UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ROY HARNESS, et al., Plaintiffs, v. DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI, in his official capacity, Defendant.	Civil Action No. 3:17-cv-791-DPJ-FKB *Consolidated with* Civil Action No. 3:18-cv-188-CWR-LRA
DENNIS HOPKINS, et al., Plaintiffs, v. DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI, in his official capacity, Defendant.	ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF
THE *HOPKINS* PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Dennis Hopkins, Herman Parker, Jr., Walter Wayne Kuhn, Jr., Byron Demond Coleman, Jon O'Neal and Earnest Willhite ("*Hopkins* Plaintiffs" or "Named Plaintiffs") respectfully submit this memorandum of law in support of the *Hopkins* Plaintiffs' Motion for Summary Judgment (the "Motion") in *Hopkins et al. v. Hosemann*. Pursuant to Local Rule 7(b)(6)(A), the *Hopkins* Plaintiffs respectfully request oral argument on this motion.

PRELIMINARY STATEMENT

The right to vote is the cornerstone of citizenship in a democratic society. But in Mississippi, tens of thousands of individuals will never again have the opportunity to cast a ballot because of the state's punitive, unjust and arbitrary criminal disenfranchisement laws. Under Section 241 of the Mississippi Constitution, individuals who are convicted in Mississippi state courts of numerous crimes ("disenfranchised individuals") lose the right to vote for the rest of their lives (the "lifetime voting ban"). A disenfranchised individual may only regain the right to vote at the behest of the Governor, or through the rarity of a "suffrage bill" passed by the Mississippi Legislature pursuant to Section 253 of the Mississippi Constitution (the "suffrage restoration provision"). Neither the suffrage restoration provision nor any Mississippi statute establishes objective criteria for legislators to apply. Instead, Mississippi legislators have complete discretion to decide which disenfranchised individuals may vote again. Between 2013 and 2017, the Mississippi Legislature restored voting rights to just *fourteen* individuals.

This lawsuit asserts two claims challenging Mississippi's unforgiving lifetime voting ban and three claims challenging the state's standardless suffrage restoration provision. As set forth below, the material facts are undisputed, and the *Hopkins* Plaintiffs are "entitled to judgment as a matter of law" on each of these claims. Fed. R. Civ. P. 56(a).

***Count One**:* The lifetime voting ban is a form of punishment that is both cruel and unusual, in violation of the Eighth Amendment. Enacted with punitive intent, the lifetime voting ban is penal in character and effect. Condemning Americans who have completed their sentences to a lifetime of second-class citizenship is exceedingly cruel, as measured by modern standards of fairness and decency.[1] It is also unusual: 40 states and the District of Columbia do not impose a lifetime voting ban on any individuals convicted of disenfranchising offenses, other than election and government-related offenses.[2] Six states impose a lifetime voting ban only on individuals convicted of certain categories of disenfranchising offenses. Mississippi is one of only four states that impose a lifetime voting ban on *all* individuals convicted of disenfranchising offenses.

***Count Two**:* Mississippi's lifetime voting ban violates the Equal Protection Clause because it is not drawn with precision to satisfy a compelling state interest using the least drastic means available. Section 2 of the Fourteenth Amendment provides no exemption from the rigorous demands of the Equal Protection Clause for criminal disenfranchisement laws that permanently "deny" the right to vote based on "participation in rebellion, or other crime." Section 2's exemption is limited to laws that temporarily "abridge" this right. Because Mississippi's lifetime voting ban falls outside the scope of Section 2's exemption, it is subject to strict scrutiny review, which it cannot satisfy.

[1] "Sentence" means the term of incarceration, parole, probation and/or supervised release imposed for the conviction of a disenfranchising offense.

[2] "Lifetime voting ban" or "lifetime disenfranchisement" means a permanent prohibition on the right to vote even after sentence completion, without any non-discretionary pathway to obtain the restoration of the right to vote.

***Count Three**:* Mississippi's suffrage restoration provision violates the Equal Protection Clause because it permits legislators to arbitrarily restore voting rights to some Mississippi citizens and not others. Since there are no standards guiding the legislators' decisions, they are free to vote for or against suffrage bills for any reason—or no reason at all. Such an arbitrary and irrational reenfranchisement scheme cannot pass constitutional muster.

***Count Four**:* Mississippi's suffrage restoration provision violates the First Amendment by impermissibly vesting legislators with unfettered discretion to determine who may express their political and ideological views by casting a ballot, while denying others this same right.

***Count Five**:* Mississippi's suffrage restoration provision violates the Equal Protection Clause because it was enacted with racially discriminatory intent as part of Mississippi's 1890 Constitution, has never been amended, and continues to disproportionately impact black Mississippians.

STATEMENT OF FACTS

Mississippi punishes individuals convicted of disenfranchising offenses in Mississippi state courts by depriving them of the right to vote for the rest of their lives.[3] Pursuant to the state's lifetime voting ban, an individual may vote (be a "qualified elector") only if he or she has "*never been convicted* of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy."[4] MISS. CONST. art. XII, § 241

[3] MISS. CONST. art. XII, § 241; MISS. CODE ANN. §§ 23-15-11, 23-15-19 (2018); Ex. 19, Mississippi Mail-In Voter Registration Application (stating that only convictions in Mississippi state courts are disenfranchising). Only felonies are disenfranchising under Mississippi law. Ex. 17, Def.'s Response to Pl.'s RFA No. 7 at 4.

[4] All of the evidentiary materials cited in support of this Motion are judicially noticeable pursuant to Federal Rule of Evidence 201. Courts routinely take judicial notice of similar materials. *See, e.g.*, *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226–227 (1959) (legislative history); *Lamar v. Micou*, 114 U.S. 218, 223 (1885) (laws of any state); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862, 866 n.3 (D.S.D. 2015) (historic state statutes), *aff'd*, 799 F.3d 918 (8th Cir. 2015); *Hayden v. Paterson*, 594 F.3d

(emphasis added). Although the Mississippi Constitution lists only ten disenfranchising offenses, the Mississippi Attorney General ("AG") has opined that there are twelve additional offenses that fall within the scope of the lifetime voting ban: (1) armed robbery; (2) extortion; (3) felony bad check; (4) felony shoplifting; (5) larceny; (6) receiving stolen property; (7) robbery; (8) timber larceny; (9) unlawful taking of a motor vehicle; (10) statutory rape; (11) carjacking; and (12) larceny under lease or rental agreement.[5] The AG has also repeatedly opined that "there could be additional crimes that are disqualifying."[6] In 2012, the Mississippi Legislature further extended the reach of the lifetime voting ban by adding voter fraud as a disenfranchising offense.[7] Because of the breadth of Mississippi's lifetime voting ban, an individual can lose the right to vote forever for such minor offenses as writing a bad check for $100, or stealing $250 worth of timber.[8] Violating the terms of the state's punitive lifetime voting ban carries the risk of severe criminal penalties.[9] For instance, a disenfranchised individual who signs and submits a

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150, 168 n.14 (2d Cir. 2010) (journal of New York's constitutional convention in a challenge to New York's felon disenfranchisement law); *In re Enter. Mortg. Acceptance Co., LLC, Secs. Litig*, 391 F.3d 401, 410 n.8 (2d Cir. 2004) (amicus brief); *Stukenberg v. Abbott*, No. 2:11-CV-84, 2017 WL 74371, at *3 (S.D. Tex. Jan. 9, 2017) (statements made by the Governor of Texas); *Devine v. Educational Testing Service*, Civ. A. No. H-14-1782, 2014 WL 7072150, at *3 n.5 (S.D. Tex. Dec. 12, 2014) (information on an official government website); *Cargill, Inc. v. Clark*, No. 10-487-JJB, 2012 WL 6115096, at *5 & n.1, 2. (M.D. La. Dec. 10, 2012) (government publication); *Tipton v. Northrop Grumman Corp.*, No. 08-1267, 2009 WL 3160163, at *5 (E.D. La. Sept. 29, 2009) (court records); *John Doe I v. Roman Catholic Diocese of Galveston-Houston*, No. H-05-1047, 2007 WL 2817999, at *23 n.30 (S.D. Tex. Sept. 26, 2007) (legislative bill analysis); *U.S. ex. rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 680 (E.D. Tex. 2006) ("[T]he coverage and existence of newspaper and magazine articles.").

[5] 2009 Miss. Att'y Gen. Op. 2009-00210 (July 9, 2009); Ex. 21, Disenfranchising Crimes. These additional offenses are listed on Mississippi's voter registration application. Ex. 19.

[6] 2009 Miss. Att'y Gen. Op. 2009-00210 (July 9, 2009); 2004 Miss. Att'y Gen. Op. 2004-0171 (Apr. 23, 2004).

[7] S.B. 2227, 2012 Leg., Reg. Sess. (2012).

[8] MISS. CODE ANN. § 97-19-67(1)(d) (2018) (setting forth penalties for MISS. CODE ANN. § 97-19-55 (2018)); MISS. CODE ANN. § 97-17-59(2) (2018); Ex 16, *Hopkins* Pls.' RFA No. 8 at 8 & ex. A; Ex. 17, Def.'s Response to Pl.'s RFA No. 8 at 2-3.

[9] MISS. CODE ANN. §§ 97-13-25, 97-13-35, 23-15-753 (2018).

voter registration application may be charged with a felony and imprisoned for up to five years.[10]

Mississippi does not maintain comprehensive data on individuals who are subject to the lifetime voting ban.[11] Based on the data that is available, however, the lifetime voting ban impacts tens of thousands of Mississippians who have completed their sentences. The *Hopkins* Plaintiffs' expert, Dr. Dov Rothman, determined that nearly 50,000 individuals were convicted of disenfranchising offenses in Mississippi state courts between 1994 and 2017 alone.[12] Ex. 1, Rothman Rep. ¶¶ 10(a), 14. More than 29,000 of these individuals have completed their sentences. *Id.* ¶¶ 10(b), 17. Defendant's expert did not question or refute these findings. Ex. 3, Moore Rep.; *see also* Ex. 4, Rothman Reply Rep. ¶ 7.

The Named Plaintiffs are among the many victims of Mississippi's lifetime voting ban. ***Dennis Hopkins*** completed his sentence for grand larceny over sixteen years ago. Ex. 5, Hopkins Rep. ¶ 4. He is the owner of a towing business, a registered foster parent, and the former chief of his local fire department. *Id.* ¶ 6. Mr. Hopkins is raising eight children with his wife. *Id.* ***Herman Parker, Jr.*** completed his sentence for grand larceny more than two decades ago. Ex. 6, Parker Rep. ¶ 4. Today, Mr. Parker is a father of two and a longstanding employee of the Vicksburg Housing Authority. *Id.* ¶ 9. ***Walter Wayne Kuhn, Jr.*** completed his sentence for grand larceny twenty-six years ago. Ex. 7, Kuhn Rep. ¶ 4. A veteran of the United States Army,

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[10] Ex. 19, Mississippi Mail-In Voter Registration Application; MISS. CODE ANN. § 97-13-25 (2018).

[11] Ex 18, Def.'s Response to Pl.'s Interrog. No. 2 at 3.

[12] Dr. Rothman conducted an analysis of conviction records maintained by Mississippi's Administrative Office of the Courts ("AOC") for the period between January 1, 1994 and December 31, 2017. Ex. 1, Rothman Rep. ¶ 11. AOC records are used in the Statewide Elections Management System ("SEMS"), Mississippi's electronic voter registration database, for the purpose of identifying individuals convicted of disenfranchising offenses. Ex 18, Def.'s Resp. to Pl.'s Interrog. 1 at 2. The AOC was established on July 1, 1993; one of its responsibilities is to "collect case statistics from all civil, criminal and youth courts in the state." *See Administrative Office of the Courts*, STATE OF MISS. JUDICIARY, https://courts.ms.gov/Newsite2/aoc/aoc.php (last visited Oct. 2, 2018).

Mr. Kuhn works as a home improvement contractor and volunteers his time to help men who are recovering from drug addiction. *Id.* ¶¶ 3, 5–6. His record was expunged in December of 2017. *Id.* ¶ 10. ***Byron Demond Coleman*** completed his sentence for receiving stolen property twenty years ago. Ex. 8, Coleman Rep. ¶ 4. He worked as a delivery driver until he suffered a stroke. *Id.* ¶ 3. ***Jon O'Neal*** completed his sentence for second-degree arson of a non-dwelling in 2015. Ex. 9, O'Neal Rep. ¶ 4. ***Earnest Willhite*** completed his sentence for grand larceny in January 2018. Ex. 10, Willhite Rep. ¶ 4.

A. Disenfranchised Individuals Have No Realistic Opportunity to Regain the Right to Vote.

A disenfranchised individual may only regain the right to vote in Mississippi through an act of the Governor or the passage of a suffrage bill by the Mississippi Legislature.[13] The legislative process for the restoration of voting rights is governed by Section 253 of the state constitution, which provides in its entirety as follows:

> 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. No Mississippi statute establishes objective criteria that legislators must take into account when considering the restoration of an individual's voting rights. Legislators do not have to explain why they voted for or against a proposed suffrage bill; rather, votes are simply recorded in "yeas" or "nays."[14] There is no statutorily established appeals

[13] MISS. CONST. art. XII, §§ 241, 253; MISS. CODE ANN. § 47-7-41 (2018); Ex. 20, Mississippi Voter Information Guide at 2. *See also* MISS. CODE ANN. § 99-19-37 (2018) (addressing the restoration of suffrage to veterans of World Wars I and II).

[14] MISS. CONST. art. XII, § 253; art. IV, § 55; Ex. 30, Bill history for H.B. 1475 (2017); Ex. 27, Record of Senate votes on H.B. 1475 (2017); Ex. 28, Record of House votes on H.B. 1475 (2017).

process for individuals whose suffrage bills are denied.

Regaining the right to vote through a suffrage bill is a complex multi-step process. ***First,*** a legislator must introduce a suffrage bill on behalf of a disenfranchised individual.[15] ***Second,*** the sponsoring legislator must obtain approval from the House Judiciary B Committee (if a representative) or the Senate Judiciary Committee, Division B (if a senator).[16] Each house has its own self-determined rules for committee approval.[17] If the suffrage bill does not win Judiciary Committee approval, the suffrage bill cannot proceed.[18] ***Third*****,** the suffrage bill must pass the first house of the Mississippi Legislature to consider the bill by a two-thirds vote.[19] ***Fourth****,* the Judiciary B Committee of the second house of the Mississippi Legislature must approve the bill.[20] A suffrage bill may win approval by the Judiciary B Committee of the first house to consider it, and pass by a two-thirds vote of that house, only to then "die" in committee in the second house.[21] This is what happened, for example, when a suffrage bill was proposed on behalf of Herman Parker, one of the Named Plaintiffs in this action, in 2012—nearly fourteen years

[15] Only legislators may introduce bills before the Mississippi Legislature. *See, e.g.*, Ex. 23, Miss. Leg. House Rules, R. 92; Ex. 24, Miss. Leg. Senate Rules, R. 74. A suffrage bill usually states the petitioner's name, home county, disenfranchising offense, and sentence completion status, and typically includes a sentence to the following effect: "The Legislature has been reliably informed that [petitioner] is now conducting [him- or herself] as a law-abiding and honorable citizen in a good and lawful manner." *See, e.g.*, Ex. 25, S.B. 2107 (2017); Ex. 26, H.B. 1475 (2017).

[16] MISS. CONST. art. IV, § 74; Ex. 23, Miss. Leg. House Rules, R. 48; Ex. 24, Miss. Leg. Senate Rules, R. 75, 78; *see, e.g.*, Ex. 29, Bill history for S.B. 2107 (2017); Ex. 30, Bill history for H.B. 1475 (2017).

[17] MISS. CONST. art. IV, § 55 ("Each House may determine rules of its own proceedings . . . .").

[18] MISS. CONST. art. IV, § 74; Ex. 23, Miss. Leg. House Rules, R. 48; Ex. 24, Miss. Leg. Senate Rules, R. 78; *see, e.g.*, Ex. 31, Bill history for H.B. 1695 (2018).

[19] MISS CONST. art. XII, § 253; *see*, *e.g.*, Ex. 29, Bill history for S.B. 2107 (2017); Ex. 30, Bill history for H.B. 1475 (2017).

[20] MISS. CONST. art. IV, § 74; Ex. 23, Miss. Leg. House Rules, R. 48; Ex. 24, Miss. Leg. Senate Rules, R. 75, 78; *see, e.g.*, Ex. 29, Bill history for S.B. 2107 (2017); Ex. 30, Bill history for H.B. 1475 (2017).

[21] *See, e.g.*, Ex. 32, Bill history for S.B. 2947 (2016).

after he had completed his sentence.[22] ***Fifth***, the suffrage bill must pass the second house of the Mississippi Legislature by a two-thirds vote.[23] ***Finally,*** the Governor must either sign the suffrage bill or allow it to become a law without his signature.[24]

The Mississippi Legislature restored voting rights to four individuals in 2018, six individuals in 2017, four in 2015, three in 2014, and one in 2013. Ex. 11, Summary Chart I: Successful Suffrage Bills. Not a single suffrage bill was passed in 2016. *Id.* These eighteen re-enfranchised Mississippians appear to have virtually nothing in common. For example, there is no consistent number of years that have passed since the date of each individual's conviction, or uniformity in terms of the offense type or sentence length.

B. Both the Lifetime Voting Ban and the Suffrage Restoration Provision Were Enacted as Part of a Scheme to Disenfranchise Black Mississippians.

As detailed at length in the report submitted by the *Hopkins* Plaintiffs' expert historian, Dr. Dorothy Pratt, both the lifetime voting ban and the suffrage restoration provision were enacted in Mississippi's 1890 Constitution for the purpose of disenfranchising black Mississippians and ensuring white political control of the state.[25] During the 1890 Constitutional Convention ("1890 Convention"), the Committee on the Elective Franchise, Apportionment and Elections (the "Franchise Committee") devised numerous ostensibly race-neutral voter eligibility requirements with the specific intention of disproportionately disenfranchising black men.[26]

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[22] Ex. 6, Parker Dec. ¶¶ 4, 8; Ex. 33, Bill history for H.B. 1562 (2012).

[23] MISS CONST. art. XII, § 253*; see also, e.g.,* Ex. 29, Bill history for S.B. 2107 (2017); Ex. 30, Bill history for H.B. 1475 (2017).

[24] MISS CONST. art. IV, § 72*, see also, e.g.,* Ex. 29, Bill history for S.B. 2107(2017); Ex. 30, Bill history for H.B. 1475 (2017).

[25] Ex. 2, Pratt. Rep. ¶¶ 8(a–d), 25–27, 51–54.

[26] Ex. 2, Pratt Rep. ¶¶ 8(a–b), 25–31, 37–39; Ex. 15, Summary Chart V: Selected Statements by Delegates to the 1890 Constitutional Convention; Ex. 34, *Proceedings* at 9–11, 83–87, 134–36, 275, 700–03; Ex. 35, "Senator J.Z. George"; Ex. 36, "Judg[e] Calhoon's Views"; Ex. 37, "Gen'l George's Views"; Ex. 38,

These provisions included a poll tax, a lengthy residency requirement, a literacy test, and a targeted criminal disenfranchisement provision that was "limited . . . to a carefully selected list of crimes that aimed to ensnare more African Americans than whites."[27]

Although the Franchise Committee "intended to craft specifications to apply principally to African American voters, . . . they knew that some white men would be disfranchised in the process." Ex. 2, Pratt. Rep. ¶ 39. A number of the delegates to the 1890 Convention were opposed to the incidental disenfranchisement of any white men, even to advance the larger goal of disenfranchising as many black men as possible.[28] "[T]o mitigate the effect of the disfranchisement provisions on white males," the Franchise Committee "created escape clauses." *Id.* ¶ 41. The first of these was the "Understanding Clause," pursuant to which an illiterate applicant could qualify to vote by providing an explanation of a constitutional provision of the registrar's choosing to the registrar's satisfaction.[29] The Understanding Clause included no standards for its application.[30] Instead, the Understanding Clause vested the registrars with complete discretion to decide who could vote and who could not.[31] The unstated purpose of the

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"Judiciary Committee"; Ex. 42, "The Convention. Military Bill Is Much Amended and Passed"; Ex. 43, "Stuck in the Whole"; Ex. 44, "Another Talking Day"; Ex. 45, "More Free Talking"; Ex. 46, "The Franchise"; Ex. 47, "Convention Speeches. Delivered by Messrs. Mayes and Eskridge"; Ex. 48, "Convention Speeches. Hon J.H. Jones Speaks Against Female Suffrage"; Ex. 49, "Discussion Continues"; Ex. 50, "And Still They Talk"; Ex. 51, "Flood of Amendments"; Ex. 57, Appellee's Reply Br. at 35–37, *Ratliff v. Beale* (Miss. 1896).

[27] Ex. 2, Pratt Rep. ¶ 51, *id.* ¶¶ 38–39; Ex. 34, *Proceedings* at 134–36. These provisions were extraordinarily effective at disenfranchising black men. Ex. 2, Pratt Rep. ¶¶ 73–74; Ex. 58, *Voting in Mississippi* at 8; Ex. 57, Appellee's Reply Br. at 35–37, *Ratliff v. Beale* (Miss. 1896).

[28] Ex. 2, Pratt Rep. ¶¶ 39–40; Ex. 43, "Stuck in the 'Whole'"; Ex. 49, "Discussion Continues"; Ex. 48, "Convention Speeches. Hon. J.H. Jones Speaks Against Female Suffrage"; Ex. 40, "A Property Qualification."

[29] Ex. 2, Pratt Rep. ¶¶ 42–43; Ex. 34, *Proceedings* at 136, 676; MISS. CONST., art. XII, § 244 (1890).

[30] Ex. 2, Pratt Rep. ¶¶ 42–43; Ex. 34, *Proceedings* at 136, 676; MISS. CONST., art. XII, § 244 (1890).

[31] Ex. 2, Pratt Rep. ¶¶ 43–44; Ex. 41, "Two Good Speeches"; Ex. 39, "Female Suffrage Day."

Understanding Clause was to enable illiterate white men to qualify to vote.[32]

The Franchise Committee also created a second "escape clause"—the suffrage restoration provision—for white men who might be convicted of disenfranchising offenses. Ex. 2, Pratt. Rep. ¶¶ 8(d–f), 41, 51–54. "Just as the Understanding Clause served as a safety net for illiterate white males who would otherwise be disfranchised by the proposed literacy test, the Suffrage Restoration Provision ensured that whites caught up in the criminal justice system had a possible remedy and could redeem their franchise."[33] Like the Understanding Clause, the suffrage restoration provision included "no standards of any kind" but instead vested legislators with "complete discretion to determine whose voting rights to restore."[34] The suffrage restoration provision has never been amended; it reads word-for-word today as it did in 1890.[35] Defendant submitted no expert report to contradict or challenge the reliability of Dr. Pratt's expert opinions.

STANDING

Each of the *Hopkins* Plaintiffs has been convicted of a disenfranchising offense and has completed his sentence.[36] One of the Named Plaintiffs, Herman Parker Jr., unsuccessfully attempted to regain his voting rights by suffrage bill.[37] None of the *Hopkins* Plaintiffs has regained the right to vote through a suffrage bill or a pardon.[38] All of the *Hopkins* Plaintiffs will forever be prohibited from voting in Mississippi, barring a change in Defendant's interpretation

[32] Ex. 2, Pratt Rep. ¶¶ 8(d), 41-42, 45, 48–49; Ex. 49, "Discussion Continues"; Ex. 55, "Understanding Clause"; Ex. 54, "Don't Like it But Takes It."

[33] Ex. 2, Pratt Rep. ¶ 53; *see also* Ex. 52, "The Great Question"; Ex. 53, "The Convention."

[34] Ex. 2, Pratt Rep. ¶ 54; Ex. 34, *Proceedings* at 193–195, 677; MISS. CONST. art. XII, § 253 (1890).

[35] Ex. 17, Def.'s Response to Pl.'s RFA No. 28 at 11.

[36] Ex. 5, Hopkins Dec. ¶ 4; Ex. 6, Parker Dec. ¶ 4; Ex. 7, Kuhn Dec. ¶ 4; Ex. 8, Coleman Dec. ¶ 4; Ex. 9, O'Neal Dec. ¶ 4; Ex. 10, Willhite Dec. ¶ 4.

[37] Ex. 6, Parker Dec. ¶ 8; Ex. 33, Bill history for H.B. 1562 (2012).

[38] Ex. 5, Hopkins Dec. ¶ 4; Ex. 6, Parker Dec. ¶ 4; Ex. 7, Kuhn Dec. ¶ 4; Ex. 8, Coleman Dec. ¶ 4; Ex. 9, O'Neal Dec. ¶ 4; Ex. 10, Willhite Dec. ¶ 5.

or application of the lifetime voting ban.[39] The *Hopkins* Plaintiffs' injuries are fairly traceable to and redressable by Defendant, who is "designated as Mississippi's chief election officer." MISS. CODE ANN. § 23-15-211.1.[40] *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) ("The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by its Secretary of State, who serves as the 'chief election officer of the state.'").

ARGUMENT

Summary judgment should be granted "if 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). Summary judgment is particularly appropriate where, as here, "the only issue[s] before the [C]ourt" are "pure question[s] of law." *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991). As demonstrated below, no material facts are in dispute, and the *Hopkins* Plaintiffs are entitled to judgment as a matter of law on all five claims.[41]

I. *Count One*: Mississippi's Lifetime Voting Ban Violates the Eighth Amendment's Prohibition on Cruel and Unusual Punishments.

Mississippi's lifetime voting ban is a punishment that is both cruel and unusual, as measured under "the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58 (2010); *see also Kennedy v. Louisiana*, 554 U.S.

[39] In December 2017, one of the Named Plaintiffs, Mr. Kuhn, obtained the expungement of his record. Ex. 7, Kuhn Dec. ¶ 10. Prior to the commencement of this litigation, Defendant maintained that the only way for an individual to regain the right to vote was through a suffrage bill passed by the Mississippi Legislature or at the behest of the Governor. Ex. 20, Mississippi Voter Information Guide at 2. But Defendant has since suggested that the expungement of a conviction may restore an individual's voting rights. Ex. 17, Def.'s Response to Pl.'s RFA No. 2 at 2. In the event that Defendant decides that expungement restores voting rights, Mr. Kuhn would be eligible to vote.

[40] Defendant has numerous responsibilities in connection with the interpretation and implementation of Mississippi's lifetime voting ban. *See, e.g.*, MISS. CODE ANN. §§ 23-15-47(3), 23-15-211(5), 23-15-213(1), 23-15-223(4) (2018).

[41] All internal quotations and citations are omitted unless otherwise noted.

407, 419 (2008) (whether a punishment is cruel and unusual "is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail"). Depriving an individual of the right to vote forever violates "the duty of the government to respect the dignity of all persons." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014); *see also Brown v. Plata*, 563 U.S. 493, 510 (2011) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Put simply, lifetime disenfranchisement is a punishment that has no place in our 21st century democratic society.

A. Mississippi's Lifetime Voting Ban Is a Form of Punishment.

The Eighth Amendment applies to Mississippi's lifetime voting ban because it "can only be interpreted as punitive." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *see also Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1328–29 (M.D. Ala. 2017) (the "focus" of the Eighth Amendment is "on proscribed forms of punishment"). Where, as here, "the intention of the legislature was to impose punishment, that ends the inquiry." *Smith v. Doe*, 538 U.S. 84, 92 (2003); *see also Thompson*, 293 F. Supp. 3d at 328–29. The Eighth Amendment also governs Mississippi's lifetime voting ban irrespective of the legislative intent because the ban is "penal . . . in character" and effects. *Mendoza-Martinez*, 377 at 168 (enumerating seven factors for determining whether a statute "is penal or regulatory in character"); *see also Smith*, 538 U.S. at 92–93, 97–106 (the *Mendoza-Martinez* factors provide a "useful framework" for determining whether a statute is "so punitive either in purpose or effect as to negate the State's intention to deem it civil"); *Thompson*, 293 F. Supp. 3d at 1329.

1. Mississippi's Lifetime Voting Ban Was Enacted as a Punishment.

Federal law has long prohibited Mississippi from enacting a criminal disenfranchisement provision in its state constitution for any purpose other than punishment. The February 23, 1870

"Act to admit the State of Mississippi to Representation in the Congress of the United States" (the "Readmission Act") established several "fundamental conditions" pursuant to which Mississippi was "admitted to representation in Congress as one of the States of the Union." Ex. 59, Readmission Act, ch. 19, 16 Stat. 67 (1870). The first of these provides "[t]hat the constitution of Mississippi 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 who are entitled to vote . . . *except as a punishment for such crimes as are now felonies at common law*." *Id.* The Readmission Act has never been amended or repealed; it was in full force and effect in 1890, when Mississippi enacted the lifetime voting ban, and in 1950 and 1968, when Mississippi amended the lifetime voting ban's list of disenfranchising offenses.

Because the Readmission Act is binding federal law, Mississippi's lifetime voting ban must be read to comport with its terms. *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Arizona v. U.S.*, 567 U.S. 387, 399 (2012) ("[S]tate laws are preempted when they conflict with federal law."); *Planned Parenthood of Houston and Southeast Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005) (courts "must choose the interpretation of [a statute] that has a chance of avoiding federal preemption"). Under the terms of the Readmission Act, Mississippi's lifetime voting ban is a punishment as a matter of law.

The punitive purpose for Mississippi's lifetime voting ban is evidenced by the manner in which Mississippi government officials view and enforce it. As Mississippi's Governor recently stated, "[t]here is a *price to pay* for violating the laws of the state of Mississippi, particularly a felony. And one of them is that you lose your right to vote unless it is restored by the Mississippi

Legislature."[42] Disenfranchised individuals who violate the terms of the state's lifetime voting ban are subject to further criminal penalties.[43] For example, in 2011, a disenfranchised individual was sentenced to ten years in prison for his "illegal participation" in municipal elections.[44] These criminal "enforcement procedures" are "probative of the legislature's intent" in enacting the lifetime voting ban. *Smith*, 538 U.S. at 94; *see also Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268, at *7 (N.D. Oh. Sept. 4, 2007) (finding that a law's criminal enforcement mechanism "contribute[d] to the argument that the law was . . . intended" to be penal).

2. Mississippi's Lifetime Voting Ban Is Penal in Character and Effect.

The seven factors enumerated by the Court in *Mendoza-Martinez* also demonstrate that the voting ban is "penal . . . in character" and effect, and is thus subject to Eighth Amendment strictures. 372 U.S. at 168. *Mendoza-Martinez* looks to whether: (1) "the sanction involves an affirmative disability or restraint," (2) "it has historically been regarded as a punishment," (3) "it comes into play only on a finding of scienter," (4) "its operation will promote the traditional aims of punishment—retribution and deterrence," (5) "the behavior to which it applies is already a crime," (6) "an alternative purpose to which it may rationally be connected is assignable for it," and (7) "it appears excessive in relation to the alternative purpose assigned." *Id.*; *see also Smith*, 538 U.S. at 97–105. These factors "are neither exhaustive nor dispositive," but serve as "useful guideposts." *Smith*, 538 U.S. at 97. Each of these factors confirms the punitive nature of the lifetime voting ban.

First, permanent deprivation of the right to vote plainly constitutes an "affirmative

[42] Ex. 67, Jerry Mitchell, "SPLC: State still depriving rights," *Clarion Ledger* (Mar. 28, 2018) (emphasis added).

[43] *See* MISS. CODE ANN. §§ 97-13-25, 97-13-35, 23-15-753 (2018).

[44] Ex. 22, *Canton Man Receives Maximum Sentence for Voter Fraud* (Office of D.A. Guest, May 2011).

disability." *Mendoza-Martinez*, 372 U.S. at 168. "No right is more precious in a free country" than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (explaining that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."). "[T]he right to vote is one of the fundamental personal rights included within the concept of liberty." *U.S. v. Tex.*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 (1966). It is also one of the hallmarks of citizenship. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (noting that "the right to vote" is "one of the most fundamental rights of our citizens"). Taking away the right to vote for the rest of an individual's life is unquestionably a severe affirmative disability that diminishes her dignity, silences her political voice, and forever banishes her from civic society.[45]

The personal experiences of individuals subject to the lifetime voting ban leave no doubt that permanent revocation of the right to vote is an "affirmative disability." *See Smith*, 538 U.S. at 99–100 (when determining whether a sanction imposes an affirmative disability, the Court "inquire[s] how the effects of the [sanction] are felt by those subject to it"). The Southern District of Mississippi has found that Mississippi's lifetime voting ban has "draconian consequences" for individuals convicted of disenfranchising offenses:

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.

McLaughlin v. City of Canton, Miss., 947 F. Supp. 954, 971 (S.D. Miss. 1995) (Wingate, J.). The

[45] Defendant has admitted that the lifetime voting ban "impose[s] a disability." Ex. 18, Def.'s Response to Pl.'s Interrog. No. 28 at 14–15.

experiences of the *Hopkins* Plaintiffs echo the *McLaughlin* court's findings.[46] For example, Dennis Hopkins "feel[s] like a third or fourth-class citizen of" Mississippi because he cannot vote. Ex. 5, Hopkins Dec. ¶ 7. Herman Parker, Jr. "dread[s] Election Day because it reminds [him] of what [he has] lost." Ex. 6, Parker Dec. ¶ 6. And Byron Demond Coleman views himself as "a lower-class Mississippian who has no respectability in this state." Ex. 8, Coleman Dec. ¶ 5.

Second, criminal disenfranchisement has "historically been regarded as punishment." *Mendoza-Martinez*, 372 U.S. at 168; *see also Smith*, 538 U.S. at 97 (recognizing historical usage as among the "most relevant" *Mendoza-Martinez* factors). Both the Second and Eleventh Circuits have found that criminal disenfranchisement has historically been imposed as a punitive measure. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Felon disenfranchisement laws . . . are a punitive device stemming from criminal law."); *Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004) ("There is a longstanding practice in this country of disenfranchising felons as a form of punishment."), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (*en banc*). Fifteen states have acknowledged that "felon disenfranchisement has been used . . . as a form of punishment throughout the Nation's history."[47] Florida's Governor has similarly described felon disenfranchisement as "a penal restriction on the franchise" that "is deeply rooted in the Nation's history."[48]

The historical record provides ample evidence that criminal disenfranchisement has

[46] Ex. 5, Hopkins Dec. ¶¶ 7–10; Ex. 6, Parker Dec. ¶¶ 5–10; Ex. 7, Kuhn Dec. ¶¶ 5–9; Ex. 8, Coleman Dec. ¶¶ 5–7; Ex. 9, O'Neal Dec. ¶¶ 5–7.

[47] Ex. 63, Amicus Br. at *21, *Muntaqim v. Coombe* (2d Cir. 2005) (Nos. 01-7260, 04-3886), 2005 WL 4680739 (arguing that the Voting Rights Act did not restrict states' rights "to establish punishments for felons" through disenfranchisement).

[48] Ex. 64, Br. in Opp. to Pet. for a Writ of Cert. at *1, *Johnson v. Bush* (2005) (No. 05-212), 2005 WL 2662479.

traditionally been considered punitive in nature.[49] During Reconstruction, Congress enacted legislation prohibiting certain states from amending their constitutions to impose criminal disenfranchisement "except as a punishment for . . . crimes." Exs. 60–62. In *Richardson v. Ramirez*, the Court found the language of these Acts "convincing evidence of [the] historical understanding" of felon disenfranchisement. 418 U.S. 24, 53 (1974). Numerous post-*Ramirez* courts have recognized the punitive nature of criminal disenfranchisement.[50] The present-day laws of several states, including Mississippi, specifically recognize criminal disenfranchisement as a punishment or penalty.[51] New York has "made clear" that its criminal disenfranchisement statute "constitutes an integral part of its criminal and penal systems." *Hayden v. Pataki*, 449 F.3d 305, 327 (2d Cir. 2006). The lifetime voting ban is similarly an integral part of Mississippi's penal system.

Third, most of Mississippi's disenfranchising offenses require "a finding of scienter." *Mendoza-Martinez*, 372 U.S. at 168; *see also Austin v. U.S.*, 509 U.S. 602, 619 (1993) (a "focus"

[49] For example, in 1823, a New York court found that "[t]he disenfranchisement of a citizen" is a "punishment" that is "the consequence of treason, and of infamous crimes." *Harmelin v. Michigan*, 501 U.S. 957, 982–83 (1991) (quoting *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct. 1823), *aff'd*, 3 Cow. 686 (N.Y. 1824)). Moreover, since 1831, the Delaware constitution has empowered the state legislature to "impose the forfeiture of the right of suffrage as a punishment for crime." Ex. 65, DEL. CONST. art. IV, § 1 (1831); Ex. 66, DEL. CONST. art. V, § 2 (1897); *see also* DEL. CONST. art. V, § 2.

[50] *See, e.g.*, *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (felons are disenfranchised "because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment"); *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008) ("Laws disenfranchising convicted felons are penal in nature."); *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1060 (M.D. Tenn. 2008) ("[L]aws disenfranchising felons are punitive in nature."), *aff'd*, 624 F.3d 742 (6th Cir. 2010); *Sweeney v. Burns*, 377 A.2d 338, 340 (Conn. C.P. 1977) (finding Connecticut's criminal disenfranchisement statute "clearly penal in nature"); *see also Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (Rehnquist, J., dissenting) (noting that certain "felons" are "denied the franchise as part of their punishment") (emphasis added).

[51] *See* MISS CODE ANN. § 97-39-3 (2018), entitled *Additional penalties* (providing that disenfranchisement is one of the penalties for dueling), codified in Title 97, entitled *Crimes*; *see also* IDAHO CODE § 18-310 (2018); N.J. STAT. ANN. § 19:34-46 (2018); KAN. STAT. ANN. § 21-6613 (2018); VT. CONST. ch. II, § 55.

on "culpability" "makes [statutory provisions] look more like punishment").

Fourth, Mississippi's lifetime voting ban "promote[s] the traditional aims of punishment—retribution and deterrence." *Mendoza-Martinez,* 372 U.S. at 168. Historically, disenfranchisement has been imposed as "retribution for committing a crime," among other purposes.[52] There is no evidence that the lifetime voting ban benefits Mississippi's electorate or serves any concrete purpose other than retribution. *See, e.g.*, *Mendoza-Martinez*, 372 U.S. at 181–82 (finding the "lack of any reference to the societal good" demonstrated that "Congress was concerned solely with inflicting effective retribution").

Fifth, the lifetime voting ban is "an additional sanction attaching to behavior already a crime." *Mendoza-Martinez*, 372 U.S. at 169–70, n.30. Mississippi's lifetime voting ban is imposed only on individuals convicted of disenfranchising offenses and no one else.

Sixth, Defendant can point to no *tangible* nonpunitive purpose for Mississippi's lifetime voting ban but instead claims that the ban is imposed to "distinguish between persons who are fit and those who are unfit to exercise" what Defendant describes as "the *privilege* of suffrage," along with other equally abstract purposes.[53] Over the years, "[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes." *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972). "Search for modern reasons to sustain the old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of

[52] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 50 (2000). Keyssar's *The Right to Vote* has been authoritatively cited by the Supreme Court, among other courts. *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 27 (2013); *see also Veasey v. Abbott*, 830 F.3d 216, 331 n.10 (5th Cir. 2016) (Costa, J., dissenting in part).

[53] Ex. 18, Def.'s Response to Pl.'s Interrog. No. 28 at 14-15 (emphasis added).

serious crimes from participating in the electoral process, or a quasi-metaphysical invocation that the interest is preservation of the 'purity of the ballot box.'" *Id.* Historian Alexander Keyssar has explained that these abstract rationales for criminal disenfranchisement laws emerged once it became clear that the "efficacy of disfranchisement as a punishment was . . . dubious."[54]

Even if the Court were to find that Mississippi's lifetime voting ban serves such abstract regulatory purposes, the *primary* purpose of the ban is to punish individuals convicted of disenfranchising offenses.[55] *See, e.g., Muntaqim,* 366 F.3d at 123 (noting the "nearly universal use of felon disenfranchisement as a punitive device"); *Bailey v. Baronian,* 394 A.2d 1338, 1343 (R.I. 1978) (recognizing that "disenfranchisement has been viewed simply as a punitive provision," among other purposes); *Austin*, 509 U.S. at 610 (recognizing that "sanctions frequently serve more than one purpose"). Several courts have found that criminal disenfranchisement laws are enacted for multiple purposes, including punishment.[56]

Seventh, the lifetime voting ban is "excessive in relation to" any purported nonpunitive purpose that Defendant may ascribe to it. *Mendoza-Martinez,* 372 U.S. at 168. Mississippi's

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[54] *The Right to Vote* at 131.

[55] The Fifth Circuit and other courts have directly and indirectly relied on dicta in the plurality opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), which did not concern a criminal disenfranchisement law, to find that there is a rational nonpunitive purpose for criminal disenfranchisement laws generally. *See, e.g.*, *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). The *Trop* opinion noted that a criminal disenfranchisement law would be punitive if it was enacted for a punitive purpose. *See Trop,* 356 U.S. at 96 (recognizing that if the "sanction[ ]" of criminal disenfranchisement is "imposed for the purpose of punishing bank robbers" then "the statute authorizing [this] disabilit[y] would be penal"). Neither *Trop* nor *Shepherd* considered whether there is a rational nonpunitive basis for Mississippi's uniquely harsh lifetime voting ban. *See, e.g.*, *Thompson*, 293 F. Supp. 3d at 1313 (denying a motion to dismiss an Eighth Amendment challenge to Alabama's criminal disenfranchisement law, and reasoning that Alabama's law "requires its own analysis" of purpose).

[56] *See, e.g.*, *Baker v. Cuomo*, 58 F.3d 814, 821 (2d Cir. 1995) ("[F]elon disenfranchisement is reasonably related to social contract principles, penal considerations and the state's interest in ensuring that elections are free from fraud and corruption."), *vacated in part on other grounds*, 85 F.3d 919 (2d Cir. 1996); *State ex rel. Barrett v. Sartorious*, 175 S.W.2d 787, 788 (Mo. 1943) (stating that felon disenfranchisement is imposed both as "additional punishment" and "to safeguard and preserve the purity of elections").

lifetime voting ban applies to every individual convicted of a disenfranchising offense without any individualized assessment of whether that individual is likely to commit election fraud or is otherwise "unfit to exercise the privilege of suffrage."[57] Moreover, individuals convicted of disenfranchising offenses are deprived of the right to vote forever, even if they have completed their sentences and have never been convicted of any crimes since.[58] Significantly, the overwhelming majority of disenfranchised individuals who have completed their sentences are under the age of 45. *See* Ex. 1, Rothman Rep. ¶¶ 10(d), 20. These individuals may spend the rest of their lives obeying the laws, paying their taxes, and otherwise complying with their obligations under the so-called "social compact."[59] Yet, they will nevertheless suffer potentially decades of disenfranchisement as a punishment for long-ago crimes.

B. Mississippi's Lifetime Voting Ban Constitutes Cruel and Unusual Punishment in Violation of the Eighth Amendment.

Mississippi's lifetime voting ban is both cruel and unusual when considered in light of

[57] Ex. 18, Def.'s Response to Pl.'s Interrog. No. 28 at 14–15. *See, e.g.*, *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086, 1099 (D. Minn. 2018) (finding an "across-the-board restriction" on the residency of sex offenders "excessive in relation to its stated purpose" of protecting the public because it involved no "individualized assessment" but was instead "directly tied to an offender's prior conviction, not to any present threat to community safety"); *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (holding that Michigan's Sex Offenders Registration Act was "excessive" in relation to its "professed purpose of keeping Michigan communities safe" because it "brand[ed] registrants as moral lepers solely on the basis of a prior conviction" without "any individualized assessment"), *cert. denied, Snyder v. John Does #1-5*, 138 S. Ct. 55 (2017); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 954, 959 (E.D. Wis. 2017) (finding a restriction excessive because individuals were "ban[ned] . . . without any individualized inquiry into their risk to the community," and explaining that in order "to avoid an excessive punitive effect, a statute imposing a particularly harsh disability must allow an individualized assessment").

[58] *See, e.g.*, *Doe v. Miami-Dade Cty.*, 846 F.3d 1180, 1185–86 (11th Cir. 2017) (finding plaintiffs adequately alleged that Florida's sex offender residency restriction was "excessive in comparison to its public safety goal of addressing recidivism" because the "residency restriction applie[d] for life, even after an individual no longer ha[d] to register as a sexual offender under Florida law"); *Hoffman*, 249 F. Supp. 3d at 959–60 (finding a sex offender residency restriction excessive in relation to any claimed "rational" nonpunitive purpose because it "applie[d] to Designated Offenders for life").

[59] Ex. 18, Def.'s Response to Pl.'s Interrog. No. 28 at 14–15.

"the Eighth Amendment's text, history, meaning, and purpose," as well as "controlling precedent[ ]." *Graham*, 560 U.S. at 61. Decades ago, lifetime disenfranchisement may have been viewed as an acceptable form of punishment. But "[t]he Eighth Amendment is not fastened to the obsolete" and "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Hall*, 134 S. Ct. at 1992. Today, there is widespread agreement among the States that permanent revocation of the right to vote is an unjust and undemocratic punishment. This "national consensus" is evidenced by "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 U.S. at 61.

1. Lifetime Disenfranchisement Is Exceedingly Cruel.

The right to vote is the quintessential right of citizenship. *See, e.g.*, *Evans v. Cornman*, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "a fundamental political right" that is "preservative of all rights"); *Tex.*, 252 F. Supp. at 250 ("[T]he right to vote clearly constitutes one of the most basic elements of our freedom—the core of our constitutional system."). Indeed, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[60] *Reynolds v. Sims,* 377 U.S. 533, 567 (1964). The Southern District of Mississippi has recognized that the right to vote is a badge of citizenship. *See McLaughlin*, 947 F. Supp. at 971 (finding that disenfranchised individuals are "condemned to the lowest form of citizenship").

Lifetime disenfranchisement is thus tantamount to the revocation of citizenship—a

[60] Numerous state constitutional and statutory re-enfranchisement provisions refer to the voting rights as *citizenship* rights. For example, Rhode Island's Restoration of Voting Rights Act emphasizes that "[v]oting is an essential part of reassuming the duties of full citizenship." R.I. GEN. LAWS § 17-9.2-2(a)(1) (2018). *See also* COLO. CONST. art. VII, § 10; IDAHO CODE ANN. § 18-310(2) (2018); MINN. STAT. § 609.165 (2018); N.C. GEN. STAT. ANN. § 13-1 (2018).

punishment the Supreme Court has deemed too "cruel and unusual" even for wartime deserters. *See Trop v. Dulles*, 356 U.S. 92, 99–100 (1958) (plurality opinion). The *Trop* opinion explained that "the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be." *Id.* at 92–93. "Citizenship is not a license that expires upon misbehavior," nor is citizenship "lost every time a duty of citizenship is shirked." *Id.* at 92. Like the punishment of denationalization, lifetime disenfranchisement "destroys for the individual the political existence that was centuries in the development," and "strips the citizen of his status in" his local, state and national political and civic communities. *Id.* at 101. Mississippi's lifetime voting ban is therefore "offensive to cardinal principles for which the Constitution stands." *Id.* at 102. Where, as here, a "[g]overnment acts to take away [a] fundamental right of citizenship," "the safeguards" established in the Eighth Amendment "should be examined with special diligence." *Id.* at 103.

2. Lifetime Disenfranchisement Has Become Truly Unusual.

"[L]aws enacted by state legislatures provide the clearest and most reliable objective evidence of contemporary values." *Hall*, 134 S. Ct. at 2002. These laws demonstrate that there is now a "national consensus" against the punishment of lifetime disenfranchisement. This consensus extends far "beyond our Nation's borders." *Graham,* 560 U.S. at 80 (considering the "climate of international opinion concerning the acceptability of a particular punishment"); *see also Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (same).

a. State Legislatures Around the Country Have Rejected the Punishment of Lifetime Disenfranchisement.

Half a century ago, the Second Circuit affirmed dismissal of an Eighth Amendment challenge to New York's now-repealed lifetime voting ban. *Green v. Bd. of Elections*, 380 F.2d 445, 450–51 (2d Cir. 1967). The Second Circuit reasoned that "the great number of states

excluding felons from the franchise forbids a conclusion that this is a cruel and unusual punishment within the context of the evolving standards of decency that mark the progress of a maturing society." *Id.* Since *Green*, states around the country have near-uniformly rejected the punishment of lifetime disenfranchisement in response to a sea change in public mores.[61] Ex. 12, Summary Chart II: State Action Restoring or Expanding Voting Rights. For example, New York ended its lifetime voting ban because "[i]t is inconsistent with the general philosophy of corrections to continue punishment after a person has accounted" for his crimes.[62] Montana ended its lifetime voting ban because such a "*system of permanent punishment* is contrary to the best interests of society, in that it does nothing to aid rehabilitation of a criminal."[63] And Texas ended its lifetime voting ban because "[e]x-felons have paid their debt to society, and should be given a second chance to be good citizens" instead of being "*punished for the rest of their lives.*"[64]

Today, 40 states and the District of Columbia do not impose a lifetime voting ban on individuals convicted of disenfranchising offenses, other than election and government-related offenses. Ex. 13, Summary Chart III: States That Do Not Impose a Lifetime Voting Ban. Six states impose a lifetime voting ban only on individuals convicted of certain categories of disenfranchising offenses. Ex. 14, Summary Chart IV: States That Impose a Lifetime Voting Ban

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[61] There are a couple of exceptions to this nationwide trend. In 1981, Tennessee enacted a lifetime voting ban for individuals convicted of certain offenses. 1981 Tenn. Pub. Acts, c. 345, §§ 3, 8 (enacting Tenn. Code Ann. § 2-2-139). Moreover, in Florida, Iowa and Kentucky, lifetime voting bans have been reinstated by gubernatorial action.

[62] Ex. 68 at 2, *Bill Memorandum for Bill 4675* (N.Y. 1971).

[63] Ex. 69, General Government and Constitutional Amendment Committee on Suffrage and Elections, *Comments on Majority Proposal*, in Mont. Constitutional Convention at 337 (1971–72) (emphasis added). The Committee further stated: "The presumption is that when a man comes out of prison he should be encouraged to resume normal civic relationships." *Id.* at 338.

[64] Ex. 70 at 4, House Study Group, *Bill Analysis for H.B. 718* (Tex. 1983) (emphasis added).

Only for Certain Categories of Disenfranchising Offenses. Only four states—Florida, Iowa, Kentucky and Mississippi—impose a lifetime voting ban on all individuals convicted of disenfranchising offenses.[65] Florida's lifetime voting ban may soon be abolished pursuant to a constitutional amendment that will be on the ballot this November.[66] "The practice [of lifetime disenfranchisement], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002) (finding a "national consensus" where *only 30 states* prohibited the execution of mentally retarded offenders); *see also Roper*, 543 U.S. at 564 (finding a "national consensus" where *only 30 states* prohibited the execution of individuals who were under 18 at the time of their crimes); *Hall*, 134 at 1986 (finding a national consensus where "an individual with an IQ score of 71 would not be deemed automatically eligible for the death penalty" in 41 states).

b. Democracies Worldwide Have Also Rejected the Punishment of Lifetime Disenfranchisement.

"[A]mong Western industrial nations, only the United States and Belgium continue to disenfranchise ex-felons for life."[67] "[M]any European countries have no restrictions on felon voting, even for those serving time in prison."[68] Illustrative of the global consensus against the

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[65] FLA. CONST. art. VI, § 4(A); FLA. STAT. §§ 97.041(2)(B), 944.292(1) (2018); IOWA CONST. art. 2, § 5; IOWA CODE § 48A.6(1) (2018); KY. CONST. § 145(1); MISS. CONST. art. XII, § 241; MISS. CODE ANN. § 23-15-11 (2018).

[66] Fl. Amend. 4, Voting Rights Restoration for Felons Initiative (2018); *see also Advisory Opinion to the Attorney General re: Voting Restoration Amendment*, 215 So. 3d 1202 (Fla. 2017).

[67] Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 Syracuse L. Rev. 85, 90 (2005); *see also International Comparisons of Felon Voting Laws*, PROCON.ORG, https://felonvoting.procon.org/view.resource.php?resourceID=000289 (last visited Oct. 2, 2018).

[68] Amy E. Lerman & Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* 90 (2014). *See also* Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. Int'l L.J. 197, 210 (2011) (arguing that "an identifiable global trajectory has emerged towards the expansion of felon suffrage").

punishment of disenfranchisement is the Supreme Court of Canada's 2002 decision in *Sauvé v. Canada*. Ex. 71, [2002] 3 S.C.R. 519. The *Sauvé* Court found that the punishment of "[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy." *Id.* at 4. Mississippi's lifetime voting ban is thus an outlier both nationally and among democracies the world over.

3. Lifetime Disenfranchisement Is Inherently Disproportionate.

"The concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. Mississippi's lifetime voting ban is plainly disproportionate because it applies the same punishment to individuals convicted of a broad range of disenfranchising offenses, without any consideration of each individual's culpability or mitigating circumstances. *See id.* at 71 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Assuming *arguendo* that disenfranchisement can ever be a valid form of punishment, temporary disenfranchisement limited to the time an individual is in custody or under supervision may satisfy the Eighth Amendment's proportionality requirement. Under this framework, an individual convicted of murder and sentenced to lifetime imprisonment would never regain the right to vote, while an individual convicted of larceny and sentenced to two years in probation would lose the right to vote for two years.[69]

[69] Defendant has suggested that disenfranchised individuals should remain ineligible to vote until they have fully paid all fines and restitution owed. Def.'s Mem. in Response to Pl.'s Motion for Class Cert. at 14–16. If such a requirement were imposed, then similarly-situated individuals convicted of the same disenfranchising offense, sentenced to the same term of incarceration, and ordered to pay the same amount in fines and restitution could lose the right to vote for dramatically different lengths of time, based on nothing more than the ability to pay. Neither the Eighth Amendment nor the Equal Protection Clause countenances such a result. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard.").

II. Count Two: Mississippi's Lifetime Voting Ban Violates the Equal Protection Clause Because It Falls Outside of the Scope of Section 2's Exemption.

Mississippi's lifetime voting ban violates the Equal Protection Clause because it is not narrowly drawn to address a compelling state interest using the least drastic means. *See Dunn v. Blumstein*, 405 U.S. 330, 337, 342–43 (1972) (holding that strict scrutiny applies to laws granting the right to vote to some citizens and denying this right to others). Section 2 of the Fourteenth Amendment provides no exemption from strict scrutiny for lifetime disenfranchisement laws. The exemption in Section 2 applies only to laws that "abridge" the right to vote on the basis of "participation in rebellion, or other crime" (the "other crime" exemption) and not to laws that "deny" this right forever. *See, e.g.*, *Ramirez*, 418 U.S. at 54 (emphasizing the significance of Section 2's "express language"). Because Mississippi's lifetime voting ban falls outside the scope of Section 2's exemption, it is subject to strict scrutiny, which it cannot satisfy.

A. Section 2's "Other Crime" Exemption Does Not Encompass Laws Imposing Lifetime Disenfranchisement.

Section 2 establishes a penalty of reduced representation in Congress (the "representation penalty"). It provides:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, 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 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. Section 2 first addresses the operation of the representation penalty when the right to vote "is denied," and then discusses the application of the penalty when the right to vote is "in any way abridged." Given the text and structure of Section 2, it is clear that the word "abridge" refers to a restriction on the right to vote that is different from, and less severe than, the complete "denial" of the right to vote.[70]

History demonstrates that the term "abridge" in Section 2 refers to a *temporary* limitation on the right to vote. In the course of enacting the Fourteenth Amendment, Congress considered and rejected a provision that would have temporarily disenfranchised former Confederates until July 4, 1870.[71] Given that Congress was focused on the question of whether to temporarily disenfranchise former Confederates at the time it enacted Section 2, the phrase "in any way abridged" must be interpreted as referring to the *temporary* loss of voting rights. *See, e.g.*, *Ramirez*, 418 U.S. at 54 ("[T]he understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 . . . is of controlling significance" in interpreting Section 2.). Construing the term "abridge" to refer to a temporary restriction on the right to vote also comports with the prevailing understanding of the meaning of the term "abridge" during the era when the Fourteenth Amendment was enacted. *See, e.g.*, *Reno v.*

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[70] *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 359 (1997) (Souter, J., concurring in part and dissenting in part) (explaining, in the analogous context of the Fifteenth Amendment, that "abridgement necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden," and that "[a]bridgement therefore must be a condition between complete denial, on the one hand, and complete enjoyment of voting power on the other"); *see also Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) ("When the word ['abridge'] is used in connection with and following the word 'deny,' it means to circumscribe or burden.").

[71] Ex. 72, Cong. Globe, 39th Cong., 1st Sess. 2286 (Apr. 30, 1866); *see also* Ex. 73, Cong. Globe, 39th Cong., 1st Sess. 2771 (May 23, 1866) (quoting Senator Clark of New Hampshire, who observed that the temporary disenfranchisement provision "does not seem to be satisfactory to a great many persons"). Section 2 of this draft of the Fourteenth Amendment included the subsequently-enacted "other crime" exemption ("or in any way abridged, except for participation in rebellion or other crime"). Ex. 72. There was no comma between the words "rebellion" and the phrase "or other crime" in this draft. *Id.*

Bossier Parish School Bd., 528 U.S. 320, 334–35 (1997) (explaining, in the context of the Fifteenth Amendment, that the "core meaning" of the term "abridge" is to "shorten"); *see also* Ex. 74, Noah Webster, *An American Dictionary of the English Language* 105 (1828) (defining "abridge" as "[t]o make shorter" or "[t]o lessen; to diminish," among other definitions).

Section 2's sole limiting clause—"except for participation in rebellion, or other crime"—immediately follows and modifies only the phrase "or in any way abridged." U.S. CONST. amend. XIV, § 2. *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."). Thus this limiting clause does not apply to the syntactically distant phrase "is denied." *See, e.g., Lockhart v. U.S.*, 136 S. Ct. 958, 963 (2016) (recognizing "the basic intuition" that "when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it" because of the "mental energy" involved in "carry[ing] the modifier" backwards).

A comparison with the linguistic structure of the Fifteenth Amendment, which was passed by Congress just three years after the Fourteenth Amendment, demonstrates the propriety of this construction. While Section 2 separates the phrase "is denied" from the phrase "or in any way abridged," the Fifteenth Amendment uses the combined phrase "shall not be denied or abridged.' *Compare* U.S. CONST. amend. XIV, § 2, *with* U.S. CONST. amend. XV, § 1. The Fifteenth Amendment treats denial and abridgement together because it applies the same restrictions to both. Section 2, on the other hand, addresses the two separately because it establishes an exception for the abridgement of the right to vote for "participation in rebellion, or

other crime" that does not apply to the denial of the right to vote.

The "other crime" exemption is thus limited to laws that temporarily "abridge" the right to vote of individuals convicted of disenfranchising offenses, and does not extend to laws that "deny" these individuals the right to vote forever. Mississippi's lifetime voting ban exceeds the parameters of Section 2's "other crime" exemption and is subject to strict scrutiny review.

B. Mississippi's Lifetime Voting Ban Cannot Survive Strict Scrutiny.

Mississippi's lifetime voting ban cannot survive strict scrutiny because it is not "necessary to promote a compelling state interest." *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627, 630–33 (1969) (holding that "the deference usually given to the judgment of legislators does not extend to decisions concerning which residents may participate in the election of legislators and other public officials"); *see also Dunn*, 405 U.S. at 346 (finding that "purity of the ballot box" is not a sufficiently significant state interest to satisfy strict scrutiny). To the extent there could possibly be any "compelling state interest" in depriving citizens of their right to vote forever, Mississippi's lifetime voting is clearly not "drawn with precision" to achieve any such interest using the least "drastic means" available. *Id.* at 343; *Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right to vote must be carefully and meticulously scrutinized.").

Furthermore, the questions raised by Count Two remain open for this Court's consideration. In *Ramirez,* the Supreme Court held that strict scrutiny does not apply only to criminal disenfranchisement laws that are "expressly exempted" under Section 2. 418 U.S. at 55. Subsequently, in *Hunter v. Underwood*, the Supreme Court recognized that Section 2's exemption does not encompass all criminal disenfranchisement laws. 471 U.S. 222, 233 (1985)

(applying strict scrutiny to a criminal disenfranchisement law enacted with racially discriminatory intent). Because Mississippi's lifetime voting ban permanently denies (rather than abridges) the right to vote for certain individuals, it should not be deemed "expressly exempted" under Section 2 and, as in *Hunter,* strict scrutiny should apply.

The *Ramirez* Court did not address Section 2's distinctions between the "denial" of the right to vote and the "abridgement" of this right, nor did the Court consider whether the limiting clause, "except for participation in rebellion, or other crime," applies only to the phrase "or in any way abridged." Neither issue was raised in the parties' briefings. *Ramirez* therefore does not resolve the questions presented here. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) (holding that a prior Supreme Court ruling could not be read as resolving a question that was neither addressed by the Court nor argued by the parties, and reasoning that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue"); *Harvey v. Brewer*, 605 F.3d 1067, 1073–74 (9th Cir. 2010) (O'Connor, J., sitting by designation) (finding that a question regarding the types of felonies covered by Section 2's "other crimes" exemption was an open one because the *Ramirez* Court had not "directly addressed this precise question."); *see also Legal Services for Prisoners with Children v. Bowen*, 170 Cal. App. 4th 447, 458 (Cal. Ct. App. 2009) (because *Ramirez* did not "expressly consider[ ] whether the section 2 exemption is limited to felonies at common law," it "cannot be read to foreclose this issue").[72] If the Court determines

[72] *See also U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38 (1952) (holding that if a legal question "was not . . . raised in briefs or argument nor discussed in the opinion of the Court . . . the case is not a binding precedent on this point"); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (if a prior decision "did not directly confront the question," the Court will "view the question as an open one"); *Smith v. Clark*, 189 F. Supp. 2d 548, 555 (S.D. Miss. 2002) (finding that a prior Supreme Court ruling did not resolve a question that "was not discussed or even raised" in the Court's opinion), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003); *United States v. Harrison*, 296 F.3d 994, 1005 (10th Cir. 2002) ("[A] prior opinion cannot stand as precedent for a proposition of law not explored in the opinion, even when the facts stated in the opinion would support consideration of the proposition.").

that Count Two is foreclosed by *Ramirez*, the *Hopkins* Plaintiffs present these arguments to preserve the issue for appeal.

III. Count Three: Mississippi's Arbitrary Suffrage Restoration Provision Violates the Equal Protection Clause.

Mississippi's standardless suffrage restoration provision violates the Equal Protection Clause because it is inherently arbitrary. As Defendant has previously acknowledged, "the State cannot make a completely arbitrary distinction between groups of felons so as to work a denial of equal protection."[73]

A. The Equal Protection Clause Prohibits the Arbitrary Restoration of the Right to Vote.

The Fifth Circuit has held that the "selective disenfranchisement or reenfranchisement of convicted felons must . . . bear a rational relationship to the achieving of a legitimate state interest."[74] *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978). "[T]he rational basis test is not a toothless one," and the asserted state interest "must find some footing in the realities of the subject addressed by the legislation." *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 942 (S.D. Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015). A "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

In accordance with these fundamental legal precepts, the Fifth Circuit has twice instructed that arbitrary disenfranchisement or reenfranchisement of individuals convicted of

[73] Ex. 75, Appellees' Br. (including the Mississippi Secretary of State) at *27, *Young v. Hosemann* (5th Cir. 2010) (Nos. 08-60941, 09-60188), 2009 WL 6391080.

[74] The *Shepherd* court upheld a Texas reenfranchisement scheme that differentiated between individuals convicted in federal courts and those convicted in state courts—an objective and non-arbitrary classification. 575 F.2d at 1115.

disenfranchising offenses violates the Equal Protection Clause. *See Shepherd*, 575 F.2d at 1114 ("No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote."); *Williams v. Taylor*, 677 F.2d 510, 517 (5th Cir. 1982) (holding that the plaintiff was entitled to proceed on his equal protection claim for "arbitrary enforcement of the disenfranchisement procedure"). Other circuit courts have similarly found that a "state may not . . . classify on a wholly arbitrary basis" in disenfranchisement and reenfranchisement schemes. *Owens v. Barnes,* 711 F.2d 25, 27 (3d Cir. 1983). A "state could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons." *Id.* Nor could a state "choose to re-enfranchise voters of only one particular race, or re-enfranchise only those felons who are more than six-feet tall." *Harvey*, 605 F.3d at 1079.

B. Mississippi's Standardless and Inherently Arbitrary Suffrage Restoration Provision Violates the Equal Protection Clause.

Mississippi's suffrage restoration provision is inherently arbitrary in violation of the Equal Protection Clause because neither the provision itself nor any Mississippi statute establishes objective standards that legislators must apply when determining which disenfranchised individuals should regain the right to vote. Instead, the suffrage restoration provision vests Mississippi legislators with unconstrained discretion to determine whose voting rights to restore. *See* MISS. CONST. art. XII, § 253.

The 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. *La. v. United States*, 380 U.S. 145, 152–53 (1965) (striking down Louisiana's constitutional

interpretation test because it vested the registrars with "discretion . . . to determine the qualifications of applicants for registration while imposing no definite and objective standards"); *Davis v. Schnell*, 81 F. Supp. 872, 877–78 (S.D. Ala. 1949) (*Schnell I*) (striking down Alabama's constitutional interpretation test because it established "[n]o uniform, objective or standardized test" but instead empowered the board with "the arbitrary power to accept or reject any prospective elector that may apply"), *aff'd*, 336 U.S. 933 (1949). Such laws cannot satisfy the Equal Protection Clause because they allow "full latitude" not just for "calculated, purposeful discrimination" but also "for unthinking, purposeless discrimination." *U.S. v. La.*, 225 F. Supp. 353, 387, 391 (E.D. La. 1963) (*La. I*), *aff'd*, 380 U.S. 145 (1965); *see also Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1267 (N.D. Miss. 1987) ("Unfettered discretion in voting registration procedures unnecessarily restricts access to the political process."), *aff'd*, 932 F. 2d 400 (5th Cir. 1991).

Like the constitutional interpretation test on which it was modeled, Mississippi's suffrage restoration provision was enacted "for the purpose of allowing arbitrary action, and not for the purpose of providing a definite and reasonable standard." *Schnell I,* 81 F. Supp. at 879; *see also* Ex. 2, Pratt Rep. ¶¶ 8(d–e), 53–54. The suffrage restoration provision vests Mississippi legislators with "the power to establish two classes, . . . those who may vote and those who may not." *Schnell I,* 81 F. Supp. at 879. "Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution." *Id.*

IV. <u>Count Four:</u> Mississippi's Standardless Suffrage Restoration Provision Violates the First Amendment.

The suffrage restoration provision violates the First Amendment by empowering the Mississippi Legislature with unfettered discretion to allow some individuals convicted of

disenfranchising offenses with the right to express their political and ideological views by casting a vote, while leaving others forever "voiceless at the ballot box." *McLaughlin*, 947 F. Supp. at 971. It is "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969). Because there are no "narrow, objective, and definite standards to guide the" legislators in deciding whose voting rights to restore, the suffrage restoration provision is facially invalid. *Id.*

A. The Restoration of Voting Rights Implicates First Amendment Concerns.

The First Amendment protects all forms of political speech and political association, including the right to vote. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) ("We have acknowledged the existence of a First Amendment interest in voting."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 424–25 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that "[v]oting is, among other things, a form of speech"); *Veasey v. Perry*, 71 F. Supp. 3d 627, 684–85 (S.D. Tex. 2014) ("The individual's right to vote is firmly implied in the 1st Amendment of the United States Constitution."), *aff'd in part, rev'd in part on other grounds*, 830 F.3d 216 (5th Cir. 2016). The suffrage restoration provision therefore plainly implicates First Amendment concerns. *See, e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

B. Mississippi's Suffrage Restoration Provision Vests Legislators with Unfettered Discretion in Violation of the First Amendment.

Mississippi's suffrage restoration provision is *per se* unconstitutional because it vests state legislators with complete discretion to grant selected disenfranchised individuals the opportunity to engage in expressive conduct while leaving others silenced. *See Shuttlesworth*, 394 U.S. at 150–51 (holding that a law which "makes the peaceful enjoyment of freedoms which

the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship"). When government officials have the discretion to decide who may engage in expressive conduct and who may not, the First Amendment requires that such discretion be constrained by "narrowly drawn, reasonable and definite standards." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 132–33 (1992). "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." *Plain Dealer*, 486 U.S. at 758. Without objective standards, it is "far too easy" for government officials to use "shifting or illegitimate criteria" to decide who may speak and who must stay silent. *Id.* at 758, 763 (recognizing that the "danger" of "content and viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official").

To protect against the possibility of unlawful discrimination, the Supreme Court has consistently struck down statutory schemes vesting government officials with unfettered discretion to grant or deny permission to engage in expressive conduct based on such indeterminate and subjective criteria as "morals" and "decency."[75] Plaintiffs do not have to demonstrate that such a scheme has actually resulted in unlawful discrimination in order to prevail on a facial First Amendment challenge. *See Forsyth Cty.*, 505 U.S. at 133 n.10 ("Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision."); *Fernandes v. Limmer*, 663 F.2d 619, 625 (5th Cir. 1981) ("A court

[75] *See, e.g.*, *Shuttlesworth*, 394 U.S. at 150–51 (striking down a parade ordinance where the permitting officials "were to be guided only by their own ideas of public welfare, peace, safety, health, decency, good order, morals or convenience" when "deciding whether or not to withhold a permit"); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (striking down a union solicitation ordinance where government officials could "refuse to grant [a] permit if they [did] not approve of the applicant or of the union or of the union's effects upon the general welfare," and reasoning that "[t]hese criteria are without semblance of definite standards or other controlling guides").

may invalidate an excessively broad grant of discretion on its face, without regard to the particular facts of the plaintiff's case, because the very existence of the discretion lodged in the public official is constitutionally unacceptable."). The question is not "whether the administrator [of the law] has exercised his discretion in a content-based manner, but whether there is anything in the [law] preventing him from doing so."[76] *Forsyth Cty.*, 505 U.S. at 133 n.10.

Mississippi's suffrage restoration provision contains no such limits, and leaves legislators free to decide whether they personally "approve of the applicant," *Staub*, 355 U.S. at 322, "guided only by their own ideas," *Shuttlesworth*, 394 U.S. at 150–51. The suffrage restoration provision is therefore facially invalid under the First Amendment. *See Forsyth*, 505 U.S. at 133 ("The First Amendment prohibits the vesting of such unbridled discretion in a government official.").

V. Count Five: Mississippi's Suffrage Restoration Provision Was Enacted with Racially Discriminatory Intent in Violation of the Equal Protection Clause.

Mississippi's suffrage restoration provision violates the Equal Protection Clause because it was originally enacted with discriminatory intent, has never been amended, and continues to disproportionately impact the state's black residents. *See Hunter*, 471 U.S. at 232–233 (striking down a criminal disenfranchisement law that (i) was "motivated by a desire to discriminate

[76] The prohibition against such unfettered discretion applies with equal force when the relevant 'licensing authority' is a legislative body. *See, e.g.*, *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009) (where "a legislative body" has "decisionmaking authority" under "a permitting scheme for expressive conduct," that "authority is vulnerable to challenge on grounds of unbridled discretion"); *Sons of Confederate Veterans, Fla. Div., Inc. v. Atwater*, No. 6:09-cv-134-Orl-28KRS, 2011 WL 1233091, at *7 (M.D. Fla. Mar. 30, 2011) (holding that a specialty license plate program that vested the Florida Legislature with unfettered discretion to approve or reject applications violated the First Amendment); *Women's Res. Network v. Gourley*, 305 F. Supp. 2d 1145, 1154 (E.D. Ca. 2004) (permanently enjoining enforcement of a statute that "grant[ed] California legislators unconstitutional, unfettered discretion" to grant or deny applications for specialty license plates "because no standard govern[ed] the decision").

against blacks on account of race," (ii) had never been formally amended through legislation, and (iii) continued to have disproportionate effects on black individuals).

A. Mississippi's Suffrage Restoration Provision Was Enacted with Racially Discriminatory Intent.

The delegates to Mississippi's Convention "adopted . . . a disenfranchising crimes provision . . . to exclude black citizens from participation in the electoral process."[77] As explained in detail by the *Hopkins* Plaintiffs' expert historian, Dr. Pratt, the delegates crafted the suffrage restoration provision to provide a safety net for white men convicted of these same disenfranchising offenses. Ex. 2, Pratt Rep. ¶¶ 8(d–f), 51–54.

The evidence that Mississippi's suffrage restoration provision was enacted with racially discriminatory intent closely parallels the evidence presented in *Hunter*. As was the case at Alabama's constitutional convention, "the question [at Mississippi's Convention] was not whether to disenfranchise the Negro but rather how to do so constitutionally."[78] *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984) (*Hunter I*), *aff'd*, 471 U.S. 222 (1985). Just as the president of Alabama's constitutional convention announced his intention "to establish white supremacy," *Hunter*, 471 U.S. at 229, the president of Mississippi's Convention openly and repeatedly stated that the Convention's purpose was to "devise some means by which [black Mississippians] shall be practically excluded from government control."[79] Like the delegates to

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[77] *Mississippi State Chapter,* 674 F. Supp. at 1251; *see also Ratliff v. Beale,* 20 So. 865, 868 (Miss. 1896) (recognizing that the delegates crafted the criminal disenfranchisement provision to target black men); Ex. 2, Pratt Rep. ¶¶ 8(a–c), 38–39, 51.

[78] Ex. 2, Pratt Rep. ¶¶ 8 (a–c), 19, 25–31; Ex. 35, "Senator J. Z. George" at 1.; Ex. 34, *Proceedings* at 83–87; Ex. 38, "Judiciary Committee" at 1; *see also* n. 26, *supra*.

[79] Ex. 49, "Discussion Continues" at 3; *see also* Ex. 34, *Proceedings* at 9–11, 700–03; Ex. 56, "Farewell Address" at 5; Ex. 57, Appellee's Br. at 35–37, *Ratliff v. Beale* (Miss. 1896); Ex. 2, Pratt Rep. ¶¶ 25–26, 69–71.

Alabama's all-white constitutional convention, the delegates to Mississippi's almost-all-white Convention were forthright about their goal of disenfranchising black citizens. Ex. 15, Summary Chart V: Selected Statements by Delegates to the 1890 Constitutional Convention.[80] There can be no "serious[] dispute" that a "zeal for white supremacy ran rampant" at Mississippi's Convention, just as it did at Alabama's convention a decade later. *Hunter*, 471 U.S. at 229. The evidence thus "demonstrates conclusively" that the suffrage restoration provision was enacted with discriminatory intent.[81]

B. The Suffrage Restoration Provision Has Racially Discriminatory Effects.

An analysis conducted by Dr Rothman, the *Hopkins* Plaintiffs' expert, shows that Mississippi's suffrage restoration provision disproportionately impacts black individuals. Ex. 1, Rothman Rep. ¶¶ 10(c–d), 14–15, 17, 19, & exs. 1–4. The state's citizen voting-age population is approximately 36% black and 61% white. *Id.* ¶ 15; Ex. 76, Census data. However, of the nearly 50,000 individuals convicted of disenfranchising offenses in Mississippi state courts between 1994 and 2017, 59% are black and 37% are white. Ex. 1, Rothman Rep. ¶ 14 & exs. 1–2. This disparity persists among individuals convicted of disenfranchising offenses who have completed their sentences. *Id.* ¶ 17, 19 & exs. 3–4. Of the approximately 29,000 individuals who have completed their sentences for the convictions of disenfranchising offenses between 1994 and 2017, 58% are black and only 36% are white. *Id.* ¶ 17. Nearly 14,000 of the approximately

[80] *See also* n.26, *supra*.

[81] The law is clear that plaintiffs do not have to provide direct evidence of discriminatory intent. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 564 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *Veasey v. Abbott*, 830 F.3d 216, 235–36 (5th Cir. 2016) ("To require direct evidence of intent would essentially give legislators free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions. This approach would ignore the reality that neutral reasons and do mask racial intent . . . .").

17,000 black individuals who have completed their sentences for the convictions of disenfranchising offenses between 1994 and 2017 are under the age of 45. *Id.* ¶¶ 17, 20. Black individuals in Mississippi are therefore disproportionately subject to the suffrage restoration provision, which applies *only* to individuals convicted of disenfranchising offenses.[82]

C. The Suffrage Restoration Provision Has Never Been "Cleansed" of Its Discriminatory Intent.

Because the suffrage restoration has survived completely unchanged since 1890, binding Fifth Circuit precedent holds that its original discriminatory taint still inheres.[83] *See Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). In *Cotton,* the Fifth Circuit recognized that Mississippi's lifetime voting ban was "motivated by a desire to discriminate against blacks." 157 F.3d at 391. But the court found that two amendments to the list of disenfranchising offenses in the lifetime voting ban, one in 1950 and the other in 1968, "removed the discriminatory taint associated with the original version." *Id.* The *Cotton* court explained that if the lifetime voting ban had never been amended, it would have been "bound by *Hunter*, which, construing an Alabama provision of similar age and intent, held it violative of equal protection." *Id.* Mississippi's suffrage restoration provision has never been amended, and therefore violates the Equal Protection Clause. Even assuming that Mississippi legislators now exercise "good faith in administering the [suffrage restoration provision] without reference to race," "[n]either their impartiality nor the passage of time . . . can render immune a purposefully discriminatory scheme

[82] *See, e.g.*, *Arlington Heights*, 429 U.S. at 260 (refusal to rezone to allow low-income housing had a racially discriminatory impact where "blacks constituted 40% of those Chicago area residents who were eligible to become tenants" but "composed a far lower percentage of [the] total area population"); *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (omnibus election law that restricted "practices disproportionately used by African Americans" had a racially discriminatory impact").

[83] Ex. 17, Def.'s Response to Pl.'s RFA No. 28 at 11 (admitting that the suffrage restoration provision has never been amended).

whose invidious effects still reverberate today." *Hunter I*, 730 F. 2d at 621.

Like the Louisiana constitutional interpretation test held unconstitutional by the Supreme Court, the suffrage restoration provision still stands as a "wall" preventing black disenfranchised Mississippians from regaining the right to vote. *La. I*, 225 F. Supp. at 355. "[T]his wall, built to bar [black citizens] from access to the franchise, must come down." *Id.* at 356.

CONCLUSION

For the foregoing reasons, the *Hopkins* Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment as to each of the five claims asserted.

Dated: October 4, 2018

By: /s/ Paloma Wu

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CERTIFICATE OF SERVICE

I, Paloma Wu, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by email to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

This 4th day of October, 2018.

/s/ Paloma Wu

Paloma Wu