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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case presents two certiorari-worthy constitutional questions that affect the voting rights of tens of thousands of Mississippians. Respondent does not seriously contest the significance of this case or that it presents an appropriate vehicle to address the issues presented. Respondent's principal objection is that the en banc majority was so correct that granting certiorari is not warranted. On those arguments, Respondent is wrong. And to the limited extent that Respondent addresses procedural arguments supporting a grant of certiorari, Respondent misses the mark.

First, the en banc majority erroneously held that Section 2 of the Fourteenth Amendment exempts Section 241 from review under the Eighth Amendment. This Court has made clear that one constitutional amendment does not preempt the protections of another. Respondent's arguments that Section 241 is neither punishment, nor cruel or unusual, similarly fail. Section 241's voting restrictions constitute punishment under both prongs of the "intents-effects" test mandated by *Smith v. Doe*, 538 U.S. 84, 92 (2003). Section 241 is also cruel and unusual given the clear national consensus against the punishment it imposes. Mississippi is one of only two states that impose lifetime disenfranchisement on first-time offenders convicted of non-violent or non-governance related crimes who have completed their sentences. It is immaterial that "nearly every State disenfranchises *some* felons," as Respondent argues. Petitioners ask this Court to decide whether Mississippi's lifetime disenfranchisement scheme

violates the Eighth Amendment, not whether any other disenfranchisement scheme is unconstitutional.

Second, *Richardson v. Ramirez* incorrectly held that Section 2 of the Fourteenth Amendment exempts from strict scrutiny laws that permanently deny voting rights for "participation in rebellion, or other crime." 418 U.S. 24, 41, 54 (1974). The *Richardson* Court did not consider whether, under the rule of the last antecedent, this clause modifies only the term it immediately follows—"abridged"—and does not reach back to modify the term "denied." Respondent does not dispute that Petitioners' reading of Section 2 is correct under the rule of the last antecedent. Respondent nonetheless argues that the *Richardson* Court adopted the "natural reading" of Section 2, yet offers an unnatural and baseless interpretation in support. Moreover, while Respondent invokes *stare decisis* principles against granting certiorari, in fact all such principles weigh in favor of revisiting *Richardson*.

ARGUMENT

I. Petitioners' Eighth Amendment Challenge to Section 241 Merits Review

A. This Constitutional Issue Is Exceptionally Important

Section 241 permanently impedes Mississippians convicted of disenfranchising offenses from exercising voting rights even after serving their court-mandated sentences. The Court should address the en banc majority's erroneous decision and safeguard this fundamental right for Mississippians who have been disenfranchised by Section 241.

1. The En Banc Decision Was Incorrectly Decided

Respondent's argument that *Richardson* "forecloses" Petitioners' Eighth Amendment challenge to Section 241 misstates the Court's holding. Opp.10. The *Richardson* Court held only that the Equal Protection Clause in Section 1 of the Fourteenth Amendment could not render felony disenfranchisement *per se* unconstitutional where Section 2 of that amendment provided an "affirmative sanction" for such restrictions. 418 U.S. at 54. Even if *Richardson* remains undisturbed, it did not address whether Eighth Amendment protections are diminished by virtue of their incorporation to the states through the Fourteenth Amendment. This Court has repeatedly held that substantive rights are not diluted or somehow "watered-down" based on their incorporation through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 765–66 (2010). Respondent's argument to the contrary fails to address the absurd outcomes that

would result if *Richardson* were so expanded. *See* Pet.App.64a (Dennis, J., dissenting) (noting that, by the en banc majority's logic, states could "execute an intellectually disabled person or a child—as long as she has been afforded due process").

Respondent's claim that invalidating Section 241 would "void the power entirely" of states to disenfranchise individuals convicted of felonies under Section 2 is misleading. Opp.12. Even if this Court deemed lifetime felony disenfranchisement unconstitutional, states could still disenfranchise individuals who are serving their felony sentences, including while they are on parole, probation or post-release supervision.

Second, Section 241 is subject to Eighth Amendment scrutiny because it imposes punishment under *Smith*'s "intents-effects" test, which first considers "[i]f the intention of the legislature was to impose punishment," and, if not, whether the law "is so punitive either in purpose or effect" that it negates any civil intention. 538 U.S. at 92 (citations omitted). Respondent does not dispute that when Mississippi enacted Section 241, it was bound by Mississippi's Readmission Act, which prohibited the State from enacting laws that deprive citizens of voting rights "*except as punishment*." Act of Feb. 23, 1870, ch. 19, 16 Stat. 67 (emphasis added). At the time of the Readmission Act, punishment meant exactly what it means today: "[t]he act of punishing; any infliction . . . imposed on one who has committed a fault or crime . . . a penalty." Joseph Worcester, *A Dictionary of the English Language* 1155 (1860). Rather than accept this unambiguous meaning of "punishment," Respondent reaches beyond the statute and points to

the Reconstruction Act in an attempt to substantiate the en banc majority's baseless holding that "'punishment' does not mean 'punishment.'" Pet.App.46a (Dennis, J., dissenting). The Readmission Act is clear on its face, and the Court need not stray beyond its plain language to establish the meaning of "punishment." *See McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear.").

Respondent claims the plurality opinion in *Trop v. Dulles* "signal[s]" that felony disenfranchisement laws are non-punitive, effectively conceding that *Trop* did not address this question. Opp.12 (citing 356 U.S. 86, 96 (1958)). Construing *Trop* as Respondent suggests is "a misreading of *Trop*." *Thompson v. Alabama*, 65 F.4th 1288, 1304 (11th Cir. 2023). Instead, *Trop* states that "the evident purpose of the legislature" is the key factor in determining whether a felony disenfranchisement law is penal in nature. 356 U.S. at 96. Here, the penal purpose of Section 241 is clear given its enactment under Mississippi's Readmission Act.

The remaining "intents-effects" factors under *Smith* similarly demonstrate that Section 241 imposes punishment. Respondent places unjustified weight on Section 241's location in the state constitution's "Franchise" article. The mere placement of the section is far outweighed by other clear evidence of the intent of the Mississippi legislature to impose Section 241 as penal. *See Trop*, 356 U.S. 86, 94 (holding "[m]anifestly the issue of whether [a statute] is a penal law cannot be . . .

determined" by mere "inspection of the labels pasted on [it]"); *see also Smith*, 538 U.S. at 94–95; Pet.18.

Third, Section 241 is both cruel and unusual. Citing no authority, Respondent asserts that the categorical analysis in *Graham v. Florida*, 560 U.S. 48, 60–61 (2010) must be limited to cases involving juvenile life without parole and the death penalty because those sentences are "different." Opp.20. Applying this unsupported standard, Respondent argues that lifetime disenfranchisement is not sufficiently "different" from other punishments because lifetime imprisonment, a more severe punishment, is supposedly not subject to *Graham*'s categorical analysis. *Graham* itself involved "a categorical challenge to a term-of-years sentence," however, and the Court did not limit its analytical framework only to cases involving minors. *See* 560 U.S. at 61. Moreover, lifetime imprisonment is a sentence imposed by the court. By contrast, lifetime disenfranchisement is a punishment that extends *beyond* the sentence imposed by a court. The *Graham* factors apply to such disproportionate punishment and demonstrate why Section 241 does not pass Eighth Amendment scrutiny.

Thirty-two states and the District of Columbia do not impose lifetime felony disenfranchisement under any circumstances. This is more than sufficient under *Graham* to demonstrate a national consensus against such punishment. *See Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (national consensus where 30 states rejected punishment at issue); *Roper v. Simmons*, 543 U.S. 551, 564, 566 (2005) (same). Respondent argues that because most states disenfranchise individuals convicted of felonies in

some circumstances, there is no national consensus against this punishment. Opp.21. But Petitioners do not challenge *temporary* felony disenfranchisement during sentence completion. This case challenges the *lifetime* disenfranchisement of Mississippians who have completed their felony sentences.

Section 241 is also disproportionate under *Graham* because it neither accounts for "the culpability of the offenders," nor "serves legitimate penological goals." *Graham*, 560 U.S. at 67–68. Respondent suggests that each disenfranchising offense encompassed by Section 241 is "serious, probative of dishonesty or poor civic virtue, a common-law crime whose gravity has long been recognized, [or] a crime that has commonly triggered disenfranchisement." Opp.18. But Respondent cannot explain why stealing $250 worth of timber or writing a bad check for $100 is "serious" enough to warrant lifetime disenfranchisement, while many other crimes involving theft and fraud are not. Pet.App.79a–80a. Finally, Respondent argues that the Court should not exercise its independent judgment under *Graham* to find Section 241 unconstitutional. Opp.21–22. Respondent does not analyze any considerations relevant to this analysis as set forth in *Graham*, all of which weigh in favor of finding Section 241 unconstitutional. *See* 560 U.S. at 67–68; Pet.22–23.

B. This Case Is an Ideal Vehicle to Address the Applicability of the Eighth Amendment to Section 241

Respondent makes three cursory arguments why this case is not an appropriate vehicle for reviewing

whether Section 241 violates the Eighth Amendment. *See* Opp.22–23. None has merit.

First, Respondent argues that there is no circuit split because the Second and Eleventh Circuits reached the same conclusion as the en banc majority. Opp.22. However, *Green v. Board of Elections* supports Petitioners' Eighth Amendment challenge because it demonstrates the dramatic shift away from lifetime felony disenfranchisement in recent decades—42 states imposed this punishment when *Green* was decided compared to 18 states today (and only two, including Mississippi, permanently disenfranchise first-time offenders for non-violent or non-governance related crimes). 380 F.2d 445, 450–51 (2d Cir. 1967). The Eleventh Circuit's decision in *Thompson v. Alabama* is inapposite because the court did not analyze whether Alabama's Readmission Act demonstrated the Alabama legislature's intent to enact lifetime disenfranchisement as a punishment. 65 F.4th at 1305. Review is warranted because no other circuit court, nor this Court, has squarely addressed the question presented here.

Second, Respondent asserts that this case does not raise a recurring legal issue because only three circuit courts have addressed it in the last 50 years. Opp.23. But for Mississippians who will otherwise be bound by an en banc Fifth Circuit ruling, this is their only opportunity for this issue to be correctly resolved by this Court.

Third, Respondent incorrectly argues that this case is an improper vehicle to raise a facial challenge to Section 241 because disenfranchisement may be proportionate in some circumstances, such as when applied to "brutal murderers, child rapists, and

egregiously dishonest perjurers." *Id.* But Petitioners do not argue that Section 241 violates the Eighth Amendment insofar as it applies while individuals are serving their court-ordered sentences, including those serving lifetime sentences. This challenge seeks the restoration of voting rights only for those individuals whose crimes did not, in the view of the court and the State, warrant a lifetime sentence.

II. Certiorari Should Be Granted to Consider a Question of Constitutional Interpretation That *Richardson* Did Not Address

Respondent does not, and cannot, argue that the *Richardson* Court decided or even considered the question Petitioners ask this Court to address: whether the phrase "except for participation in rebellion, or other crime" in Section 2 of the Fourteenth Amendment (the "other crime exception") only modifies the phrase "or in any way abridged" and does not reach back to modify "denied." Under the well-established rule of the last antecedent, the answer is "yes." Contemporaneous definitions of "abridge" further demonstrate that the other crime exception applies only to laws that temporarily abridge the right to vote—not laws that forever deny this right.

None of Respondent's arguments purporting to explain why the rule of the last antecedent does not apply and contending that the *Richardson* Court adopted the "natural reading" of Section 2 weighs against granting certiorari.

A. Section 2's "Other Crime" Exception Applies Only to Laws That Temporarily Abridge the Right to Vote

Respondent argues that the "other crime" exception modifies both "denied" and "abridged" because it is set off from "abridged" by a comma. Opp.25–26. But when the Fourteenth Amendment was written, courts placed little weight on commas and other punctuation marks. *See* Pet.30 n.4; *Ewing's Lessee v. Burnet*, 36 U.S. 41, 54 (1837) ("Punctuation is a most fallible standard by which to interpret a writing.").

For example, in *Hammock v. Farmers' Loan & Trust Co.*, this Court rejected an effort to leverage a comma to expand the scope of an 1874 statute governing the powers an Illinois judge could "lawfully exercise in vacation." 105 U.S. 77, 82 (1881). The statute provided that judges "shall have power in vacation, to hear and determine motions, to dissolve injunctions, [and other specified motion types]." *Id.* at 83. Petitioner relied on the comma between the phrases "to hear and determine motions" and "to dissolve injunctions" to argue that "a judge in vacation could hear and determine motions of every kind." *Id.* at 84. The Court held that such sweeping judicial powers could not be "conferred by the introduction of a comma," and instead construed the statute to permit judges in vacation to decide only the specific enumerated categories of motions, effectively erasing the comma from the statute. *Id.* at 84–85. The Court reasoned that the comma "should not have a controlling influence" because "[p]unctuation is no part of the statute." *Id.* at 84. As in *Hammock*, this Court should not rely on a single comma in Section 2

to overwrite the more natural reading of the text and the implications of the last antecedent rule.

Respondent also attempts to analogize to the Due Process Clause, where the phrase "without due process of law" is set off by a comma from "life, liberty, or property." Opp.26. The modifier in Section 1 applies to "life, liberty, or property" not because of the preceding comma, but because they are a parallel series of nouns. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."). While the Due Process Clause sets forth a "simple and parallel [list] without unexpected internal modifiers or structure," Section 2 has a "varied syntax" that "makes it hard for the reader" to apply the "modifying clause" to both the denial and the abridgement of the right to vote. *Lockhart v. United States*, 577 U.S. 347, 351–52 (2016) (applying the last antecedent rule).

Respondent further contends that "denied" and "abridged" are both modified by the other crime exception because the verb "is" appears only once in Section 2. Opp.26. But it is a "routine aspect of expression" to list a singular verb that applies to "several terms coming after it, one by one." *Pulsifer v. United States*, 601 U.S. 124, 134 (2024). "The [singular] verb in the sentence carries over—some grammarians use the term "distribut[es]"—to every item on the ensuing list." *Id.* (citations omitted); *see also id.* at 134–35 (offering examples from the Constitution where "the [singular] verb phrase operates on each term *seriatim*").

Finally, Respondent contends, without support, that "denied" "refers to a prohibition on the right to vote" while "abridged" means "an inhibition . . . that falls short of a prohibition." Opp.26–27. Aside from unconstitutional literacy tests, Respondent provides no examples of how an inhibition would be different from a prohibition. And, under Respondent's self-styled definitions, either term could refer to a permanent or temporary restriction, rendering the use of two distinct terms redundant. Because Section 2 includes both "denied" and "abridged," offset by the disjunctive term "or," these words must "be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (citations omitted).

Contemporaneous sources and this Court's jurisprudence make clear that "denied" refers to an outright prohibition, while "abridged" refers to a *shortening or reduction*. Pet.31–32; *see also, e.g.*, *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 333–34 (1999) (noting that the "core meaning" of "abridge" is "shorten").

B. *Stare Decisis* Principles Weigh in Favor of Revisiting *Richardson*

Each of the factors this Court considers in deciding whether to revisit a prior decision favors granting certiorari.

First, *Richardson* is egregiously wrong because it departs from "the language of the instrument, . . . which offers a fixed standard for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (citations omitted). Bypassing the key question of whether the "other crime" exception applies both to the denial and the abridgement of the right to vote,

the *Richardson* Court instead surveyed the "scant" legislative history and state constitutional provisions to determine the "intention" of the provision. 418 U.S. at 43. This erroneous approach led the Court to its incorrect conclusion.

Second, *Richardson* has resulted in significant negative "real-world effects on the citizenry." *Ramos v. Louisiana*, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part). Tens of thousands of current and future Mississippians are now or will be forever disenfranchised even after they have fully completed their sentences. This practice harms all Mississippians because lifetime disenfranchisement "*increase[s]* recidivism." Pet.App.58a (Dennis, J., dissenting).

Finally, with respect to "reliance interests," Respondent does not "claim[] anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke." *Ramos*, 590 U.S. at 107. Without support, Respondent contends, illogically, that Mississippi relied on the 1974 *Richardson* decision in enacting Section 241 in 1890. Opp.28. But Respondent does not and cannot argue that Mississippi would be adversely impacted by restoring voting rights to individuals who have fully completed their court-ordered felony sentences.

CONCLUSION

The petition should be granted.

December 27, 2024

Respectfully submitted,

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