No. 24-560

IN THE

Supreme Court of the United States

DENNIS HOPKINS, ET AL.,
Petitioners,

v.

MICHAEL WATSON,
MISSISSIPPI SECRETARY OF STATE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 241 of the Mississippi Constitution makes certain felons indefinitely ineligible to vote. The questions presented are:

1. Does Section 241 violate the federal Constitution's prohibition of cruel and unusual punishments?

2. Does Section 241 violate the Fourteenth Amendment's Equal Protection Clause by impermissibly burdening the right to vote?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rule

Other Authorities

OPINIONS BELOW

The court of appeals' en banc opinion (Petition Appendix (App.) 1a-72a) is reported at 108 F.4th 371. The court of appeals' panel opinion (App.73a-157a) is reported at 76 F.4th 378. The district court's opinion (App.158a-196a) is not reported but is available at 2019 WL 8113392.

JURISDICTION

The court of appeals' judgment was entered on July 18, 2024. Justice Alito extended the time to file a petition for certiorari to November 15, 2024. The petition was filed that day. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Like other States, Mississippi imposes qualifications on who may vote. These address residency, age, citizenship, registration, and criminal history. Miss. Const. art. XII, § 241. This case is about that last qualification.

The U.S. Constitution recognizes that a State may deny its citizens "the right to vote" "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. Mississippi has always disqualified some felons from voting. Since 1890 it has done so through lists of disenfranchising crimes in Section 241 of the state constitution. For over 50 years, Section 241 has disqualified those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy." Section 241 disenfranchises covered felons indefinitely. Section 253 of the state constitution authorizes the legislature to "restore the right of

suffrage to any person disqualified by reason of crime" "by a two-thirds vote" of both legislative houses. The governor can also restore the right to vote by pardon. 29 Miss. Admin. Code pt. 201, R. 4.1.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), this Court rejected a Fourteenth Amendment challenge to state laws indefinitely disenfranchising felons. *Id.* at 56; *see id.* at 41-56. *Richardson* involved a challenge, brought by felons who had completed their prison and parole terms, to California laws indefinitely disenfranchising those convicted of an "infamous crime." *Id.* at 26-27. The challengers claimed that the Equal Protection Clause—by protecting the right to vote—bars such disenfranchisement. *Id.* at 26-27, 54. This Court rejected that claim. The Court reasoned as follows: Section 2 of the Fourteenth Amendment apportions congressional representation based on state population but reduces that representation if a State "denie[s]" or "abridge[s]" the right to vote of certain adult male citizens. U.S. Const. amend. XIV, § 2. That latter rule has one exception: a State is not penalized when it denies or abridges the vote "for participation in rebellion, or other crime." *Ibid.* That text means that "the exclusion of felons from the vote has an affirmative sanction in" section 2. 418 U.S. at 54. Section 2's "legislative history" (*id.* at 43; *see id.* at 43-48) and "the historical understanding of the Fourteenth Amendment" (*id.* at 53; *see id.* at 48-53) confirm that that text "mean[s] what it says." *Id.* at 43; *see id.* at 54. And given section 2's text and history, the Equal Protection Clause—in section 1—cannot bar a State from disenfranchising felons. *Id.* at 54-56. Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced

representation" that section 2 "imposed for other forms of disenfranchisement." *Id.* at 55. So the Fourteenth Amendment does not bar a State from "exclud[ing] from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56.

2. Petitioners are Mississippi citizens who are disqualified from voting because of their felony convictions. App.6a. In 2018 they filed this suit against the Mississippi Secretary of State. *Ibid.* They brought two "facial" claims against Section 241. Complaint ¶ 91 (ROA.19-60662.52). First, they claim that Section 241 violates the Eighth Amendment (applied to States by the Fourteenth Amendment) by inflicting the cruel and unusual punishment of permanent disenfranchisement. App.7a. Second, they claim that Section 241 violates the Fourteenth Amendment's Equal Protection Clause by impermissibly burdening the right to vote. *Ibid.* (Petitioners also brought three claims against Section 253's reenfranchisement mechanism. The court of appeals ruled that petitioners lack standing to bring those claims. App.4a n.2; *see* App.90a-92a. Petitioners do not challenge that ruling in this Court.)

The district court certified a class of those convicted of crimes listed in Section 241 who have completed their sentences. *See* App.6a-7a. The court consolidated this case with *Harness v. Hosemann*, No. 3:17-cv-791 (S.D. Miss.), a lawsuit claiming that Section 241 violates the Equal Protection Clause because it is tainted by racial animus. *See* App.159a.

The district court granted summary judgment to the Secretary on petitioners' claims challenging Section 241. App.183a-188a, 195a. First, the court

ruled that petitioners' Eighth Amendment claim fails. App.186a-188a. The court reasoned that section 2 of the Fourteenth Amendment recognizes that a State may deny the vote "for participation in rebellion, or other crime," and that "it would be internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement" when "[section] 2 of the Fourteenth Amendment permits it." App.187a. Second, the court ruled that petitioners' equal-protection claim is foreclosed by *Richardson*, which (as explained) rejected an equal-protection challenge to permanent-felon-disenfranchisement laws. App.183a-186a. (The court also rejected the *Harness* plaintiffs' race-based equal-protection challenge to Section 241 and severed the lawsuits. App.169a-183a, 195a. In *Harness*, which moved more quickly on appeal than this case, the en banc court of appeals affirmed the district court's decision, holding that Section 241 is not tainted by racial animus. *Harness v. Watson*, 47 F.4th 296, 303, 311 (5th Cir. 2022) (en banc) (per curiam); *contra* Pet. 7-8. This Court denied certiorari over a dissent. 143 S. Ct. 2426 (2023).)

3. A divided panel of the court of appeals affirmed in part and reversed in part the district court's decision rejecting petitioners' challenges to Section 241. App.73a-157a. In an opinion by Judge Dennis, the panel reached two holdings relevant here. First, the panel reversed the district court's Eighth Amendment ruling, held "that permanent disenfranchisement inflicted by Section 241" is "cruel and unusual punishment," and directed the district court to enjoin Section 241's enforcement. App.100a, 128a-129a; *see* App.101a-127a. Second, the panel affirmed the district court's equal-protection ruling. App.94a-99a. The panel agreed that *Richardson*

forecloses that claim. App.97a-99a. Judge Jones dissented from the panel's ruling that Section 241 violates the Eighth Amendment. App.138a-157a.

4. The court of appeals granted rehearing en banc and, in an opinion written by Judge Jones and joined by 10 other judges, affirmed the district court's decision rejecting petitioners' challenges to Section 241. App.1a-41a. Two other judges concurred in the judgment. App.3a nn.*, †.

First, the court of appeals held that petitioners' Eighth Amendment claim fails, for three independent reasons. App.7a-41a.

One: The court ruled that *Richardson* forecloses petitioners' claim. App.8a-20a. The court explained that *Richardson* recognized that section 2 of the Fourteenth Amendment allows States to disenfranchise felons, rejected the view that section 1 of that Amendment "bar[s] outright" what section 2 "plainly allows," and thus rejected a claim that section 1's Equal Protection Clause bars States from disenfranchising felons. App.9a; *see* App.13a-17a. *Richardson*, the court ruled, requires rejecting petitioners' Eighth Amendment claim. App.9a, 17a, 19a. The Eighth Amendment applies to States through the Due Process Clause in section 1 of the Fourteenth Amendment. App.8a, 9a. So ruling for petitioners would require holding that section 1 of the Fourteenth Amendment bars what section 2 allows. App.9a, 17a, 19a. *Richardson* forecloses that. *Ibid.* The court recognized that disenfranchisement laws are subject to constitutional limits—including those imposed by section 1. App.11a-12a. So "a State may not," for example, "disenfranchise felons with racially discriminatory intent": that would violate the Equal

Protection Clause. App.11a (citing *Hunter v. Underwood*, 471 U.S. 222, 233 (1985)). But, the court added, constitutional provisions "limit[ing]" "the exercise of a legitimate power" cannot "void the power entirely." App.12a (internal quotation marks omitted). Petitioners' claim, the court observed, seeks to void the power that section 2 recognizes and would create conflict between constitutional provisions. App.12a-13a; *see* App.9a-13a.

Two: The court ruled that, even without *Richardson*, felon disenfranchisement is not a punishment and so is not subject to the Eighth Amendment's bar on "cruel and unusual punishments." App.21a-34a. The court applied the "two-part test" that this Court has used "for determining whether" a law imposes "punishment" "within the meaning of the Constitution." App.21a. That test assesses whether the State "inten[ded] ... to impose punishment" and (if it did not) whether the law is "so punitive either in purpose or effect as to negate" the State's intention to deem it "civil and nonpunitive." *Smith v. Doe*, 538 U.S. 84, 92 (2003). At the first step, the court ruled that "[i]n no way do the text and structure of Section 241 indicate that it was intended as a penal measure." App.23a; *see* App.23a-24a. Section 241 instead defines qualifications for "the franchise." App.24a. The court rejected the view that Mississippi's Readmission Act—a federal law that, as a condition to readmitting Mississippi to the Union after the Civil War, barred the State from disenfranchising citizens "except as a punishment"—means that Section 241's drafters intended to impose punishment. App.25a-27a. That Act's use of the word "punishment," the court said, does not overcome Section 241's "text and structure"—particularly since

the Act recognizes that the State may disenfranchise felons. App.27a. The court added that "there is a strong argument that 'punishment' as used in" the Act refers to the "consequence of a crime"—not a penalty. App.26a n.14. At the second step, the court ruled that petitioners failed to show that Section 241 is "so punitive in its effect" as to be a punishment. App.28a; *see* App.28a-34a. All governing factors, the court ruled, cut against petitioners: felon disenfranchisement "is not an affirmative disability or restraint"; it "has long been regarded as serving a nonpenal, regulatory purpose"; it lacks a scienter requirement; it addresses conduct that is already criminal, but only to serve a "nonpenal interest"; it "does not promote the traditional aims of punishment"; it "has a rational connection to a nonpunitive purpose"; and it is "not excessive with respect to [that] purpose." App.28a-34a (cleaned up).

Three: The court ruled that even if felon disenfranchisement were a punishment, it is not "cruel and unusual." App.35a-41a. The court first recognized that under the Eighth Amendment's "original meaning," Section 241 is not cruel and unusual. App.35a; *see* App.35a-36a. The court then considered the two-part test that this Court has used in assessing whether "a type of punishment" is categorically unconstitutional. App.37a; *see* App.36a-41a. At the first step, a court considers whether a "national consensus" rejects the sentencing practice at issue. App.37a. At the second step, the court determines, in the exercise of its "independent judgment," whether the practice is "disproportionate." *Ibid.* The court of appeals did not believe that this categorical analysis applies beyond "cases that involve the death penalty or juvenile offenders

sentenced to life in prison"—the only cases in which this Court has applied that analysis. *Ibid.*; *see* App.37a-38a. But the court applied that analysis and ruled that "neither prong" supports the view that felon disenfranchisement is cruel and unusual. App.38a. At the first step, the court ruled, any effort to identify a "national consensus" against permanent felon disenfranchisement is "doomed to failure" because "no two States share the same voting laws even though nearly every State disenfranchises *some* felons." *Ibid.*; *see* App.38a-39a. At the second step, the court ruled, "independent judgment" cannot invalidate permanent felon disenfranchisement because "no defensible limiting principle" could support such a ruling. App.39a; *see* App.39a-41a.

Second, the court of appeals held that petitioners' equal-protection claim fails. App.4a n.2. The en banc court "agree[d]" with the panel that this claim "is foreclosed by *Richardson*." *Ibid.*; *see* App.94a-99a. As the panel explained, this claim asks the court "to invalidate on equal protection grounds a state law authorizing permanent disenfranchisement of persons convicted of certain crimes." App.97a. That is "precisely the type of law" that *Richardson* "expressly upheld against an equal protection attack." *Ibid.* So *Richardson* dooms such a claim. App.97a-99a.

Judge Dennis dissented in an opinion joined by 5 other judges. App.42a-72a. He maintained that Section 241 violates the Eighth Amendment because "it is cruel and unusual to punish individuals for life by permanently disenfranchising them after they have fulfilled all terms of their sentences." App.65a. He thought that *Richardson* does not foreclose petitioners' claim because that case rejected an equal-protection claim, not a substantive-due-process claim

invoking the Eighth Amendment. App.62a; *see* App.61a-65a. He concluded that permanent disenfranchisement under Section 241 is "punishment" subject to the Eighth Amendment. App.45a-48a. The Readmission Act, he said, means that Mississippi can disenfranchise felons "only" as "punishment." App.45a, 46a. And he concluded that Section 241 imposes a "cruel and unusual" punishment. App.48a-61a. That conclusion rested on a perceived national consensus against permanently disenfranchising those who have completed their sentences (App.50a-55a) and on an "independent judgment" that such disenfranchisement is disproportionate (App.55a-61a).

REASONS FOR DENYING THE PETITION

The en banc court of appeals rejected petitioners' challenges to the Mississippi Constitution's felon-disenfranchisement provision. That decision is correct and does not warrant further review. The petition should be denied.

I. The First Question Presented Does Not Warrant Review.

Petitioners ask this Court to grant review to decide "whether permanently disenfranchising individuals who have completed their sentences for past felony convictions violates the Eighth Amendment's prohibition on cruel and unusual punishments." Pet. 13 (capitalization altered; formatting omitted); *see* Pet. 13-25. The en banc court of appeals correctly resolved that question and its decision does not warrant further review.

A. The court of appeals was right to reject petitioners' Eighth Amendment claim: Mississippi's indefinite disenfranchisement of certain felons does not violate the U.S. Constitution's prohibition of cruel and unusual punishments. App.7a-41a. Petitioners' claim fails for three independent reasons. *Ibid.*

1. This Court's precedent forecloses any claim seeking to strip a State of its power to disenfranchise felons indefinitely. That is what petitioners' Eighth Amendment claim seeks. So it fails. App.8a-20a.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), this Court rejected the view that the Fourteenth Amendment bars a State from indefinitely disenfranchising felons. *Id.* at 56; *see id.* at 41-56. As explained above, *supra* pp. 2-3, this Court reasoned that "the exclusion of felons from the vote has an affirmative sanction in" the text of section 2 of that Amendment, 418 U.S. at 54, that section 2's "legislative history" and "the historical understanding of the Fourteenth Amendment" confirm that that text "mean[s] what it says," *id.* at 43, 53; *see id.* at 43-53, and that, given section 2's text and history, the Equal Protection Clause—in section 1—cannot bar a State from disenfranchising felons, *id.* at 54-56. Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation" that section 2 "imposed for other forms of disenfranchisement." *Id.* at 55. So the Fourteenth Amendment does not block a State from "exclud[ing] from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56.

As the en banc court of appeals held, *Richardson* forecloses petitioners' claim that the Eighth Amendment bars indefinite disenfranchisement of felons who have completed their sentences. App.9a, 17a, 19a; *see* App.8a-20a. The Eighth Amendment applies to the States through section 1 of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962). So petitioners' claim rests on the view that section 1 of the Fourteenth Amendment bars what section 2 allows. *Richardson* dooms that view. 418 U.S. at 54-55.

Petitioners dispute that *Richardson* bars their claim, Pet. 14-17, 24-25, but their arguments fail. First, they contend that *Richardson* rejected "only" an equal-protection claim and so left open other challenges to felon disenfranchisement. Pet. 15. But as explained, petitioners' claim is rooted in section 1 of the Fourteenth Amendment, and *Richardson* rejects the view that section 1 overrides section 2. Second, petitioners claim that, by holding that *Richardson* bars their claim because it seeks to use section 1 to invalidate the power recognized in section 2, the court of appeals "violated" the "established principle" that "constitutional grants of legislative authority" to the States "are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." Pet. 14, 15; *see* Pet. 16-17, 24-25. But the court of appeals agreed with that principle. App.11a-12a. It did not "suggest[ ]" that section 2 precludes "*any* constitutional challenges to lifetime felon[ ] disenfranchisement laws." Pet. 17. It recognized that felon-disenfranchisement laws are subject to constitutional limits—including those imposed by section 1—and cited as support the same

case that petitioners claim the court disregarded. *Compare* App.11a (citing *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), in stating that, under the Equal Protection Clause, States "may not disenfranchise felons with racially discriminatory intent") *with* Pet. 16 (claiming that the court "violate[d]" *Hunter*). The court added that although other constitutional provisions may "limit[ ] ... the exercise of a legitimate power," they "cannot void the power entirely." App.12a (internal quotation marks omitted). Petitioners' claim would void a large swath of the power recognized in section 2.

2. Even without *Richardson*, petitioners' claim fails because Section 241 does not impose a "punishment[ ]" subject to the Eighth Amendment. App.21a-34a.

a. A plurality of this Court has already signaled that a disenfranchisement law like Mississippi's "is not a punishment." App.22a; *see* App.22a-23a. In *Trop v. Dulles*, 356 U.S. 86 (1958), a four-Justice plurality explained: A bank robber "loses his right to liberty and often his right to vote." *Id.* at 96 (plurality opinion). "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." *Ibid.* "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." *Id.* at 96-97. That explanation alone strongly supports the view that felon disenfranchisement is not punishment.

b. Even without *Trop*, this Court's precedent shows that Section 241 does not impose punishment.

In deciding whether a state law imposes "punishment," this Court asks whether the State "inten[ded] ... to impose punishment" and (if it did not) whether the law is "so punitive either in purpose or effect as to negate" the State's intention to deem it "civil and nonpunitive." *Smith v. Doe*, 538 U.S. 84, 92 (2003). Under that framework, Section 241 does not impose punishment. App.23a-34a; *contra* Pet. 17-20.

i. Section 241's "text and structure" demonstrate that it was not "intended as a penal measure." App.23; *see* App.23a-24a. Section 241 defines "a qualified elector." Miss. Const. art. XII, § 241. Only those who meet certain qualifications—one who is an adult resident citizen, is "duly registered" to vote, and 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." *Ibid.* "Nothing on the face of" Section 241 suggests that the adopters "sought to create anything other than" a nonpenal regulation of the franchise. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The provision does not punish but instead "prescrib[es] the qualifications for the duties to be discharged"—voting. *Hawker v. New York*, 170 U.S. 189, 200 (1898) (contrasting prescriptions of qualifications with penalties). Context confirms this. Section 241 is titled "Qualifications for electors," it appears in the state constitution's "Franchise" article, and its implementing statutes are in the Election Code (not the Criminal Code), Miss. Code Ann. §§ 23-15-11, 23-15-19. *See Hendricks*, 521 U.S. at 361 ("placement" within code can "evidence[ ]" nonpenal intent). Section 241 "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." App.24a.

Like the dissent below, petitioners do not seriously confront these points. Pet. 17-18. They instead focus on Mississippi's Readmission Act, which barred the State from depriving "any citizen or class of citizens" of the right to vote "except as a punishment." Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68. According to petitioners, that Act means that disenfranchisement in Mississippi "*must*" be "punishment" for federal constitutional purposes. Pet. 17-18. As the court of appeals ruled, that is wrong. App.25a-27a. The Reconstruction-era Congress treated criminal history as a matter of voter qualifications rather than punishment. The Reconstruction Act, which set the stage for the Readmission Act by "establish[ing] conditions on which the former Confederate States would be readmitted to representation in Congress," shows this. *Richardson*, 418 U.S. at 49. The Reconstruction Act set requirements for state elections of delegates to form new state constitutions, provided that States could exclude from such elections persons who were "disenfranchised for participation in the rebellion or 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. The Readmission Act itself recognizes the State's power to disenfranchise. 16 Stat. at 68. That statute does not negate the power it recognizes. App.27a. Petitioners provide no sound basis for adopting a context-defying view of one word ("punishment") in a statute that did not purport to resolve whether disenfranchisement is a "punishment" for all federal constitutional

purposes. That Act's "punishment" reference should be read in context, to mean "consequence of a crime." App.26a n.14.

ii. Section 241 also is not "punitive ... in purpose or effect." *Smith*, 538 U.S. at 92. This Court has emphasized that "only the clearest proof" will "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 (1997). There is nothing remotely approaching such proof here. As the court of appeals held, every factor supports the view that Section 241 is not punitive. App.28a-34a; *see Smith*, 538 U.S. at 97, 105 (listing factors for determining whether a state law is punitive). Petitioners do not even engage with most of those points. *See* Pet. 18-20.

First, felon disenfranchisement has not "been regarded in our history and traditions as a punishment." *Smith*, 538 U.S. at 97; App.30a-31a. It has long been regarded as "a mere disqualification, imposed for protection, and not for punishment." *Washington v. State*, 75 Ala. 582, 585 (1884). By "long tradition," felon disenfranchisement has operated on a judgment about who should have "the right to participate in making" the laws. App.8a, 9a. In 1898, this Court cited criminal-disenfranchisement laws as an example of nonpunitive measures to protect the public. *Hawker*, 170 U.S. at 197 (citing *Washington*). Sixty years later, the *Trop* plurality observed that felon disenfranchisement is "nonpenal." 356 U.S. at 97. A decade after that, the Second Circuit held, in a decision by Judge Friendly, that "[d]epriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise.'" *Green v. Board of Elections of*

City of New York, 380 F.2d 445, 450 (2d Cir. 1967) (quoting *Trop*, 356 U.S. at 97 (plurality opinion)). Petitioners ignore most of this authority. They instead cite a *vacated* Second Circuit decision and one disenfranchisement law that used the word "punishment." Pet. 19. Those snippets—which suggest at most that "punishment" (and its variations) is a convenient catchall term for "consequence of committing a crime"—do not overcome the cases cited above that actually assess whether disenfranchisement is a punishment.

Second, felon disenfranchisement imposes no "affirmative disability or restraint." *Smith*, 538 U.S. at 97; App.28a-30a. It "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." 538 U.S. at 100. Disenfranchised felons "are free to move where they wish and to live and work as other citizens" are. *Id.* at 101. And Section 241 does not impose any affirmative duties on disenfranchised felons. *Compare id.* at 101-02 (law imposing reporting duties on sex offenders did not impose an "affirmative disability"). Disenfranchisement just "remove[s] the civil rights of individuals due to their criminal behavior as part of the State's regulatory power." *Thompson v. Alabama*, 65 F.4th 1288, 1306 (11th Cir. 2023). Even if disenfranchisement were a "restraint" in some sense, the same could be said of occupational debarment—which this Court has repeatedly held to be nonpunitive. App.29a (collecting cases). Indeed, this Court has held that some physical restraints—even of indefinite duration—are nonpunitive. *See Hendricks*, 521 U.S. at 363, 369 (potentially indefinite civil commitment); *United States v. Salerno*, 481 U.S. 739,

746-48 (1987) (pre-trial detention of criminal defendant). The loss of the right to vote does not impose a comparable restraint—particularly for felons, who do not stand in the shoes of non-felons since they no longer have a fundamental right to vote.

Third, felon disenfranchisement does not "promote[ ] the traditional aims of punishment"—deterrence and retribution. *Smith*, 538 U.S. at 97, 102; App.33a. "It is very unlikely that an individual considering whether to commit a felony would be willing to risk imprisonment but not disenfranchisement." *Thompson*, 65 F.4th at 1307. And nothing in Section 241 shows a retributive aim or operation. The length of disenfranchisement is not "measured by the extent of the wrongdoing," as is often true of punishments. *Smith*, 538 U.S. at 102. It is instead a blanket, indefinite prohibition for listed felonies based on a judgment about "the qualifications" needed to perform the duty of voting. *Hawker*, 170 U.S. at 200. Section 241's criminal-history qualification stands, moreover, beside other qualifications—on residency, age, citizenship, and registration. Those qualifications are reasonable and relevant to voting—and, as with felon disenfranchisement, none is retributive. *Cf.* App.33a.

Fourth, 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; App.33a-34a. It is rational and "nonpenal" for a State to conclude that one who "breaks the laws" has "abandoned the right to participate" in making them. *Green*, 380 F.2d at 450, 451. A State "properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to ... criminal laws ... by violating those laws sufficiently

important to be classed as felonies." *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). Section 241 rationally promotes those nonpunitive purposes and does so in a way that is not excessive. Each of Section 241's disenfranchising crimes is serious, probative of dishonesty or poor civic virtue, a common-law crime whose gravity has long been recognized, a crime that has commonly triggered disenfranchisement—or a combination of these features. App.34a. Indefinitely disenfranchising on those grounds is reasonable and enjoys a long tradition. Petitioners fault Section 241 for its "blanket application." Pet. 19; *see* Pet. 19-20. But this Court long ago recognized that legislatures are entitled "to make a rule of universal application" in adopting nonpunitive public-welfare regulations based on judgments about character—even though such rules may sweep in some who "reform and become in fact possessed of a good moral character." *Hawker*, 170 U.S. at 197. In endorsing that authority, this Court cited as an example the rule "in many States" that "a convict is debarred the privileges of an elector." *Ibid.* Such a rule is not punitive. *See id.* at 200.

Last, felon disenfranchisement under Section 241 has no scienter requirement and addresses only conduct that is "already a crime." *Smith*, 538 U.S. at 105; App.31a-32a. Although these factors are often "of little weight," 538 U.S at 105, each supports the view that Section 241 is nonpunitive. Scienter is associated with penalties. *See*, *e.g.*, *Hendricks*, 521 U.S. at 362. The crimes listed in Section 241 thus generally have scienter requirements. But disenfranchisement is different. Section 241 does not itself impose any "scienter requirement for felon disenfranchisement; it is sufficient that the person be convicted of a

disqualifying felony." *Thompson*, 65 F.4th at 1307. Similarly, although disenfranchisement under Section 241 is "tied to criminal activity," here that feature does not suggest punitiveness. *United States v. Ursery*, 518 U.S. 267, 292 (1996). States "may impose both a criminal and a civil sanction" for "the same act or omission." *Ibid.*; *e.g.*, *Hawker*, 170 U.S. at 190-91, 200 (debarment from practice of medicine based on "convict[ion] of a felony" is not a "penalty"). Section 241 does not use a criminal conviction to impose a new punishment. It uses a criminal conviction because of what that conviction reveals. "[T]he 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. Section 241 implements a judgment that those convicted of listed felonies lack the character appropriate for exercising the franchise. *Shepherd*, 575 F.2d at 1115 (felons "have manifested a fundamental antipathy to ... criminal laws," and States may validly "exclud[e]" them "from the franchise"). That is a nonpenal end.

Every factor thus supports the court of appeals' ruling that Section 241 does not impose punishment. Petitioners did not meet their "heavy burden" of providing "the clearest proof" that Section 241 is "so punitive either in purpose or effect as to negate" the adopters' "intention" to deem it "civil." *Hendricks*, 521 U.S. at 361. Section 241 is not a punishment and so is not subject to the Eighth Amendment.

3. Even if Section 241 imposed punishment, permanent felon disenfranchisement is not "cruel and unusual" and so it comports with the Eighth Amendment. App.35a-41a.

Permanent felon disenfranchisement is not cruel and unusual. App.35a-36a. When the Fourteenth Amendment was adopted, 29 of the 36 States "had provisions in their constitutions which prohibited, or authorized the legislature to prohibit," felons from voting. *Richardson*, 418 U.S. at 48. A century later, 42 States had such provisions. *Green*, 380 F.2d at 450. Fifty years ago, this Court recognized that States may "exclude some or all convicted felons from the franchise." *Richardson*, 418 U.S. at 53; *see id.* at 54-56. Today nearly every State disenfranchises some felons. And the plain text of section 2 of the Fourteenth Amendment still allows States to permanently disenfranchise felons. Concluding that the Eighth Amendment overrides the squarely on-point section 2 would be remarkable.

Petitioners claim that Section 241 is subject to the test this Court has applied to claims that certain punishments categorically violate the Eighth Amendment. Pet. 20-21. That categorical analysis does not apply here. App.37a-38a. This Court has applied that analysis "only in cases that involve the death penalty or juvenile offenders sentenced to life in prison." App.37a. This Court's caselaw treats those sentences as "different" from other sentences. *Ibid.* Lifetime felon disenfranchisement is not categorically "different" from other sentences. Lifetime *imprisonment* (at least for adults) is common in our society and is not subject to this Court's categorical approach. It follows that the far lesser sanction of lifetime *disenfranchisement* is not subject to that approach either. Section 241 should be upheld under the textual and historical analysis set out above.

Even if a categorical analysis applies, petitioners' claim fails. App.38a-41a. Under that analysis, a court

assesses "objective indicia of society's standards" to discern "whether there is a national consensus against the sentencing practice at issue" and then "determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham v. Florida*, 560 U.S. 48, 61 (2010). There is no "national consensus" against indefinite disenfranchisement. *Contra* Pet. 20-22. *Richardson* invoked "settled historical and judicial understanding" in upholding California's permanent-disenfranchisement regime. 418 U.S. at 54. Plenty of States still use the practice. App.66a-72a (appendix). Nearly all States disenfranchise some felons. And States disenfranchise in such varied ways that a court cannot soundly condemn indefinite disenfranchisement. App.38a-39a. Although many States have relaxed their restrictions on the franchise for felons, that is not a solid basis for condemning the States that maintain firmer restrictions: "traditional notions of federalism" allow States to take different approaches. *Rummel v. Estelle*, 445 U.S. 263, 282 (1980). And States that have relaxed their restrictions may later want to change course.

That leaves the Judiciary's "independent judgment." To the extent that such a judgment is anything but a legally rootless exercise of raw will, there is no sound basis for using that judgment to condemn Section 241. *Contra* Pet. 22-24. The people of Mississippi have resoundingly disagreed with that view. No court had embraced that view before the panel did below. And the judgments of whether and for how long to disenfranchise felons are legislative, not judicial. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and in judgment) ("[O]ur decisions recognize that we lack

clear objective standards to distinguish between sentences for different terms of years."). Those judgments call for drawing lines that are "subjective" and thus "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-76. And it would be singularly improper to exercise "independent judgment" to condemn a practice that the Fourteenth Amendment recognizes that States may use. Hesitation is especially warranted where, as here, there is at least serious doubt that the sanction at issue is even a punishment. *Supra* pp. 12-19.

B. The court of appeals' Eighth Amendment ruling does not warrant further review.

First, as explained above, the court of appeals' ruling is correct. More than that: The decision rests on three separate grounds that each provide an independent basis for rejecting petitioners' claim. Each ground hews to this Court's precedent. Petitioners cannot overcome any of those grounds—let alone all three. *Supra* Part I-A.

Second, there is no lower-court conflict. Two other circuits have ruled, like the court below, that felon-disenfranchisement laws do not impose punishment. *Green*, 380 F.2d at 450 (rejecting the claim that "[d]epriving convicted felons of the franchise" is "a punishment" subject to the Eighth Amendment); *Thompson*, 65 F.4th at 1304-08 (ruling that Alabama's felon-disenfranchisement law is nonpenal and so comports with the Ex Post Facto Clause). And the one other circuit to have considered an Eighth Amendment challenge to a felon-disenfranchisement law rejected it. *Green*, 380 F.2d at 450-51 (holding that even if felon disenfranchisement were a "punishment," it is not "cruel and unusual").

Third, the Eighth Amendment claim does not present a recurring legal issue. Because this claim is so weak, few courts have had to face it—and only two courts of appeals (over 50+ years) have had to decide it. The court of appeals' rejection of a deeply flawed constitutional attack is thus no different from countless other decisions that this Court declines to review each year. The decision does not present any "exceptionally important" issue. *Contra* Pet. 13-24.

Fourth, even putting aside the multiple independent grounds for the decision below, this Court's intervention would not affect the outcome of this case for another reason. Petitioners challenge Section 241 only on its face. Complaint ¶ 91 (ROA.19-60662.52). So they must show that "no set of circumstances exists under which" Section 241 would comport with the Eighth Amendment. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners cannot carry that "heavy burden." *Ibid.* There is nothing "disproportionate" (*Graham*, 560 U.S. at 70, 72) about permanently stripping the right to vote from (for example) brutal murderers, child rapists, and egregiously dishonest perjurers—as Section 241 does. For them, Section 241 imposes a proportionate "punishment" and so does not violate the Eighth Amendment. That dooms petitioners' purely facial Eighth Amendment claim and shows that this case is not a sound vehicle for deciding the first question presented. *Contra* Pet. 25.

II. The Second Question Presented Does Not Warrant Review.

Petitioners also ask this Court to grant review to decide whether section 2 of the Fourteenth Amendment allows States to permanently

disenfranchise felons. Pet. 26-37. The en banc court of appeals correctly resolved that question and its decision does not warrant further review.

A. Petitioners claim that Section 241 violates the Equal Protection Clause because it permanently denies the fundamental right to vote but fails strict scrutiny. Pet. 26, 37. The court of appeals was right to reject that claim. App.4a n.2; *see* App.94a-99a.

Richardson v. Ramirez, 418 U.S. 24 (1974), forecloses this claim. App.4a n.2; *see* App.94a-99a. Again: *Richardson* held that because "the exclusion of felons from the vote has an affirmative sanction in" section 2 of the Fourteenth Amendment, 418 U.S. at 54, section 1's Equal Protection Clause cannot bar a State from disenfranchising felons, *id.* at 54-56. *Richardson* ruled specifically that that Clause does not bar a State from "exclud[ing] from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56. So *Richardson* rejects the view, urged by petitioners, that the Equal Protection Clause bars permanently disenfranchising felons.

Richardson is correct. It adopts the natural reading of section 2, 418 U.S. at 43, 54, soundly construes the Amendment's structure to harmonize section 1 and section 2, *id.* at 54-56, and undertakes a thorough historical analysis that confirms that section 2's text "mean[s] what it says," *id.* at 43; *see id.* at 43-53. The decision thus rests on the Fourteenth Amendment's text, structure, and history—exactly what this Court looks to when construing any constitutional provision.

Petitioners argue that *Richardson* misconstrued section 2. Pet. 26-36. Their argument runs as follows: Section 2's first sentence apportions congressional

representation based on state population. Its second sentence then reduces that representation if a State denies the right to vote to certain adult male citizens, but with an exception. That sentence provides: "*But when the right to vote* at any election ... *is denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged, except for participation in rebellion, or other crime*," the State's congressional representation "shall be reduced" proportionally. U.S. Const. amend. XIV, § 2 (emphases added). Petitioners argue that, under the last-antecedent canon, the phrase "except for participation in rebellion, or other crime" modifies only the phrase "or in any way abridged," not the phrase "is denied." Pet. 26-27, 29-30, 31. Petitioners thus say that section 2 recognizes a State's power only to "temporarily abridge[ ]" (not "permanently deny") the right to vote "for participation in rebellion, or other crime." Pet. 26, 27 (capitalization altered; formatting omitted); *see* Pet. 31-32. They maintain that because Section 241 permanently denies the right to vote, it falls outside what section 2 allows, is thus subject to strict scrutiny because it burdens the right to vote, and fails that standard. Pet. 26, 37. In holding that section 2 allows States to permanently disenfranchise felons, petitioners say, *Richardson* erred. Pet. 26-27, 32-36.

This argument fails. The phrase "except for participation in rebellion, or other crime" modifies both "denied" and "abridged." That modifying phrase is set off from the "abridged" phrase by a comma. The phrase thus presumptively modifies both verbs preceding it—"denied" and "abridged." *See Sobranes Recovery Pool I, LLC v. Todd & Hughes Construction*

Corp., 509 F.3d 216, 223 & n.19 (5th Cir. 2007) (when modifying language is "set off from the last item in the list by a comma, this suggests that the modification applies to the whole list and not only the last item"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161 (2012) (recognizing that punctuation "will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part" and that "[p]roperly placed commas" can "cancel the last-antecedent canon"); *contra* Pet. 30 n.4. And section 2 uses the word "is" just once, to join "denied" and "abridged": "is denied ... or ... abridged." That feature confirms that "denied" and "abridged" are linked and are both modified by the other-crime phrase. The Fourteenth Amendment's broader structure confirms that the other-crime phrase modifies both verbs. Section 1's Due Process Clause says: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The modifying phrase "without due process of law" is set off by a comma and applies to all three items listed. So too for section 2. These features confirm that, as *Richardson* held, section 2 allows States to permanently disenfranchise felons.

More: Petitioners' argument rests on the view that "denied" refers to *permanent* prohibitions of the right to vote but "abridged" refers to *temporary* prohibitions. *E.g.*, Pet. 27, 31, 32, 33, 35, 36, 37. That view is flawed. Neither term is limited to temporal restrictions on the right to vote. *Deny* means "[n]ot to afford" or "to withhold"—a prohibition. Noah Webster, An American Dictionary of the English Language 280 (1867); *see* Joseph E. Worcester, Dictionary of the English Language 383 (1860) ("[t]o refuse to grant" or "to withhold"). *Abridge* generally

means "[t]o curtail" or "to reduce"—an inhibition that falls short of a prohibition. Worcester 6; *see* Webster 4 (*abridged* means "[m]ade shorter" or "lessened"). This suggests that "denied" in section 2 refers to a prohibition on the right to vote and that "abridged" refers to an inhibition on the right that falls short of a prohibition. But nothing suggests that "denied" means only permanent prohibitions or that "abridged" means only temporary inhibitions. Denials can be permanent (lifetime disenfranchisement) or temporary (disenfranchisement for five years). Abridgments can be permanent (a lifetime requirement to pass a literacy test at each election) or temporary (a requirement to pass a literacy test until age 50). This confirms that "denied" and "abridged"—in the Fourteenth Amendment and other amendments, *see* Pet. 30-31—work together to fully bar the disenfranchisement at issue, whether it is permanent, temporary, total, or partial. The two terms work in tandem and must be read in light of that. So the Fourteenth Amendment's other-crime phrase must be read to modify both terms.

B. The court of appeals' equal-protection ruling does not warrant further review. Petitioners do not claim that this ruling presents a lower-court conflict or a recurring question of federal law. They instead ask this Court to grant certiorari to overrule *Richardson*. Pet. 29; *see* Pet. 26-37. None of the *stare decisis* factors supports revisiting that decision. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part) (discussing *stare decisis* factors). First, and as explained, *Richardson* is correct. There is no serious argument that it is "egregiously wrong." *Id.* at 1414. Second, petitioners cite nothing to show that *Richardson* has proven

unworkable or that it has caused any "negative ... consequences." *Id.* at 1415. *Richardson* adopts a clear rule that allows States to relax their felon-disenfranchisement laws through the democratic process—as many States have done. That some States have not embraced petitioners' policy view is not a negative consequence but is instead a normal feature of democracy and federalism—and it is "some evidence ... that there are two sides to the argument" about how to approach felon disenfranchisement. *Richardson*, 418 U.S. at 55. Third, upending *Richardson* would "unduly upset reliance interests" of States, like Mississippi, that have relied on that decision (and on the Fourteenth Amendment's plain text) in enacting laws restricting voting by felons. 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). This Court should not grant review to revisit a correct 50-year-old decision.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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