No. 24A-

IN THE

Supreme Court of the United States

DENNIS HOPKINS, *et al.*,

Applicants,

v.

SECRETARY OF STATE WATSON, *et al.*,

Respondents.

ON APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO JUSTICE SAMUEL A. ALITO, JR. OF THE SUPREME COURT OF THE UNITED STATES

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

BRADLEY E. HEARD
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 340
Decatur, GA 30030

LESLIE FAITH JONES
SOUTHERN POVERTY LAW CENTER
111 E. Capitol Street, Suite 280
Jackson, MS 39201

AHMED SOUSSI
SOUTHERN POVERTY LAW CENTER
201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170

JONATHAN K. YOUNGWOOD
Counsel of Record
JANET A. GOCHMAN
NIHARA K. CHOUDHRI
JACOB LUNDQVIST
ALBERT J. TAGLIAFERRI
CHARLOTTE MCCARY
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
jyoungwood@stblaw.com

Counsel for Applicants

Application

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicants Dennis Hopkins, Herman Parker, Jr., Walter Wayne Kuhn, Jr., Byron Demond Coleman, Jon O'Neal, and Earnest Willhite, individually and on behalf of a class of all others similarly situated, respectfully request a 30-day extension of time, to and including November 15, 2024, within which to file a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Applicants request this extension because of the importance of the issues presented and undersigned counsel's need for additional time to prepare a petition that will assist the Court in deciding whether to grant certiorari.

1. The Fifth Circuit entered judgment en banc on July 18, 2024. *See Hopkins v. Watson*, 108 F.4th 371 (5th Cir. 2024), App. 1a. Unless extended, the time to file a petition for a writ of certiorari will expire on October 16, 2024. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. The petition concerns whether Mississippi's felony disenfranchisement scheme violates the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment of the United States Constitution. Under Section 241 of Mississippi's Constitution ("Section 241"),

citizens convicted of a wide range of felonies are forever deprived of their right to vote even after sentence completion and irrespective of how minor the underlying crime, the length of their sentence, or their age at the time they committed the offense. Section 253 of Mississippi's Constitution ("Section 253") sets forth a standardless legislative process for the case-by-case restoration of voting rights revoked under Section 241. Mississippi is one of only a handful of states that impose lifetime disenfranchisement as a punishment for offenses unrelated to protecting the honest administration of elections and governance. Moreover, Mississippi is one of only two states that permanently disenfranchise first-time offenders who have completed their sentences and who were convicted of non-violent and non-governance-related felonies.

3. Applicants bring this action on behalf of themselves and a class of all similarly situated individuals who have been convicted of one of the disenfranchising offenses under Section 241 and have completed their term of incarceration, supervised release, parole, and/or probation. Respondent is the Mississippi Secretary of State, in his official capacity.

4. Applicants filed suit alleging, *inter alia*, that (i) Section 241 violates the Eighth Amendment's prohibition on cruel and unusual punishment and the Equal Protection Clause and (ii) Section 253 violates the First Amendment and the Equal Protection Clause. Applicants successfully moved for class certification, and the parties subsequently cross-moved for summary judgment. The District Court denied Applicants' motion for summary judgment in full, holding that Section 241

does not violate the Equal Protection Clause or the Eighth Amendment and that Section 253 does not violate the First Amendment or the Equal Protection Clause. *See* App. 129a. On appeal, a panel of the Fifth Circuit reversed and granted summary judgment for the Applicants on the basis that Section 241 violates the Eighth Amendment, but denied Applicants' Section 253 claims for lack of standing. *See* App. 60a.

5. Respondent filed and the Fifth Circuit granted a petition for rehearing en banc. *See* App. 158a. After the rehearing, a majority of the Fifth Circuit issued a decision holding that Section 241 does not violate the Equal Protection Clause or the Eighth Amendment and denying Applicant's Section 253 claims for lack of standing. *See* App. 1a.

6. This Court's review is needed to resolve several issues impacting the fundamental right to vote of tens of thousands of Mississippians. For example, without engaging in any meaningful analysis, the District Court and the Fifth Circuit rejected Applicants' proper textualist interpretation of Section 2 of the Fourteenth Amendment and therefore prematurely rejected Applicants' argument that Section 241 violates the Equal Protection Clause. Moreover, the Fifth Circuit's en banc decision severely narrows the scope of the Eighth Amendment and ignores well-recognized constitutional principles. In particular, it stretches *Richardson v. Ramirez*, 418 U.S. 24 (1974) beyond its plain scope in a way that infringes on the protections guaranteed by the Eighth Amendment. Indeed, *Richardson* did not address the Eighth Amendment at all, yet, based on this decision, the Fifth Circuit

en banc majority concluded that the Fourteenth Amendment and the Eighth Amendment are mutually exclusive.

7. The en banc majority's Eighth Amendment analysis also contravenes Supreme Court precedent by misapplying the intents-effects test and narrowing the applicability of the categorical approach for determining whether a punishment is cruel and unusual. *See Graham v. Florida*, 560 U.S. 58, 60–62 (2010); *Smith v. Doe*, 538 U.S. 84, 94 (2003). For example, the en banc decision suggests that the categorical analysis can only be applied in cases involving the death penalty or juvenile offenders, which is not a limitation this Court has ever endorsed. *See Graham*, 560 U.S. at 60–62 (explaining that the categorical approach is appropriate when a "case implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes.").

8. Counsel of record has had, and continues to have, multiple, competing obligations leading up to the current deadline. The requested extension is thus needed to properly address the complex, important issues involved in this case.

9. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including November 15, 2024.

Respectfully submitted,

/s/ Jonathan K. Youngwood

Jonathan K. Youngwood
Counsel of Record
Janet A. Gochman
Nihara K. Choudhri
Jacob Lundqvist
Albert J. Tagliaferri
Charlotte McCary
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
+1.212.455.2000
jyoungwood@stblaw.com

Bradley E. Heard
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue
Suite 340
Decatur, GA 30030

Leslie Faith Jones
SOUTHERN POVERTY LAW CENTER
111 E. Capitol Street
Suite 280
Jackson, MS 39201

Ahmed Soussi
SOUTHERN POVERTY LAW CENTER
201 St. Charles Avenue
Suite 2000
New Orleans, LA 70170

Counsel for Applicants

Dated: September 16, 2024

APPENDIX

TABLE OF APPENDICES

Page

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 18, 2024
Lyle W. Cayce
Clerk

No. 19-60662

DENNIS HOPKINS, *individually and on behalf of a class of all others similarly situated*; HERMAN PARKER, JR., *individually and on behalf of a class of all others similarly situated*; WALTER WAYNE KUHN, JR., *individually and on behalf of a class of all others similarly situated*; BRYON DEMOND COLEMAN, *individually and on behalf of a class of all others similarly situated*; JON O'NEAL, *individually and on behalf of a class of all others similarly situated*; EARNEST WILLHITE, *individually and on behalf of a class of all others similarly situated*,

Plaintiffs—Appellees,

versus

SECRETARY OF STATE MICHAEL WATSON, *in his official capacity*,

Defendant—Appellant,

CONSOLIDATED WITH

No. 19-60678

DENNIS HOPKINS, *individually and on behalf of a class of all others similarly situated*; HERMAN PARKER, JR., *individually and on behalf of a class of all others similarly situated*; WALTER WAYNE KUHN, JR., *individually and on behalf of a class of all others similarly situated*; JON O'NEAL, *individually and on behalf of a class of all others similarly situated*; EARNEST WILLHITE, *individually and on behalf of a class of all others*

similarly situated; BRYON DEMOND COLEMAN, *individually and on behalf of a class of all others similarly situated*,

Plaintiffs—Appellees Cross-Appellants,

versus

SECRETARY OF STATE MICHAEL WATSON, *in his official capacity*,

Defendant—Appellant Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-188

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, *Chief Judge*, KING, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, and RAMIREZ, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge,* joined by RICHMAN, *Chief Judge*, and SMITH, ELROD, SOUTHWICK, HAYNES[*], WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, and RAMIREZ[†] *Circuit Judges*

This en banc court convened to reconsider a panel decision holding that Section 241 of the Mississippi Constitution, which disenfranchises those convicted of certain felony offenses,[1] fails the test of the Eighth Amendment,

---

[*] JUDGE HAYNES concurs in the judgment only.

[†] JUDGE RAMIREZ concurs in the judgment only.

[1] This court recently upheld the same provision against another constitutional challenge predicated on racial discrimination in *Harness v. Watson*, 47 F.4th 296, 311 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426 (2023).

as incorporated by the Fourteenth Amendment's Due Process Clause.[2] We reject that result because the United States Constitution cannot properly be so interpreted. The Supreme Court, in *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655 (1974), reaffirmed a body of constitutional law expressly permitting States to enact felon disenfranchisement. And even if modern jurisprudence under the Eighth Amendment is applicable, which it is not, the case law cannot be stretched to outlaw Section 241.

Mississippi, like all States, imposes various restrictions on who may vote. These include mental competency, residency, age, citizenship, registration, and criminal history qualifications, all of which are laid out in Section 241 of the Mississippi Constitution:

> Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President

---

[2] *Hopkins v. Hosemann*, 76 F.4th 378 (5th Cir. 2023), *reh'g en banc granted, opinion vacated Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023). The panel, however, rejected Plaintiffs' claim that Section 241 violates the Equal Protection Clause on a non-racial basis because that challenge is foreclosed by *Richardson v. Ramirez,* 18 U.S. 24, 94 S. Ct. 2655 (1974). 76 F.4th at 396–98. The panel also held that Plaintiffs have constitutional standing to challenge Section 241 but lack standing to challenge a companion State constitutional provision, Section 253, which authorizes the State legislature to re-enfranchise felons. *Id.* at 393–95. And the panel held it unnecessary to separately evaluate a First Amendment challenge to Section 253, which is inextricably bound to the Eighth Amendment arguments. *Id.* at 392. The en banc court agrees with each of these dispositions.

> and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.

MISS. CONST. ART. XII, § 241. Mississippi disenfranchises these felons for life, though voting rights may be restored by a two-thirds vote of the State legislature under Section 253 of the Mississippi Constitution.[3]

Laws like Mississippi's Section 241 have faced many unsuccessful constitutional challenges in the past. When the Supreme Court ruled that the Equal Protection Clause does not bar States from permanently disenfranchising felons, it dispensed some advice to the losing parties:

> We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them. . . . But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people . . . . will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Richardson v. Ramirez, 418 U.S. at 55, 94 S. Ct. at 2671. In other words: go and convince the State legislatures. Do the hard work of persuading your fellow citizens that the law should change. The paramount lesson of the Constitution and *Richardson* is that the changes sought by Plaintiffs here can and must be achieved through public consensus effectuated in the legislative process, not by judicial fiat.

---

[3] In addition to Section 253, gubernatorial pardons can restore voting rights, and there is limited restoration available for WWI and II veterans. *See* 76 F.4th at 389.

BACKGROUND

This case was filed in 2018 by six Mississippi citizens who have been permanently disenfranchised pursuant to Section 241. *See Hopkins v. Hosemann*, 76 F.4th 378, 391 (5th Cir. 2023), *reh'g en banc granted, opinion vacated Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023). Among them, Dennis Hopkins, disenfranchised since 1998, was convicted of grand larceny. Herman Parker Jr., a public employee for the Vicksburg Housing Authority, is disenfranchised because of a grand larceny conviction when he was nineteen. Byron Demond Coleman became disenfranchised in 1997 because of a conviction for receiving stolen property. These plaintiffs have completed all terms of their sentences. The district court certified a class comprising similar plaintiffs. They sued the Mississippi Secretary of State in his official capacity, challenging Sections 241 and 253 and requesting declaratory and injunctive relief for alleged violations of the First, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiffs claimed, more precisely, that Section 241 inflicts a cruel and unusual punishment of permanent disenfranchisement, while it also violates the Equal Protection clause by impermissibly burdening their right to vote.

The parties filed cross-motions for summary judgment. The district court rejected the Secretary's arguments that Plaintiffs lacked Article III standing and that *Ex Parte Young* equitable relief is unavailable against the Secretary. On the merits, however, the district court upheld Section 241 and certified its order for interlocutory appeal. The appeal was decided by the panel adversely to the Secretary, to the extent that the panel declared Section 241 in violation of the Eighth Amendment's cruel and unusual punishment clause. This court vacated the panel opinion for en banc rehearing.

Before this en banc court, the Plaintiffs contend that Section 241 violates the Eighth Amendment, as cruel and unusual punishment, and it is

not saved by the Fourteenth Amendment's Section 2 proviso that States may disenfranchise a citizen convicted of an "other crime." To succeed in these positions, the Plaintiffs must overcome the formidable obstacle of the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. at 54–56, 94 S. Ct. 2670–72.

The following analysis responds to Plaintiffs' position by examining first, the Constitution; and second, *Richardson* and a wealth of corroborating authorities. But, assuming arguendo that the "evolving standards" test for the Eighth Amendment may apply, we demonstrate that Section 241 still survives.

I. The Constitution

Section One of the Fourteenth Amendment guarantees "due process" and "equal protection of the laws." U.S. Const. Amend. XIV, § 1. After a long process of exegesis, it is settled that the Due Process Clause incorporates much of the Bill of Rights, and State governments must respect protections like the Eighth Amendment's prohibition of cruel and unusual punishment. *See McDonald v. Chicago*, 561 U.S. 742, 763, 130 S. Ct. 3020, 3034 (2010); *see also* U.S. Const. Amend. VIII.

Section Two of the Fourteenth Amendment is less familiar but more specific. It reduces the number of representatives in Congress to which a State is entitled if that State disenfranchises any of its male, non-Indian citizens over the age of 21. But there is a single exception: States may not be penalized for disenfranchising a citizen "for participation in rebellion, *or other crime*." U.S. Const. Amend. XIV, § 2 (emphasis added). The carve-out reflects a long tradition in this country, and before that, in British law,

and before that, in the Western world.[4] This tradition can be summed up in Lockean terms: if a person breaks the laws, he has forfeited the right to participate in making them. *See Green v. Bd. of Elections of N.Y.C.*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.).

In *Richardson v. Ramirez*, discussed further below, the Supreme Court explained the relationship between Sections One and Two against the background of an Equal Protection claim brought by plaintiffs concerning their voting rights. 418 U.S. at 41–55, 94 S. Ct. at 2665–71. The Court's holding did not distinguish between the Equal Protection and Due Process components of Section One, but rested "on the demonstrably sound proposition that [Section One], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section Two] imposed for other forms of disenfranchisement." *Id.* at 55, 94 S. Ct. at 2671. On this logic, it is irrelevant that Plaintiffs here make a Due Process argument (*i.e.*, via incorporation of the Eighth Amendment) rather than one founded on the Equal Protection clause, which *Richardson* expressly dealt with. None of the Section One provisions, according to *Richardson*, can be understood to bar what Section Two plainly allows.

Even if the Eighth Amendment right were considered on its own terms, we are bound, as interpreters of the Constitution, to seek "a fair construction of the whole instrument." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). All of its provisions "should be interpreted in a way that renders them compatible, not contradictory." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) [hereinafter "READING LAW"]. It is useless

[4] For a brief summary of that tradition, *see* George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 852–61 (2005).

for the Fourteenth Amendment to authorize felon disenfranchisement if the practice is made illegal by the Eighth. The canon against surplusage warns against such unnatural readings. *Id.* at 174.

Thus, the Cruel and Unusual Punishments Clause should not be understood to prohibit what "the explicit language of the Constitution affirmatively acknowledges" elsewhere as legitimate. *Furman v. Georgia*, 408 U.S. 238, 380, 92 S. Ct. 2726, 2799 (1972) (Burger, C.J., dissenting); *see also Gregg v. Georgia*, 428 U.S. 153, 177, 96 S. Ct. 2909, 2927 (1976) (approving capital punishment under certain circumstances). *Cf. Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51, 79 S. Ct. 985, 990 (1959) (stating that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters"); *Romer v. Evans*, 517 U.S. 620, 634, 116 S. Ct. 1620, 1628 (1996) ("that a convicted felon may be denied the right to vote" is an "unexceptionable" proposition).

Reinforcing this postulate, Section Two provides that States will not have their Congressional representation curtailed if they strip the franchise from those who "*participat[ed]* in rebellion, or other crime." U.S. CONST. AMEND. XIV § 2 (emphasis added). Logically, Section Two would not penalize States for disenfranchising the *narrower group* of those who were actually *convicted* of a serious crime. Yet if the Eighth Amendment were to operate to totally proscribe felon disenfranchisement, that would be the result.[5]

---

[5] The dissent, echoing the Plaintiffs, tries to elide this problem by asserting that "only" "lifelong felon disenfranchisement" after "completion of a person's criminal sentence" is unconstitutionally cruel and unusual. But, as will be explained, there is no logical stopping point for judicial repudiation of Section Two felon disenfranchisement once judges wander into the subjective realm of "independent judgment" concerning the relative importance of the "fundamental right" of voting versus "legitimate penological goals" of disenfranchisement. That the dissent here finds no legitimate penological goals foreshadows future rulings. Equally disturbing, the dissent's unprecedented extension of the "evolving standards" theory of the Eighth Amendment to this novel subject of post-

It is true that "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 9 (1968). For example, a State may not disenfranchise felons with racially discriminatory intent. *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 1922 (1985).[6] Likewise, the Thirteenth Amendment bars involuntary servitude "except as a punishment for crime." U.S. CONST. AMEND. XIII. Nevertheless, certain involuntary work requirements imposed on convicted criminals may violate the Cruel and Unusual Punishments Clause. *Williams v. Henagan*, 595 F.3d 610, 622 n. 18 (5th Cir. 2010).

Although these decisions place a "limitation" on the "exercise" of a legitimate power, they cannot void the power entirely. *Williams*, 393 U.S. at 29, 89 S. Ct. at 9. The correct interpretive question is how to reconcile the Fourteenth Amendment's provisions with the Eighth Amendment as construed in case law. This is no different from the task undertaken to reconcile other provisions of the Constitution that seem to point in different directions. *See, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 375–378, 126 S. Ct. 990, 1003–05 (2006) (reconciling the Bankruptcy Clause with the Eleventh Amendment); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 528–33, 139 S. Ct. 2449, 2467–2470 (2019) (reconciling the Dormant Commerce Clause with the Twenty-first Amendment); *United*

---

conviction disabilities lays the groundwork for wholesale judicial revision of criminal punishments.

[6] To clarify a point for confused readers: this is not an issue in today's case. Sitting *en banc*, this court has already held that the current version of Section 241 was not enacted with discriminatory intent. *See Harness*, 47 F.4th at 311.

States v. Vaello Madero, 596 U.S. 159, 161–62, 142 S. Ct. 1539, 1541 (2022) (reconciling the Territories Clause with the Fifth Amendment's Due Process Clause). Thus, *Hunter* placed a narrow limitation on Section Two's disenfranchisement power, aligning the Equal Protection Clause with Section Two; *Hunter* certainly did not void the power entirely. Ultimately, the "proper question" is "not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50, 114 S. Ct. 492, 499 (1993). Here, the answer is that neither Amendment is violated.

Moreover, even if this court were to find a conflict between the Eighth Amendment and Section Two of the Fourteenth, the established canons of interpretation dictate that Section Two should be given effect. It is both more specific and later in time than the Eighth Amendment. If "there is a conflict between a general provision and a specific provision, the specific provision prevails." READING LAW at 183. "While the implication of a later enactment will rarely be strong enough to repeal a prior provision, it will often change the meaning that would otherwise be given to an earlier provision that is ambiguous." *Id.* at 330. And a "provision that flatly contradicts an earlier-enacted provision repeals it." *Id.* at 327. This court may not "careen[] past all these standard interpretive guardrails" to essentially eviscerate Section Two. *Hopkins*, 76 F.4th at 420 (Jones, J. dissenting).

II. *RICHARDSON*

In *Richardson*, the Supreme Court held that California's felon disenfranchisement law did not run afoul of the Equal Protection Clause. 418 U.S. at 56, 94 S. Ct. 2671. In so holding, the Court rested

> on the demonstrably sound proposition that [Section 1], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section 2] imposed for other forms of

> disenfranchisement. . . . [Section 2] is as much a part of the amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.

Id. at 55, 94 S. Ct. at 2671. There is no equivocation here. Yet the Plaintiffs and the dissent attempt to minimize *Richardson*, principally by asserting that the Court decided only against a *per se* Equal Protection violation challenge to felon disenfranchisement. They recognize that if *Richardson* interprets Section One as a whole, their position is untenable. A careful reading of *Richardson*, however, leaves no doubt that *Richardson*, like the Amendment, means what it says.

Then-Justice Rehnquist's opinion commences its discussion by describing the State's arguments that

> those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section] 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by [Section] 2 of the Amendment. *This argument seems to us a persuasive one unless it can be shown that the language of* [*Section*] *2, "except for participation in rebellion, or other crime," was intended to have a different meaning than would appear from its face.*

Id. at 43, 94 S. Ct. at 2665 (emphasis added). The opinion then discusses at length what legislative history there was, which "indicates that this language was intended by Congress to mean what it says." *Id.* at 43, 94 S. Ct. at 2666. Further light was shed, the Court states, from the fact that at the time Section 2 was adopted, "29 States . . . prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Id.* at 48, 94 S. Ct. at 2668 (footnote with citations omitted).

"More impressive," the Court observes, is the history surrounding the Reconstruction Act of 1867, which preceded the admission of former

rebellious States to the Union except upon certain conditions. *Id.* That Act required new State constitutions "in conformity with the Constitution of the United States in all respects" to be framed by a convention whose delegates were male citizens subject to certain qualifications "*except such as may be disenfranchised for participation in the rebellion or for felony at common law*. . . . " *Id.* at 49, 94 S. Ct. at 2668. The Court adds to this history a description of the Act by Sen. Henderson of Missouri, whose explanation of the bill included the following:

> It provided that when the rebel States should adopt universal suffrage, regardless of color or race, excluding none, white or black, except for treason or such crimes as were felony at the common law, the regulation of exclusion to be left to the States themselves. . .

Id. at 50, 94 S. Ct. at 2669 (internal citation omitted). Following the Reconstruction Act, and building on its provisions, the Readmission Acts were passed, each one in substantively the same language as to disenfranchisement. The first of these, enacted in June 1868 for Arkansas, provided a "fundamental condition" for the State's readmission:

> That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote…except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted. . . .

Id. at 51, 94 S. Ct. at 2669. The Court then notes that "[t]he same 'fundamental condition' . . . was imposed" on all the former Confederate States in their Readmission Acts, "with only slight variations in language." *Id.* at 52, 94 S. Ct. at 2670.

The Court goes on to support the "convincing evidence of the historical understanding of the Fourteenth Amendment" with a series of its decisions that "have indicated approval of such exclusions [of felons] on a

number of occasions." *Id.* at 53, 94 S. Ct. at 2670. *See Murphy v. Ramsey*, 114 U.S. 15, 5 S. Ct. 747 (1885) (excluding bigamists and polygamists from franchise under territorial law of Utah); *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299 (1890) (same in Idaho territory). The Court quotes a then-recent decision that explicitly noted a "criminal record" as an "obvious example[] indicating [a] factor[] which a State may take into consideration in determining the qualifications of voters." *Richardson*, 418 U.S. at 53, 94 S. Ct. at 2670 (quoting *Lassiter*, 360 U.S. at 51, 79 S. Ct. at 990). The Court cites two three-judge court decisions that rejected felon disenfranchisement challenges and were summarily affirmed by the Court. *See id.* (citing *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C 1972), *aff'd* 411 U.S. 961, 93 S. Ct. 2151 (1973); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12, 90 S. Ct. 153 (1969)). Both of those decisions relied on Judge Henry Friendly's opinion for the Second Circuit, which held that a challenge to New York's felon disenfranchisement did not require the convening of a three-judge court. *Green*, 380 F.2d at 445, *cert. denied,* 389 U.S. 1048, 88 S. Ct. 768 (1968).[7]

After all this history, the Court explains that felon disenfranchisement does not run afoul of the Equal Protection Clause, which had been applied to other voter qualifications (*e.g.*, residency requirements). *Richardson*, 418 U.S. at 54-55, 94 S. Ct. at 2671. The Court's discussion thus moved from demonstrating that Section Two plainly authorized States' felon disenfranchisement laws to rejecting the general claims against disenfranchisement founded on the Equal Protection clause of Section One. The Court's reasoning ineluctably supports the conclusion that the

[7] To *Richardson*'s list should be added the more recent decision in *Romer v. Evan*s, 517 U.S. 620, 634, 116 S. Ct. at 1628 (1996) ("that a convicted felon may be denied the right to vote. . . is" an "unexceptionable" proposition).

Fourteenth Amendment's framers could not have intended to prohibit outright in Section One what was expressly exempted in Section Two.

To date, other circuit courts have faithfully applied *Richardson*, and none have rejected it. *See Jones v. Governor of Fla.*, 950 F.3d 795, 801 (11th Cir. 2020) ("Regardless of the political trend toward re-enfranchisement, there is nothing unconstitutional about disenfranchising felons—even all felons, even for life."(citing *Richardson*, 418 U.S. at 56, 94 S. Ct. at 2671)); *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) (en banc) ("The Supreme Court has ruled that, as a result of th[e] language [of Section 2], felon disenfranchisement provisions are presumptively constitutional." (citing *Richardson*, 418 U.S. at 24, 94 S. Ct. at 2655)).

In the face of the Court's reasoning and subsequent caselaw, the Plaintiffs' and the dissent's arguments to limit or minimize *Richardson* are feeble. Broadly, they argue that *Richardson* does not *per se* exclude other constitutional challenges to felon disenfranchisement. First, they note that the Court remanded the *Richardson* plaintiffs' case to examine their "alternative contention" under the Equal Protection Clause. 418 U.S. at 56, 94 S. Ct. at 2671. That is correct, but misleading. That contention concerned unequal application of the *concededly applicable* California disenfranchisement provisions. *Id*.

Further, Plaintiffs' reliance on *Hunter* to demonstrate that Section Two does not *per se* authorize felon disenfranchisement does nothing to elevate their claims founded on a broad interpretation of the Eighth Amendment. *Hunter*, as shown, crafted a narrow and clear limit on the otherwise expansive power retained by the States in Section Two. But these Plaintiffs' position is exactly like that of the *Richardson* plaintiffs, who had fully completed their felony incarcerations and parole and were nonetheless subjected to permanent disenfranchisement in California. *Id.* at 32-33, 94 S. Ct. at 2660. Plaintiffs cannot circumvent *Richardson* while standing in

the shoes of the plaintiffs in that case. Their pretended distinction is neither narrow nor clear and, if adopted, renders Section Two effectively meaningless—contrary to the Court's holding.

Finally, the Plaintiffs' creative reading of *Richardson* contradicts the dissent's understanding of the case. Justice Marshall, dissenting in *Richardson*, put it plainly: "The Court construes [Section] 2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons." 418 U.S. at 72, 94 S. Ct. at 2680. There is no daylight between the majority's upholding Section Two against claims predicated on Section One (no matter the basis) and the dissent's apt description of the majority holding. *Richardson* cannot be minimized by these Plaintiffs and controls this case.

The dissent, preoccupied with its (incorrect) Eighth Amendment analysis, does not engage with this discussion at all and instead tries to write *Richardson* off. The dissent claims not to see the relevance of a case "decided nearly half a century ago, nor the 19th century history of Section 2 of the Fourteenth Amendment that *Richardson* recounted" in the face of the "evolving standards of decency" in "today's" Eighth Amendment. With due respect, we are bound by the understanding of constitutional text evinced in precedents, even those that are a half century old. We are also bound by the original understanding of constitutional provisions as explained in *Richardson*. Just a few weeks ago, the Supreme Court re-emphasized the importance of constitutional text, history and precedent in evaluating cases. *See United States v. Rahimi*, 602 U.S. ___, No. 22-915, 2024 WL 3074728, at *6 (U.S. June 21, 2024) (noting that the Court's Second Amendment jurisprudence looks at "constitutional text and history" as well as "our historical tradition of firearm regulation"), *id.* at *17–28 (Kavanaugh, J., concurring) (describing the "proper roles of text, history, and precedent in constitutional interpretation" and noting that "history, not policy, is the

proper guide" for courts), *id.* at *29 (Barrett, J., concurring) (stating that "for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law"); *see also Sec. & Exch. Comm'n v. Jarkesy*, No. 22-859, 2024 WL 3187811, at *7–*10 (U.S. June 27, 2024) (analyzing the relationship between common law fraud and federal securities fraud, as well as the history of the Seventh Amendment jury trial right, and holding that the similarities between the two implicated the Seventh Amendment right to a jury trial). The dissent also fails even to cite, much less distinguish, overwhelming pre- and post-*Richardson* precedents that buttressed or follow *Richardson*'s holding: pursuant to Section Two, albeit with a narrow exception, States may in fact disenfranchise citizens for "other crime[s]." The dissent's Eighth Amendment reasoning, in contrast, finds no support in text or precedent, and its logic is at war with *Richardson*.

III. The Eighth Amendment

Even if *Richardson* had never been decided, the Plaintiffs' Eighth Amendment contention must fail because felon disenfranchisement is not a punishment, much less cruel or unusual.[8]

A.

The Supreme Court has articulated a two-part test for determining whether something is a "punishment" within the meaning of the Constitution. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003).

---

[8] The dissent's Eighth Amendment analysis is reminiscent of the Ninth Circuit's experiment in *Martin v. Boise*, which held that the Eighth Amendment bars cities from enforcing public-camping ordinances against homeless individuals whenever the number of homeless individuals in a jurisdiction exceeds the number of "practically available" shelter beds. 920 F.3d 584, 617 (9th Cir. 2019). The Supreme Court has now squarely rejected that avant-garde interpretation of the Eighth Amendment in *City of Grants Pass v. Johnson*, No. 23-175, 2024 WL 3208072 (U.S. June 28, 2024).

Courts initially ascertain whether "the intention of the legislature was to impose punishment." *Id.* at 92, 123 S. Ct. at 1147. If so, "that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quotation marks and citation omitted).

The dissent acknowledges, though it downplays, that the Supreme Court has already signaled that felon disenfranchisement is not a punishment. In *Trop v. Dulles*, the plurality wrote the following:

> A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But *because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.*

356 U.S. 86, 96–97, 78 S. Ct. 590, 596 (1958) (emphasis added).[9] On the strength of this language, three other circuits have categorically held that felon disenfranchisement is nonpenal.[10] Only the Eleventh Circuit has

---

[9] *Trop* was decided in the context of the Ex Post Facto Clause. But because we assume the Constitution uses the word "punishment" consistently, the test for identifying constitutional "punishments" is the same for the Ex Post Facto Clause, the Eighth Amendment, and the Double Jeopardy Clause. *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019).

[10] *Simmons v. Galvin*, 575 F.3d 24, 43 (1st Cir. 2009) ("The Supreme Court has stated that felon disenfranchisement provisions are considered regulatory rather than punitive."); *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) ("Moreover, in *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-penal purpose. . . . Accordingly, as a matter of federal law, disenfranchisement statutes do not violate the Ex Post Facto Clause of the U.S. Constitution.") (citation omitted); *Green*, 380 F.2d at 450 ("Depriving convicted felons of

departed from this categorical holding. *See Thompson v. Alabama*, 65 F.4th 1288, 1304 (11th Cir. 2023) (charging the other circuits with "a misreading of *Trop*."). Irrespective of its analysis of *Trop*, however, the Eleventh Circuit still concluded that Alabama's disenfranchisement law, which has a history and structure very similar to that of Mississippi, was nonpenal. *Id.* at 1308.

In no way do the text and structure of Section 241 indicate that it was intended as a penal measure. These considerations are the primary focus of the intent inquiry. *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. To reiterate, the constitutional provision states that a mentally capable person

> who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector.

MISS. CONST. ART. XII, § 241. Article XII outlines the procedures for elections in Mississippi, not criminal punishments. Thus, this provision evidences no punitive intent toward felons any more than it implies an intent to punish non-citizens, short-term residents of Mississippi, those unregistered to vote, or those under the age of eighteen. Instead of singling out felons for disqualification from the franchise, the provision merely defines the franchise in such a way as to exclude them.[11] *Smith* provides a

---

the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise.'" (quoting *Trop*, 356 U.S. at 97, 78 S. Ct. at 596)).

[11] Compare Mississippi's Section 241 with a portion of the Alabama Constitution recently upheld as a nonpenal regulation of the franchise: "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until

useful contrast, as Alaska's sex offender registration requirement was placed within the State's criminal procedure code, but all the statutory indicia still led the Supreme Court to find no intent to inflict criminal punishment under the Eighth Amendment. 538 U.S. at 95–106, 123 S. Ct. at 1148–1154. On its face, Section 241 displays a civil rather than criminal statutory intent. *See id.*; *cf. Thompson*, 65 F.4th at 1303–08.[12]

Because the constitutional provision does not bespeak an intent to punish, the other *Smith* factors must be considered below. But the dissent posits another argument based on statutory construction. The dissent contents that the Readmission Act, in defining the terms under which Mississippi could be readmitted to the Union following the Civil War, barred the State from depriving "any citizen or class of citizens" of the right to vote "except as a punishment." ACT OF FEBRUARY 23, 1870, CH. 19, 16 STAT. 67.[13]

---

restoration of civil and political rights or removal of disability." ALA. CONST. ART. VIII, § 177. The Eleventh Circuit found this text sufficient to indicate "a preference that [Alabama's] felon disenfranchisement provision be considered civil instead of criminal." *Thompson*, 65 F.4th at 1305.

[12] The dissent characterizes felon disenfranchisement as intentionally punitive in part because of dicta from *Packingham v. North Carolina,* in which the Supreme Court set aside a state law that made it a felony for a registered sex offender to access social media. 582 U.S. 98, 107, 137 S.Ct. 1730, 1737 (2017). On the contrary, *Packingham* noted that the law's impact on individuals who had served their sentences was "not an issue before the Court." *Id.* Moreover, the Court decided that case using the completely different First Amendment intermediate scrutiny standard of review, *id.* at 105-06, 137 S.Ct. at 1736. Eighth Amendment analysis proceeds along an entirely different track, far more solicitous of legislative choices and federalism principles.

[13] The odd implication of this argument seems to be that, if disenfranchisement in Mississippi is not "punishment," it would call into question whether Mississippi was properly readmitted to the Union. Theoretically, Mississippi would be depriving a class of citizens of the right to vote for a reason other than punishment. That implication, of course,

The Plaintiffs, as well as the dissent, also contend that any felon disenfranchisement that occurs in Mississippi is *per se* punitive for Eighth Amendment purposes. This argument is too clever by half. It initially requires equating "punishment" as used in the Readmission Act with "punishment" in the Mississippi Constitution, and then requires equating "punishment" in both one hundred fifty-year old enactments with the Supreme Court's late-twentieth century adoption of the "evolving standards of decency" test for punishment under the Eighth Amendment. *See Trop*, 356 U.S. at 101, 78 S. Ct. at 598. Timing is everything. Plaintiffs' argument, echoed by the dissent, fails without a conclusion that "punishment" meant the same thing in 1870 as Eighth Amendment "punishment" has evolved to mean in recent decades.

Unlike our obligation to use the same definition for the Ex Post Facto Clause and the Eighth Amendment in the U.S. Constitution, the canons of interpretation do not oblige us to attach the same meaning to "punishment" in the Readmission Act and the Eighth Amendment.[14] In the end, this

---

is far from the same as concluding that Section 241 is preempted by the Eighth Amendment. *See Hopkins*, 76 F.4th at 403.

Additionally, one of Mississippi's *amici*, The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State at Scalia Law School, argues that enforcing the Readmission Provision against Mississippi at this date would violate the "fundamental principle of equal sovereignty among the States." *Shelby County. v. Holder*, 570 U.S. 529, 544, 133 S. Ct. 2612, 2623 (2013) (quotation marks and citations omitted); *see also Coyle v. Smith*, 221 U.S. 559, 31 S. Ct. 668 (1911). We do not address this argument, which the parties did not raise or brief.

[14] The parties offer conflicting interpretations of the Readmission Act, but there is a strong argument that "punishment" as used in the 1870 Readmission provision referred to the "consequence of a crime," and not "punishment" as used by the Supreme Court in its post-*Trop* Eighth Amendment cases. *Hopkins*, 76 F.4th at 422 (Jones, J., dissenting). The strongest indication that "punishment" in the Readmission provision refers to "the consequence of a crime" is the parallel nature of the Readmission Acts with the Reconstruction Act, as the latter provided that States could exclude as electors persons who

argument is a distraction. The ultimate interpretation of the Readmission Act is not before us. All this court must do is apply the post-*Smith* tests of "punishment" for Eighth Amendment purposes to Section 241.

When the provision's text and structure are considered, and in light of precedent, it becomes obvious that Section 241 was not intended as a punishment. The Plaintiffs' and dissent's reliance on the text of the Readmission Act is not only wrong, but entirely backward, because the Readmission Act was meant to acknowledge the very State power that the Plaintiffs and the dissent would repudiate. Punitive intent cannot be found on the face of Section 241.

B.

According to the second part of the *Smith* test, courts consider seven factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S. Ct. 554, 567–68 (1963), to determine whether a sanction is punitive in effect though not facially. Although the *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," they are "useful guideposts." *Smith,* 538 U.S. at 97, 123 S. Ct. at 1149. Courts therefore evaluate whether a sanction (1) "involves an affirmative disability or restraint;" (2) "has historically been regarded as a punishment;" (3) "comes into play only on a finding of scienter;" (4) "will promote the traditional aims of punishment—retribution

---

were "disenfranchised. . . for felony at common law" and treated that and other eligibility features as "qualifications" for "the elective franchise." ACT OF MAR. 2, 1867, CH. 153, 14 STAT. 428, 429. *See Richardson*, 418 U.S. at 49, 94 S. Ct. at 2668.

There are other indications that Congress did not use "punishment" solely when discussing imprisonment or fines. *See, e.g.*, 12 STAT. 394, 402 (1862) (describing student "expulsion" from school in the District of Columbia as "punishment"); and various military statutes prescribing "punishments" ranging from reduction of rating and extra duties (Navy), 12 STAT. 600, 603 (1862), to dismissal from the service (Army), *e.g.*, 12 STAT. 820, 821 (1863) (taking abandoned property), 17 STAT. 117, 118 (1872) (knowingly enlisting minors), 17 STAT. 582, 584 (1873) (allowing escape from military prison).

and deterrence;" (5) "applies [to underlying behavior that] is already a crime;" (6) has "an alternative purpose to which it may rationally be connected;" and (7) "appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 372 U.S. at 168–69, 83 S. Ct. at 567–68. Only if these factors indicate that Section 241 is "punishment" would a provision even be subject to an analysis of whether it is "cruel and unusual" under the Eighth Amendment. Further, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100, 118 S. Ct. 488, 493 (1997) (internal quotation marks omitted).

Plaintiffs have not made the stringent showing that under the above factors, Section 241 is so punitive in its effect as to demand Eighth Amendment scrutiny.

First, "disenfranchisement is not an affirmative disability or restraint as that term is normally understood." *Thompson*, 65 F.4th at 1306 (internal quotation omitted)[15]; *see also Smith*, 538 U.S. at 97, 123 S. Ct. at 1149. Like Alaska's sex offender registration and notification law, which the Supreme Court upheld in *Smith*, Section 241 "imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint." 538 U.S. at 100, 123 S. Ct. at 1151 (citing *Hudson*, 522 U.S. at 104, 118 S. Ct. at 496). Indeed, Section 241 is less suspect under this factor than the Alaska statute because that law imposed affirmative duties on sex

[15] Puzzlingly, the dissent does not discuss the Eleventh Circuit's interpretation of Alabama's very similar felon disenfranchisement provision at all, despite its striking similarities to Section 241.

offenders, while no affirmative duties exist for felons disenfranchised under Section 241. *See id.* at 101–02.[16]

An apt comparison may be drawn between disenfranchisement and occupational disbarment, which the Supreme Court has repeatedly upheld as a nonpunitive consequence of criminal convictions. *See Thompson*, 65 F.4th at 1306 (citing *Hudson*, 522 U.S. at 105, 118 S. Ct. at 496 (banking industry)); *see also De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 1155 (1960) (union offices); *Hawker v. People of New York*, 170 U.S. 189, 190–93, 200, 18 S. Ct. 573, 574–75, 577–78 (1898) (medical practice). Notably, the Supreme Court has even held that civil confinements carrying potentially indefinite physical restraint may be nonpunitive. *See Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S. Ct. 2072, 2085 (1997). As *Thompson* observed, "felon disenfranchisement and occupational disbarment are similar in many ways. Both remove the civil rights of individuals due to their criminal behavior as part of the State's regulatory power." *Thompson*, 65 F.4th at 1306 (citation omitted). Moreover, describing the right to vote as "fundamental" does not enhance the argument for an unconstitutional "disability," because this court has found the interests of felons in retaining the right to vote "constitutionally distinguishable" from non-felons' right-to-vote claims. *Williams v. Taylor*, 677 F.2d 510, 514 (5th Cir. 1982).

To the extent that the Plaintiffs attempt to recast this factor concerning "restraints" from an objective test to a subjective experience of the disenfranchised, they misread *Smith's* instruction for courts to examine "how the effects of" a law "are felt by those subject to it." 538 U.S. at 99–100, 123 S. Ct. at 1151. The Supreme Court analyzed both physical restraints

---

[16] *But cf. Does 1-5 v. Snyder*, 834 F.3d 696, 703-04 (6th Cir. 2016) (holding that a statute regulating where sex offenders may live, work and loiter imposed "direct restraints on personal conduct" that were "far more onerous than those considered in *Smith*.")

and "substantial occupational or housing disadvantages . . . that would not have otherwise occurred." *Id.*, 538 U.S. at 100, 123 S. Ct. at 1151. The Court did not allude to the subjective feelings of disenfranchised felons.

Second, as we have already noted, the disenfranchisement of felons has long been regarded as serving a nonpenal, regulatory purpose. This tradition substantially predates *Trop*'s description of felon disenfranchisement as "nonpenal." *See* 356 U.S. at 97, 78 S. Ct. at 596. For instance, in 1898, the Supreme Court described felon disenfranchisement laws as a type of measure designed to protect the public, and not punish for past offenses. *Hawker*, 170 U.S. at 197, 18 S. Ct. at 576.

The Plaintiffs' argument to the contrary has little support. They rely on a footnote in an out-of-circuit opinion, *see Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 n.5 (11th Cir. 2005), which the same circuit recently dismissed as "non-binding dicta." *See Thompson*, 65 F.4th at 1302 ("Our two off-hand references to felon disenfranchisement as historically a 'punitive device' were thus non-binding dicta.") (discussing *Johnson* and *Jones v. Governor of Fla.*, 950 F.3d 795, 819 (2020)). They also cite dicta from a Second Circuit case that was later vacated. *See Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir. 2004), *opinion vacated on reh'g en banc*, 449 F.3d 371 (2d Cir. 2006) (dism'd on other grounds). And in any case, the panel in *Muntaqim* unanimously *upheld* New York's felon disenfranchisement law in the face of a Voting Rights Act challenge. 366 F.3d at 130.

The third and fifth *Mendoza-Martinez* factors also weigh in favor of Section 241 being nonpunitive.[17] Disenfranchisement under Section 241 has no scienter requirement and addresses only conduct that was "already a

[17] Both the Eleventh and First Circuits analyzed these two factors together when upholding, respectively, Alabama's and Massachusetts's felon disenfranchisement laws. *See Thompson*, 65 F.4th at 1307; *Simmons*, 575 F.3d at 45.

crime." *Smith*, 538 U.S. at 105, 123 S. Ct. at 1154. Plaintiffs attempt to bootstrap the fact that the crimes listed in Section 241 have scienter requirements into an argument that Section 241 *itself* has a scienter requirement—and may be punitive according to these *Mendoza-Martinez* factors. We concur in the Eleventh Circuit's refutation of this argument in *Thompson*:

> There is no scienter requirement for felon disenfranchisement; it is sufficient that the person be convicted of a disqualifying felony. Likewise, felon disenfranchisement only sanctions behavior that is already criminal. That felon disenfranchisement laws are "tied to criminal activity . . . is insufficient to render the [laws] punitive."

65 F.4th at 1307 (quoting *United States v. Ursery*, 518 U.S. 267, 292, 116 S. Ct. 2135, 2149 (1996)). In the same way that Congress or the states "may impose both a criminal and a civil sanction in respect to the same act or omission," *Ursery*, 518 U.S. at 292, 116 S. Ct. at 2149, Section 241 relies on a criminal conviction to implement the public's judgment about the appropriate relationship between moral character and voting. "It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character." *Hawker*, 170 U.S. at 196, 18 S. Ct. at 576. Underscoring the regulatory nature of Section 241, Judge Gee also described the State's nonpenal interest in an opinion for this court:

> A state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies. As Judge Friendly noted in *Green* . . . such persons have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly.

Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

Looking to the fourth factor, we conclude that Section 241's operation does not "promote the traditional aims of punishment—retribution and deterrence." *Mendoza-Martinez*, 372 U.S. at 168, 83 S. Ct. at 567. Plaintiffs do not argue that the provision's potential consequence of disenfranchisement is a deterrent to crime, but instead that it exhibits unvarnished retribution for criminal conduct. We disagree. Taking away certain felons' right to vote is more reflective of a collective judgment about the character traits that should be possessed by citizens who participate in Mississippi's democratic process. In this way, it is no different from Section 241's mental competency, residency, age, citizenship, and registration requirements, which are ubiquitous among the United States and in democratic societies around the world.

On the final *Mendoza-Martinez* factors, we conclude that Section 241 "has a rational connection to a nonpunitive purpose [and] is [not] excessive with respect to this purpose." *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149. As Judge Friendly explained, a State can rationally conclude, for completely nonpenal reasons, that "[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact." *Green*, 380 F.2d at 451. Each of Section 241's disenfranchising crimes is serious and probative of dishonesty or lack of civic virtue, or is a common-law crime whose gravity has long been recognized. Mississippi, "which could lawfully disenfranchise all felons permanently. . . has not exceeded its interest per the seventh factor by choosing only to disenfranchise individuals who commit felonies [Mississippi] considers especially heinous." *Thompson*, 65 F.4th at 1307 (citing *Richardson*, 418 U.S. at 56, 94 S. Ct. at 2671).

In *Hawker*, the Supreme Court accepted that States may "make a rule of universal application" concerning former felons, and that such a rule would be nonpenal despite the fact that "this test of character is not in all

cases absolutely certain, and that sometimes it works harshly." 170 U.S. at 197, 18 S. Ct. at 576. By analogy, at common law, a person convicted of a crime was incompetent as a witness regardless of how much time had passed since the conviction and notwithstanding any "proof of a complete reformation." *Id.* *Hawker* compared this "absolute test" to felon disenfranchisement law "in many states." *Id.* Against this background, Plaintiffs' insistence that Section 241 lacks a rational, nonpunitive, and non-excessive purpose is unpersuasive.

Plaintiffs have failed to carry their burden of demonstrating, with "the clearest proof," a punitive or otherwise excessive purpose for what is otherwise facially a nonpenal regulation. *Hudson*, 522 U.S. at 100, 118 S. Ct. at 493.

C.

Even if Plaintiffs were to get past *Richardson* and the *Mendoza-Martinez* factors to show that Section 241 should be subjected to an Eighth Amendment analysis, the provision readily survives that scrutiny because it does not inflict cruel and unusual punishment.

The Plaintiffs fundamentally err in advocating a categorical rule that permanent felon disenfranchisement amounts to cruel and unusual punishment. They attempt to limit their claim to "Plaintiffs and their class," *i.e.*, to felons who have been disenfranchised for life after completing all conditions of their sentences (except possibly felons who committed crimes involving election integrity).[18] The dissent takes them up on this invitation. Nonetheless, the Plaintiffs must rely on the test created by the Supreme Court to determine whether a punishment is *categorically* cruel and unusual under the Eighth Amendment. *See United States v. Farrar*, 876 F.3d 702, 717

[18] Plaintiffs' counsel appeared to concede this additional exception to their proposed categorical rule at oral argument before the en banc court.

(5th Cir. 2017). The reasoning embraced by the Plaintiffs and the dissent cannot be limited to the facts of this case and is categorically wrong.

If courts were allowed to interpret "cruel and unusual" according to the original meaning of those terms, there is no question that felon disenfranchisement would be neither cruel nor unusual. *Baze v. Rees*, 553 U.S. 35, 101, 128 S. Ct. 1520, 1560 (2008) (Thomas, J., joined by Scalia., J., concurring in judgment (stating that the Cruel and Unusual Punishments Clause, as originally understood, only forbids "purposefully torturous punishments"); *Graham v. Florida*, 560 U.S. 48, 99, 130 S. Ct. 2011, 2044 (2010), as modified (July 6, 2010) (Thomas, J., dissenting) ("It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous methods of punishment." (quotation marks and citation omitted)); *Bucklew v. Precythe*, 587 U.S. 119, 151, 139 S. Ct. 1112, 1135 (2019) (Thomas, J., concurring) ("The evil the Eighth Amendment targets is intentional infliction of gratuitous pain . . . . The historical evidence shows that the Framers sought to disable Congress from imposing various kinds of torturous punishments, such as gibbeting, burning at the stake, and embowelling alive, beheading, and quartering." (quotation marks and citation omitted)); *Grants Pass*, 2024 WL 3208072, at *11 (Gorsuch, J., joined by Roberts, C.J., Thomas, J., Alito, J., Kavanaugh, J., and Barrett, J.) (holding that the "Cruel and Unusual Punishments Clause was adopted to ensure that the new Nation would never resort to punishments . . . [that] were 'cruel' because they were calculated to 'superadd . . . terror, pain, or disgrace,' [and] 'unusual' because, by the time of the Amendment's adoption, they had 'long fallen out of use.'" (citations omitted)).

But we are bound by *Trop*, in which the Supreme Court held that the "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101,

78 S. Ct. at 598. In cases challenging a type of punishment, this involves two steps. First, courts consider "objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61, 130 S. Ct. at 2022, *as modified* (July 6, 2010) (quotation marks omitted). Second, courts "determine, in the exercise of our own independent judgment, whether [the practice] is a disproportionate punishment." *Roper v. Simmons*, 543 U.S. 551, 564, 125 S. Ct. 1183, 1192 (2005). This assessment includes consideration of "the severity of the punishment in question," "the culpability of the offenders at issue in light of their crimes and characteristics," and "whether the challenged . . . practice serves legitimate penological goals." *Graham*, 560 U.S. at 67, 130 S. Ct. at 2026.

In applying this line of cases, the dissent "stretches precedent beyond the breaking point." *Hopkins*, 76 F.4th at 423 (Jones, J., dissenting). Critically, the categorical analysis so far has been applied only in cases that involve the death penalty or juvenile offenders sentenced to life in prison. *Farrar*, 876 F.3d at 717. The Supreme Court "has never established a categorical rule prohibiting a terms-of-years sentence," and has emphasized that cases involving death-penalty and juvenile offenders are "different," *id.* (citing *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 2464 (2012) ("children are constitutionally different"), *Gregg*, 428 U.S. at 188, 96 S. Ct. at 2932 ("penalty of death is different in kind")). Nor has the Court ever established a categorical rule relating to felon disenfranchisement.[19] Every circuit court that has had the chance to invalidate felon disenfranchisement

[19] If anything, in *Richardson*, the Supreme Court relied on "settled historical and judicial understanding" in upholding California's permanent disenfranchisement of felons. 418 U.S. at 54, 94 S. Ct. at 2670.

has rejected the opportunity. We should not be the first to break new ground. The ability to vote, though assuredly important, is in no way analogous to death or a minor's life imprisonment.

In any event, neither prong of the categorical analysis test is satisfied for felon disenfranchisement statutes. To begin with, no two States share the same voting laws even though nearly every State disenfranchises *some* felons. *Id.* at 424.[20] Hence, trying to identify any "national consensus" against permanent felon disenfranchisement using the "objective indicia" of State laws is an enterprise doomed to failure. *Graham*, 560 U.S. at 61, 130 S. Ct. at 2022. It is not the business of courts to spar over the appropriate level of generality to apply when counting the noses of fifty different State laws and State constitutional provisions.[21] *See Rummel v. Estelle*, 445 U.S. 263, 275–76, 100 S. Ct. 1133, 1140 (1980) ("[T]he lines to be drawn are indeed subjective and therefore properly within the province of legislatures, not courts." (quotation marks omitted)).

The unsuitability of categorical analysis becomes even clearer when judges try to apply their "independent judgment" to determine the

---

[20] "[A] few states always or usually allow voting during incarceration. Some states allow felons to vote after their release. Some allow voting after they complete a prison term, probation, and parole. Some require felons to first pay all owed fines and restitution. Some have statutorily defined waiting periods. And some, like Mississippi, permanently disenfranchise felons. Moreover, this list does not even begin to delve into the intricacies of these laws, such as which felonies they cover and the procedures for the restoration of voting rights. A reasonably clever lawyer could find a dozen ways to divvy up states and find a national consensus against any particular practice." *Hopkins*, 76 F.4th at 424 (Jones, J., dissenting).

[21] Further, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel v. Estelle*, 445 U.S. 263, 282, 100 S. Ct. 1133, 1143 (1980). Trying to neatly partition this broad spectrum of State laws as they exist at a fixed point in time also runs headlong into the fact that some States that have relaxed their restrictions may later want to change course.

constitutionality of Section 241. This is an improper invitation to precisely the type of judicial legislating that the Constitution's separation of powers prohibits, because, among other reasons, "independent judgment" has no defensible limiting principle. Plaintiffs prove this very point in asking us to pick and choose within Section 241, limiting re-enfranchisement to only those felons who have served their full terms and completed all other requirements like supervised release and payment of fines and restitution. But if these Plaintiffs prevail, it is difficult to conceive how the remainder of Section 241 or other State laws disenfranchising some felons, even during imprisonment, would be insulated from conflict with the Eighth Amendment.

The logical incoherence becomes even more profound when, as the vacated panel opinion admitted, the death penalty has largely escaped categorical Eighth Amendment challenges. Moreover, most States imprison some felons for life, thereby also disenfranchising them for life. Yet these punishments are not cruel and unusual. Put another way, a State can execute murderers, but according to the dissent, it may not keep murderers from voting if they are released from prison.

Another set of anomalies would arise, if felon disenfranchisement is unconstitutional, between that result and other onerous collateral consequences of committing felony offenses. Felons' right to travel, to practice a lawful occupation, run for public office, serve on juries, and possess firearms are impaired by a litany of federal and State laws. *Id.*; *see also* 28 U.S.C. § 1865(b)(5) (disqualifying from jury service anyone who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year" and has not had "his civil rights. . . restored"). The right to serve on a jury is especially significant, as the Supreme Court holds that "with the exception of voting, for most citizens the honor and privilege

of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407, 111 S. Ct. 1364, 1369 (1991). But it is difficult to imagine the Supreme Court deeming the Section 1865 statutory disqualification to be "punitive," much less cruel and unusual under the Eighth Amendment. Finally, sex offenders are also often required to register for the protection of those around them. *Cf. Smith v. Doe*, 538 U.S. at 105–06, 123 S. Ct. at 1154 (finding such requirements non-penal). In all these respects, "[c]ompleting a prison sentence does not entitle felons to all the rights they previously possessed." *Hopkins*, 76 F.4th at 424 (Jones, J., dissenting). In short, "cruel and unusual" is not the same as "harmful and unfair," *id.* at 424, n.11, and it is only that limited type of criminal statute that violates the Eighth Amendment.

IV.

Holding Art. XII, Section 241 of the Mississippi Constitution categorically unconstitutional, even as to a limited set of offenders, is at odds with the Supreme Court's and other courts' decisions, would thwart the ability of the State's legislature and citizens to determine their voting qualifications, and would require federal courts overtly to make legislative choices that, in our federal system, belong at the State level. The district court's judgment denying relief to the Plaintiffs is AFFIRMED.

JAMES L. DENNIS, *Circuit Judge*, joined by KING, STEWART, GRAVES, HIGGINSON, and DOUGLAS, *Circuit Judges*, dissenting:

The right to vote is the essence of a democratic society and "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Yet Article XII, Section 241, of the Mississippi Constitution of 1890 mandates permanent, lifetime disenfranchisement of a person convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy."[1] Disenfranchisement extends to free people who have completed all terms of their sentences. The Plaintiffs, representing a class of persons who have been convicted of Section 241's crimes and have completed the terms of their sentences, challenge the constitutionality of Section 241. The Plaintiffs are both Black and White, and their Eighth Amendment argument is independent of the "invidious" discrimination that originated Section 241.[2] Rather, the Plaintiffs argue

[1] The Mississippi Secretary of State is required by statute to treat additional crimes that the Mississippi Attorney General deems to be a species of the common law as crimes listed in Section 241. *See* MISS. CODE § 23-15-151. For instance, timber larceny, armed robbery, and larceny under a lease agreement are all deemed by the Attorney General as disenfranchising crimes though they are not expressly listed in Section 241.

[2] Mississippi's lifetime disenfranchisement statute stands alone in its "invidious" origin, as both our court and the Mississippi Supreme Court confirm, conceived "by a desire to discriminate against" Black people. *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc); *see also Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("[Section] 241 was enacted in an era when southern states discriminated against [B]lack[] [people] by disenfranchising convicts for crimes that, it was thought, were committed primarily by [B]lack[] [people]."); *Ratliff v Beale*, 74 Miss. 247, 20 So. 865, 868 (1896) ("[The] consistent, controlling[,] directing purpose governing the [1890] convention[:] . . . to obstruct the exercise of the franchise by [Black people]."). And although our divided, full court recently held that subsequent reenactments "purged" Section 241 of its original discriminatory intent, those reenactments have no rhyme or reason (like disqualifying for vote crimes, or exempting first offenders), so their addition only compounds animus with arbitrariness.

permanent disenfranchisement of free persons who have completed all terms of their sentences constitutes cruel and unusual punishment in violation of the Eighth Amendment. Under well-settled principles of Eighth Amendment jurisprudence, the Plaintiffs have met their burden. A national consensus to this effect has now formed among a large majority of the states.

To dodge this conclusion, the majority largely conflates the Plaintiffs' challenge to the punishment at issue in this case—permanent disenfranchisement of free persons who have completed all terms of their sentences—with a challenge to felon disenfranchisement in general. Where the majority does reach the issue before us, it picks and chooses among precedents, ignoring well-established Eighth Amendment principles, while stretching the Supreme Court's Equal Protection decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), beyond all recognition. What is even worse, the majority finds the Eighth and Fourteenth Amendments mutually exclusive, flouting Supreme Court precedent that "provisions [granting] Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

I respectfully dissent.

* * *

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." To run afoul of that Amendment, the challenged action must constitute "punishment." We must then determine whether a punishment is cruel and unusual using the so-called "categorical approach." To do so, courts "look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

This determination involves first looking to whether "there is a national consensus" against permanent felon disenfranchisement after completion of sentence. *Id.* at 61. Second, we are required to "determine, in the exercise of our own independent judgment, whether the [permanent disenfranchisement of a free person under Section 241] is a disproportionate punishment for" those Mississippians who have fulfilled their sentences and returned to society but remain permanently disenfranchised. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

I

The first question is whether Section 241 imposes punishment. As the majority explains, we employ "an intents-effects test" to help determine whether a statute constitutes punishment under various constitutional provisions, including the Eighth Amendment. *Does 1-7 v. Abbott*, 945 F.3d 307, 314 (5th Cir. 2019). Under this test, "[i]f the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* Key here, the Supreme Court has stated that "the manner of [a law's] codification . . . [is] probative of the legislature's intent." *Smith v. Doe*, 538 U.S. 84, 94 (2003).

Even a cursory review of Section 241's legislative history reveals that the delegates of the Mississippi Constitutional Convention of 1890 intended Section 241 to be nothing else but punitive. As one of the "fundamental conditions" of Mississippi's reentry to the Union following the Civil War, Congress forbade "the constitution of Mississippi" from ever being "amended or changed [so] as to deprive any citizen or class of citizens of the United States of the right to vote . . . *except as a punishment* for such crimes as are now felonies at common law, whereof they shall have been duly convicted." Act of February 23, 1870, ch. 19, 16 Stat. 67 ("Readmission Act") (emphasis added). Under the plain language of the Readmission Act, Mississippi may only alter its Constitution to authorize disenfranchisement

if it does so *as a punishment* for a common law felony offense. When interpreting a state law, we should "choose the interpretation . . . that has a chance of avoiding federal preemption." *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005); *see also Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 739 (5th Cir. 2020) (allowing a claim that Mississippi violated the education provisions of the Readmission Act to proceed). Section 241 of Mississippi's 1890 Constitution—a post-Readmission Act felon disenfranchisement provision—must be construed as a punitive measure for felony convictions in order for the provision to comply with binding federal law. The Eleventh Circuit has come to the same conclusion, holding Florida's felon disenfranchisement scheme was "punishment," in part because "the Readmission Act of Florida authorized felon disenfranchisement *only* as punishment." *Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020).

The majority strains to disregard this reality, theorizing that "punishment" as used in the Readmission Act cannot mean "punishment" as it is used in the Eighth Amendment but instead likely means "consequence"—in other words "punishment" does not mean "punishment." *Ante*, at 17–21. But we must interpret the language of a statute "according to its 'ordinary, contemporary, common meaning.'" *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)). It is a wonder the majority cannot give the word "punishment" its ordinary meaning when the majority itself recounts the Supreme Court's decision in *Richardson* to give the language of Section 2 of the Fourteenth Amendment the "meaning tha[t] would appear from its face." *Richardson*, 418 U.S. at 43; *Ante*, at 11.[3]

[3] To bolster its rationale, the majority also posits a problem where there is none, supposing that if Mississippi does disenfranchise people for a reason other than punishment,

Despite this strong evidence of intent, the majority mistakenly relies on the disenfranchisement provision's mere placement alongside regulatory franchise provisions. "The location and labels of a statutory provision do not by themselves transform a [criminal] remedy into a [civil] one." *See Smith*, 538 U.S. at 94; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 702 (1995) (noting legislators can intend one provision of a law to have "a character of its own not to be submerged by its association" with neighboring provisions).

Importantly, in *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958), the Supreme Court did not hold that felon disenfranchisement provisions are nonpunitive, as the majority claims. In *Trop*, the Supreme Court used a hypothetical to illustrate that courts must determine whether a statute is penal or nonpenal. *Id.* The hypothetical was: "A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote." *Id.* at 96. The Court stated we must look to the "purpose" or intent of the statute to determine its quality. *Id.* The Court recognized that disenfranchisement could be penal if it had that purpose, stating if "both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal." *Id.* But, the Court explained, if "the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the

---

it would call into question whether Mississippi was properly readmitted to the Union. *Ante*, at 20 n.13. As stated, when interpreting a state law, we should "choose the interpretation . . . that has a chance of avoiding federal preemption." *Planned Parenthood of Hous. & Se. Tex.*, 403 F.3d at 342. If reading "punishment" to mean "consequence" raises preemption problems, our rules of interpretation tell us to read "punishment" as "punishment." In any event, even if there were a conflict, the commonsense remedy would not be to invalidate Mississippi's place in the Union but would be to declare that Section 241 is preempted. *See Williams*, 954 F.3d at 739 (5th Cir. 2020).

franchise." *Id.* at 96–97. As *Trop* instructs, we must look to the intent behind the statute, and here the Readmission Act shows the intent behind Section 241 was to be penal. As the Eleventh Circuit recently held, to expand *Trop*'s hypothetical to "the conclusion that felon disenfranchisement is always nonpenal" is a "misreading of *Trop*." *Thompson v. Sec'y of State for the State of Ala.*, 65 F.4th 1288, 1304 (11th Cir. 2023).

The Readmission Act shows the intent behind enactment of Section 241, and the majority offers no rebuttal. With the intent behind Section 241 clear, there is no need to examine its purpose and effect. *See Smith*, 538 U.S. at 92.

II

Having determined that Section 241 inflicts punishment, we must determine whether its permanent denial of the franchise for conviction of an enumerated crime is "cruel and unusual" punishment under the Eighth Amendment as applied to the Plaintiffs and their class—Mississippians who cannot vote even though they have fulfilled all terms of their sentences. As noted, the categorical approach to Eighth Amendment challenges requires courts to "look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58 (quoting *Estelle*, 429 U.S. at 102).

Before the initial panel, no party disputed that the categorical approach provides the correct legal framework in this case, but on rehearing the State and the majority inexplicably question its applicability, suggesting that the categorical approach is limited to death-penalty and juvenile-offender cases. *Ante*, at 29. The Supreme Court has never taken such a cramped view. The Court has employed the categorical approach when a "case implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 U.S.

at 60–62. By contrast, in cases where the Court considers "a gross proportionality challenge to a particular defendant's sentence," its analysis "begin[s] by comparing the gravity of the offense and the severity of the sentence." *Id.* at 60–61.

Here, it is not a particular defendant's sentence but rather a punishment "itself [that] is in question." *Id.* at 61. In other words, this case involves a "particular type of [punishment]"—permanent disenfranchisement—"as it applies to an entire class of offenders who have committed a range of crimes"—felons convicted of Section 241 disenfranchising offenses who have completed all terms of their court-imposed sentences. *Id.* Because the Plaintiffs' challenge squarely fits the mold of the categorical approach, this long-standing Supreme Court test provides the relevant inquiry.

III

Under the first prong of the categorical approach, we consider whether "there is a national consensus" against the challenged punishment. *Id.* The Supreme Court has instructed that this determination "should be informed by objective factors to the maximum possible extent." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* (internal quotation marks omitted); *see also Graham*, 560 U.S. at 61 ("The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the . . . practice at issue." (quoting *Roper*, 543 U.S. at 572)). To assess whether there is a "national consensus" against the challenged punishment, we consider "objective indicia of society's standards" as embodied in legislation, including not only the aggregate number of

jurisdictions rejecting the punishment but also any consistent legislative trends in that direction. *Graham*, 560 U.S. at 61–62; *see also Roper*, 543 U.S. at 566–67 (explaining that, besides the sheer number of states rejecting a practice, the "consistency of the direction of change" is a significant factor in determining whether there is a national consensus against a practice).

Beginning with the aggregate number of jurisdictions, in *Atkins v. Virginia*, 536 U.S. at 316, 321, the Supreme Court determined that a "national consensus ha[d] developed against" executing people with intellectual disabilities when thirty states had legislatively proscribed the practice. The same number of states, thirty, had opposed the death penalty for juvenile offenders—either by "express provision [in legislation] or judicial interpretation"—when the Court held that practice to be cruel and unusual in *Roper v. Simmons*, 543 U.S. at 564. And in *Enmund v. Florida*, 458 U.S. 782, 793 (1982), the Court emphasized that the fact that only eight jurisdictions authorized the death penalty for participation in a robbery during which an accomplice commits murder "weigh[ed] on the side of rejecting capital punishment" for that offense.

In this case, an exhaustive review of state laws substantiates that the overwhelming majority of states oppose punishing felons by permanently denying them the right to vote. Currently, thirty-five states and the District of Columbia—including Louisiana and Texas—do not permanently disenfranchise former felons who have completed all terms of their sentences. *See* Appendix *infra*. And four states only permit permanent disenfranchisement for corrupt practices in elections or governance. *Id.* For example, Maryland permanently disenfranchises felons convicted for buying or selling votes, while Missouri does so only as a result of a conviction for an offense "connected with right of suffrage." MD. CODE, ELEC. LAW § 3-102(b); MO. REV. STAT. § 115.133.2. Mississippi is one of only eleven states that still permanently disenfranchise felons for offenses other than

those pertaining to elections. Put another way, thirty-nine states plus the District of Columbia do not impose lifetime disenfranchisement as a punishment for offenses unrelated to protecting the honest administration of elections, while only a minority of eleven still do. Even more staggering, Mississippi is one of only two states that permanently disenfranchise first-time offenders who have completed their sentences and who were convicted of non-violent and non-voting-related felonies. These statistics closely mirror those that the Supreme Court has found significant—the thirty who had abandoned the challenged practice in *Atkins* and *Roper* and the mere eight states who retained the challenged practice in *Enmund*.

Turning to the consistency of the direction of change, in *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989), the Court held that the execution of people with intellectual disabilities did not violate the Eighth Amendment at that time. The Court noted that the laws of only sixteen states and the federal government precluding the execution of this vulnerable class of persons were insufficient to show a national consensus against the practice. *Id.* at 334. Thirteen years after *Penry*, the Court revisited that decision in *Atkins* and held that "a national consensus ha[d] developed" against the challenged practice not only due to "the [total] number of these States" that had acted since *Penry* to ban executing members of this class of offenders—sixteen had done so—"but [also] the consistency of the direction of change." 536 U.S. at 314–16.

Similarly, in *Roper*, 543 U.S. at 566, 568, in which the Supreme Court struck down the juvenile-crime death penalty, the Court stressed the consistency of the direction of change in rejecting that practice. Though only five states had abandoned juvenile-crime executions in the fifteen years since the Court upheld the punishment in *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989), the *Roper* Court followed *Atkins*'s admonition that what matters under the Eighth Amendment is "not so much" the absolute number of

states that have abandoned a particular practice or the pace of that abandonment, but instead the "consistency of the direction of change." *Roper*, 543 U.S. at 566.

As to permanent, lifetime disenfranchisement of free persons, in 1974, when the Court decided *Richardson*, twenty-seven states permitted the practice as applied to felons whose offenses were unrelated to elections or good governance and who had completed all terms of their sentences. *See* Appendix, *infra*. Currently, only eleven do. *Id.* Between 1974 and 2020, sixteen states (for a total of thirty-five) have stopped the practice of imposing lifetime disenfranchisement on felons who have served their sentences for offenses unrelated to elections or governance. *Id.* Sixteen is the exact number of states that changed their laws to reject the execution of people with intellectual disabilities between *Penry* and *Atkins*. *Atkins*, 536 U.S. at 314–16. And it is more than threefold the total number of states that abolished the juvenile-crime death penalty in the timespan between *Stanford* and *Roper*. *Roper*, 543 U.S. at 566. The evidence here clearly demonstrates "consistency [in] the direction of change" and a repudiation of the permanent felon disenfranchisement of free persons. *Id.* (quoting *Atkins*, 536 U.S. at 315). That a trend in abandoning a punishment has proven so durable and long-lasting demonstrates that society has turned away from that punishment. In this way, the steady rejection of permanent felon disenfranchisement over nearly half a century is as much, or even more, consistent than the change in the punishment laws considered in *Atkins* and *Roper*.

The majority and the State contend that there can be no national consensus because states disenfranchise felons in diverse ways. *Ante*, at 30. Specifically, the majority argues "no two States share the same voting laws even though nearly every State disenfranchises *some* felons," and citing to *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)—a case not utilizing the categorical approach but instead evaluating a specific defendant's

sentence—the majority states that "[i]t is not the business of courts to spar over the appropriate level of generality to apply when counting the noses of fifty different State laws and State constitutional provisions." *Ante*, at 30–31 (emphasis in original). However, this case does not concern the validity of temporary felon disenfranchisement laws, or the disenfranchisement of the incarcerated, or any other mode of disenfranchisement not contained in Section 241. We are concerned solely with Mississippi's practice of punishing *felons who have completed all terms of their sentences* by *permanently disenfranchising* them for life. The Supreme Court regularly examines how many states authorize a specific punishment for a specific class. *See Atkins*, 536 U.S. at 314–16 (examining how many states authorized the *death penalty* for people with *intellectual disabilities*); *Roper*, 543 U.S. at 566 (examining how many states authorized the *death penalty* for *juvenile crimes*). It is in fact quite simple to count the state laws that do not permit permanent disenfranchisement of former felons, and we have done so in a thorough Appendix, *infra*. This objective evidence makes clear that a supermajority of states rejects permanent disenfranchisement, especially as it is practiced in Mississippi.

IV

We must also "determine, in the exercise of our own independent judgment, whether [permanent disenfranchisement under Section 241] is a disproportionate punishment for" those Mississippians who have completed their sentences but remain permanently disenfranchised. *Roper*, 543 U.S. at 564. This assessment requires us to consider the severity of the punishment in question, the culpability of the offenders at issue considering their crimes and characteristics, and whether the challenged practice serves legitimate penological goals. *Graham*, 560 U.S. at 67.

To determine whether permanent disenfranchisement is proportional to the Plaintiffs' offenses, it is first necessary to assess the importance of the denied right. As the Supreme Court has held, "[i]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *See Atkins*, 563 U.S. at 311 (cleaned up) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The right to vote is "a right at the heart of our democracy." *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion). "No right is more precious in a free country" than the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* "A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family." *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973) (Powell, J., dissenting).

Voting is the lifeblood of our democracy and the deprivation of the right to vote saps citizens of the ability to have a say in how and by whom they are governed. Permanent denial of the franchise, then, is an exceptionally severe penalty, constituting nothing short of the denial of the democratic core of American citizenship. It is an especially cruel penalty as applied to those whom the legal system has already deemed to have completed all terms of their sentences. These individuals, despite having satisfied their debt to society, are precluded from ever fully participating in civic life.[4] To be sure,

---

[4] This view has support from the Supreme Court. In *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), which was a First Amendment challenge to a state law that made it a felony for a registered sex offender to access social media, the Court, in striking down the law, noted "the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system." While *Packingham* was decided under the First Amendment, not the Eighth Amendment, it shows the Court's conscientiousness toward the rights of those who have served their debt to society and now "seek to reform and to pursue lawful and rewarding lives." *Id.* at 108. If it was troubling to permanently deny access to social media,

they are excluded from the most essential feature and expression of citizenship in a democracy—voting.[5]

With respect to *Graham*'s second consideration—the culpability of the Plaintiffs' class—we observe that Section 241's punishment applies equally to all members of the class, regardless of their underlying crime or the class member's individual mental state during the commission of the crime. Section 241 permanently disenfranchises murderers and timber thieves alike; it does not distinguish between mature adults and juveniles, accomplices, or the intellectually disabled—the latter three being classes of persons the Supreme Court has recognized as categorically less culpable. *Roper*, 543 U.S. at 570; *Enmund*, 458 U.S. at 800–01; *Atkins*, 536 U.S. at 317–18. It is clear, then, that Section 241 does not reflect society's measured response to a felon's moral guilt.

We next consider whether the punishment of permanent disenfranchisement advances any legitimate penological goals. *Graham*, 560 U.S. at 67. A punishment that "lack[s] any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. The

---

it is even more troubling to permanently deny the right to vote, the most precious right we enjoy.

[5] The right that began our Revolution fits uniquely with the Supreme Court's rare but distinctive use of the Eighth Amendment as an amplifier. The right to vote inexorably has expanded to include those who once were excluded. Pamela S. Karlan, *Ballots & Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003). As one scholar of America's common venture put it, "[t]he Colonists rebelling against English rule, the [W]hite males disenfranchised by property and tax qualifications, the freedmen after the Civil War, and finally women all protested that they were reduced to the level of slaves if they did not have the vote and equal representation." JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 16 (Harvard Univ. Press 2001). Correspondingly, more than a quarter of our constitutional amendments pertain to and expand the right to vote.

traditional justifications for punishment are incapacitation, rehabilitation, deterrence, and retribution. *Id.* at 71–74.

Taking these justifications in turn, incapacitation cannot support Section 241's punishment because it does not incapacitate a convict from committing crimes; it only prevents him from voting. While felon disenfranchisement could potentially prevent recidivism if it were applied specifically to those convicted of voting-related offenses, Section 241, as discussed, applies to broad categories that are unrelated to elections crimes. And as to these categories of crimes, Section 241 does nothing to thwart a former felon from reoffending. Rather, the only conduct it prevents is voting. Further, there is evidence that disenfranchisement may actually *increase* recidivism. One comparative study found that "individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release." Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 426 (2012).

Section 241 does not further the goal of rehabilitation either. Lifetime disenfranchisement does not contribute to reforming an offender. Quite to the contrary, it hinders reintegration into society by denying the right to vote, a cherished marker and right of citizenship. *See Reynolds*, 377 U.S. at 560. The State has not argued otherwise, claiming that felon disenfranchisement's precise purpose is to exclude a former felon from participation in this aspect of our society. There is "no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights." *Trop*, 356 U.S. at 111 (Brennan, J., concurring). This exclusion is not rehabilitative. It only reinforces the stigma that the disenfranchised are "beyond redemption."

Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004); *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1112–16 (2002) (discussing why disenfranchisement is anti-rehabilitative).

For its part, deterrence only works if an individual is aware that a particular punishment attends a particular offense. It is questionable—and we have been presented with no evidence to suggest otherwise—to what extent Mississippians, and specifically those who would consider committing a crime listed in Section 241, are aware they could permanently lose the right to vote by virtue of a conviction. We have also been presented with no evidence to suggest that the prospect of losing the franchise has even a marginal additional deterrent effect when a person committing a felony already faces the more immediate sanction of criminal confinement. Similarly, there is no reason to believe that the punishment of disenfranchisement will deter recidivism because the felon who has lost the franchise under Section 241 has lost it forever, regardless of his future conduct.

That leaves retribution. While retribution is a "legitimate reason to punish," *Graham*, 560 U.S. at 71, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. We have explained that the continuing—in fact, unending—punishment Section 241 inflicts is wholly unrelated to the moral culpability of the diverse class of felons that it applies. Moreover, because the sentences imposed on the Plaintiffs are necessarily ones that are capable of being completed, the criminal legal system has determined that the Plaintiffs who served their sentences are capable of being returned to a position within society. To permanently remove from them the most precious right of citizenship is thus disproportionate to their offenses and cannot stand as a

permissible exercise of retribution. *See Roper*, 543 U.S. at 564; *Reynolds*, 377 U.S. at 561.

Our nation has a tradition of fixing punishment to meet the crime. After a sentence is complete, the individual is said to have paid his debt to society. But for those adjudicated to have committed a crime enumerated in Section 241 and whose judicially imposed sentences have been completed, the provision tacks on an exceptionally severe penalty that is not visited on citizens who violate many other crimes not listed in Section 241. Because it is an arbitrary, lifelong punishment, permanent disenfranchisement of a felon who has served his sentence is much different and more severe than permanent disenfranchisement of a felon serving life behind bars. The majority fails to acknowledge this difference. *See ante*, at 30–32. While some disabilities that attach to a felony conviction do persist beyond the criminal sentence, in a democracy, to deny the right to vote is to render one without a say in the manifold ways the government touches his life. That Mississippi denies this most precious right permanently, despite a felon having served his sentence, is disproportionate and inconsistent with the consensus against permanent disenfranchisement among our nation's state legislatures. The punishment of permanent disenfranchisement also contravenes the Eighth Amendment's proportionality principle because it lacks a nexus with any legitimate penological justification. *See Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Graham*, 560 U.S. at 71. Thus, insofar as it applies to otherwise free individuals who have fulfilled all terms of their sentences, Section 241 is proscribed by the Eighth Amendment's advancing standards of decency under the Constitution.

V

Finally, the majority incorrectly concludes that *Richardson* controls this case. In *Richardson*, former felons argued that California laws that

permanently disenfranchised any person convicted of an "infamous crime" unless the person obtained a court order or executive pardon that restored the franchise violated the Equal Protection Clause. 418 U.S. at 26–27. In considering the plaintiffs' claim, the Supreme Court looked not only to Section 1 of the Fourteenth Amendment, where the Equal Protection Clause is located, but also to the "less familiar" Section 2 of that Amendment, which imposes a penalty of reduced congressional representation on states that deny or abridge the right to vote for reasons other than "participation in rebellion, or other crime." *Id.* at 42. Relying on Section 2, the Court rejected the plaintiffs' challenge. The Court pointed out that the phrase "except for participation in rebellion, or other crime" exempted states with felon disenfranchisement laws from the amendment's sanction of reduced representation in Congress. *Id.* at 55. From this observation, the Court held that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [the Equal Protection Clause of Section 1] of that Amendment, that which was expressly exempted from the lesser sanction of reduced representation by [Section 2] of the Amendment." *Id.* at 43.

In the present case, the State and the majority argue that *Richardson* forecloses all constitutional challenges to felon disenfranchisement. The argument goes: Because the Eighth Amendment's protection from cruel and unusual punishment is incorporated against the states through the Due Process Clause in Section 1 of the Fourteenth Amendment, and because *Richardson* held that California's permanent felon disenfranchisement did not violate Section 1's Equal Protection Clause (a different clause than the Due Process Clause in Section 1), Mississippi's law cannot violate the Eighth Amendment through its incorporation by Section 1's Due Process Clause. That argument is deeply wrong.

First and foremost, *Richardson* decided an Equal Protection challenge to permanent felon disenfranchisement, not a challenge based on a substantive right of the Eighth Amendment incorporated through the Due Process Clause. The Supreme Court has made clear that the substantive rights contained in the Bill of Rights—including those of the Eighth Amendment—are not diluted or somehow lesser in content by virtue of their being incorporated through the Fourteenth Amendment. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"); *Timbs v. Indiana*, 586 U.S. 146, 150 (2019) ("Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). Thus, although an Eighth Amendment claim is brought against a state like Mississippi through the Fourteenth Amendment, it is evaluated under Eighth Amendment standards. *See Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment). *Richardson* did not examine permanent felon disenfranchisement of free persons under Eighth Amendment standards. Whether a punishment is "cruel and unusual" within the meaning of the Eighth Amendment requires ascertaining society's "evolving standards of decency," which, in turn, are determined by "evidence of contemporary values." *Graham*, 560 U.S. at 58, 62. Neither *Richardson*, which was decided nearly half a century ago, nor the nineteenth century history of Section 2 of the Fourteenth Amendment that *Richardson* recounted appear relevant to the "evolving standards of decency" of today that the Eighth Amendment embodies. *Id.* at 58.[6]

[6] Separately, the majority's "incorporation argument flies in the face of decades of settled and effective practice" by the Supreme Court of how constitutional rights

The majority's construction of *Richardson* also disregards the precept that "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." *Williams*, 393 U.S. at 29. The Supreme Court has "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another. . . . The proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993). Take, for example, the death penalty. There, the Fourteenth Amendment only limits imposition of the death penalty by requiring states to afford a defendant due process. Presumably, the majority would not argue that it is permissible to execute an intellectually disabled person or a child—as long as she has been afforded due process—because the Fourteenth Amendment trumps the Eighth Amendment. *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 568. Yet that is the logic of the majority's view of *Richardson*. The independent limits that the Fourteenth Amendment place on disenfranchisement do not stand in the way of the irrefutable conclusion we draw from our faithful application of well-settled Eighth Amendment jurisprudence: it is cruel and unusual to punish individuals for life by permanently disenfranchising them after they have fulfilled all terms of their sentences.

---

incorporated against the states operate. Recent Case, *Constitutional Law – Eighth Amendment – Fifth Circuit Holds that Disenfranchisement of Incarcerated People Is Cruel and Unusual Punishment* — Hopkins v. Hosemann*, 76 F.4th 378 (5th Cir.),* vacated and reh'g en banc granted*, 83 F.4th 312 (5th Cir. 2023) (per curiam)*, 137 HARV. L. REV. 1002, 1005 (2024). The majority's "reading risks creating daylight between federal and state claims," whereby "a state-based claim [must] go through an analysis of substantive limits on the Fourteenth Amendment before going to Eighth Amendment case law, whereas a federal claim would go straight to the case law." *Id.* at 1009.

* * *

Denying released offenders the right to vote takes away their full dignity as citizens, separates them from the rest of their community, and reduces them to "other" status. I respectfully dissent.

APPENDIX

States with permanent criminal disenfranchisement penalties

1974	**2000**	**2020**
Alabama	Alabama	Alabama
Alaska	Arizona	Arizona
Arizona	California	Delaware
Arkansas	Delaware	Florida
California	Florida	Iowa
Connecticut	Iowa	Kentucky
Florida*	Kentucky	Maryland*
Georgia	Maryland	Massachusetts*
Idaho	Massachusetts*	Mississippi
Iowa	Mississippi	Missouri*
Kentucky	Missouri	Nebraska
Louisiana	Nebraska	New Jersey*
Maryland*	New Hampshire	Tennessee
Massachusetts*	New Jersey*	Virginia
Mississippi	New Mexico	Wyoming
Missouri	New York	
Nebraska	Ohio*	
Nevada	Tennessee	
New Hampshire	Virginia	
New Jersey*	Washington	
New Mexico	Wyoming	
New York		
North Dakota		

Oklahoma

Rhode Island

South Carolina

Tennessee

Texas

Utah*

Virginia

Washington

Wyoming

** Permanent disenfranchisement for election-related offenses only.*

States with permanent disenfranchisement penalties (with citations)

	1974	2000	2020
Alabama	*Ala. Const. art. VIII, § 182; Ala. Code tit. 17 § 15 (1958)*	*Ala. Const. art. VIII, §177 (see also Amendment 579 (1996)); Ala. Code. § 17-3-10 (2000)*	*Ala. Const. art. VIII, § 177; Ala. Code. § 15-22-36.1*
Alaska	*Ak. Const. art. V, § 2; Ak. Code § 15.05.030 (1960)*		
Arizona	*Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. § 16-101(5)*	*Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. §§ 13-905, 13-909-12 (2000)*	*Ariz. Rev. Stat. §§ 13-908(A), 13-907(A)*
Arkansas	*Ark. Const. art. III, § 6 (1947)*		
California	*Cal. Const. art. II, § 3 (1972); Cal. Elec. Code §§ 310, 321, 383, 389, 390; Ramirez v. Brown,*	*Cal. Const. art. II, § 4; Cal. Penal Code §§ 4852.01, 4852.17, 4853 (2000)*	

	507 P.2d 1345, 1347 (Cal. 1973)		
Connecticut	*Conn. Rev. Stat. § 9-46 (1973)*		
Delaware		*Del. Const. art. V, §§ 2, 7; 15 Del. Code §§ 1701, 5104 (2000)*	*Del. Const. art. V, § 2*
Florida	*Fla. Const. art. VI, § 4 (1973); Fla. Code § 97.041(5)**	*Fla. Const. art. VI, § 4 (2000); Fla. Stat. §§ 97.041, 944.292, 944.293*	*Fla. Const. art. VI, § 4; Fla. Stat. § 944.292(1); Fla. Const. art. IV, § 8 (a), (c)*
Georgia	*Ga. Const. art. II, § 2-701 (1945)*		
Idaho	*Idaho Const. art. VI, § 3 (1947); Idaho Code § 34-402 (1949)*		
Iowa	*Iowa Const. art. II, § 2*	*Iowa Const. art. II, § 5; Iowa Code § 48A.6 (2000)*	*Iowa Const. art. II, § 5*
Kentucky	*Ky. Const. § 145 (1955)*	*Ky. Const. § 145; Ky. Stat. § 116.025 (2000)*	*Ky. Const. § 145*
Louisiana	*La. Const. art. VIII, § 6 (1968)*		
Maryland	*Md. Const. art. I, § 2 (1972); Md. Code. Art. 33 ¶ 3-4 (1974)**	*Md. Const. art. I, § 4; Md. Code art. 33, § 3-102 (2000)*	*Md. Elec. Code § 3-102**
Massachusetts	*Mass. Gen. Laws ch. 51 § 1 (1972)**	*Ma. Const. art. III; Ma. Gen. L. 51 § 1 (2000)**	*Ma. Const. art. III; Ma. Gen. L. 51 § 1**
Mississippi	*Miss. Const. art. XII, § 241; Miss. Code § 23-5-35 (1972)*	*Miss. Const. art. XII, § 241; Miss. Code § 23-5-35 (1972)*	*Miss. Const. art. XII, § 241*
Missouri	*Mo. Rev. Stat. § 111.021 (1969)*	*Mo. Rev. Stat. § 115.113 (2000)*	*Mo. Rev. Stat. § 115.133.2**
Nebraska	*Neb. Const. art. VI, § 2; Neb. Rev. Stat.*	*Neb. Rev. Stat. § 32-313 (2000); Ways v.*	*Neb. Rev. Stat. §§ 29-112, 32-313*

	§§ 29-112, 29-113 (1974)	*Shively, 264 Neb. 250 (2002)*	
Nevada	*Nev. Const. art. II, § 1; Nev. Rev. Stat. §§ 213.090, 213.155*		
New Hampshire	*N.H. Const. art. XI (1970); N.H. Rev. Stat. § 607-A-2 (1974)*	*N.H. Const. art. XI (2000)*	
New Jersey	*N.J. Rev. Stat. § 19:4-1 (1971)**	*N.J. Stat. § 19:4-1 (2000)**	*N.J. Stat. § 19:4-1**
New Mexico	*N.M. Const. art. VII, § 1 (1973)*	*N.M. Stat. § 31-13-1 (2000)*	
New York	*N.Y. Elec. Law § 152 (1964)*	*N.Y. Const. art. II, § 3; N.Y. Code § 5-106 (2000)*	
North Dakota	*N.D. Const. art. V, § 127 (1960)*		
Ohio		*Ohio Stat. §§ 2961.01, 3599.39 (2000)**	
Oklahoma	*Okla. Const. art. III, § 1 (1974)*		
Rhode Island	*R.I. Const. art. Am. XXXVIII (1973)*		
South Carolina	*S.C. Const. art. II, § 7; S.C. Code § 23-62 (1962, 1975 Supp.)*		
Tennessee	*Tenn. Const. art. IV, §2; Tenn. Code § 2-205 (1971)*	*Tenn. Code § 40-29-105 (2000)*	*Tenn. Code Ann. § 40-29-204*
Texas	*Tex. Const. art. XVI, § 2; Tex. Rev. Stat. art. 5.01 (1967)*		
Utah	*Utah Const. art. IV, § 8 (1971)**		
Virginia	*Va. Const. art. II, § 2; Va. Code § 24.1-42 (1973)*	*Va. Const. art. II, § 1; Va. Code § 53.1-231.2 (2000)*	*Va. Const. art. II, § 1; art. V, § 12*
Washington	*Wash. Const. art. VI, § 3 (1974)*	*Wash. Const. art. VI, § 3; Rev. Code*	

		Wash. § 9.94A.637 (2000); Madison v. State, 161 Wash. 2d 85 (2007)	
Wyoming	*Wyo. Const. art. VI, § 6 (1957); Wyo. Stat. §§ 6-4, 7-311 (1957)*	*Wyo. Stat. §§ 6-10-106, 7-13-105 (2000)*	*Wyo. Const. art. IV, § 5; Wyo. Stat. Ann. §§ 6-10-106, 7-13-105(a), (b)*

** Permanent disenfranchisement for election-related offenses only.*

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 18, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-60662 cons. w/ 19-60678
Hopkins v. Watson
USDC No. 3:18-CV-188

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellant pay to Appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Ms. Lauren Aguiar
Mr. Patrick Berry
Ms. Janet A. Gochman
Mr. Bradley E. Heard
Ms. Leslie Faith Jones
Mr. Jared Gregory LeBlanc
Mr. Justin Lee Matheny
Mr. R. Trent McCotter
Mr. Sean Morales-Doyle
Mr. Louis Peter Petrich
Mr. Carroll E. Rhodes
Mr. Joseph Patrick Sakai
Mr. Ari J. Savitzky
Mr. Ahmed Soussi
Mr. Scott G. Stewart
Mr. Joshua Tom
Mr. Andrew T. Tutt
Ms. Caroline Van Zile
Mr. Matthew W. Walch
Mr. Jonathan K. Youngwood

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 3, 2023
Lyle W. Cayce
Clerk

No. 19-60662
CONSOLIDATED WITH
No. 19-60678

DENNIS HOPKINS, *individually and on behalf of a class of all others similarly situated*; HERMAN PARKER, JR., *individually and on behalf of a class of all others similarly situated*; WALTER WAYNE KUHN, JR., *individually and on behalf of a class of all others similarly situated*; BRYON DEMOND COLEMAN, *individually and on behalf of a class of all others similarly situated*; JON O'NEAL, *individually and on behalf of a class of all others similarly situated*; EARNEST WILLHITE, *individually and on behalf of a class of all others similarly situated*,

Plaintiffs—Appellees,

versus

SECRETARY OF STATE DELBERT HOSEMANN, *in his official capacity*,

Defendant—Appellant,

Appeal from the United States District Court
for the Southern District of Mississippi
No: 3:18-CV-188

Before KING, JONES, and DENNIS, *Circuit Judges*.

JAMES L. DENNIS, *Circuit Judge*:

In this class action, Plaintiffs, representing persons who have been convicted of certain crimes and have completed the terms of their sentences, challenge their disenfranchisement by two provisions of Article XII of the Mississippi Constitution of 1890. The first provision, Section 241, mandates permanent, lifetime disenfranchisement of a person convicted of a crime of any one of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy."[1] The second, Section 253, provides for a discretionary, standardless scheme for the Mississippi Legislature to restore the right to vote to disenfranchised persons on an individualized basis by a two-thirds vote of all members of each house of the Legislature.

Plaintiffs sued Mississippi's Secretary of State (the "Secretary"), contending that Section 241 violates the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection under the law. They also claim that Section 253 violates the Fourteenth Amendment's guarantee of equal protection of the laws and the First Amendment guarantee of freedom of speech. The Secretary responded that Plaintiffs lack Article III standing, that their claims are barred by the doctrine of state sovereign immunity, and that all of their claims fail on their merits.

For the reasons explained below, we hold that Plaintiffs are entitled to prevail on their claim that, as applied to their class, disenfranchisement for life under Section 241 is unconstitutional cruel and unusual punishment

[1] The Mississippi Secretary of State, the defendant here, is required by statute to treat additional crimes that the Mississippi Attorney General deems to be a species of the common law crimes listed in Section 241. *See* MISS. CODE. § 23-15-151. For instance, timber larceny, armed robbery, and larceny under a lease agreement are all deemed by the Attorney General as disenfranchising crimes though they are not expressly listed in Section 241.

within the meaning of the Eighth Amendment. In the last fifty years, a national consensus has emerged among the state legislatures against permanently disenfranchising those who have satisfied their judicially imposed sentences and thus repaid their debts to society. Today, thirty-five states plus the District of Columbia disavow the practice embodied in Section 241, a supermajority whose size is dispositive under controlling Supreme Court precedent. Mississippi stands as an outlier among its sister states, bucking a clear and consistent trend in our Nation against permanent disenfranchisement. And in our independent judgment—a judgment under the Eighth Amendment that the Supreme Court requires we make—Section 241's permanent disenfranchisement serves no legitimate penological purpose. By severing former offenders from the body politic forever, Section 241 ensures that they will never be fully rehabilitated, continues to punish them beyond the term their culpability requires, and serves no protective function to society. It is thus a cruel and unusual punishment.

We accordingly reverse the district court's contrary ruling, render judgment for Plaintiffs on this claim, and remand the case with instructions that the district court grant relief declaring Section 241 unconstitutional and enjoining the Secretary from enforcing Section 241 against the Plaintiffs and the members of the class they represent. Plaintiffs' equal protection claim against the Secretary with respect to Section 241, however, is foreclosed by the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974). Additionally, Plaintiffs lack standing to challenge the legislative process embodied in Section 253 through this action.

I. Factual and Procedural Background

A. Mississippi's 1890 Constitution and Sections 241 and 253

Sections 241 and 253 of the Mississippi Constitution are, with the exception of several amendments to Section 241, original to the state's 1890

Constitution, which was adopted in reaction to the expansion of black suffrage and other political rights during Reconstruction. *See Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc). After wresting control of state government from black leaders and their Republican allies through a campaign of violence and electoral fraud, Mississippi's white political leadership called for a new state constitution that would ensure "a home government, under the control of the white people of the State." *Senator J. Z. George, He Addresses a Large Audience at His Old Home*, The CLARION-LEDGER (JACKSON) 1 (Oct. 24, 1889). In 1890, the state legislature voted to convene a constitutional convention in order to draft and adopt a new state constitution. From the outset, the object of the 1890 Mississippi Constitutional Convention was clear: to ensure the political supremacy of the white race. *See Harness*, 47 F.4th at 318 (Graves, J. dissenting). Key to accomplishing this end was a package of "voter qualifications and procedures" that delegates adopted "to exclude black citizens from participation in the electoral process." *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

Although the delegates were explicit about their goal of white political control, they were careful to avoid provisions overtly violating the Fifteenth Amendment's ban on restricting voting based on race. Convention's Committee on the Elective Franchise (the "Franchise Committee") thus proposed voter qualification requirements that were facially race neutral. These included the kind of poll taxes, literacy tests, and residency requirements that were common in the American South during the post-Reconstruction era. Among these requirements was also a criminal disenfranchisement provision that remains today as Section 241 of the Mississippi Constitution. The measure was designed to target as disenfranchising offenses those that the white delegates thought were more often committed by black men. *Harness*, 47 F.4th at 300; *Ratliff v. Beale*, 20 So. 865, 868–69 (Miss. 1896) (explaining that

in enacting Section 241 the Convention aimed to "obstruct the exercise of the franchise by the negro race" by including as disenfranchising offenses only those "to which its weaker"—by which the court meant "black"—"members were prone.").

The possibility that the disenfranchisement provisions might ensnare not only black men but also poor white males caused concern at the Convention. So, in an effort to mitigate the fear that the disenfranchisement provisions would also affect whites, the Convention ratified several "escape" clauses. For example, to reduce the impact of literacy tests on poor white males, the Convention enacted the "Understanding Clause," a provision that allowed a voter to pass a "constitutional interpretation test" by giving a "reasonable interpretation" of the state constitution. The Franchise Committee justified this "Understanding Clause" on the grounds that it would "exclude . . . [n]o white man who has sense enough to go to the mill," and urged that the clause would "secure[] a white basis upon which to erect a permanent State government." *Don't Like It But Takes It*, The CLARION-LEDGER (JACKSON) 1 (Oct. 9, 1890).

Another of the escape clauses was the suffrage restoration provision that is contained in Section 253. Section 253 allows the Mississippi Legislature to, by a two-thirds vote of the elected members of both houses, restore the voting rights of any person disenfranchised by Section 241. MISS. CONST. art. XII, § 253. While the record behind the enactment of Section 253 is scant, its timing and context suggest it was intended to limit the impact of Section 241's criminal disenfranchisement provision on white men, providing a limited "safety net" to allow any whites unintentionally disenfranchised by Section 241 to escape its effects. And, like the Understanding Clause, Section 253 includes no objective standards of any kind, allowing legislators unfettered discretion in restoring the franchise to individuals.

Mississippi's 1890 Constitution was adopted by a vote of the delegates on November 1, 1890, without ratification by the people of Mississippi. Other Southern states took notice of Mississippi's "success" in disenfranchising its black electorate and used the State's 1890 Constitution as a model when adopting their own racial disenfranchisement provisions. *See* Franita Tolson, *What Is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 469–71 (2015) (noting that South Carolina and North Carolina adopted constitutional disenfranchisement provisions in an effort to limit the black electorate).

Since its enactment, Section 241 has been amended twice. *Harness*, 47 F.4th at 300. In 1950, "burglary" was removed from the list of disenfranchising crimes, and in 1968, "murder" and "rape" were added—the latter offenses having been historically excluded because they were not considered crimes a black person was prone to commit. *See Ratliff*, 20 So. at 868. Under Section 241, an individual who is convicted of a crime as minor as writing a bad check for $100 or stealing less than $250 worth of timber is permanently disenfranchised. MISS. CODE § 97-19-67(1)(d); § 97-17-59.

Section 253 has never been amended, and, with the exception of gubernatorial pardon and the limited restoration for certain World War I and II veterans, it remains the only means for disenfranchised individuals to regain the right to vote. In the mid-1980s, an election law task force appointed by the Mississippi Secretary of State and two separate panels convened by the Mississippi Legislature proposed repealing Section 253 and replacing it with an amendment that would automatically restore the right to vote to individuals convicted of disenfranchising crimes upon completion of their sentences. The Legislature, however, ultimately did not adopt this proposal as part of an election law reform bill enacted in 1986.

Sections 241 and 253 continue to be part of the Mississippi Constitution and over the years they have been remarkably effective in achieving their original, racially discriminatory aim. In 2017, 36% of voting-age citizens in Mississippi were black. Yet, according to data provided by the Mississippi Administrative Office of the Courts, of the nearly 29,000 Mississippians who were convicted of disenfranchising offenses and have completed all terms of their sentences between 1994 and 2017, 58%—or more than 17,000 individuals—were black. Only 36% were white. The discretionary legislative re-enfranchisement permitted by Section 253 does little to alleviate this disproportionate burden, and, as a practical matter, legislative suffrage is exceedingly rare: between 2013 and 2018, the Mississippi Legislature restored the right to vote to only eighteen individuals.

B. The Secretary's Role in Enforcement of Sections 241 and 253

Federal law requires that each state designate a chief election official who is "responsible for coordination" of the state's duties under the National Voter Registration Act ("NVRA"). 52 U.S.C. § 20509; *see also* Voluntary Guidance on Implementation of Statewide Voter Registration Lists, Election Assistance Comm'n, 70 FED. REG. 44593-02, 44594 (Aug. 3, 2005) ("The chief State election official is the highest ranking State official who has, as a primary duty, the responsibility to ensure the lawful administration of voter registration in Federal elections."). In Mississippi, the Secretary of State performs this role. MISS. CODE § 23-15-211.1(1). The Secretary is charged by state law with establishing the instructions and application form for voter registration. *Id*. §§ 23-15-39(1), 23-15-47(3). Each municipality's clerk, in her capacity as the local registrar of voters, is in turn required to "use [the] voter registration applications . . . prescribed by the Secretary of State" when registering voters. *Id*. § 23-15-35(1).

The current Mississippi voter registration application form, as adopted by the Secretary, states that individuals convicted of certain crimes in a Mississippi state court are not eligible to register to vote. The form requires an applicant to affirm, on penalty of perjury, that he or she has either "never been convicted of voter fraud or any other disenfranchising crime" or has had their voting rights restored. The Secretary is also tasked by state statute with "implement[ing] and maintain[ing]" an electronic information processing system containing a "centralized database of all registered voters in the state." *Id*. § 23-15-165(1). This system, referred to as the Statewide Elections Management System ("SEMS"), is updated by each county's circuit clerk on a quarterly basis with a list of persons convicted of any disenfranchising crime under Section 241; these persons are then purged from the voter rolls in the database. *Id*. § 23-15-151.

Finally, the Secretary serves on the State Board of Election Commissioners and is responsible in that capacity for training county election commissioners on voter roll maintenance, including the use of SEMS to remove disqualified electors from voting rolls. *Id*. § 23-15-211(4). After an elections commissioner completes annual training, the Secretary provides the commissioner with a certificate that is required for the commissioner to maintain office. *Id.* §§ 23-15-211(4)–(5) (providing that election commissioners are required to attend the Secretary's elections seminars, upon completion of which they are to receive a certificate that must be renewed yearly).

In sum, the Secretary is Mississippi's "chief election officer" and performs key functions in administering and enforcing state election laws, including by (1) establishing voter registration instructions and application forms, which state that a person convicted of any disenfranchising crime is ineligible to vote; (2) administering the SEMS registered voter database; and (3) training county election officials through mandatory seminars on their obligation to purge SEMS of ineligible voters and then certifying these officials.

C. Proceedings Below

In 2018, six permanently disenfranchised Mississippi citizens filed this putative class-action lawsuit in federal district court, asserting five federal constitutional challenges to Sections 241 and 253. Plaintiffs, who were convicted of various crimes and have completed all terms of their sentences, sued the Secretary in his official capacity, requesting declaratory and injunctive relief for claimed violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. Dennis Hopkins, a grandfather and founder of a local peewee football team, has been disenfranchised since 1998 when he was convicted of grand larceny. Herman Parker Jr., a public employee with over a decade of service working for the Vicksburg Housing Authority, is disenfranchised for life because he was convicted of grand larceny at the age of nineteen. And Byron Demond Coleman lost his right to vote in 1997 when he was convicted of receiving stolen property after buying some refurbished appliances. The district court certified Plaintiffs' proposed class, allowing Plaintiffs to represent persons in the state who have been convicted of a Section 241 disenfranchising offense and who have completed all terms of their sentences.

Plaintiffs and the Secretary filed cross-motions for summary judgment. The Secretary contended that Plaintiffs lacked standing, that their suit was barred by sovereign immunity, and that the claims failed on their merits. The district court rejected the Secretary's jurisdictional arguments, holding that Plaintiffs had standing to bring each of their claims and that the Secretary was amenable to a suit seeking equitable relief under *Ex parte Young*. But, on the merits, the district court granted summary judgment to the Secretary except as to Plaintiffs' Section 253 race-based equal protection claim. On this latter claim only, the court ruled that "questions of fact" remained as to whether Plaintiffs "met their burden" under controlling precedent. The court then certified its order for interlocutory appeal.

The parties filed timely cross-petitions with this court seeking permission to file an interlocutory appeal. This court granted both petitions and consolidated the appeals.

II. Legal Standard

We review an order on summary judgment *de novo*, applying the same standard as applicable to the district court. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 397 (5th Cir. 2010). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

III. Discussion

On appeal, Plaintiffs argue that: (1) the district court properly held that Article III standing was satisfied as to all claims, (2) the *Ex parte Young* exception to sovereign immunity allows all claims to be brought against the Secretary; (3) Section 241's lifetime voting ban infringes on the fundamental right to vote, is therefore subject to strict scrutiny, and cannot satisfy such demanding review; (4) Section 241's lifetime disenfranchisement violates the Eighth Amendment's prohibition on cruel and unusual punishment because it is punitive and contrary to contemporary standards of decency; (5) Section 253, the suffrage restoration provision, violates the Equal Protection Clause because it authorizes legislators to arbitrarily restore (or not restore) the right to vote to some citizens rather than others, its enactment in 1890 was motivated by racial animus, and it disproportionately impacts black Mississippians today; and (6) Section 253 violates the First Amendment because legislators are given the power to exercise "unfettered discretion" in

determining who can express their constitutionally-protected political views by voting.[2]

In response, the Secretary contends that (1) Plaintiffs lack Article III standing and sovereign immunity bars their claims; (2) the Supreme Court's decision in *Richardson v. Ramirez*, which upheld California's permanent felon disenfranchisement scheme against an equal protection challenge, forecloses Plaintiffs' equal protection claim; (3) Section 241 cannot violate the Eighth Amendment because *Richardson* precludes an Eighth Amendment challenge to permanent disenfranchisement and because Section 241 does not impose "punishment" within the meaning of the Eighth Amendment; (4) Section 253's discretionary procedures for restoration of the franchise do not violate equal protection under Supreme Court precedent because Plaintiffs failed to demonstrate that Section 253 was enacted with a discriminatory motive and currently has a racially disproportionate impact; and (5) Section 253 does not run afoul of the First Amendment because the First Amendment does not afford greater protection for voting rights than that already provided by the Fourteenth Amendment.

We address these arguments in turn, starting as we must with the question of standing.

A. Article III Standing

The district court denied the Secretary's motion for summary judgment based on lack of standing, concluding that Plaintiffs have standing to bring all their claims—the equal protection and Eighth Amendment

[2] Plaintiffs did not offensively petition this Court for permission to appeal the question of whether a standardless re-enfranchisement law violates the First Amendment. Plaintiffs included defensive argument on this issue because it was raised by the Secretary in his briefing and in the event it is reached by the Court.

challenges to Section 241, as well as the equal protection and First Amendment challenges to Section 253.

Article III of the Constitution limits the exercise of federal judicial power to "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (citing U.S. CONST. art. III, § 2). The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish Article III standing, (1) Plaintiffs must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) "the injury has to be fairly traceable to the challenged action of the defendant"; and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." *Id.* at 560–61 (cleaned up). Plaintiffs, as the party invoking federal jurisdiction, "bear[] the burden of establishing these elements." *Id.* at 561. Furthermore, "'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). We review questions of standing *de novo*. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

Considering Plaintiffs' standing to assert their various challenges to each of the provisions at issue, we hold that Plaintiffs have demonstrated their standing to pursue their Section 241 claims but not their Section 253 claims.

1. Section 241

Plaintiffs challenge the permanent disenfranchisement provision of Section 241 on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition of cruel and unusual punishment. The district court concluded that the Secretary's

statutory duties managing a statewide computerized election management system and his designation as the state's chief elections officer established that "Plaintiffs' injuries are sufficiently traceable to and redressable by" the Secretary. The Secretary disagrees, arguing that because he merely provides information to local officials who administer elections regarding disqualified voters, Plaintiffs' injuries cannot be traced to nor redressed by him.

The district court disagreed, as do we. Plaintiffs' injuries stemming from Section 241 are fairly traceable to the Secretary. Designated by federal law as Mississippi's chief election officer, the Secretary is tasked with developing mail voter application forms, 52 U.S.C. § 20508(a)(2), and, under Mississippi law, is responsible for establishing the instructions and application form for voter registration. *See* MISS. CODE §§ 23-15-39(1), 23-15-47(3). The current Mississippi voter registration application and form, as established by the Secretary, states that a person convicted of any disenfranchising crime in a Mississippi court is ineligible to vote and requires that an applicant affirm that they have never been convicted of such a crime on penalty of perjury. Municipal clerks are statutorily required to use an application form evidencing a disenfranchising conviction to deny registration as "prescribed by the Secretary." *Id.* § 23-15-35(1).

On this basis alone, Plaintiffs' injuries are fairly traceable to the Secretary's actions. By requiring individuals to declare, on penalty of perjury, that they have not been convicted of disenfranchising crimes, the voter registration application that the Secretary developed prohibits individuals convicted of disenfranchising crimes from lawfully completing the application form that is needed in order to vote. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) (Secretary's duty to design mail-in-ballot sufficient to confer standing on voters denied the right to vote by mail because of age).

But the Secretary's duties do not end there. The Secretary is also tasked with "implementing and maintaining" the SEMS database. MISS. CODE § 23-15-165(1). SEMS "constitute[s] the official record of registered voters in every county of the state," and therefore plays an essential component in purging from the voter rolls individuals convicted of a disenfranchising crime. *Id.* For example, SEMS is updated quarterly with a list of individuals convicted of disenfranchising offenses. *Id.* § 23-15-151. And the Secretary has the statutory responsibility to train local elections officials to use SEMS to filter out disenfranchised individuals from the SEMS voter database. *Id.* § 23-15-211(4). Indeed, local elections commissioners can only be certified as such after attending the Secretary's annual training, in which he instructs them to purge the voter rolls. *Id.* §§ 23-15-211(4)-(5). Though local officials may be the ones to ultimately remove ineligible voters from their voter rolls, they do so based on an eligibility determination made by the Secretary and in accordance with training from his office. The Secretary's conduct need not be the proximate cause of a voter's disenfranchisement in order for the denial of the right to vote to be fairly traceable to him. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). When a voter is removed from the voter rolls by a local official acting on information and instructions provided by the Secretary and in accordance with training from his office, the voter's injury is fairly traceable to the Secretary.

Because of these duties, the Secretary is also in a position to redress Plaintiffs' alleged injuries. Were the Secretary enjoined from enforcing Section 241, as Plaintiffs seek, he could amend Mississippi's voter registration form to allow disenfranchised class members to register, cease entering the names of citizens disqualified under Section 241 into SEMS or, alternatively, train local election officials to disregard that information in SEMS in maintaining their local voter rolls.

In sum, "the Secretary of State ha[s] a role in causing the claimed injury and is in a position to redress it at least in part. That is enough to confer standing to the voter plaintiffs to sue the Secretary." *Tex. Democratic Party*, 978 F.3d at 178. *See also Harness v. Hosemann*, 988 F.3d 818, 821 (5th Cir. 2021) (finding standing to sue the Secretary for enforcing Section 241), *reh'g en banc granted, opinion vacated*, 2 F.4th 501 (5th Cir. 2021), *and on reh'g en banc affirmed sub nom. Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022).

2. Section 253

Plaintiffs also challenge Section 253 of Mississippi's Constitution, contending that that provision violates the First Amendment and the Fourteenth Amendment's Equal Protection Clause. The district court stated that the Secretary's role in Section 253 is "slight," but nevertheless found that Plaintiffs "minimally demonstrated standing" with respect to these claims because the Secretary is Mississippi's "chief election officer and maintains SEMS, which would presumably be involved in one of the final steps in returning a convicted felon to the voting rolls after he or she successfully files a section 253 petition." Since the Secretary had "some connection with the enforcement of the act," the district court concluded that Plaintiffs had standing to sue.

We observe that Plaintiffs characterize their injury not as the Secretary's implementation and enforcement of Section 253 but instead as the "unconstitutional burden" the provision places on individuals seeking to regain the right to vote through the passage of a suffrage bill. More specifically, this burden is having to petition the Legislature for a suffrage bill and then navigate the standardless and arbitrary process to pass the bill. This legislative process that Plaintiffs challenge begins and ends without the Secretary's involvement. The Secretary, in his official capacity, does not sponsor, draft, debate, vote on, or otherwise officially impact the passage or denial of a

suffrage restoration bill under Section 253. True, the Secretary will enforce any suffrage bill the Legislature happens to pass. But Plaintiffs' issue is not with the enforcement of any particular suffrage bill or suffrage bills generally, but with the Legislature's caprice in failing to enact them in the first place. Thus, the injury Plaintiffs complain of—the legislative process for restoration of the franchise—is not fairly traceable to the Secretary but instead is "the result of the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560 (cleaned up). Accordingly, although Plaintiffs have established standing as to their claims against Section 241, they lack standing as to their claims against Section 253.

B. Sovereign Immunity

There is one final jurisdictional matter: Eleventh Amendment sovereign immunity, which the Secretary contends bars Plaintiffs' challenge to Section 241. The Eleventh Amendment generally precludes private suits against nonconsenting states in federal court. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Sovereign immunity extends to suits against state officials that are, in effect, a suit against a state. *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651, 663–69 (1974)). However, under the equitable exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123, 155–56 (1908), a plaintiff may bring suit for injunctive or declaratory relief against a state official, in her official capacity, to "enjoin enforcement of a state law that conflicts with federal law." *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 515 (5th Cir. 2017). Our court has observed that there is a "significant[] overlap" between the "Article III standing analysis and *Ex parte Young* analysis." *City of Austin*, 943 F.3d at 1002 (quoting *Air Evac EMS, Inc.*, 851 F.3d at 520).

Whether the Secretary is subject to suit under the *Ex parte Young* exceptions first depends upon whether the "complaint alleges an ongoing

violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Plaintiffs' complaint alleges that the enforcement of Section 241 continues to wrongfully deprive them of the franchise in violation of the Eighth and Fourteenth Amendments and prays for declaratory and injunctive relief to stop the ongoing violation of their rights. Plaintiffs' complaint thus requests relief that is permissible under *Ex parte Young*.

The next inquiry concerns whether the defendant, "by virtue of his office, has some connection with the enforcement" of Section 241. *Ex parte Young*, 209 U.S. at 157. Without this requisite connection, the suit "is merely making [the state officer] a party as a representative of the state, and thereby attempting to make the state a party." *Id.* Although "[t]his circuit has not spoken with conviction" regarding the precise scope of the connection required under *Ex parte Young*, a sufficient connection certainly exists when there exists a "'special relationship' between the state actor and the challenged" provision. *Tex. Democratic Party*, 978 F.3d at 179 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010)). This standard is met here.

As explained in our standing analysis regarding Section 241 *supra*, the Secretary is charged under state law with establishing the instructions and application form for voter registration, and the form that the Secretary has developed specifically states that persons convicted of disenfranchising offenses are ineligible to vote. Further, state law requires the Secretary to develop and implement SEMS, which is "the official record of registered voters in every county of the state," MISS. CODE § 23-15-165(1), and to train local elections officials to use SEMS to purge disenfranchised persons from the SEMS voter database. *Id.* § 23-15-211(4). Although local elections officials may also play a role in the disenfranchisement process, this does not alter or reduce the Secretary's clear connection to the enforcement of Section 241.

Because Plaintiffs have standing to pursue their Section 241 claims and because the *Ex parte Young* exception to state sovereign immunity applies, we have jurisdiction over Plaintiffs' appeal. We therefore proceed to the merits of their challenges to Section 241.

C. Equal Protection Challenge to Section 241

Plaintiffs contend that permanent disenfranchisement under Section 241 of the Mississippi Constitution violates the Equal Protection Clause of the Fourteenth Amendment. This claim, Plaintiffs acknowledge, must be reconciled with the Supreme Court's decision in *Richardson v. Ramirez*. 418 U.S. 24 (1974).

In *Richardson*, former felons who had completed all terms of their court-imposed sentences challenged a set of California laws that permanently disenfranchised any person convicted of an "infamous crime" unless and until the person obtained a court order or executive pardon that restored the franchise. *Id.* at 26–27. The plaintiffs argued that, when applied to a class of felons whose terms of incarceration and parole had expired, California's permanent disenfranchisement scheme violated the Equal Protection Clause by burdening a fundamental right without a compelling state interest. *Id.* at 27. In considering the plaintiffs' claim, the Supreme Court looked not only to Section 1 of the Fourteenth Amendment, where the Equal Protection Clause is located, but also to the "less familiar" Section 2 of that Amendment. *Id.* at 42. Section 2 provides, in relevant part:

> [W]hen the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of [a State's] representation [in Congress] . . . shall be reduced in the proportion which the number of such [disenfranchised] citizens shall bear to whole number of [citizens eligible to vote in that state].

U.S. CONST. amend. XIV, § 2. Thus, Section 2 of the Fourteenth Amendment imposes a penalty of reduced congressional representation on states that deny or abridge the right to vote for reasons other than "participation in rebellion, or other crime." *Id.*

The Court ultimately rejected the plaintiffs' challenge, relying primarily on Section 2. The Court pointed out that the phrase "except for participation in rebellion, or other crime" (the "other crime" exception) exempted states like California that disenfranchised their citizens because of felony convictions from the amendment's sanction of reduced representation. *Id.* at 55. From this observation, the Court posited that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [the Equal Protection Clause of Section] 1 of that Amendment, that which was expressly exempted from the lesser sanction of reduced representation by [Section] 2 of the Amendment." *Id.* at 43. In light of the "affirmative sanction" for "the exclusion of felons from the vote in [Section] 2 of the Fourteenth Amendment," the Court held that California laws permanently disenfranchising "convicted felons who have completed their sentences and paroles" did not violate the Equal Protection Clause. *Id.* at 56. Under binding Supreme Court precedent, then, state laws that permanently disenfranchise convicted felons are not *per se* unconstitutional on equal protection grounds.[3]

[3] Although we are bound by the Supreme Court's holding in *Richardson*, we do not contend here that the *Richardson* majority's reading of Section 2 is the only plausible interpretation of the provision. Justice Marshall, dissenting in *Richardson*, forcefully argued that the disenfranchisement of ex-felons must withstand the requirements of the Equal Protection Clause because neither the fact that multiple States "had felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of [Section 2], can serve to insulate such disenfranchisement from equal protection scrutiny."

Despite *Richardson*'s holding, Plaintiffs urge that it does not foreclose their equal protection claim. They advance what they characterize as a novel textualist argument that was not raised in *Richardson*—that Section 2's "other crime" exception to reduced representation applies only when laws *temporarily* "abridge" the right to vote and does not apply when laws, like Section 241 of Mississippi's Constitution, *permanently* "deny" the franchise. Plaintiffs thus argue that permanent felon disenfranchisement is not "expressly exempted" from Section 2's representation penalty, and, therefore, *Richardson*'s determination that the Equal Protection Clause in Section 1 does not prohibit felon disenfranchisement laws is inapplicable. *Id.* at 43.

Though Plaintiffs do not expressly ask us to overrule *Richardson*—a power we undoubtedly lack, *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012)—their argument calls for us to invalidate on equal protection grounds a state law authorizing permanent disenfranchisement of persons convicted of certain crimes. But that is precisely the type of law the *Richardson* Court expressly upheld against an equal protection attack. The California laws the *Richardson* plaintiffs challenged were not temporarily abridging disenfranchisement laws, but permanent ones like the Mississippi law challenged here. *See Richardson*, 418 U.S. at 27–28 ("At the time respondents were refused registration" . . . the California Constitution provided that no person convicted of an infamous crime "shall *ever* exercise the privileges of an elector in this State.") (emphasis added). *Richardson*, therefore, applied Section 2's "other crime" exception to permanent disenfranchisement. Whether the Supreme Court majority thought California's permanent disenfranchisement was a "denial" of the right to vote or an "abridgment" is

---

Richardson, 418 U.S. at 74, 77 (Marshall, J., dissenting, joined by Brennan, J.) (concluding that Section 2 "was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment").

immaterial. The Court clearly was of the opinion that California's constitutional and statutory scheme—which permanently disenfranchised individuals convicted of "infamous crimes"—fell within the "other crime" exception found in Section 2 of the Fourteenth Amendment. *See id.* at 54–55. The Court thus necessarily rejected an argument that the "other crime" exception applied only to temporary disenfranchisement.

In sum, as an "inferior court," U.S. CONST. art. III, § 1, we are bound by the Supreme Court's decision in *Richardson*, *see Ballew*, 668 F.3d at 782, and therefore must conclude that Section 241 of Mississippi's Constitution does not violate the Equal Protection Clause by burdening this fundamental right.[4] The district court thus correctly granted summary judgment to the Secretary on this claim.

---

[4] Plaintiffs cite to several cases to support their contention that "[e]ven if the *Richardson* Court had assumed that the 'other crime' exception modifies the words 'is denied' as well as the phrase 'or in any way abridged,' the Supreme Court's unstated assumption does not foreclose consideration of this question." We find this argument unavailing. The cases cited by Plaintiffs stand for the proposition that legal questions neither raised before nor considered by a prior court do not constitute binding precedent. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (refusing to rely on dictum in another case to resolve the plaintiff's alternative argument, which was not briefed by the plaintiff and which would have required the court to decide a question that was "a significant issue in its own right"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (explaining in a case where an indispensable party was not joined or added as a litigant that earlier decisions in which the Court reached the merits of a dispute despite the absence of an arguably necessary party could not serve as binding precedent on the requirement of such a party's presence because that issue had not been "suggested or decided" in the earlier cases); *Brecht v. Abrahamson*, 507 US. 619, 631 (1993) (in considering whether the harmless-error standard of review applied in federal habeas cases, the Supreme Court reasoned that even though it was applied in such a manner in the past, its application "had never squarely addressed the issue," and therefore was "free to address [that] issue on the merits"). In the instant case, the legal question of whether state laws providing for permanent disenfranchisement of convicted felons violate equal protection has already been squarely passed upon by the Supreme Court. *See Richardson*, 418 U.S. at 24.

D. Eighth Amendment Challenge to Section 241

Plaintiffs contend that permanent disenfranchisement by Section 241 is cruel and unusual punishment that violates the Eighth Amendment. Section 241 disenfranchisement begins upon a person's conviction of a Section 241 offense and continues for the rest of his life. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society' . . . 'The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (first quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); then quoting *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008)). The district court failed to apply this standard to Section 241, concluding in error that Section 2 of the Fourteenth Amendment placed the practice of permanent felon disenfranchisement

---

Plaintiffs also point to the Ninth Circuit's treatment of felon disenfranchisement in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), in which the plaintiffs challenged an Arizona statute that permanently disenfranchised convicted felons. The plaintiffs sought to "escap[e] *Richardson*'s long shadow" by contending that the "other crime" exception in Section 2 "only permit[ted] disenfranchisement for common-law felonies" and did not apply to statutory felonies. *Id.* at 1071, 1073–74 (9th Cir. 2010) (O'Connor, J., sitting by designation). The Ninth Circuit acknowledged that the plaintiffs' proposed reading of Section 2 was "in extreme tension with *Richardson*" given that the Supreme Court upheld a permanent felon disenfranchisement scheme without evincing any "concern with whether any particular felony was one recognized at common law." *Id.* at 1074, 1078 (quoting *Richardson*, 418 U.S. at 56). Nevertheless, since neither the Ninth Circuit nor the Supreme Court "ha[d] directly addressed this precise question"—the types of crimes within the ambit of Section 2's "other crime" exception—the court considered (and rejected) the merits of plaintiffs' argument. *Id.* at 1074. By contrast, Plaintiffs here ask this court to adopt a construction of Section 2 that is not merely in tension with *Richardson* but instead directly conflicts with that decision's holding. That we cannot do.

beyond the reach of the Eighth Amendment. We reverse the district court's entry of summary judgment for the Secretary. For the reasons hereinafter assigned, we instead render judgment for the plaintiffs declaring that permanent disenfranchisement inflicted by Section 241 of Article XII of the Mississippi Constitution is cruel and unusual punishment in violation of the Eighth Amendment.

1. *Richardson* Applied Only Equal Protection Precepts and Therefore Does Not Foreclose Plaintiffs' Eighth Amendment Claim

Before engaging in the Eighth Amendment analysis, we point out that the district court erred by omitting entirely to perform that assessment in the present case. Relying on the Supreme Court's decision in *Richardson*, the district court concluded that Plaintiffs' Eighth Amendment claim failed because it would be "internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while § 2 of the Fourteenth Amendment permits it." *Harness v. Hosemann*, No. 3:17-CV-791, 2019 WL 8113392, at *11 (S.D. Miss. Aug. 7, 2019). That was error. *Richardson* held only that permanent disenfranchisement did not violate the Equal Protection Clause of the Fourteenth Amendment by burdening a fundamental right without adequate justification. The Court did not consider or decide whether a permanent ban on felons' voting after they completely served their sentences violates the Eighth Amendment's prohibition on cruel and unusual punishment.

The Supreme Court has "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another . . . The proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993). Though *Richardson* contemplated that felon disenfranchisement was implicitly authorized by Section 2 of the Fourteenth

Amendment, "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see also Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."). Indeed, this fundamental principle of constitutional construction has been applied by the Supreme Court in circumstances squarely analogous to the case at bar. In *Hunter v. Underwood*, 471 U.S. 222, 227–29 (1985), the Court held that a provision of Alabama's Constitution that disenfranchised persons convicted of crimes "involving moral turpitude" violated the Equal Protection Clause in Section 1 of the Fourteenth Amendment because of the provision's racially discriminatory origins and impact. The Court explained that, despite the "implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens for 'participation in rebellion, or other crime,'" Section 2 did not "permit . . . purposeful racial discrimination" that "violates § 1 of the Fourteenth Amendment." *Id.* at 233 (internal citation omitted). "[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment," the Court explained. *Id.* "Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary." *Id.*

Further, there is no reason to think the Eighth Amendment's protections may, for some special reason, be nullified by the Constitution's countenancing a particular type of punishment. Courts, including ours, have recognized that the Eighth Amendment constrains states' power to impose "cruel and unusual" conditions of involuntary servitude on prisoners, despite the fact that the Thirteenth Amendment "specifically allows involuntary servitude as punishment after conviction of a crime." *Murray v.*

Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990). Although the Thirteenth Amendment may authorize the state to impose work obligations on prisoners, "there are circumstances in which prison work requirements can constitute cruel and unusual punishment" in violation of the Eighth Amendment. *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (holding that prisoner stated an Eighth Amendment claim when he alleged that he was forced to work "90 to 120 hours per week;" "that he cannot do the hard labor assigned to him because he is physically disabled;" and "that he is constantly cursed and threatened by prison supervisors"); *see also Williams v. Henagan*, 595 F.3d 610, 622 n.18 (5th Cir. 2010) ("Prison work conditions may however, amount to cruel and unusual punishment.").

The district court erred in concluding that Section 2 of the Fourteenth Amendment's implicit authorization of permanent disenfranchisement settles all constitutional questions about the practice. Fundamental tenets of constitutional jurisprudence and on-point Supreme Court precedent makes clear that Section 2 does not override all other constitutional protections. Although the Fourteenth Amendment has been interpreted to implicitly authorize felon disenfranchisement, disenfranchisement schemes established under this authority must still be consonant with other constitutional commands, including those embodied in the Eighth Amendment. The protections to individual liberty and dignity afforded by each provision of the Constitution do not evaporate when one provision permits states to legislate in a certain field. "Obviously we must reject the notion that [Section 2], gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Rhodes*, 393 U.S. at 29.

Furthermore, *Richardson* only addressed an equal protection challenge to permanent disenfranchisement. It did not examine or rule upon an Eighth Amendment claim, as the present case requires. Whether a

punishment is "cruel and unusual" within the meaning of the Eighth Amendment requires ascertaining society's "evolving standards of decency," which, in turn, are determined by "evidence of contemporary values." *Graham*, 560 U.S. at 58, 62. Neither *Richardson*, which was decided nearly half a century ago, nor the 19th century history of Section 2 that the opinion recounted appear obviously relevant to the "evolving standards of decency" of today that the Eighth Amendment embodies. *Id.* at 58. We therefore see no way in which Section 2, as interpreted by *Richardson*, precludes an Eighth Amendment challenge to permanent criminal disenfranchisement today.

Our dissenting colleague contends that *Richardson* forecloses nearly all constitutional challenges to felon disenfranchisement. The argument goes: Because the Eighth Amendment's protection from cruel and unusual punishment is incorporated against the states through the Due Process Clause in Section One of the Fourteenth Amendment, and because *Richardson* held that California's permanent felon disenfranchisement did not violate Section One's Equal Protection Clause (a different clause than the Due Process Clause in Section One), Mississippi's law cannot violate the Eighth Amendment through Section One's Due Process Clause. One need not do more than restate the dissent's argument to demonstrate its lack of merit. As an initial matter, *Richardson* decided an Equal Protection challenge to permanent felon disenfranchisement, not a challenge based on a substantive right incorporated through the Due Process Clause. *Richardson*'s reading of how the Equal Protection Clause in Section One is limited by the representation reduction mechanism in Section Two says nothing about narrowing the scope of substantive rights incorporated through the Due Process Clause. The Supreme Court has made clear that the substantive rights contained in the Bill of Rights—including those of the Eighth Amendment—are not diluted or somehow lesser in content by virtue of their

being incorporated through the Fourteenth Amendment. To the contrary, "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)); *see also Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (applying the Eighth Amendment through the Fourteenth by looking to the "norms that currently prevail," not "the standards that prevailed when the Eighth Amendment was adopted in 1791"). The dissent's novel theory of constitutional law is unsupportable.

The dissent's citations to generic canons of statutory interpretation are also meritless. The dissent argues that we allow the Eighth Amendment's "general" prohibition on cruel and unusual punishment to override Section Two's "specific" authorization of felon disenfranchisement as punishment. As an initial matter, we do not adopt the dissent's characterization of the Eighth Amendment as a "general" provision that must yield to the implicit authorization of felon disenfranchisement in Section 2 of the Fourteenth Amendment. Were that true, then no constitutional challenge to a state's felon disenfranchisement law would be possible, a result that is plainly incompatible with the Supreme Court's decision in *Hunter*. The dissent acknowledges that constitutional grants of power to legislate in a certain area "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Post* at 57 (quoting *Williams v. Rhodes*, 393 U.S. 23, 29 (1968)). Our reading employs *this* canon of constitutional interpretation. It is the interpretive method that the Supreme Court has expressly instructed the lower courts to follow. And it is the one the Court has applied to an analogous question of whether felon

disenfranchisement may violate a substantive constitutional right. The answer to that question is clear: a state's felon disenfranchisement law may violate the Constitution, Section Two notwithstanding. *See Hunter*, 471 U.S. at 233.

We consider, then, whether Mississippi's permanent disenfranchisement scheme is supportable today under the Eighth Amendment.

2. Permanent Disenfranchisement Under Section 241 is Punishment

As is self-evident from its text, the Eighth Amendment's Cruel and Unusual Punishment Clause applies only to punishments. The threshold Eighth Amendment issue therefore is whether Section 241 constitutes a punishment or, instead, a non-punitive regulation of the electoral franchise.

Our court has adopted "an intents-effects test" to help determine whether a statute constitutes punishment under various constitutional provisions, including the Eighth Amendment. *Does 1-7 v. Abbott*, 945 F.3d 307, 314 (5th Cir. 2019). Under this test, "[i]f the intention of the legislature was to impose punishment, that ends the inquiry[.]" *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)). In reviewing the legal context in which the Mississippi Constitutional Convention of 1890 enacted Section 241, we find strong evidence that the body's intent was to establish a punitive law, punishing and disenfranchising the targeted convicts without any legitimate penological goals.

As one of the "fundamental conditions" of Mississippi's reentry to the Union following the Civil War, Congress forbade "the constitution of Mississippi" from ever being "amended or changed [so] as to deprive any citizen or class of citizens of the United States of the right to vote . . . *except as a punishment* for such crimes as are now felonies at common law, whereof

they shall have been duly convicted." Act of February 23, 1870, ch. 19, 16 STAT. 67 ("Readmission Act") (emphasis added). This condition on readmission, also imposed on other formerly Confederate states, was meant to address the nefarious tactics to restrict black suffrage already emerging in the Southern states despite the Fifteenth Amendment's recent passage. *See Oregon v. Mitchell*, 400 U.S. 112, 167 n.18 (1970). Under the plain language of the Readmission Act, Mississippi may only alter its constitution to authorize disenfranchisement if it does so *as a punishment* for a common law felony offense. This fundamental condition on Mississippi's power to enact a disenfranchisement scheme cannot be ignored: "the manner of [Section 241's] codification . . . [is] probative of the legislature's intent." *Smith*, 538 U.S. at 94. Therefore, Section 241 of Mississippi's 1890 Constitution—a post-Readmission Act felon disenfranchisement provision—must be construed as a punitive measure for felony convictions in order for the provision to comply with binding federal law. *See Jones v. Governor of Fla.*, 950 F.3d 795, 819 (11th Cir. 2020) (concluding that "[d]isenfranchisement is punishment," based in part on the fact that "the Readmission Act of Florida authorized felon disenfranchisement *only* as punishment.") (emphasis in original).[5]

[5] The dissent points out that the Eleventh Circuit reached a contrary conclusion in a different case, one involving whether an amendment to Alabama's voter disenfranchisement law was retroactive punishment that violated the Ex Post Facto clause. *Post* at 62 (discussing *Thompson v. Alabama*, 65 F.4th 1288, 1300 (11th Cir. 2023). True, the Eleventh Circuit did conclude that Alabama's new law—ratified by the state's voters in 1996—did not constitute punishment. *Id.* at 1303–1308. But, contrary to the dissent's claim, the Eleventh Circuit did not reach this conclusion despite the terms of the Readmission Act. The court never once mentioned the Readmission Act, let alone analyzed whether Alabama's modern law was punitive in light of the limitations the Readmission Act placed on the state's ability to disenfranchise its citizens. This case provides no support for the dissent's decision to ignore the plain terms of Mississippi's Readmission Act.

Though there is historical evidence that some members of the 1890 Mississippi Constitutional Convention viewed the Mississippi Readmission Act generally as an unconstitutional intrusion into Mississippi's power to regulate elections,[6] there is no evidence that the Convention viewed the Act's limitation of disenfranchisement to cases of criminal punishment as invalid. More importantly, to conclude that Section 241 was not intended to impose punishment would require us to also conclude that Mississippi has been, and continues to be, in violation of the Readmission Act. Such a dramatic holding is not only unwarranted given the complete lack of evidence that Section 241 was intended to contravene the Readmission Act, but it would also expose Mississippi to broad liability for this violation. *See Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 739 (5th Cir. 2020) (allowing a claim that Mississippi violated the education provisions of the Readmission Act to proceed). Faced with the choice between reading Section 241 to comply with applicable federal law or reading it to violate the Readmission Act, we should "choose the interpretation . . . that has a chance of avoiding federal

---

Indeed, as the *Thompson* court itself noted, "disenfranchisement can be penal or nonpenal." *Id.* at 1303. "Accordingly, courts must determine the legislative intent behind the felon disenfranchisement statute or constitutional provision under consideration before holding that it is penal or nonpenal for constitutional purposes." *Id.* And here in this case, we have strong evidence of intent that the Eleventh Circuit never considered—the plain text of Mississippi's Readmission Act which prohibits disenfranchisement "except as a punishment for such crimes as are now felonies at common law." It is no wonder the cases reach different conclusions.

[6] The Convention's Judiciary Committee produced a report implying that the "fundamental conditions" of readmission that the Act purported to impose on the State exceeded Congress's constitutional powers. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION at 83-87; *see also* William Alexander Mabry, *Disenfranchisement of the Negro in Mississippi* Vol 4. No. 3 JOURNAL OF SOUTHERN HISTORY 318, 325 (1938). Notably, this report concluded that franchise regulations like poll taxes and residency requirements were permitted under the Readmission Act. It was silent on the Act's limitation of felon disenfranchisement to punishment.

preemption." *Planned Parenthood of Houston and Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005).[7]

Neither the Secretary nor the dissent seriously engage with Plaintiffs' argument that the Readmission Act determines Section 241's purpose. The Secretary asserts that Plaintiffs' reliance on the Readmission Act to determine the Convention's intent is "self-defeating" and "illogical" because the Act permits disenfranchisement as punishment, and therefore ultimately undermines Plaintiffs' Eighth Amendment claim—an argument the dissent echoes. This argument attacks the wrong part of the analysis, failing to address the threshold question: whether Section 241's disenfranchisement inflicts a punishment in the first place. As to that question, the Readmission Act's authorization of disenfranchisement as punishment that the Secretary relies on supports Plaintiffs' position that the law is punishment. The Secretary and dissent also argue that the plain text of Section 241's criminal disenfranchisement provisions evinces no intention to punish and appears alongside nonpunitive regulations like age, competency, and residency requirements. We are unconvinced, however, that the disenfranchisement provisions' mere placement alongside regulatory franchise provisions is strong evidence that the former were not intended as punishment. "The location and labels of a statutory provision do not by themselves transform a [criminal] remedy into a [civil] one." *Smith*, 538 U.S. at 94 (2003); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (legislators can intend one provision of a law

[7] The dissent wishes to ignore the Readmission Act, declaring that the question whether Mississippi would violate the Act by passing non-punitive disenfranchisement regulations "is not before us." *Post* at 62. With respect, we fail to see how the dissent's conclusion—that Mississippi's disenfranchisement scheme is *not* punitive—would not immediately raise the question (and likely answer it) of whether the state had violated the terms of its readmission.

to have "a character of its own not to be submerged by its association" with neighboring provisions). Finally, the Secretary argues in a footnote that reading the Readmission Act to impose limits on Mississippi's power to disenfranchise—to read the Act to mean what it says—would violate the principle of "equal sovereignty," citing to *Shelby County v. Holder*, 570 U.S. 529 (2013). *Shelby County*, though, held no such thing. It expressly recognized that Congress "may draft" a law imposing burdens and limitations on some states and not others, and held merely that the method by which the Voting Rights Act did so was no longer justified given political and social changes since its formulation. 570 U.S. at 557.

We think that Section 241 must be read in light of the explicit requirements of the Readmission Act that Mississippi may only disenfranchise persons as punishment for conviction of a common law felony. Considered in this light, there is clear proof that Section 241 was intended as punishment—indeed, there can be no other permissible intention under the Readmission Act.

3. Section 241 Violates Society's Evolving Standards of Decency

Having determined that Section 241 inflicts punishment, our next task is to determine whether its permanent denial of the franchise for conviction of an enumerated crime is "cruel and unusual" punishment under the Eighth Amendment as applied to Plaintiffs and their class. That is, we must decide whether this practice is in accord with "the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58. In undertaking this inquiry, we first consider whether "there is a national consensus" against the challenged punishment. *Id.* at 61. The Supreme Court has instructed that this determination "should be informed by objective factors to the maximum possible extent." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). The "clearest and

most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* (internal quotation marks omitted); *see also Graham*, 560 U.S. at 61 ("The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the . . . practice at issue.") (internal quotation marks omitted). These benchmarks, however, are not completely dispositive of the matter. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of [Mississippi's voter disenfranchisement scheme] under the Eighth Amendment." *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *see also Graham*, 560 U.S. at 61 (same).[8]

---

[8] In *Graham v. Florida*, the Supreme Court explained that the two-step analysis outlined above applies when a "case implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes." 560 U.S. at 61. The Court uses this "categorical approach" in order to craft "categorical rules to define Eighth Amendment standards." *Id.* at 60, 62. By contrast, in cases where the Court considers "a gross proportionality challenge to a particular defendant's sentence," its analysis "begin[s] by comparing the gravity of the offense and the severity of the sentence." *Id.* at 60. In this case, it is not a particular defendant's sentence but rather a punishment "itself [that] is in question." *Id.* at 61. In other words, this case involves a "particular type of [punishment]"—permanent disenfranchisement—"as it applies to an entire class of offenders who have committed a range of crimes"—felons convicted of Section 241 disenfranchising offenses who have completed all terms of their court-imposed sentences. *Id.* Accordingly, and in light of the fact that no party suggests otherwise, we follow the Court's categorical approach to assessing this claim. *Id.*

The dissent argues that the categorical approach is inapplicable because the Supreme Court has so far only applied that analysis to sentences of death and of life without parole. That is true, but all it proves is that this case presents a res nova question. Having concluded that Section 241 exacts a punishment, we must ascertain whether that punishment exceeds the limits of the Eighth Amendment. As discussed above, the Supreme Court has instructed that, when examining the constitutionality of a particular practice of punishment applied to a range of offenses, rather than a specific defendant's sentence, courts should employ the categorical approach. *Graham*, 560 U.S. at 60–61. Such is the inquiry here, and so we follow the Supreme Court's instruction. The dissent offers

i. National Consensus Against Permanent Disenfranchisement as a Punishment for Offenders Who Have Completed Their Sentences

To assess whether there is a "national consensus" against the challenged punishment, we consider "objective indicia of society's standards" as embodied in legislation, including not only the aggregate number of jurisdictions rejecting the punishment but also any consistent legislative trends in that direction. *Graham*, 560 U.S. at 62.

Turning first to legislation, an exhaustive review of state laws shows that the overwhelming majority of states oppose the punishment of permanently disenfranchising felons who have completed all terms of their sentences. Currently, thirty-five states and the District of Columbia do not permanently disenfranchise felons. *See* Appendix *infra*. And four other states only permit permanent disenfranchisement for corrupt practices in elections or governance. *Id.* For example, Maryland permanently disenfranchises felons convicted for buying or selling votes, while Missouri does so only as a result of a conviction for an offense "connected with right of suffrage." MD. CODE, ELEC. LAW § 3-102(b); MO. REV. STAT. § 115.133.2. Mississippi is one of only eleven states that still permanently disenfranchises felons for offenses other than those pertaining to elections. Put another way, thirty-nine states plus the District of Columbia do not impose lifetime disenfranchisement as a punishment for offenses unrelated to protecting the honest administration of elections.

Significantly, the Supreme Court has found a national consensus against a punishment when far fewer states than here opposed it. For

---

no alternative other than to forgo the Eighth Amendment analysis completely. That we cannot do. "The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights." *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

example, in *Atkins v. Virginia*, the Court determined that a "national consensus ha[d] developed against" executing the "mentally retarded"[9] when thirty states had legislatively proscribed the practice. 536 U.S. at 321, 326 (holding that executing members of this class of offenders is cruel and unusual). And the same number of states, thirty, had opposed the death penalty for juvenile offenders—either by "express provision [in legislation] or judicial interpretation"—when the Court held that practice to be cruel and unusual. *See Roper v. Virginia*, 543 U.S. 551, 564 (2005). Indeed, that only eleven states authorize the punishment challenged here closely resembles the statistics considered in *Enmund v. Florida*, in which the Court emphasized that the fact that only eight jurisdictions authorized the death penalty for participation in a robbery during which an accomplice commits murder "weigh[ed] on the side of rejecting capital punishment" for that offense. 458 U.S. 782, 793 (1982); *see also Kennedy v. Louisiana*, 554 U.S. 407, 426 *as modified* (Oct. 1, 2008) (holding that capital punishment for the crime of child rape violates the Eighth Amendment and observing that, "[t]hough our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind").

A national consensus that a punishment is cruel and unusual may be further evidenced by a clear and consistent trend in state legislatures to abandon the punishment, particularly in response to a court decision upholding the punishment's validity. *Roper*, 543 U.S. 566–67 (explaining that, besides the sheer number of states rejecting a practice, the "consistency of the direction of change" is a significant factor in determining whether

[9] The contemporary preferred terminology for such persons is people with intellectual or cognitive disabilities. *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

there is a national consensus against a practice). In *Penry v. Lynaugh*, for example, the Court held that the execution of the "mentally retarded" did not violate the Eighth Amendment. 492 U.S. 302, 334 (1989). The Court reasoned that the laws of sixteen states and the federal government[10] precluding the execution of this vulnerable class of persons were insufficient to show a national consensus against this practice. *Id.* at 334. Thirteen years after *Penry*, the Court revisited that decision in *Atkins*. Again, the Court considered whether a national consensus existed against capital punishment for the "mentally retarded," this time focusing primarily on the development of any consistent trends since *Penry* opposing this practice. What "was significant," the Court explained, was "not so much the [total] number of these States" that had acted since *Penry* to ban executing members of this class of offenders—sixteen had done so—"but the consistency of the direction of change." *Atkins*, 536 U.S. at 315. As the Court succinctly put it, "[m]uch ha[d] changed since" *Penry*, and, indeed, "a national consensus ha[d] developed" against the challenged practice in response to the earlier decision. *Id.* at 314, 316.

Similarly, in *Roper*, which struck down the juvenile death penalty, the Court stressed the consistency of the direction of change in rejecting that practice. 543 U.S. at 568. Though only five states had abandoned juvenile executions in the fifteen years since the Supreme Court upheld the punishment in *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989), the *Roper* Court followed *Atkins*'s admonition that what matters under the Eighth Amendment is "not so much" the absolute number of states that have abandoned a particular practice or the pace of that abandonment, but instead

[10] Only two states and the federal government specifically prohibited executing the cognitively disabled, while fourteen other states prohibited the death penalty categorically. *Penry*, 492 U.S. at 334.

the "consistency of the direction of change." *Id.* at 566. Thus, the shift in state laws between *Stanford* and *Roper*, though smaller in number, was nonetheless "significant" because, as in *Atkins*, "the same consistency of direction of change ha[d] been demonstrated." *Id.* at 565, 566.

With regard to lifetime felon disenfranchisement, at the time the Supreme Court decided *Richardson* in 1974, twenty-seven states permitted the practice as applied to felons whose offenses were unrelated to elections or good governance and who had completed all terms of their sentences. *See* Appendix. Currently, only eleven do. Since *Richardson*, sixteen states have stopped the practice of imposing lifetime disenfranchisement on felons who have served their sentences for offenses unrelated to elections or governance. *See* Appendix. That is the exact number of states that changed their laws to reject the execution of the "mentally retarded" between *Penry* and *Atkins*. And it is more than threefold the total number of states that abolished the juvenile death penalty in the timespan between *Stanford* and *Roper*. The evidence clearly demonstrates "consistency [in] the direction of change," and a repudiation of permanent felon disenfranchisement. *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315); *see also* Amicus Brief of the District of Columbia, et al., *Community Success Initiative v. Moore*, No. 331PA21 at 4–9 (N.C. Aug. 17, 2022) (discussing the "clear and growing consensus among states" against permanent disenfranchisement). That a trend in abandoning a punishment has proven so durable and long-lasting demonstrates that society has truly turned away from that punishment. In this way, the steady rejection of permanent felon disenfranchisement over nearly half a century is as much, or even more, consistent than the change in the punishment laws considered in *Atkins* and *Roper*.

In sum, the objective barometers of society's standards—namely, the rejection of permanent felon disenfranchisement for offenses unrelated to elections and good governance by a clear majority of states and the

consistency in the trend toward abolition of the practice—provide sufficient evidence of a national consensus against punishing felons by permanently barring them from the ballot box even when they have completed all terms of their sentences.

The Secretary counters that there can be no national consensus against permanent felon disenfranchisement because many states disenfranchise felons for some period of time, such as during their period of incarceration or until completion of parole or probation. It is true that almost all states disqualify felons from voting at least while they are incarcerated or under supervision, Maine and Vermont being the exceptions. The dissent makes the same argument, asserting that there can be no national consensus when the states disenfranchise felons in such diverse ways. But this case does not concern the validity of temporary felon disenfranchisement laws, or the disenfranchisement of the incarcerated, or any other particular mode of disenfranchisement not contained in Section 241. In the present case, we are concerned solely with Mississippi's practice of punishing felons who have completed all terms of their sentences by *permanently* disenfranchising them for life. And objective evidence makes clear that a supermajority of states reject this practice.

The Secretary also emphasizes that Section 241 only permanently disenfranchises for the categories of felonies enumerated therein and that therefore individuals who commit felonies not included under Section 241 are not disqualified from voting. But, having already determined that the state permanently disenfranchises as punishment, *see supra* part III.D.2, the fact that the state chooses not to exact this punishment against all felons is immaterial to our current analysis of whether a national consensus against this punishment exists. We need not, as the Secretary apparently invites us to do, go felony-by-felony, asking whether there is a national consensus against permanent disenfranchisement as a punishment for each specific

felony offense.[11] Rather, the objective indicia of society's standards demonstrate that a consensus exists against meting out this sanction as a punishment, and the Secretary's arguments to the contrary are unavailing. Based on the evidence before us, we conclude that our society has set its face against permanent disenfranchisement as a punishment.

ii. Independent Judicial Determination that Section 241 is Cruel and Unusual

We must next "determine, in the exercise of our own independent judgment, whether [permanent disenfranchisement under Section 241] is a disproportionate punishment for" those Mississippians who have completed their sentences but remain permanently disenfranchised. *Roper*, 543 U.S. at 564. This assessment requires us to consider "the severity of the punishment in question," "the culpability of the offenders at issue in light of their crimes and characteristics," and "whether the challenged . . . practice serves legitimate penological goals." *Graham*, 560 U.S. at 67.

Before undertaking this inquiry, we emphasize that the issue here is not, of course, whether the offenses listed in Section 241 warrant criminal sanction. Rather, the question is whether punishing an individual who has served the terms of his sentence by forever withholding from him the right to

[11] If we were to accept the invitation to investigate Mississippi's disenfranchisement scheme felony-by-felony, it would not stand the state in good stead. Section 241 lists a fraction of the hundreds of crimes on Mississippi's books. That means that Mississippi citizens who are convicted of non-Section 241 offenses are not disenfranchised for life. Consequently, the Mississippi felons who remain permanently disenfranchised after serving all of their sentences are subjected to an especially cruel and unusual punishment as compared to Mississippi felons not convicted of Section 241 crimes and felons in states that do not engage in permanent disenfranchisement. And the Secretary has presented no evidence that any penological or other goals are furthered or justified by permanently disenfranchising only the felons convicted of the crimes encompassed in Section 241's list.

vote constitutes cruel and unusual punishment under the Supreme Court's precedents and our own reasoning. And to determine whether this punishment is proportional to Plaintiffs' offenses, it is first necessary to assess the importance of the right that Plaintiffs are denied. *See Atkins*, 563 U.S. at 311 ("It is a precept of justice that punishment for crime should be graduated and proportioned to the offense.") (cleaned up) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

In a democracy, the right to vote is a "fundamental political right" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (observing that the right to vote is "a right at the heart of our democracy"). "No right is more precious in a free country" than the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* "A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family." *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973) (Powell, J., dissenting).

The Supreme Court's soaring language on the right to vote makes clear two fundamental and interrelated points: (1) voting is the lifeblood of our democracy and (2) the deprivation of the right to vote saps citizens of their essential right to have a say in how and by whom they are governed. Permanent denial of the franchise, then, is an exceptionally severe penalty, constituting nothing short of the denial of the democratic core of American citizenship. It is an especially cruel penalty as applied to those whom the justice system has already deemed to have completed all terms of their sentences. These individuals, despite having satisfied their debt to society, are precluded from ever fully participating in civic life. Indeed, they are excluded from the most essential feature and expression of citizenship in a democracy—voting.

Turning to the culpability of Plaintiffs' class, we observe that Section 241's punishment applies equally to all members of the class, regardless of their underlying crime or the class member's individual mental state during the commission of the crime. Section 241 disenfranchises murderers and timber thieves alike; it does not distinguish between mature adults and juveniles, accomplices, or the intellectually disabled—the latter three being classes of persons the Supreme Court has recognized as categorically less culpable. *Roper*, 543 U.S. at 570; *Enmund*, 458 U.S. at 800–801; *Atkins*, 536 U.S. at 317–18. It is clear, then, that Section 241 does not reflect society's measured response to a felon's moral guilt. Rather, as the provision's odious origins make clear, Section 241's infliction of disenfranchisement on only certain offenders has nothing to do with their heightened culpability.

Next, we consider whether the punishment of permanent disenfranchisement advances any legitimate penological goals. *Graham*, 560 U.S. at 68. A punishment that "lack[s] any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. The traditional justifications for punishment are incapacitation, rehabilitation, deterrence, and retribution. *Id.* at 71–74.

Taking these in turn, incapacitation cannot support Section 241's punishment because it does not incapacitate a convict from committing crimes; it only prevents him from voting. While felon disenfranchisement could potentially prevent recidivism if it were applied specifically to those convicted of voting-related offenses, Section 241, as discussed, applies to broad categories that are unrelated to elections crimes. And as to these categories of crimes, Section 241 does nothing to thwart a former felon from reoffending. Rather, the only conduct it incapacitates is voting. Further, there is evidence that disenfranchisement may actually *increase* recidivism. One comparative study found that "individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to

be rearrested than those released in states that restore the franchise post-release." Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 426 (2012).

Section 241 does not further the goal of rehabilitation. Lifetime disenfranchisement does not contribute to reforming an offender. Quite to the contrary, it hinders reintegration into society by denying voting, a cherished marker and right of citizenship. *See Reynolds*, 377 U.S. at 560. The Secretary has not argued otherwise, claiming that felon disenfranchisement's precise purpose is to exclude a former felon from participation in this aspect of our society. There is "no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights." *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J. concurring). This exclusion is not rehabilitative. If anything, it can only reinforce the stigma that the disenfranchised are "beyond redemption." Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004); *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1112–16 (2002) (discussing the republican case against disenfranchisement as anti-rehabilitative).

For its part, deterrence only works if an individual is aware that a particular punishment attends a particular offense. It is questionable—and we have been presented with no evidence to suggest otherwise—to what extent Mississippians, and specifically those who would consider committing a crime covered by Section 241, are aware they could permanently lose the right to vote by virtue of a conviction. Moreover, it is unclear—and again we have been presented with no evidence that makes it clear—what marginal

deterrent effect the prospect of losing the franchise has when a person committing a felony already faces the more immediate sanction of criminal confinement. Similarly, there is no reason to believe that the punishment of disenfranchisement will deter recidivism because the felon who has lost the franchise under Section 241 has lost it forever, regardless of his future conduct.

That leaves retribution. While this is a "legitimate reason to punish," *Graham*, 560 U.S. at 71, "the severity of the appropriate punishment necessarily depends on the culpability of the offender[.]" *Atkins*, 536 U.S. at 319. We have explained that the continuing—indeed, unending—punishment Section 241 inflicts is wholly unrelated to the moral culpability of the diverse class of felons it applies to. Moreover, because the sentences imposed on Plaintiffs are necessarily ones that are capable of being completed, the criminal justice system has implicitly determined that Plaintiffs who served their sentences are capable of being returned to a position within society. And the fact that Plaintiffs have actually completed all terms of their sentences means that they merit being restored to their basic rights as citizens. To permanently remove from them the most precious right of citizenship is thus disproportionate to their offenses and cannot stand as a permissible exercise of retribution. *See Roper*, 543 U.S. at 564; *Reynolds*, 377 U.S. at 561.

For those adjudicated to have committed a crime enumerated in Section 241 and whose judicially imposed sentence has been completed, the provision tacks on an exceptionally severe penalty—one that is unconstitutional as to all it ensnares. Our nation has a tradition of fixing punishment to meet the crime. After a sentence is complete, the individual is said to have paid his debt to society. While some disabilities may attach to a felony conviction that persist beyond the criminal sentence, in a democracy, to deny the right to vote is to render one without a say in the manifold ways

the government touches his life. That Mississippi denies this most precious right permanently, despite the felon's sentence having been served, is disproportionate and inconsistent with the consensus against permanent disenfranchisement among state legislatures. The punishment of permanent disenfranchisement also contravenes the Eighth Amendment's proportionality principle because it lacks a nexus with any legitimate penological justification. *See Miller*, 567 U.S. 460, 489 (2012); *Graham*, 560 U.S. at 71. Thus, insofar as it applies to those who have fulfilled all terms of their sentences, Section 241 is proscribed by the Eighth Amendment's advancing standards of decency under the Constitution.

VII. Conclusion

"No right is more precious in a free country" than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* This right is not only fundamental to the democratic ordering of our society, it is also expressive of the dignity of American citizenship—that each person is an equal participant in charting our nation's course. *Reynolds*, 377 U.S. at 533; *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[O]ne source of [the right to vote's] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

Mississippi denies this precious right to a large class of its citizens, automatically, mechanically, and with no thought given to whether it is proportionate as punishment for an amorphous and partial list of crimes. In so excluding former offenders from a basic aspect of democratic life, often long after their sentences have been served, Mississippi inflicts a disproportionate punishment that has been rejected by a majority of the states and, in the independent judgment of this court informed by our precedents, is at odds with society's evolving standards of decency. Section

241 therefore exacts a cruel and unusual punishment on Plaintiffs. Accordingly, we REVERSE the district court's grant of summary judgment to the Secretary on Plaintiffs' Eighth Amendment claim and RENDER judgment for Plaintiffs on that claim. The case is REMANDED with instructions that the district court grant relief declaring Section 241 unconstitutional and enjoining the Secretary from enforcing Section 241 against the Plaintiffs and the members of the class they represent.

APPENDIX

States with permanent criminal disenfranchisement penalties

1974	**2000**	**2020**
Alabama	Alabama	Alabama
Alaska	Arizona	Arizona
Arizona	California	Delaware
Arkansas	Delaware	Florida
California	Florida	Iowa
Connecticut	Iowa	Kentucky
Florida*	Kentucky	Maryland*
Georgia	Maryland	Massachusetts*
Idaho	Massachusetts*	Mississippi
Iowa	Mississippi	Missouri*
Kentucky	Missouri	Nebraska
Louisiana	Nebraska	New Jersey*
Maryland*	New Hampshire	Tennessee
Massachusetts*	New Jersey*	Virginia
Mississippi	New Mexico	Wyoming

Missouri	New York
Nebraska	Ohio*
Nevada	Tennessee
New Hampshire	Virginia
New Jersey*	Washington
New Mexico	Wyoming
New York	
North Dakota	
Oklahoma	
Rhode Island	
South Carolina	
Tennessee	
Texas	
Utah*	
Virginia	
Washington	
Wyoming	

* *Permanent disenfranchisement for election-related offenses only.*

States with permanent disenfranchisement penalties (with citations)

1974		2000		2020	
State	**Citation**	**State**	**Citation**	**State**	**Citation**
Alabama	*Ala. Const. art. VIII, § 182; Ala. Code tit. 17 § 15 (1958)*	Alabama	*Ala. Const. art. VIII sec. 177 (see also Amendment 579 (1996)); Ala. Code.*	Alabama	*Ala. Const. art. VIII § 177; Ala. Code. § 15-22-36.1.*

			17-3-10 (2000)		
Alaska	*Ak. Const. art. V § 2; Ak. Code § 15.05.030 (1960)*	Arizona	*Ariz. Const. art. 7 sec. 2; Ariz. Stat. 13-905, 13-909-12 (2000)*	Arizona	*Ariz. Rev. Stat. § 13-908(A); Ariz. Rev. Stat. 13-907(A)*
Arizona	*Ariz. Const. art. 7 § 2; Ariz. Rev. Stat. § 16-101(5)*	California	*Cal. Const. art. 2 sec. 4; Cal. Penal Code 4852.01, 4852.17, 4853 (2000)*	Delaware	*Del. Const. art. 5 sec. 2*
Arkansas	*Ark. Const. art. 3 § 6 (1947)*	Delaware	*Del. Const. art. 5 sec. 2, 7; 15 Del. Code sec. 1701, 5104 (2000)*	Florida	*Fla. Const. art. VI, § 4; Fla. Stat. § 944.292(1); Fla. Const. art. IV, § 8 (a), (c)*
California	*Cal. Const. art. 2 § 3 (1972); Elec. Code §§ 310, 321, 383, 389, 390; Ramirez v. Brown, 507 P.2d 1345, 1347 (Cal. 1973)*	Florida	*Fla. Stat. 97.041, 944.292, 944.293; Fla. Const. art. 6 sec. 4 (2000)*	Iowa	*Iowa Const. art. 2 sec. 5*
Connecti-cut	*Conn. Rev. Stat. 9-46 (1973)*	Iowa	*Iowa Const. art. 2 sec. 5; Iowa Code sec. 48A.6 (2000)*	Kentucky	*Ky. Const. sec. 145*

Florida*	*Fla. Const. art. VI §. 4 (1973); Fla. Code 97.041(5)*	Kentucky	*Ky. Const. sec. 145; Ky. Stat. 116.025 (2000)*	Mary-land*	*Md. Elec. Code sec 3-102*
Georgia	*Ga. Const. art. II § 2-701 (1945)*	Maryland	*Md. Const. art. 1 sec. 4; Md. Code art. 33, sec. 3-102 (2000)*	Massa-chusetts*	*Ma. Const. art 3; Ma. Gen. L. 51 sec. 1*
Idaho	*Idaho Const. art. 6 § 3 (1947); Idaho Code 34-402 (1949)*	Massa-chusetts*	*Ma. Const. art 3; Ma. Gen. L. 51 sec. 1 (2000)*	Missis-sippi	*Miss. Const. art. XII § 241*
Iowa	*Iowa Const. art. 2 § 2*	Missis-sippi	*Miss. Const. sec. 241; Miss Code 23-5-35 (1972)*	Missouri*	*Mo. Rev. Stat. § 115.133.2*
Kentucky	*Ky. Const. art. 145 (1955)*	Missouri	*Mo. Stat. 115.113 (2000)*	Nebraska	*Neb. Rev. Stat. § 29-112; § 32-313*
Louisiana	*La. Const. art. 8 § 6 (1968)*	Nebraska	*Neb. Stat. 32-313 (2000); Ways v. Shively, 264 Neb. 250 (2002)*	New Jer-sey*	*N.J. Stat. 19:4-1*
Mary-land*	*Md. Const. art. I § 2 (1972); Md. Code. Art. 33 ¶ 3-4 (1974)*	New Hamp-shire	*N.H. Const. Pt. 1 art. 11 (2000)*	Tennes-see	*Tenn. Code Ann. § 40-29-204*
Massa-chusetts*	*Mass. Gen. Laws chp. 51 § 1 (1972)*	New Jer-sey*	*N.J. Stat. 19:4-1 (2000)*	Virginia	*Va. Const. art. II, § 1; art. V, § 12.*

Missis-sippi	*Miss. Const. § 241; Miss Code 23-5-35 (1972)*	New Mexico	*N.M. Stat. sec. 31-13-1 (2000)*	Wyoming	*W.S. Ann. 6-10-106; W.S. 7-13-105(a), (b); Wyo. Const. art. 4, § 5.*
Missouri	*Mo. Rev. Stat. 111.021 (1969)*	New York	*N.Y. Const. art. 2 sec. 3; N.Y. Code 5-106 (2000)*		
Nebraska	*Neb. Const. art. VI § 2; Neb. Rev. Stat. 29-112, 29-113 (1974)*	Ohio*	*Ohio Stat. 2961.01, 3599.39 (2000)*		
Nevada	*Nev. Const. art. 2 § 1; Nev. Rev. Stat. 213.090, 213.155*	Tennes-see	*Tenn. Code 40-29-105 (2000)*		
New Hamp-shire	*N.H. Const. art. 11 (1970); N.H. Rev. Stat. 607-A-2 (1974)*	Virginia	*Va. Const. art. 2 sec. 1; Va. Code 53.1-231.2 (2000)*		
New Jer-sey*	*N.J. Rev. Stat. 19:4-1 (1971)*	Washing-ton	*Wash. Const. art. 6 sec. 3; RCW 9.94A.637 (2000); Madison v. State, 161 Wash. 2d 85 (2007).*		
New Mexico	*N.M. Const. art. VII § 1 (1973)*	Wyoming	*Wyo. 6-10-106; 7-13-105 (2000)*		

New York	*N.Y. Elec. Law 152 (1964)*	
North Dakota	*N.D. Const. art. V § 127 (1960)*	
Oklahoma	*Okla. Const. art. III § 1 (1974)*	
Rhode Island	*R.I. Const. art. Am. XXXVIII (1973)*	
South Carolina	*S.C. Const. art. 2 sec. 7; S.C. Code 23-62 (1962, 1975 Supp)*	
Tennessee	*Tenn. Const. art. 4 sec. 2 ; Tenn. Code 2-205 (1971);*	
Texas	*Tex. Const. art. 16 sec. 2; Tex. Rev. Stat. art. 5.01 (1967)*	
Utah*	*Utah Const. art. IV sec. 8 (1971)*	
Virginia	*Va. Const. art. II sec. 2; Va. Code 24.1-42 (1973)*	
Washington	*Wash. Const. art. 6 sec. 3 (1974);*	

Wyoming	*Wyo. Const. art. 6 sec. 6 (1957); Wyo. Stat. 6-4 (1957); Wyo. Stat. 7-311 (1957)*

* *Permanent disenfranchisement for election-related offenses only.*

EDITH H. JONES, *Circuit Judge*, dissenting:

The panel decision holds that Section 241 of the Mississippi Constitution, recently upheld in this court against another challenge,[1] now fails the test of Eighth Amendment scrutiny, incorporated by the Fourteenth Amendment Due Process Clause. Because the majority never fully quotes the relevant provision, I begin with text, which states that a mentally competent inhabitant of Mississippi:

> who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector.

MISS. CONST. Art. 12, § 241.

Laws like this one have faced many unsuccessful constitutional challenges in the past. When the Supreme Court ruled that the Equal Protection Clause does not bar states from permanently disenfranchising felons, it dispensed some advice to the losing parties:

> We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them. . . . But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people . . . will ultimately come around to that

[1] *Harness v. Watson*, 47 F.4th 296, 311 (5th Cir. 2022) (en banc), *pet. for cert. filed* (Oct. 28, 2022) (No. 22-412).

> view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Richardson v. Ramirez, 418 U.S. 24, 55, 94 S. Ct. 2655, 2671 (1974). In other words: go and convince the state legislatures. Do the hard work of persuading your fellow citizens that the law should change.

Today, the court turns that advice on its head. No need to change the law through a laborious political process. The court will do it for you, so long as you rely on the *Due Process Clause*, rather than the *Equal Protection Clause*. With respect, this is not a road that the Constitution—or precedent—allows us to travel. I dissent.[2]

I.

Section One of the Fourteenth Amendment guarantees "due process" and "equal protection of the laws." U.S. CONST. amend. XIV § 1. After a long process of exegesis, it is settled that the Due Process Clause incorporates much of the Bill of Rights, and state governments must respect protections like the Eighth Amendment's prohibition of cruel and unusual punishment. *See McDonald v. City of Chicago*, 561 U.S. 742, 763, 130 S. Ct. 3020, 3034 (2010).

Section Two of the Fourteenth Amendment is less familiar but more specific. It reduces the number of representatives in Congress to which a state is entitled if that state disenfranchises any of its male, non-Indian citizens over the age of 21. But there is a single exception: states may not be penalized for disenfranchising a citizen "for participation in rebellion, *or other crime*." U.S. CONST. amend. XIV § 2 (emphasis added). The carve-out

---

[2] To be precise, I do not quarrel with the holding that Plaintiffs have standing to challenge Section 241 of the state constitution but not Section 253. And like the majority, I need not separately address the plaintiffs' First Amendment claim, which is inextricably bound with my conclusions regarding the Eighth Amendment.

reflects a long tradition in this country, and before that, in British law, and before that, in the Western world.[3] This tradition can be summed up in Lockean terms: if a person breaks the laws, he has forfeited the right to participate in making them. *See Green v. Bd. of Elections of N.Y.C.*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.).

Despite Section Two's explicit allowance of felon disenfranchisement, plaintiffs alleged in *Richardson* that California's felon disenfranchisement law violated Section One's Equal Protection Clause. The Supreme Court rejected the argument as it held that the specific language in Section Two casts light on the generalities of Section One. 418 U.S. at 43, 94 S. Ct. at 2665 (finding persuasive the petitioner's argument that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section One] of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by [Section Two] of the Amendment.").

The plaintiffs in today's case differ from those in *Richardson* in only one way: they allege that Mississippi's felon disenfranchisement law violates Section One's Due Process Clause. Their reasoning, and the majority's holding, relies on three propositions. One is the undisputed rule that the Due Process Clause incorporates the Eighth Amendment's prohibition against cruel and unusual punishments. But the other two propositions are false. Contrary to the majority, *Richardson*'s ruling extends beyond the Equal Protection context, and felon disenfranchisement is not a cruel and unusual punishment. I address each faulty proposition in turn.

---

[3] For a brief summary of that tradition, see George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 852-61 (2005).

II.

To begin with, *Richardson v. Ramirez* controls this case. Its holding did not rest on which part of Section One was invoked by the plaintiffs, but "on the demonstrably sound proposition that [Section One], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section Two] imposed for other forms of disenfranchisement." *Id.* at 55, 2671. This is far from the only language in the opinion that has applicability beyond the Equal Protection Clause. *See Richardson*, 418 U.S. at 43, 94 S. Ct. at 2665 ("[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section One] . . . that which was expressly exempted from . . . [Section Two] of the Amendment."); *id.* at 54, 2670 (relying on the "settled historical and judicial understanding of *the Fourteenth Amendment's effect* on state laws disenfranchising convicted felons") (emphasis added); *id.* at 55, 2671 (urging would-be reformers to petition the state legislatures rather than the courts); *id.* at 48, 2668 (focusing "on the understanding of those who framed and ratified the Fourteenth Amendment" as a whole). On this logic, it is irrelevant what clause of Section One is cited by plaintiffs. None of its provisions can be understood to bar what Section Two plainly allows.

It changes nothing that plaintiffs rely on Eighth Amendment precedent. That precedent is made applicable to Mississippi via the Due Process Clause. *Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 1421 (1962). Therefore, the Eighth Amendment right asserted by plaintiffs cannot exceed the scope of the Due Process Clause.

Even if the Eighth Amendment right were considered on its own terms, *Richardson*'s reading of Section Two must still guide our interpretation of its scope. As interpreters of the Constitution, judges must seek "a fair construction of the whole instrument." *McCulloch v. Maryland*, 17 U.S. (4

Wheat.) 316, 406 (1819). All of its provisions "should be interpreted in a way that renders them compatible, not contradictory." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("READING LAW"). Yet the majority's interpretation renders the Section Two proviso meaningless. It is useless for the Fourteenth Amendment to authorize felon disenfranchisement if the practice is made illegal by the Eighth. The canon against surplusage warns us against such unnatural readings. *Id.* at 174.

Thus, the Cruel and Unusual Punishments Clause should not be understood to prohibit what "the explicit language of the Constitution affirmatively acknowledges" elsewhere as legitimate. *Furman v. Georgia*, 408 U.S. 238, 380, 92 S. Ct. 2726, 2799 (1972) (Burger, C.J., dissenting); *see also Gregg v. Georgia*, 428 U.S. 153, 177, 96 S. Ct. 2909, 2927 (1976) (approving capital punishment under certain circumstances). *Cf. Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51, 79 S. Ct. 985, 990 (1959) (stating that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters."); *Romer v. Evans*, 517 U.S. 620, 634, 116 S. Ct. 1620, 1628 (1996) ("that a convicted felon may be denied the right to vote . . . is" an "unexceptionable" proposition). Following this rule, this court and others have concluded without reservation that "a state has the power to disenfranchise persons convicted of a felony," even permanently. *Shepherd v. Trevino*, 575 F.2d 1110, 1112 (5th Cir. 1978).[4]

[4] *See also Jones v. Governor of Fla.*, 950 F.3d 795, 801 (11th Cir. 2020) ("Regardless of the political trend toward re-enfranchisement, there is nothing unconstitutional about disenfranchising felons—even all felons, even for life." (citing *Richardson*, 418 U.S. at 56)); *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) ("The Supreme Court has ruled that, as a result of th[e] language of [Section 2], felon disenfranchisement provisions are presumptively constitutional.").

It is true that "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 8 S. Ct. 5, 9 (1968). For example, a state may not disenfranchise felons with racially discriminatory intent. *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 1922 (1985).[5] Likewise, as the majority recognizes, the Thirteenth Amendment bars involuntary servitude "except as a punishment for crime." U.S. CONST. amend. XIII. Nevertheless, certain involuntary work requirements imposed on convicted criminals may violate the Cruel and Unusual Punishments Clause. *Williams v. Henagan*, 595 F.3d 610, 622 n. 18 (5th Cir. 2010).

But that principle places a "limitation" on the "exercise" of a legitimate power; it cannot void the power entirely. *Williams*, 393 U.S. at 29, 89 S. Ct. at 9. Today's ruling goes far beyond *Hunter*'s holding that felon disenfranchisement must be exercised in accord with the Constitution. The majority concludes that the "punishment of permanent disenfranchisement" is entirely unconstitutional. This unjustifiably creates an internal conflict in the Constitution by holding that the Eighth Amendment preempts Section Two of the Fourteenth Amendment.

Moreover, even if this court found a conflict between the Eighth Amendment and Section Two of the Fourteenth—which, to restate emphatically, it should not have done—the established canons of interpretation dictate that Section Two should be given effect. It is both more specific and later in time than the Eighth Amendment. If "there is a conflict between a general

[5] To clarify a point for confused readers: this is not an issue in today's case. Sitting *en banc*, this court has already held that the current version of Section 241 was not enacted with discriminatory intent—a finding the majority neglects to mention in its long and irrelevant discussion of Mississippi's sordid constitutional history. *See Harness*, 47 F.4th at 311.

provision and a specific provision, the specific provision prevails." READING LAW at 183. "While the implication of a later enactment will rarely be strong enough to repeal a prior provision, it will often change the meaning that would otherwise be given to an earlier provision that is ambiguous." *Id.* at 330. And a "provision that flatly contradicts an earlier-enacted provision repeals it." *Id.* at 327.

Careening past all these standard interpretive guardrails, the majority circumvents *Richardson*, while purporting not to abrogate it, based on the "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958). I am unaware of any case, ever, in which a lower federal court has declared a Supreme Court decision overtaken by subsequent events—without being quickly overruled. At the time *Richardson* was issued, no one would have construed the Eighth Amendment to prevent felon disenfranchisement. Indeed, in *Richardson*, the Court cited "settled historical and judicial understanding." 418 U.S. at 54, 94 S. Ct. at 2670 The Court cited three of its decisions stretching back to the end of the nineteenth century that approvingly referenced felon disenfranchisement, and the Court twice affirmed three-judge court rulings in 1968 and 1973 that rejected challenges to such laws. *See id.* at 53–54, 2670. It is not for this court to say this wealth of authority has become outmoded. *See Agostini v. Felton*, 521 U.S. 203, 207, 117 S. Ct. 1997 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

III.

Even if *Richardson* had never been decided, the majority opinion would still be inconsistent with precedent and the meaning of the Eighth

Amendment. Felon disenfranchisement is neither cruel, nor unusual, nor a punishment.

A.

First, the majority incorrectly concludes that Mississippi's felon disenfranchisement law is a "punishment" for Eighth Amendment purposes. The majority correctly recites the two-part test for determining whether something is a "punishment" under the meaning of the Constitution. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003). Courts initially ascertain whether "the intention of the legislature was to impose punishment." *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. If so, "that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quotation marks omitted).

The majority neglects, however, to mention that the Supreme Court has already signaled that felon disenfranchisement is not a punishment. In *Trop v. Dulles*, the plurality wrote the following:

> A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But *because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise*.

356 U.S. at 96–97, 78 S. Ct. at 596 (emphasis added).[6] On the strength of this language, three other circuits have categorically held that felon

[6] The *Trop* Court was ruling in the context of the Ex Post Facto Clause. But because we assume the Constitution uses the word "punishment" consistently, the test for

disenfranchisement is nonpenal.[7] Only the Eleventh Circuit has departed from this categorical holding. *Thompson v. Alabama*, 65 F.4th 1288, 1304 (11th Cir. 2023) (charging the other circuits with "a misreading of *Trop*."). I am inclined to agree with the majority of circuits that *Trop* assumes disenfranchisement cannot be punishment. But even the Eleventh Circuit's reasoning cannot offer comfort to the majority. That court still concluded after applying the relevant test that Alabama's disenfranchisement law, which has a history and structure very similar to that of Mississippi's, was nonpenal. *Id.* at 1308.

Considering the text and structure of Section 241 demonstrates that it was not intended as a penal measure. The majority gives short shrift to these considerations, which ought to have been its primary focus. *Doe*, 538 U.S. at 92, 123 S. Ct. at 1147. To reiterate its language, this constitutional provision states that a mentally capable person:

> who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has

---

identifying constitutional "punishments" is the same for the Ex Post Facto Clause, the Eighth Amendment, and the Double Jeopardy Clause. *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019).

[7] *Simmons v. Galvin*, 575 F.3d 24, 43 (1st Cir. 2009) ("The Supreme Court has stated that felon disenfranchisement provisions are considered regulatory rather than punitive."); *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) ("Moreover, in *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-penal purpose. Accordingly, as a matter of federal law, disenfranchisement statutes do not violate the Ex Post Facto Clause of the U.S. Constitution."); *Green*, 380 F.2d at 450 ("Depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise.'" (quoting *Trop*, 356 U.S. at 97, 78 S. Ct. at 596)).

> never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector.

MISS. CONST. Art. 12, § 241. This provision does not so much as hint at a punitive intent toward felons any more than it implies an intent to punish non-citizens, short-term residents of Mississippi, those unregistered to vote, or those under the age of eighteen. It does not even single out felons for disqualification from the franchise—it merely defines the franchise in such a way as to exclude them from its bounds.[8] Moreover, Section 241 is part of the Mississippi Constitution's Article 12, which outlines the procedures for elections, not the punishment of criminals. By its own terms, Section 241 is a nonpenal exercise of Mississippi's regulatory authority over the franchise.

The majority opinion attempts to shift focus by pointing to language from the Readmission Act. That act barred Mississippi from depriving "any citizen or class of citizens" of the right to vote "except as a punishment." Act of February 23, 1870, ch. 19, 16 STAT. 67. The majority opinion worries that, if this court does not classify disenfranchisement as punishment, it would call into question whether Mississippi was properly readmitted to the Union, because Mississippi would therefore be depriving a class of citizens of the right to vote for a reason other than punishment. Hence, the majority concludes, any felon disenfranchisement that occurs in Mississippi is *per se* punitive for Eighth Amendment purposes.

---

[8] Compare Mississippi's Section 241 with a portion of the Alabama Constitution recently upheld as a nonpenal regulation of the franchise: "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." ALA. CONST. Art. VIII, § 177. The Eleventh Circuit found this text sufficient to indicate "a preference that [Alabama's] felon disenfranchisement provision be considered civil instead of criminal." *Thompson*, 65 F.4th at 1305.

But the Readmission Act is not a license to find that the intent of Section 241 was *per se* penal. Indeed, the Eleventh Circuit was briefed on the substantially identical text of Alabama's Readmission Act, yet nevertheless held that the Alabama Constitution's disenfranchisement provision was non-penal. *Thompson*, 65 F.4th at 1305. Simply put, the question whether Mississippi violated the Readmission Act is separate from the issue before us and involves a completely different set of interpretive questions. We are not obliged to interpret the word "punishment" to mean the same thing in the Eighth Amendment as in the Readmission Act—unlike our obligation to use the same definition for the Ex Post Facto Clause and the Eighth Amendment. It could well be that "punishment" in the Act merely means "consequence of a crime," rather than "punitive." But the proper interpretation of the Readmission Act is not before us. All this court may do is apply the definition of "punishment" used for Eighth Amendment purposes to the law at hand.

When the provision's text and structure are considered, and precedent is consulted, it becomes obvious that Section 241 is not intended as a punishment. The majority disregards these sources, choosing instead to rely on the text of the Readmission Act—which ironically was meant to *recognize* the very authority this court now repudiates. Punitive intent cannot be found on these facts.[9]

B.

The majority seemingly establishes a categorical rule that permanent felon disenfranchisement is cruel and unusual punishment. True, there is a passing mention that Mississippi's law is unconstitutional "as applied to

[9] The majority forbears analysis of the second prong of the test—whether the provision is so punitive as to negate the state's intention. I need not address that prong either. But I found no compelling arguments from the plaintiffs as to why Section 241 ought to be considered "punishment."

Plaintiffs and their class." But the majority opinion immediately proceeds to apply the test used to determine whether a punishment is *categorically* cruel and unusual. *See United States v. Farrar*, 876 F.3d 702, 717 (5th Cir. 2017). And its language and reasoning are hardly constrained to the facts of the case.

If courts were allowed to interpret "cruel and unusual" in line with the original meaning of those terms, there is no question that felon disenfranchisement would be neither cruel nor unusual. But in *Trop,* the Supreme Court held that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101, 78 S. Ct. at 598. In cases involving categorical rules against a type of punishment, this involves two steps. First, courts consider "objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 2022 (2010) (quotation marks omitted), *as modified* (July 6, 2010). Second, courts "determine, in the exercise of our own independent judgment, whether [the practice] is a disproportionate punishment." *Roper v. Simmons*, 543 U.S. 551, 564, 125 S. Ct. 1183, 1192 (2005). This assessment includes consideration of "the severity of the punishment in question," "the culpability of the offenders at issue in light of their crimes and characteristics," and "whether the challenged . . . practice serves legitimate penological goals." *Graham*, 560 U.S. at 67.

In applying this line of cases, the majority stretches precedent beyond the breaking point. As this court has recognized, categorical analysis has only been used to declare a narrow and well-defined range of punishments cruel and unusual. "The [Supreme] Court has undertaken categorical analysis only for death-penalty cases and those involving juvenile offenders sentenced

to life-without-parole." *Farrar*, 876 F.3d at 717.[10] The ability to vote, though assuredly important, is in no way analogous to death or a minor's life imprisonment. In fact, courts have uniformly refused to extend the compass of "cruel and unusual" punishments beyond the Supreme Court's rulings. *Id.* (stating it "would be improper to undertake a categorical analysis" where the court "never established a categorical rule prohibiting" a practice). Deprivation of the right to vote is not the kind of interest that this narrow category of cases is meant to protect.

In addition, applying categorical analysis here leads to endless confusions. The problems begin when the majority attempts to identify a "national consensus" against permanent felon disenfranchisement using the "objective indicia" of state laws on the subject. *Graham*, 560 U.S. at 61, 130 S. Ct. at 2022. And the unsuitability of categorical analysis becomes even clearer once the majority proceeds to find Section 241 unconstitutional in its "independent judgment." *Id.*

Because no two states share the same voting laws, it is not hard to find a "national consensus" against any one state's practices. As the majority's appendix illustrates, a few states always or usually allow voting during incarceration. Some states allow felons to vote after their release. Some allow voting after they complete a prison term, probation, and parole. Some require felons to first pay all owed fines and restitution. Some have statutorily defined waiting periods. And some, like Mississippi, permanently disenfranchise felons. Moreover, this list does not even begin to delve into the

[10] *See also United States v. Cobler*, 748 F.3d 570, 580–81 (4th Cir. 2014) ("The present case involves neither a sentence of death nor a sentence of life imprisonment without parole for a juvenile offender, the only two contexts in which the Supreme Court categorically has deemed sentences unconstitutionally disproportionate."); *United States v. Walker*, 506 F. App'x 482, 489 (6th Cir. 2012) (finding categorical analysis "does not apply in cases where the defendant receives a sentence that is 'less severe' than a life sentence.").

intricacies of these laws, such as which felonies they cover and the procedures for the restoration of voting rights. A reasonably clever lawyer could find a dozen ways to divvy up states and find a national consensus against any particular practice.

Even worse, the majority opinion fails to offer a defensible bright line. If the importance of voting rights makes Section 241 cruel and unusual, then why would any form of post-incarceration disenfranchisement be constitutional? For that matter, why would disenfranchisement *during* incarceration be constitutional? To point to the length of the disenfranchisement does not resolve the matter, because in the vast majority of states, a felon can be incarcerated for life—and thereby forfeit, for life, his right to vote.

In an effort to avoid some of these problems, the majority does not quite hold that Mississippi can *never* permanently disenfranchise a felon. So long as a felon is serving time in prison, the court implies, it is permissible to strip his right to vote. Accordingly, not only may the person be disenfranchised for life due to a life prison term, but the death sentence carries the same result. The panel admits theirs is an "odd" result, in holding that disenfranchisement violates the Eighth Amendment when neither life imprisonment nor capital punishment does so.

The better term, in my view, would be "incoherent." According to the majority's reasoning, a state can sentence rapists to life in prison, meaning they can never vote—but if they are spared and eventually released, they must be allowed to vote. A state can *execute* murderers, but it may not keep them from voting if they are released from prison. In other words, permanent disenfranchisement is fine—so long as it is accompanied by a life sentence or death. But how could *adding* these sanctions make the loss of voting rights *less* cruel or unusual? The majority has no credible explanation why the Eighth Amendment permits the harsher outcome yet prohibits the milder.

The argument that criminals who served their prison sentences have paid their debt to society offers no analytical safe harbor. The consequences of committing a felony rarely end at the prison walls. Many felons are subject to considerable limits on their freedom to move about and work during probation. Sexual offenders are often required to register for the protection of those around them. *Cf. Smith v. Doe*, 538 U.S. 84, 90, 123 S. Ct. 1140, 1145 (2003) (finding such requirements nonpenal). Those with a criminal history are often obliged to report it to potential employers. They may be barred from some occupations entirely, including some forms of public office. Felons may not legally possess firearms. Completing a prison sentence does not entitle felons to all the rights they previously possessed.[11]

Because Section 241, rightly interpreted, does not impose a punishment, and because applying categorical analysis in this case is unprecedented and illogical, it is unnecessary to address the majority's exercise of "independent judgment" in detail. Instead, I will merely note that the majority's discussion of "severity" illustrates the flaws in its approach. As already discussed, categorical analysis is meant for punishments of the highest severity—execution or life imprisonment. *Farrar*, 876 F.3d at 717. Whatever its merits, disenfranchisement of felons is not of the same degree. The majority rightly extols the role of voting in a democratic society, but it cannot cite a single case to accord with its conclusion that disenfranchisement rises to the level of cruel and unusual punishment. The majority's conclusion, in short,

[11] Of course, the majority's "paid their debt to society" reasoning would provide fodder for a wealth of Eighth Amendment-based litigation challenging these additional adverse consequences of felon status. That situation would turn the alleged constitutional uniqueness of the plaintiff's First Amendment right to vote into a general weapon against state criminal justice policies. The prohibition on "cruel and unusual punishments" would be effectively mutated into a "harmful and unfair" provision.

is the product of judicial willfulness, not judgment. *Cf.* THE FEDERALIST NO. 78, at 405 (Alexander Hamilton) (George W. Carey & James McClellan, Eds., 2001). And the majority essentially gives away the game when it questions the "marginal deterrent effect the prospect of losing the franchise has when a person committing a felony already faces the more immediate sanction of criminal confinement."[12] The other factors—the culpability of the plaintiffs and the penological goals of the law—are equally inapplicable where the law at issue does not impose a punishment at all.

IV.

Today's ruling disregards text, precedent, and common sense to secure its preferred outcome. This end-justifies-means analysis has no place in constitutional law. I respectfully dissent.

[12] The majority also turns the plaintiffs' burden of proof upside-down by charging the *defendants* with failing to present evidence of a deterrent effect on felons.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 04, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No.19-60662 c/w No.19-60678
Hopkins v. Hosemann
USDC No. 3:18-CV-188

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party to bear own costs pay to the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Ms. Janet A. Gochman
Ms. Lisa S. Graybill
Mr. Bradley E. Heard
Mr. Justin Lee Matheny
Mr. Louis Peter Petrich
Mr. Carroll E. Rhodes
Mr. Joseph Patrick Sakai
Mr. Ahmed Soussi
Mr. Joshua Tom
Mr. Andrew T. Tutt
Ms. Paloma Wu
Mr. Jonathan K. Youngwood

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ROY HARNESS, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. 3:17-CV-791-DPJ-FKB

DELBERT HOSEMANN, SECRETARY OF STATE
OF MISSISSIPPI DEFENDANT

CONSOLIDATED WITH

DENNIS HOPKINS, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. 3:18-CV-188-DPJ-FKB

DELBERT HOSEMANN, SECRETARY OF STATE
OF MISSISSIPPI DEFENDANT

ORDER

Plaintiffs seek an order restoring the voting rights of convicted felons in Mississippi. The parties have all moved for summary judgment, contending that there are no disputed facts. [63, 65, 66, 74]. As discussed more fully below, both the United States Supreme Court and the Fifth Circuit Court of Appeals have rejected Plaintiffs' pivotal legal arguments as to article XII, section 241 of the Mississippi Constitution. While those courts may be free to reassess their prior rulings, the precedent is binding at the district-court level. For that and other reasons, Plaintiffs' motions [65, 74] are denied and Defendant's motions [63, 66] are granted as to disenfranchisement under section 241. As to section 253, which restores the right to vote, the Court finds the relevant motions [65, 66] should be denied.

I. Facts and Procedural History

Two groups of convicted felons filed separate suits seeking to regain the right to vote. The lead plaintiffs in those cases were Roy Harness and Dennis Hopkins. The Court consolidated the cases on June 28, 2018, and then certified a class action on February 26, 2019.

Plaintiffs challenge two sections of article XII of the Mississippi Constitution—sections 241 and 253. Section 241 provides that individuals who have been "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement[,] or bigamy" are ineligible to vote. And section 253 allows the legislature to restore an individual's suffrage by "a two-thirds vote of both houses, of all members elected."

The Harness Plaintiffs focus their complaint on section 241, arguing that it violates the Fourteenth and Fifteenth Amendments because the disenfranchising crimes that remain from the section's 1890 version were adopted to suppress black voters. Harness Am. Compl. [19] at 19–20. They seek declaratory relief enjoining Secretary of State Delbert Hosemann from taking any steps that would prevent voting by Mississippians convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, and bigamy. *Id.* at 21.[1]

The Hopkins Plaintiffs challenge both sections 241 and 253 and take a different approach. They say lifetime disenfranchisement (section 241) violates the Eighth Amendment's prohibition against cruel and unusual punishment and exceeds § 2 of the Fourteenth Amendment, which allows states to merely "abridge" a felon's voting rights. Hopkins Compl. [1] at 4–5 (filed in 3:18-CV-188-DPJ-FKB). As to section 253 (the restoration provision), the Hopkins Plaintiffs

[1] The Harness Plaintiffs do not challenge disqualification based on murder and rape convictions. *Id.* at 2.

argue that it violates both the First Amendment, by hampering political expression, and the Equal Protection Clause, because it is arbitrary and was enacted with discriminatory intent. *Id.*

II. Summary Judgment Standard

Each party seeks summary judgment. That relief is warranted under Federal Rule of Civil Procedure 56(a) when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The nonmoving party must then "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). When such contradictory facts exist, the court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *Little*, 37 F.3d at 1075; *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

III. Article III Standing and Eleventh Amendment Immunity

In his motions for summary judgment, Hosemann first raises concerns over Article III standing and Eleventh Amendment immunity. Under both approaches, Hosemann questions his connection to sections 241 and 253. As to section 241, he insists that local election officials have the duty and authority to register, refuse, and purge voters. And as to section 253, he maintains that only the legislature can act to restore voting rights.[2]

A. Legal Standards

To establish an Article III case or controversy, Plaintiffs must show: (1) they have suffered an "injury in fact," (2) there is a "causal connection between the injury and the conduct complained of," and (3) "the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Hosemann concedes that Plaintiffs meet the first element but says they cannot establish a causal connection or redressability. *See Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) (noting that a failure to establish any one element deprives the court of jurisdiction).

In addition, Hosemann asserts Eleventh Amendment immunity and argues that the *Ex parte Young* exception is inapplicable. 209 U.S. 123 (1908). Under *Ex parte Young*, a state officer can be sued in federal court despite the Eleventh Amendment, if that officer has "'some connection with the enforcement of the act' in question or [is] 'specially charged with the duty to

[2] While Article III standing and Eleventh Amendment immunity are distinct concepts, there is significant overlap. *See* Hopkins Resp. Mem. [78] at 20–21 (citing *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017)); *see also* Def.'s Rebuttal [86] at 5 (stating "plaintiff's [s]ection 241 claims against the Secretary fail under Article III and/or the Eleventh Amendment").

enforce the statute' and [is] threatening to exercise that duty." *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (5th Cir. 2001) (quoting *Ex parte Young*, 209 U.S. at 157, 158). With these standards in mind, the Court considers sections 241 and 253 separately.

B. Section 241

Hosemann says he does not enforce section 241, does not investigate or prosecute violations of election laws, does not supervise local election officials, lacks the authority to prohibit felons from registering to vote, and has no duty to remove felons from the voter rolls. Def.'s Mem. [64] at 6. But Plaintiffs argue that Hosemann's responsibilities under state law—particularly the administration of the computerized Statewide Elections Management System ("SEMS")—and his designation as the state's chief election officer under the National Voter Registration Act of 1993 ("NVRA") provide enough basis for Article III standing and trigger the *Ex parte Young* exception to Eleventh Amendment immunity.

Under state statute, "[t]he circuit clerk of each county is authorized and directed to prepare and keep in his or her office a full and complete list . . . of persons convicted of voter fraud or of any crime listed in Section 241, Mississippi Constitution of 1890." Miss. Code § 23-15-151. But the statute goes on to provide that a list of persons convicted of a disenfranchising crime "shall also be entered into [SEMS] on a quarterly basis." *Id.* SEMS is maintained by the Secretary of State and is considered "the official record of registered voters in every county of the state." *Id.* § 23-15-165(1).

Hosemann explains that "the Administrative Office of Courts provides data regarding criminal convictions which is filtered to only include individuals with a conviction of a disenfranchising crime before being loaded into [SEMS]." Hosemann Resp. to Hopkins Interrogs. [63-1] at 44. Then SEMS "provides potential match reporting regarding individuals

convicted of a disenfranchising crime and county election officials are trained to only take action upon review of a final sentencing order entered by a court." *Id.* at 49. That training is provided by Hosemann. *See id.* at 48 ("The Secretary of State provides training annually to county election commissioners regarding voter roll maintenance in accordance with Mississippi law and the National Voter Registration Act."); *see also* Miss. Code § 23-15-211(4) (stating Hosemann is responsible for conducting and sponsoring an "elections seminar" attended by county election commissioners). In other words, Hosemann receives information regarding disenfranchising convictions, adds that information to SEMS, and trains county officials on the next step.

In addition, Hosemann is Mississippi's "chief election officer" for purposes of the NVRA, Miss. Code § 23-15-211.1(1), and has "the power and duty to gather sufficient information concerning voting in elections in this state," *id.* § 23-15-211.1(2); *see also* 52 U.S.C. § 20509 ("Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this chapter."). And while this civil action is not rooted in the NVRA, several courts have held that the designation of "chief election officer" militates in favor of finding Article III standing in various election-law contexts. *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613–14 (5th Cir. 2017) (finding Article III standing, noting that the statute at issue applied to every election, and observing that the Texas Secretary of State was the chief election officer of the state); *Scott v. Schedler*, 771 F.3d 831, 838–39 (5th Cir. 2014) (finding Article III standing and noting the Secretary of State was the chief election officer under the NVRA); *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 828–29, 832 (S.D. Tex. 2012) (Costa, J.) (denying Secretary's motion to dismiss for lack of standing and noting that her "argument is at odds with numerous cases in which plaintiffs have sued secretaries of state when challenging voter registration laws even though states commonly

delegate voter registration responsibilities to county officials"), *rev'd on other grounds*, 732 F.3d 382; *see also United States v. Missouri*, 535 F.3d 844, 846 n.1 (8th Cir. 2008) (finding that the Missouri Secretary of State was the proper party to be sued under the NVRA even though enforcement power was delegated to local officials); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1276 (N.D. Fla. 2018) (noting the Secretary of State was Florida's chief election officer and "[t]his statutory job description is not window dressing").[3]

Based on these duties, Plaintiffs' injuries are sufficiently traceable to and redressable by Hosemann to establish Article III standing. While he may not be the only step in disenfranchising a voter, he certainly plays a crucial role in the process. *Compare K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (finding redressability was met even though the defendant was "far from the sole participant in the application of the challenged statute"), *with Okpalobi*, 244 F.3d at 427 (finding no standing where the state officers did not have "*any duty or ability to do anything*" in connection with the law at issue (emphasis added)).

Likewise, for purposes of Eleventh Amendment immunity, Hosemann has "some connection" with enforcement of section 241, particularly in his role as chief election officer and administrator of SEMS. *Ex parte Young*, 209 U.S. at 157; *see Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (denying immunity in action challenging voter disqualification as "incapacitated" and noting that while local election officials had authority to register voters, the Secretary of State was charged with providing local officials of individuals deemed incapacitated); *Libertarian Party of Ky. v. Grimes*, 164 F. Supp. 3d 945, 950 (E.D. Ky. 2016) (finding *Ex parte Young* exception applied where Secretary of State provided training to

[3] Hosemann also serves on the three-person State Board of Election Commissioners alongside the Governor and the Attorney General. Miss. Code § 23-15-211(1).

county clerks and therefore had "some control over the perpetuation of the ballot access regime the [p]laintiffs challenge[d]").[4]

C. Section 253

Section 253 presents a much closer question. It provides: "The Legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime; but the reasons therefor shall be spread upon the journals, and the vote shall be by yeas and nays." Miss. Const. art. XII, § 253. The Hopkins Plaintiffs ask the Court to "[i]ssue a class-wide judgment declaring that the inherently arbitrary and racially discriminatory legislative process for the restoration of voting rights established by the suffrage bill provision of the Mississippi Constitution violates the Equal Protection Clause of the Fourteenth Amendment, as well as the First Amendment." Hopkins Compl. [1] at 47.

Hosemann says he has no connection to or role in the restoration process: he is not a member of the legislature, he does not introduce suffrage bills, and he does not vote on such bills. *See* Miss. Const. art. XII, § 253; *see also* Hopkins Compl. [1] at 20 (flow chart detailing restoration process); Hosemann Resp. to Hopkins Interrogs. [63-1] at 53. He therefore denies a causal connection or redressability.

But as noted above, Hosemann is the state's chief election officer and maintains SEMS, which would presumably be involved in one of the final steps in returning a convicted felon to

[4] Hosemann relies in part on *McLaughlin v. City of Canton*, where Judge Henry T. Wingate considered criminal disenfranchisement and held that the Secretary of State was "not a proper party." 947 F. Supp. 954, 965 (S.D. Miss. 1995). But that case was decided before Mississippi revised its election laws and designated the Secretary of State as the chief election officer. *See* 2000 Miss. Laws 430 [77-13] (designating the Secretary of State as the chief election officer); 2004 Miss. Laws 305 [77-14] (implementing a statewide centralized voting system).

the voting rolls after he or she successfully files a section 253 petition. Though somewhat distinguishable, the Fifth Circuit faced a similar question in *OCA-Greater Houston*, holding:

> unlike in *Okpalobi*, where the defendants had no "enforcement connection with the challenged statute," the Texas Secretary of State is the chief election officer of the state and is instructed by statute to obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. We are satisfied that OCA has met its burden under *Lujan* to show that its injury is fairly traceable to and redressable by the defendants.

867 F.3d at 613–14 (quoting *Okpalobi*, 244 F.3d at 427 n.5) (additional quotation marks and footnotes omitted). To be sure, Hosemann's role in section 253 is slight, but he does have "'some connection with the enforcement of the act' in question." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi*, 244 F.3d at 414–15). The Hopkins Plaintiffs have minimally demonstrated standing and a basis for an *Ex parte Young* claim against Hosemann challenging section 253.

IV. Section 241 Merits Analysis

While both the Harness and Hopkins Plaintiffs challenge section 241, they pursue different theories. As such, the Court will consider the claims separately.

A. Harness Plaintiffs

Section 241 was adopted in 1890 and disenfranchised citizens found guilty of "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement[,] [and] bigamy." Harness Am. Compl. [19] at 5. The section was amended in 1950 to remove burglary and again in 1968 to add rape and murder as disenfranchising crimes. *Id.* at 2. The Harness Plaintiffs take no issue with preventing convicted rapists and murderers from voting. *Id.* But they say disenfranchisement based on the other crimes carried forward from the 1890 version violates the Fourteenth and Fifteenth Amendments because those crimes were selected to suppress black voters. *Id.* at 20.

To begin, the United States Supreme Court has expressly held that § 2 of the Fourteenth Amendment affirmatively allows states to deny suffrage to convicted felons. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). That does not, however, mean states are free to deny that right for discriminatory reasons. The Supreme Court considered that issue in *Hunter v. Underwood*, where the Court set out a burden-shifting test to determine whether Alabama's felon-disenfranchisement laws violated the Equal Protection Clause. 471 U.S. 222, 227–28 (1985).

Under the *Hunter* test, a plaintiff must show that the law's original enactment was motived by race discrimination and that the law continues to have that effect. *Id.* at 233; *see also id*. at 227–28. If the plaintiff makes those showings, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without" a racially discriminatory motive. *Id.* at 228.

But *Hunter* left a caveat when it declined to decide "whether [Alabama's disenfranchisement law] would be valid if enacted today without any impermissible motivation . . . ." *Hunter*, 471 U.S. at 233. Based on that language, the Fifth Circuit has held that "substantial, race-neutral alterations in an old unconstitutional law may remove the discriminatory taint." *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018) (citation omitted). And it has applied that rule to section 241.

In *Cotton v. Fordice*, the court observed that Mississippi twice re-enacted section 241 after original adoption:

> Section 241, as enacted in 1890, was amended in 1950, removing "burglary" from the list of disenfranchising crimes. Then, in 1968, the state broadened the provision by adding "murder" and "rape"—crimes historically excluded from the list because they were not considered "black" crimes. Amending § 241 was a deliberative process. Both houses of the state legislature had to approve the amendment by a two-thirds vote. The Mississippi Secretary of State was then required to publish a full-text version of § 241, as revised, at least two weeks before the popular election. *See* Miss. Code Ann. § 4211 (1942); H. Con. Res. 10

> (Miss. 1950); H. Con. R. 5 (Miss. 1968). Finally, a majority of the voters had to approve the entire provision, including the revision. Because Mississippi's procedure resulted both in 1950 and in 1968 in a re-enactment of § 241, each amendment superseded the previous provision and removed the discriminatory taint associated with the original version.

157 F.3d 388, 391 (5th Cir. 1998). The Fifth Circuit concluded that these amendments fell within the exception *Hunter* "left open," *id.* at 391, and therefore "*Hunter* does not condemn § 241," *id.* at 392.

As discussed next, the Harness Plaintiffs urge the Court to ignore *Cotton* because—according to them—it was based on an incomplete record, was wrongly decided, and has been at least tacitly overruled by the United States Supreme Court.

1. The Record Evidence

According to the Harness Plaintiffs, the *pro se* plaintiffs in *Cotton* were ill-equipped to create a record regarding the votes in 1950 and 1968, so the Fifth Circuit failed to consider a complete picture. Pls.' Mem. [82] at 14. They suggest, for instance, that the Fifth Circuit did not see the ballot language in 1950 and 1968. *Id.* As a result, Plaintiffs say the court failed to consider that neither the legislature nor the electorate were allowed to "vote[ ] on whether to retain or remove the other crimes on the 1890 list. Thus, the voters in 1950 and 1968 did not have to approve the entire list of disenfranchising crimes in Section 241 and were not given the option to do so." *Id.* at 13.

This argument goes only so far. True enough, the ballot language was not in the *Cotton* appellate record. But neither the *Cotton* plaintiffs nor the state mentioned the 1950 and 1968 votes in their appellate briefs. *See* Pls.' Mem. [75] at 12–13. Instead, the Fifth Circuit raised those re-enactments *sua sponte*. And the only way the Fifth Circuit would have been aware of

the 1950 and 1968 re-enactments is if it researched the legislative history on its own. Indeed *Cotton* cites that history. *See* 157 F.3d at 391.

Substantively, the Fifth Circuit's description of what happened in those years shows that it read the ballot language Plaintiffs now cite. In 1950, the ballot removing burglary from the disenfranchising offenses read as follows:

> Section 241. Every inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States of America, twenty-one years old and upwards, who has resided in this state for two years, and one year in the election district, or in the incorporated city or town in which he offers vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, and who has paid on or before the first day of February of the year in which he shall offer to vote, all poll taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such taxes, is declared to be a qualified elector; but any minster of the gospel in charge of an organized church, or his wife legally residing with him, shall be entitled to vote after six months' residence in the election district, incorporated city or town, if otherwise qualified.
>
> Adopted by the House of Representatives, January 26, 1950.
>
> Adopted by the Senate, February 10, 1950.
>
> For Amendment ……..( )
>
> Against Amendment ……...( )

1950 Ballot [74-6] at 1. Similarly, the 1968 ballot that added rape and murder read, in relevant part, as follow:

> Section 241. Every inhabitant of this State, except idiots and insane persons, who is a citizen of the United States of America, twenty-one (21) years old and upwards, who has resided in this State for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city of town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector."

ADOPTED BY HOUSE OF REPRESENTATIVES: March 25, 1968.

ADOPTED BY SENATE: March 25, 1968.

For Amendment ……..( )

Against Amendment ……...( )

1968 Ballot [74-8] at 1.

This language mirrors the Fifth Circuit's description of the ballots. As quoted more fully above, the court recognized that "a majority of the voters had to approve *the entire provision, including the revision*." *Cotton*, 157 F.3d at 391 (emphasis added). There is simply no hint that the court mistakenly believed voters did anything other than vote up or down on "the entire provision." *Id.* Nor does it appear that the court thought voters were asked to "vote[ ] on whether to retain or remove the other crimes on the 1890 list." Pls.' Mem. [82] at 13. Finally, the fact that the ballot language did not allow individual votes on the original crimes does not diminish *Cotton*'s conclusion that the final ballot language resulted from "a deliberative process." *Cotton*, 157 F.3d at 391.

That does not, however, end the analysis because *Cotton* itself contains another caveat. While the Fifth Circuit found that the 1950 and 1968 amendments removed the racial taint from the 1890 enactment, it noted that the section would remain unconstitutional "if the [1950 and 1968] amendments were adopted out of a desire to discriminate against blacks." *Id.* at 392. On this issue, Plaintiffs again say they have created a better record. Although they offer no direct proof of intent, they circumstantially note the racial demographics in 1950 and 1968; Mississippi's sad history of racial strife, especially around those dates; and other unconstitutional legislation passed in or around those years. Pls.' Mem. [82] at 16–17.

Although the Fifth Circuit did not mention this well-known history in *Cotton*, the court was persuaded by the fact that both amendments made changes that cut against stereotypical notions about which disqualifying crimes would hinder black votes. *Cotton*, 157 F.3d at 391. The court found those facts sufficient to hold—as a matter of law—that the current version of section 241 comports with equal protection. *Id.* at 392.

The Fifth Circuit has not abandoned that holding. Just last year, the court cited *Cotton* in *Veasey v. Abbott*, a case upholding a Texas voting law. 888 F.3d 792, 802 (5th Cir. 2018). Though he dissented, Judge James E. Graves, Jr., explored *Cotton* in greater depth than the majority opinion, explaining why the 1950 and 1968 votes severed the original racist intent. *Id.* at 821 (Graves, J., dissenting). As he noted, the changes resulted from a "deliberative process"; the votes occurred "sixty and seventy-eight years, respectively, after [section 241] was first enacted"; and the amendments cut against notions of what were "commonly considered to be 'black' crimes." *Id.*

While it is somewhat unusual for an appellate court to raise a factual issue *sua sponte* and then decide it as a matter of law, that is what happened in *Cotton*. The Court will not assume the Fifth Circuit failed to fully consider its holding. As a result, the Harness Plaintiffs are left arguing that *Cotton* got it wrong. But even if it did, "[i]t has been long established that a legally indistinguishable decision of [the Fifth Circuit] must be followed by . . . district courts unless overruled *en banc* or by the United States Supreme Court." *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992).

2. Whether *Cotton* Was Overruled

The Fifth Circuit has not overruled *Cotton*, but the Harness Plaintiffs say the Supreme Court abrogated the decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). *See* Pl.'s Mem. [75] at

15. Succinctly stated, they believe the events in 1950 and 1968 failed to remove the discriminatory intent that existed in 1890 because the votes merely amended section 241 and did not re-enact it. *Id.*

In *Perez*, the plaintiffs argued that *Hunter* placed the burden on Texas to prove its interim redistricting plan was not discriminatory. The Supreme Court rejected that argument noting that *Hunter* "addressed a very different situation." *Perez*, 138 S. Ct. at 2325. But in doing so, the Court offered the following synopsis of *Hunter*:

> *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. The article disenfranchised anyone convicted of any crime on a long list that included many minor offenses. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. This Court rejected that argument because the *amendments* did not alter the intent with which the article, including the parts that remained, had been adopted. *But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today*."

Id. (internal citations omitted) (emphasis added).

From this quote, the Harness Plaintiffs say the Court "drew a distinction between" re-enactments and "'amendments that did not alter the intent.'" Pls.' Mem. [75] at 15 (quoting *Perez*, 138 S. Ct. at 2325). In other words, mere amendments cannot remove discriminatory taint, whereas re-enactments may. And because Plaintiffs describe the 1950 and 1968 votes as mere amendments rather than re-enactments, *Perez* abrogates *Cotton*. *Id.*

This argument has two flaws. First, Mississippians voted for the "entire provision," as amended, leading the Fifth Circuit to conclude that section 241 was "re-enacted." *Cotton*, 157 F.3d at 391–92); *see also Veasey*, 888 F.3d at 821 (Graves, J. dissenting). Second, and more substantively, when the *Perez* Court summarized *Hunter* and described "amendments" to

Alabama's disenfranchisement laws, it was not attempting to distinguish between voluntary amendments and re-enactments because there were no voluntary amendments in *Hunter*. 138 S. Ct. at 2325. Instead, the so-called "amendments" occurred when the offending Alabama statutes were "struck down by the courts." *Hunter*, 471 U.S. at 233. Significantly, *Cotton* references this very distinction when declining to follow *Hunter*. As the Fifth Circuit noted, "the voters of Mississippi willingly broadened [section] 241 through the constitutional amendment process" which made those changes "fundamentally different" from the judicial pruning that occurred in *Hunter*. *Cotton*, 157 F.3d at 391 n.8 (characterizing alterations by judicial process as "'involuntary' amendments"). And because *Perez* does not "directly conflict[ ]" with *Cotton*, *Cotton* still controls at the district-court level. *Alvarez v. City of Brownsville*, 904 F.3d 382, 398 (5th Cir. 2018).

3. The Election Law Reform Task Force

The history of section 241 does not stop in 1968. Even assuming Plaintiffs are correct as to the 1950 and 1968 votes, the state revisited section 241 in the mid-1980s. Starting in 1984, Secretary of State Dick Molpus, a democrat, assembled a bipartisan, biracial Election Law Reform Task Force (the "Task Force") to review and revise the state's election laws. The Task Force included members of the legislature, executive-branch officials, circuit clerks, local election commissioners, and members of the public. Def.'s Evidentiary Submissions [63-2] at 106–07 (outlining purpose); *id.* at 111–13 (listing members). And the Task Force held public hearings throughout the state, met with representatives of the United States Justice Department, and received written feedback from organizations and individuals. *Id.* at 114 (noting plans for public hearings); *id.* at 203 (noting meeting with members of the Voting Rights Section of the U.S. Department of Justice); *id.* at 115–95.

Significantly, the Task Force expressly considered criminal disenfranchisement and whether to expand the list of crimes, amend section 241, or leave the law "as is." *Id.* at 212 (Election Law Reform Task Force- Summary of Action). In the final report, "[i]t was decided that [the] present law dealing with disenfranchisement of electors for the commission of certain crimes should be left as is. There was discussion as to the need for a constitutional amendment to change the law to include as disenfranchising crimes all felonies." *Id.*

The state legislature responded to the report by forming its own committees, issuing reports, and proposing legislation. *Id.* at 216–57. Prior to the 1986 Regular Session, the House committee, in conjunction with its Senate counterpart, issued a formal report, which proposed changes to section 241 and an effectuating constitutional amendment. *Id.* at 216-51. Specifically, as to disenfranchisement, the legislative committee recommended:

> 13. Disenfranchisement of felons
>
> The committee recommends that any person convicted of any felony in this state, in another state or under federal statute, excluding the crim of manslaughter and felonious violations of the Internal Revenue Code, shall not be permitted to register to vote, or to vote; and if registered the felon's name shall be removed from the registration rolls. Upon completion of his prison sentence, including any probationary period, the felon will be eligible to register to vote upon presenting to his county registrar certifiable documentation that the sentence has been discharged.

Id. at 239–40.

Following the report, legislators introduced 1986 Senate Bill 2234 ("S.B. 2234"), which would have included the recommended language broadening section 241 to all felonies except manslaughter and tax violations. *Id.* at 255, 257 (Proposed House Amendment to Senate Bill No. 2234). But those changes did not survive the legislative process and were cut from the bill that passed the 1986 legislative session. *Id.* at 259–62. Instead, the legislature adopted the Task Force's recommendation and opted to keep the original list of crimes from section 241 and

amend the Mississippi Code to make it consistent with section 241. *Id.* at 260; *see also* Miss. Code § 23-15-11 (identifying qualified voters as those who have "never been convicted of vote fraud *or of any crime listed in Section 241*, Mississippi Constitution of 1890" (emphasis added)). The legislation passed 118-3 in the House and 51-1 in the Senate. Def.'s Evidentiary Submission [63-2] at 263. It was then precleared by the Department of Justice under Section 5 of the Voting Rights Act.

There is no argument or evidence that either the Task Force or the legislature was tainted with racial animus or by a desire to perpetuate a racially motivated voting scheme. So, according to Hosemann, *if* the burden shifts to him under *Hunter*, he has demonstrated that section 241 "would have been enacted without" racial animus. Def.'s Mem. [64] at 11 (citing *Hunter*, 471 U.S. at 228).

The Harness Plaintiffs say Hosemann has not met that burden for two primary reasons. First, they say the Mississippi legislature merely amended the Mississippi Code "to conform the statute to the Constitution." Pls.' Mem. [82] at 22. In other words, it did not amend the offending constitutional provision, which therefore carries over the discriminatory intent. They also argue that even if the legislature considered amending section 241, there was no statewide vote. *Id*.

But as discussed already, the amendment to the Mississippi Code followed a multi-year, biracial, bipartisan review of Mississippi's election laws that expressly considered criminal disenfranchisement and whether section 241 should be amended. At the end, an overwhelming majority of the legislature decided to leave section 241 alone and instead amend the other election laws to conform with it. This is not a case like *Hunter* where the state itself did nothing to cure the defect, nor was a constitutionally infirm statute "perpetuated into the future by neutral

official action." *Kirksey v. Bd. of Sup'rs of Hinds Cty.*, 554 F.2d 139, 148 (5th Cir. 1977). The unrebutted history shows the state would have passed section 241 as is without racial motivation. Finally, Plaintiffs cite no authority suggesting that a statewide vote—as opposed to this thorough representative process—is necessary to remove the racist taint that attached to section 241 more than 100 years earlier.[5]

For all the reasons stated in this section, Defendant's motion for summary judgment on the Harness Plaintiffs' section 241 claims is granted.

B. Hopkins Plaintiffs

The Hopkins Plaintiffs challenge section 241 under the Eighth and Fourteenth Amendments.

1. Fourteenth Amendment Equal Protection

Unlike the Harness Plaintiffs, the Hopkins Plaintiffs offer a non-racial approach to their equal-protection claim. According to them, section 241 cannot survive strict scrutiny under § 1 of the Fourteenth Amendment because it is "not narrowly drawn to address a compelling state interest using the least drastic means." Pls.' Mem. [73] at 38 (citing *Dunn v. Blumstein*, 405 U.S. 330, 337, 342–43 (1972)).

The plaintiffs in *Richardson v. Ramirez* said the same thing. 418 U.S. at 27. There, three convicted felons alleged that California's constitution—which "disenfranchised persons convicted of an 'infamous crime'"—failed the strict-scrutiny test and therefore violated § 1's

[5] Hosemann does not directly argue that these facts implicate the *Cotton* analysis, but perhaps he should have. *Cotton* was based on the observation in *Hunter* that the Court did not consider whether the law would be valid "if enacted today without any impermissible motivation." *Hunter*, 471 U.S. at 233. In this case, Mississippi voted to keep section 241 as is and codified the implementing statutes to conform with it. Thus, "[t]he passage of time and the actions of intervening parties [appears to have] cut that thread of [racist] intent." *Veasey*, 888 F.3d at 821 (Graves, J., dissenting).

equal-protection guarantee. *Id.* The Supreme Court of California agreed, *id.* at 33–34, but the United States Supreme Court reversed. As the high Court noted, § 2 of the Fourteenth Amendment acknowledges a state's right to exclude convicted felons from the franchise, *id.* at 55–56.

Section 2 provides a penalty when a state denies or abridges the right to vote. Edited for clarity, the section provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . But when the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . , or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added). The *Richardson* Court held that because § 2 "affirmative[ly] sanction[ed]" a state's right to deny the franchise based on a criminal conviction, doing so cannot violate § 1 of that same amendment. 418 U.S. at 54.

Plaintiffs know *Richardson* is a problem and try to distinguish it by offering a different construction of § 2. According to them, the phrase "other crime" in § 2 modifies only the word "abridged" and not the word "denied." Pls.' Mem. [73] at 28. So construed, § 2 would recognize a state's right to *abridge* the voting rights of someone who commits a crime—i.e., temporarily disenfranchise that person—but not the right to permanently *deny* the franchise. *Id.* Thus, Plaintiffs say strict scrutiny applies to laws—like Mississippi's section 241—that *deny* the franchise based on a criminal conviction.

Plaintiffs insist that *Richardson* is not binding because the Court never considered their textual argument. But even assuming the Supreme Court overlooked this alternative construction, its holding is squarely on point. "[T]he specific holding of the Court was that a

state may deny the franchise to that group of 'convicted felons who have completed their sentences and paroles.'" *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (quoting *Richardson*, 418 U.S. at 56).

That holding remains binding. And as the Fifth Circuit stated in *Cotton*, "Section 2 of the Fourteenth Amendment does not prohibit states from disenfranchising convicted felons." 157 F.3d at 391 (citing *Richardson*, 418 U.S. at 24, 54). Other circuits have reached the same conclusion. *See Valenti v. Lawson*, 889 F.3d 427, 429 (7th Cir. 2018) (citing *Richardson* and stating "it is well established that Section 2 of the Fourteenth Amendment gives states the 'affirmative sanction' to exclude felons from the franchise"); *Hand v. Scott*, 888 F.3d 1206, 1209 (11th Cir. 2018) (noting the Supreme Court "has held that 'the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment'" (quoting *Richardson*, 418 U.S. at 54)); *Hayden v. Pataki*, 449 F.3d 305, 315 (2d Cir. 2006) ("The Supreme Court has ruled that, as a result of [§ 2], felon disenfranchisement provisions are presumptively constitutional."); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1225 (11th Cir. 2005) (listing cases, including *Richardson*, recognizing "the propriety of excluding felons from the franchise"); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) ("That is, once a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." (citing *Richardson*, 418 U.S. at 26–27)). Based on *Richardson* and *Cotton*, the Court must reject Plaintiffs' argument.[6]

[6] Plaintiffs apparently anticipated this holding. *See* Pls.' Mem. [73] at 43 (stating that if Court finds *Richardson* applicable, "Plaintiffs present these arguments to preserve the issue for appeal").

2. Eighth Amendment Cruel and Unusual Punishment

The Hopkins Plaintiffs also say section 241 violates the Eighth Amendment's prohibition against cruel and unusual punishment. While they offer a detailed analysis under that amendment, their argument again conflicts with § 2 of the Fourteenth Amendment. Simply put, it would be internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while § 2 of the Fourteenth Amendment permits it. As aptly stated by the district court in *Farrakhan v. Locke*,

> Plaintiffs also claim that Washington's felon disenfranchisement law violates free speech, double jeopardy and the prohibition of cruel and unusual punishment under the First, Fifth, and Eighth Amendments to the Constitution. In order to uphold these claims against Defendants' motion to dismiss, the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments. The Court is not inclined to interpret the Constitution in this internally inconsistent manner or to determine that the Supreme Court's declaration of the facial validity of felon disenfranchisement laws in *Richardson v. Ramirez* was based only on the fortuity that the plaintiffs therein did not make their arguments under different sections of the Constitution. While discussing the precedent leading up to its decision in *Richardson*, the Court wrote that "recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision." *Richardson*, 418 U.S. at 53, 94 S. Ct. at 2670. This language in *Richardson* suggests that the facial validity of felon disenfranchisement may be absolute. The Court concurs with this application to the case at hand.

987 F. Supp. 1304, 1314 (E.D. Wash. 1997). Summary judgment is appropriate as to the Hopkins Plaintiffs' Eight Amendment claim.[7]

[7] In *Graham v. Connor*, the United States Supreme Court held that claims related to search-and-seizure violations fall under the Fourth Amendment rather than the substantive-due-process provisions found in the Fourteenth Amendment. 490 U.S. 386, 395 (1989). It did so because "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct," whereas the Fourteenth Amendment addressed "the more generalized notion of 'substantive due process.'" *Id.* In a similar sense, § 2 of the Fourteenth Amendment "affirmative[ly] sanction[s]" a state's right to deny the franchise based on a criminal conviction whereas the Eight Amendment does not mention voting rights. *Richardson*, 418 U.S. at 54.

V. Section 253

As noted earlier, section 253 provides a legislative process by which a convicted felon can regain the right to vote. Under that provision, "[t]he Legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime." Miss. Const. art. XII, § 253.

The Hopkins Plaintiffs make three primary arguments for invalidating section 253: (1) it violates the First Amendment because legislators have unfettered discretion to prevent speech; (2) it violates equal protection because it includes no objective standards for determining who is entitled to relief; and (3) it was adopted for racist reasons and therefore violates equal protection as proscribed in *Hunter*. The Court will address each argument.

A. First Amendment

"[T]he First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Hand*, 888 F.3d at 1211; *see also id.* at 1212 ("Every First Amendment challenge to a discretionary vote-restoration regime we've found has been summarily rebuffed."). The Court therefore dismisses the First Amendment claim.[8]

[8] Plaintiffs cite *Hand* to support their First Amendment claim, asserting "[t]he Eleventh Circuit expressly recognized that 'a discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate . . . might violate the First Amendment.'" Pls.' Mem. [78] at 18 (quoting *Hand*, 888 F.3d at 1211–12). But what Plaintiffs left out of that sentence makes all the difference. The court was addressing schemes "designed to discriminate *based on viewpoint—say, for example, by barring Democrats*." *Hand*, 888 F.3d at 1211 (emphasis added to language deleted from Plaintiffs' memorandum). Plaintiffs' use of an ellipses is at best suspect, and they never acknowledge that the *Hand* court rejected their argument. While *Hand* is not binding, it is persuasive.

B. Arbitrary Re-enfranchisement

Plaintiffs are correct that section 253 provides no "objective standards." Pls.' Mem. [73] at 44. Instead, the provision allows the legislature to consider petitions on a case-by-case basis, which Plaintiffs attack on two grounds. First, they say "the Fifth Circuit has twice instructed that arbitrary disenfranchisement or re-enfranchisement of individuals convicted of disenfranchising offenses violates the Equal Protection Clause." Pls.' Mem. [73] at 43–44 (citing *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982); *Shepherd*, 575 F.2d 1110). But neither case actually addresses Plaintiffs' argument that standardless re-enfranchisement laws violate equal protection.

In *Shepherd v. Trevino*, the Fifth Circuit reviewed and upheld a Texas law that provided "for the reenfranchisement of convicted state felons who satisfactorily complete the terms of their probation without providing a similar mechanism for the reenfranchisement of successful federal probationers." 575 F.2d at 1111. In doing so, the court made the unremarkable observation that re-enfranchisement laws may not discriminate based on race by, for example, "disenfranchis[ing] all felons and then reenfranchis[ing] only those who are, say, white. Nor can we believe that [§] 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote." *Id.* at 1114. But *Shepherd* did not address standardless re-enfranchisement mechanisms as Plaintiffs suggest. *See* Pl.'s Mem. [73] at 44. Indeed the mechanism it approved gave courts discretion when restoring voting rights. *Shepherd*, 575 F.2d at 1115.

Williams v. Taylor is no better. There, a black voter challenged his disenfranchisement based on a prior conviction because white voters had not been disenfranchised. 677 F.2d at 514. To begin with, *Williams* was not a re-enfranchisement case. Nevertheless, Plaintiffs note that the court reversed summary judgment and allowed the plaintiff the "chance to prove his claim of

selective and arbitrary enforcement of the disenfranchisement procedure." *Id.* at 517. In doing so, the Fifth Circuit held that the plaintiff had no right to vote, but that he did have "the right not to be the arbitrary target of the Board's enforcement of the statute." *Id.* at 517. As in *Shepherd*, the case asked whether the plaintiff had been treated differently, not whether the law violated equal protection for lack of objective standards.

Plaintiffs' second argument likewise misses the mark. They say "[t]he Supreme Court has repeatedly struck down voter eligibility-related laws that are as 'completely devoid of standards and restraints' as Mississippi's suffrage restoration provision." Pls.' Mem. [73] at 44. But they support that statement by citing only disenfranchisement cases, and there is a substantive difference. As the Supreme Court has noted, re-enfranchisement does not remove a protected interest but is instead a matter of clemency. *See, e.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

In the re-enfranchisement context, *Hand* is again helpful. There, the plaintiff disputed the lack of standards for pardon petitions on equal-protection grounds. 888 F.3d at 1208. But the Eleventh Circuit concluded that the Supreme Court foreclosed the argument in *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). The *Hand* court also noted "[o]ther precedents confirm[ing] the broad discretion of the executive to grant and deny clemency," often with "unfettered discretion." 888 F.3d at 1209 (collecting cases). The Hopkins Plaintiffs understandably observe that these cases deal with the executive branch—though *Shepherd* dealt with similar discretion vested in the judicial branch. 575 F.2d at 1113. But Plaintiffs have not demonstrated that the legislative branch should be treated any differently.

Plaintiffs have also failed to satisfy their burden under the rational-basis test. *See Shepherd*, 575 F.2d at 1115. Plaintiffs say in their response to Hosemann's motion that the

Secretary of State has not shown section 253 is rationally related to a legitimate governmental interest. Pls.' Mem. [78] at 46. To begin with, it is not enough for Plaintiffs to say the state failed to demonstrate a rational basis when it is Plaintiffs' burden to make that showing. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 350 (5th Cir. 2013). Substantively, "[a] state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies." *Shepherd*, 575 F.2d at 1115. And Plaintiffs offered no reply when Hosemann demonstrated that section 253 is rationally related to this legitimate governmental interest. *See* Def.'s Mem. [80] at 38.

In sum, Plaintiffs' authority does not address standardless re-enfranchisement mechanisms under an equal-protection analysis, and they have otherwise failed to meet their burden under the rational-basis test. Plaintiffs' cited authority does, however, address equal protection where a re-enfranchisement law is allegedly applied in a discriminatory way. *See Shepherd*, 575 F.2d at 1115. And that issue folds into Plaintiffs' *Hunter* argument—whether section 253 was adopted with the intent to discriminate and has that effect. *Hunter*, 471 U.S. at 227.

C. *Hunter* Analysis

The parties dispute whether the Hopkins Plaintiffs presented sufficient record evidence of (1) discriminatory intent in 1890 and (2) racial impact—the first two prongs of the *Hunter* burden-shifting analysis. Unlike the section 241 analysis under *Cotton*, there is no Fifth Circuit authority dictating the result of this claim. Moreover, both parties submit record evidence regarding Plaintiffs' required showing. That evidence must be viewed in the light most

favorable to the non-movant on each cross motion, which produces questions of fact on whether Plaintiffs met their burden under *Hunter*.

That said, Hosemann also argues that the Task Force and legislative processes in the mid-1980s satisfy the third prong of the *Hunter* analysis as to section 253. Unlike section 241, the legislature did not pass any laws that impacted section 253. Re-enfranchisement was, however, considered. Primarily, both the House and Senate committees jointly recommended eliminating section 253 and allowing convicted felons to regain the right to vote after completing their sentences and probation. *See* Def.'s Evidentiary Submissions [63-2] at 239–41 (Election Law Reform Study Committee Recommendations). But by the time S.B. 2234 was filed, that recommendation was absent. *Id.* at 255 (Proposed House Amendment to Senate Bill No. 2334). The Court could not find in this record what happened to the suggested amendment or whether it was ever voted on by either chamber.

Hosemann does not suggest that these facts trigger the *Cotton* analysis. As for *Hunter*, the Hopkins Plaintiffs say that absent re-enactment, the Court must limit its review to what happened in 1890. Even assuming the evidence from the 1980s impacts Hosemann's final burden under *Hunter*, the record is not sufficient to hold—as a matter of law—that either party is entitled summary judgment on that factual issue. Moreover, both parties offer conflicting evidence as to the intent in 1890. Again, the evidence is viewed in the light most favorable to the non-movant, which precludes summary judgment as to original intent for enacting section 253.

VI. Conclusion

The parties presented extensive briefing. And while not all arguments are reflected in this Order, all arguments raised were considered. Those not addressed would not have changed the outcome.

With respect to section 241, this Court is bound by the precedent set by the United States Supreme Court in *Richardson v. Ramirez* and the Fifth Circuit Court of Appeals in *Cotton v. Fordice*. For that and the other stated reasons, Defendant's motion for summary judgment [63] as to the Harness Plaintiffs is granted; the Harness Plaintiffs' summary-judgment motion [74] is denied; and the Harness Complaint is severed and dismissed. A separate judgment will be entered in the severed Harness case in accordance with Federal Rule of Civil Procedure 58. Defendant's motion for summary judgment [66] as to the Hopkins Plaintiffs is granted in part and denied in part—granted as to section 241 and denied as to section 253; and the Hopkins Plaintiffs' motion for summary judgment [74] is denied as to both sections 241 and 253.

Finally, the court certifies all holdings in the still open Hopkins case for interlocutory appeal. The Court believes this order involves several controlling questions of law as to which there is substantial ground for difference of opinion. *See* 28 U.S.C. § 1292. Moreover, an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.* As noted, the Harness and Hopkins plaintiffs made different arguments as to section 241, and if the Harness Plaintiffs appeal, then the Fifth Circuit should consider the Hopkins Plaintiffs' legal-construction arguments at the same time. Regarding section 253, Hosemann may elect to appeal the standing holding and the holding regarding the implications of the 1986 committee reports recommending deletion of section 253. Likewise, plaintiffs may wish to appeal the holding that their claim raises no recognized equal-protection rights. Any one

of these or the other issues would materially impact the trial of this matter, and the Court also wishes to avoid piecemeal appeals. For these reasons, all issues are certified.

Finally, the Court anticipates an appeal and therefore stays the Hopkins case until the appeal is concluded or the parties indicate that no appeal will be filed and request pre-trial conference.

SO ORDERED AND ADJUDGED this the 7th day of August, 2019.

s/ *Daniel P. Jordan III*
CHIEF UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 19-60662
CONSOLIDATED WITH
No. 19-60678

United States Court of Appeals
Fifth Circuit
FILED
September 28, 2023
Lyle W. Cayce
Clerk

DENNIS HOPKINS, *individually and on behalf of a class of all others similarly situated*; HERMAN PARKER, JR., *individually and on behalf of a class of all others similarly situated*; WALTER WAYNE KUHN, JR., *individually and on behalf of a class of all others similarly situated*; BRYON DEMOND COLEMAN, *individually and on behalf of a class of all others similarly situated*; JON O'NEAL, *individually and on behalf of a class of all others similarly situated*; EARNEST WILLHITE, *individually and on behalf of a class of all others similarly situated*,

Plaintiffs—Appellees,

versus

SECRETARY OF STATE DELBERT HOSEMANN, *in his official capacity*,

Defendant—Appellant,

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-188

No. 19-60662
c/w No. 19-60678

ON PETITION FOR REHEARING EN BANC

(Opinion August 4, 2023, 5 Cir., 2023, 76 F.4th 378)

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Rule 41.3, the panel opinion in this case dated August 4, 2023, is VACATED.