moreover, such a duty would not be unduly burdensome on states.

What occurred in *Thompson* amounted to de facto disenfranchisement. For decades, Alabama residents deemed to have committed crimes of "moral turpitude" were disenfranchised based on the arbitrary determinations of individual county registrars. In some counties, registrars even removed from registration rolls *all* persons convicted of felonies, without determining whether the conviction was for a disqualifying felony.[31] This erroneous deprivation of voting rights and "mass dissemination of inaccurate and misleading information"[32] led *eligible* voters to believe they were ineligible to vote. This constituted widespread de facto disenfranchisement that continued even after the passage of H.B. 282. Without individualized notification of the law, many eligible ex-felons continued believing they were ineligible, as they had been told by election officials for decades.[33] Election law jurisprudence has long recognized that the right to vote involves more than the technical entitlement to register, to cast a ballot, or even to have that vote

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[29] *Id.* at *34–35. The court also distinguished this case from *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), where the state was required to notify felons convicted of "wife-beating" after they were re-enfranchised, due to their crime's unconstitutional gender classification, *id.* at 367–68.

[30] *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *35–39. The court emphasized that requiring notification would "divert essential resources" from the upcoming election, *id.* at *36, compromise federalism, *id.* at *37–38, and complicate the administration of the state's voting laws, *id.* at *38.

[31] Plaintiff's Evidentiary Submissions in Support of Preliminary Injunction ex. D at 3, *Thompson*, No. 2:16-CV-783, ECF No. 66-4 (Declaration of Synethia E. Pettaway); *see also* Chapman v. Gooden, 974 So. 2d 972, 986 (Ala. 2007) (noting plaintiffs' contention that the "[l]ongstanding practice" of registrars was to "*categorically* disfranchise[] individuals who had *any* felony conviction" (first alteration in original)).

[32] *See* ERIKA WOOD & RACHEL BLOOM, AM. CIVIL LIBERTIES UNION & BRENNAN CTR. FOR JUSTICE, DE FACTO DISENFRANCHISEMENT 1 (2008), https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf [https://perma.cc/SE98-HHW8] (defining de facto disenfranchisement).

[33] Many ex-felons were also mistakenly told they were required to pay off fees and fines related to their convictions before registering to vote. Connor Sheets, *In Wake of Reports, Alabama Clarifies that Some Felons Can Vote Despite Debts*, AL.COM (Dec. 15, 2017), http://www.al.com/news/index.ssf/2017/10/in_wake_of_reports_alabama_cla.html [https://perma.cc/XG32-QN8L]. Secretary of State John Merrill later clarified that such payments were not required for those whose crimes did not constitute moral turpitude. *Id.*

counted. Voting rights entitle citizens to "full and effective participation in the political processes."[34] While the *Thompson* court concluded that a lack of notice did not infringe on voting rights because everyone is presumed to know the law, this formalistic reasoning cuts against other courts' recognition that "[t]he right to vote is a delicate franchise" and practical barriers that impinge on voting rights can effectively mean the loss of those rights.[35] Alabama's eligible ex-felons could not effectively exercise a right that they did not know about.

This de facto disenfranchisement created an irreparable injury, which the *Thompson* court failed to recognize. "Courts routinely deem restrictions on fundamental voting rights irreparable injury" because "once [an] election occurs, there can be no do-over and no redress."[36] Indeed, the right to vote is "a civil right of the highest order."[37] Although states can legally restrict felons' voting,[38] disenfranchisement standards cannot be unconstitutionally selective or arbitrary.[39] The continued de facto disenfranchisement of ex-felons previously disenfranchised under Alabama's "moral turpitude" provision — a vague, arbitrarily enforced standard with racist origins — constituted an irreparable injury.

While this irreparable injury finding may not have changed the outcome of this particular case,[40] it would have been meaningful for the court's voting rights jurisprudence, through a recognition that de jure enfranchisement, when coupled with de facto disenfranchisement, does not amount to full voting rights. Moreover, recognizing de facto disenfranchisement as an irreparable injury would indicate the need for a voter-notification requirement to avoid such injuries in the future.

In lieu of judicial action, however, the state legislature could have imposed an affirmative duty on the Secretary of State to notify eligible ex-felons in order to render H.B. 282 effectual. At a minimum, the Alabama legislature — and state legislatures generally — should impose

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[34] Reynolds v. Sims, 377 U.S. 533, 565 (1964); *see also* Thornburg v. Gingles, 478 U.S. 30, 77 (1986) (requiring an "equal opportunity to participate in the political process").

[35] *See* Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1349–50 (N.D. Ga. 2006) (declaring voters who were unaware of a changed voter ID law before an election effectively disenfranchised).

[36] League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014).

[37] Oregon v. Mitchell, 400 U.S. 112, 139 (1970); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (stating that voting rights are "preservative of all [other] rights").

[38] Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974).

[39] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985); Williams v. Taylor, 677 F.2d 510, 517 (5th Cir. 1982) ("While [the appellant] has no right to vote as a convicted felon under § 23-5-35, he has the right not to be the arbitrary target of the Board's enforcement of the statute.").

[40] Granting the preliminary injunction would have required a positive finding on all four factors discussed above. While some circuits use a balancing approach, the Eleventh Circuit requires that each preliminary injunction factor be established. *See* Ryan Griffin, Note, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values When Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839, 843–44 (2010); *see also* ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009) ("Failure to show any of the four factors is fatal . . . .").

on the state an affirmative duty to individually notify ex-felons of their voting rights when: (1) voters face de facto disenfranchisement; (2) the harm to voters was created by the state; and (3) the state's disenfranchising practices are intertwined with racial discrimination.[41] While in an ideal world legislatures would always require notification, these three factors indicate the situations where notification is most pressingly needed and where prior cases have required robust state action. In the case of H.B. 282 voters, these three factors were met, and the Alabama legislature therefore should have imposed on the state an affirmative duty to notify.

The first factor is satisfied when eligible voters lack *effective* voting rights in practice and therefore face de facto disenfranchisement — amounting to an irreparable injury, as discussed above. For H.B. 282 voters, the state's failure to provide notice deprived those voters of their full and effective voting rights, causing them an irreparable injury — contrary to the *Thompson* court's claim that notification "would not give H.B. 282 voters any more voting rights than they have today."[42]

The second factor is satisfied when the state itself created the harm faced by eligible voters, highlighting the imbalance of the relative injuries at stake. In *Thompson*, H.B. 282 voters always should have been eligible to vote; the Alabama legislature did not intend for their crimes to be disqualifying under section 182 or the amended section 177(b), and county registrars were mistaken in regarding their crimes as offenses of "moral turpitude." Thus, through notification, the state would be correcting the prior mistakes of its officials, not notifying legally disenfranchised ex-felons of their re-enfranchisement. Courts regularly impose affirmative duties on states to rectify harms that they create. When determining whether a state bears an affirmative obligation to aid citizens in tort law, for example, courts consider whether the state "played [a] part in [the] creation" of the dangers that the citizen faced.[43] Here, because the state created the harm, notification would serve to *undo* the harm of state misinformation by informing eligible ex-felons of their voting rights and "restor[ing] the position that the plaintiff[s] would have had but for the wrong."[44]

The third factor is satisfied when erroneous disenfranchisement is racially discriminatory, implicating public interest concerns. As the

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[41] These factors map onto three of the preliminary injunction prongs, given that: de facto disenfranchisement should be recognized as an irreparable injury (prong two); the state's role in creating the harm affects the balancing of relative harms (prong three); and the racial nature of the harm implicates a compelling public interest (prong four).

[42] *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *32–33.

[43] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

[44] David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 628 (1988).

District Court for the Middle District of Alabama has acknowledged, "[i]t is now settled law that a government guilty of discrimination must 'do more than abandon its prior discriminatory purpose'"; it bears the "'affirmative responsibility' of also redressing any adverse effects of its discriminatory conduct."[45] For example, the Supreme Court has imposed on states an "affirmative duty to take whatever steps might be necessary" to rectify racial discrimination in the education system,[46] and the Court considers voting a more essential right than education.[47] Such case law supports imposing on states an affirmative duty to rectify racially discriminatory disenfranchisement. *Thompson* was a link in a long chain of events from 1901 onward that has been marked by explicit efforts to strip black Alabama residents of voting rights through nebulous felon disenfranchisement laws. By enacting H.B. 282 without notification, the legislature failed to take affirmative steps to fully remedy the state's past discrimination.

Furthermore, despite Alabama's arguments in *Thompson* that a notification system would be inadministrable, this duty is not unduly burdensome. First, contrary to what *Thompson* may suggest,[48] ex-felon notification requirements are not uncommon. Almost half the states have statutes requiring the notification of the "criminally disenfranchised about either the loss or the reinstatement of their voting rights,"[49] and voting rights organizations regard notification requirements as a model policy practice.[50] Second, Alabama has individually notified voters in the past: It was required in *Hobson v. Pow*[51] to notify men convicted of

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[45] Harris v. Siegelman, 695 F. Supp. 517, 527 (M.D. Ala. 1988) (quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979)).

[46] Green v. Cty. Sch. Bd., 391 U.S. 430, 437–38 (1968).

[47] *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted . . . by the Constitution." (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973))); Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93, 104 (1983).

[48] "Plaintiffs *go so far as to insist* that . . . Defendants should automatically reinstate [certain felons] on the voter registration rolls and provide them with individualized notice . . . ." *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *29 (emphasis added).

[49] Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 221 (2014) (citing Email from Erika Wood, Deputy Dir. of the Democracy Program, Brennan Ctr. for Justice, to authors (Mar. 11, 2011)); *see, e.g.*, KY. REV. STAT. ANN. § 196.045 (West 2006); N.C. GEN. STAT. § 163A-885 (2017).

[50] *See, e.g.*, AM. CIVIL LIBERTIES UNION, BREAKING BARRIERS TO THE BALLOT BOX: FELON ENFRANCHISEMENT TOOLKIT 19 (2008), https://www.aclu.org/sites/default/files/pdfs/votingrights/righttovote_20080125.pdf [https://perma.cc/GJ6M-LHUA].

[51] 434 F. Supp. 362, 367–68 (N.D. Ala. 1977). Distinguishing *Hobson*, the *Thompson* court emphasized that *Thompson* involved change through legislation, rather than litigation, and "everyone is presumed to know" of new legislation. *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *33 (quoting Meacham v. Halley, 103 F.2d 967, 972 (5th Cir. 1939)). It quoted a Fifth Circuit case that held that the plaintiff could not rely on inaccurate representations made by a stranger when the law said otherwise, *Meacham*, 103 F.2d at 972 — a far cry from the present context, in which *state officials*

wife-beating of their re-enfranchisement. Similarly, the District Court for the Middle District of Alabama required Alabama to notify overseas military service members of an extended voting deadline; it recognized that "merely extending the deadline . . . is ineffective if voters do not know" of the change and concluded that "broad" notice provisions were imperative "[g]iven the importance of notice."[52] The same exigency existed for H.B. 282 voters.

In addition to raising administrability concerns, the state in *Thompson* argued that it was making a good faith effort to implement H.B. 282, including by training county registrars and holding a press conference — and a notification requirement was therefore unnecessary.[53] However, the facts that it took over a month to get a notice on the Secretary of State's website,[54] and that ex-felons were more likely to vote Democratic[55] while the state leadership is Republican — combined with the racist history of this issue — call into question whether Alabama made a good faith effort to make HB 282 effectual. The state's dubious efforts reinforce the need for a duty to notify.

H.B. 282 marked important progress in Alabama's election law, but the lack of notification stunted the law's practical impact. It was enacted just months before the 2017 special election to fill Attorney General Jeff Sessions's Senate seat. While Democrat Doug Jones ultimately won the Senate race, the narrow margin of 21,924 votes between him and Republican Roy Moore[56] indicates that Alabama's estimated 60,000 H.B. 282 voters[57] could have influenced the outcome of that election had Moore been in the lead. Moreover, notifying Alabama's ex-felons not only has instrumental value for the outcome of elections, but also has normative value for ex-felons' political rights. Indeed, notification requirements may seem like a straightforward, even mundane, procedural matter but can mean the difference between voting rights that are robust and practicable, and those that merely exist on paper.

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inaccurately represented the law, and ex-felons reasonably regarded the state's representations as law.

[52] United States v. Alabama, 857 F. Supp. 2d 1236, 1243 (M.D. Ala. 2012).

[53] *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Brief in Support at 13–15, *Thompson*, No. 2:16-CV-783, ECF No. 63.

[54] Motion for Preliminary Injunction and Brief in Support, *supra* note 17, at 7.

[55] The data on partisan identity of ex-felons correlates with race. *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 780–81, 786–87 (2002).

[56] David Weigel, *Alabama Certifies Doug Jones's Victory over Roy Moore in Senate Election*, WASH. POST (Dec. 28, 2017), http://wapo.st/2lcE2LK [https://perma.cc/KA53-QBUJ].

[57] Defendants provided this estimate. *Thompson*, 2017 U.S. Dist. LEXIS 118606, at *10.