No. 22-412

IN THE

Supreme Court of the United States

ROY HARNESS, *et al.*,

Petitioners,

v.

MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* DENNIS HOPKINS, HERMAN PARKER, JR., WALTER WAYNE KUHN, JR., BRYON DEMOND COLEMAN, JON O'NEAL, AND EARNEST WILLHITE, EACH INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES:

INTERESTS OF *AMICI CURIAE*[1]

Dennis Hopkins, Herman Parker, Jr., Walter Wayne Kuhn Jr., Byron Demond Coleman, Jon O'Neal, and Earnest Willhite are among the many victims of Mississippi's punitive and unjust criminal disenfranchisement scheme. Each was convicted of a disenfranchising offense enumerated in the 1890 version of Section 241 of the Mississippi Constitution. None of these individuals may ever vote again under Mississippi law, unless they obtain a pardon from the Governor or a reprieve from the Mississippi Legislature in the form of an individualized "suffrage bill" pursuant to Section 253 of the Mississippi Constitution.

In 2018, Messrs. Hopkins, Parker, Kuhn, Coleman, O'Neal and Willhite, individually and on behalf of a class of similarly situated individuals (the "*Hopkins* Plaintiffs") filed a federal class action lawsuit styled as *Hopkins v. Hosemann* against the Mississippi Secretary of State challenging the state's criminal disenfranchisement scheme on different constitutional grounds than the case at bar. The *Hopkins* Plaintiffs claim that Section 241's lifetime voting ban violates the Eighth Amendment's prohibition on cruel and unusual punishment; and exceeds the scope of the limited exemption for criminal disenfranchisement laws set forth in Section 2 of the Fourteenth Amendment. The *Hopkins* Plaintiffs further claim that Section 253 violates the Equal Protection Clause because it was

1. In accordance with Rule 37.2(a), all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

enacted with racially discriminatory intent, has never been amended, and continues to disproportionately impact Black Mississippians. The *Hopkins* Plaintiffs also claim that Section 253 separately violates the Equal Protection Clause because it permits legislators to arbitrarily restore voting rights to some Mississippi residents and not others. Finally, the *Hopkins* Plaintiffs claim that Section 253 violates the First Amendment.[2] These constitutional claims are significant and meritorious. On December 3, 2019, a panel of the Fifth Circuit heard oral arguments on the parties' expedited cross-appeals in *Hopkins*; a decision has not yet been issued.[3]

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2. The *Hopkins* Plaintiffs brought suit on behalf of a class of similarly situated Mississippians who have completed their sentences for disenfranchising offenses. The district court granted the *Hopkins* Plaintiffs' motion for class certification in February 2019. *See* Order, Dkt. 89, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Feb. 3, 2019), at 6.

3. In June 2018, the district court granted the Secretary of State's motion to consolidate the *Hopkins* and *Harness* actions. *See* Order, Dkt. 34, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB (S.D. Miss. June 28, 2018). The parties in both cases subsequently filed cross-motions for summary judgment. In August 2019, the district court denied the *Hopkins* Plaintiffs' motion for summary judgment in its entirety, and granted the Secretary of State's motion for summary judgment with respect to all claims except for the *Hopkins* Plaintiffs' race-based equal protection challenge to Section 253. *See* Order, Dkt. 91, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Aug. 7, 2019). The district court also denied the *Harness* Plaintiffs' motion for summary judgment, granted the Secretary of State's motion for summary judgment, and severed and dismissed the *Harness* complaint. *See id.* Finally, the district court certified, *sua sponte*, all of its holdings in *Hopkins* for

The *Hopkins* Plaintiffs have a strong personal interest in the dismantling of Mississippi's criminal disenfranchisement scheme, which is rooted in racial discrimination and continues to this day to disproportionately impact Black Mississippians. The constitutionality of Mississippi's criminal disenfranchisement scheme merits careful consideration by this Court. If the Court were to grant certiorari and rule in favor of the *Harness* Plaintiffs, the Court's decision would restore the right to vote to each of the *Hopkins* Plaintiffs; and to the majority of the class of Mississippians that the *Hopkins* Plaintiffs represent.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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immediate interlocutory appeal. *See id.* The Fifth Circuit granted permission to appeal in *Hopkins* under 28 U.S.C. § 1292(b), and expedited the appeal. *See* Order, *Hopkins v. Hosemann*, No. 19-60678 (5th Cir. Sept. 11, 2019); Order, *Hopkins v. Hosemann*, No. 19-60678 (5th Cir. Sept. 24, 2019).

4. If, however, the Court were not to ultimately act in favor of the *Harness* Plaintiffs on both granting certiorari and in considering the substance of their petition, all of the distinct *Hopkins* claims would remain valid. Indeed, while the Fifth Circuit's decision should be reversed, it is worth noting that the decision does not impact any of the *Hopkins* Plaintiffs' claims. As set forth in Judge Ho's concurring opinion, disenfranchisement provisions may not "contravene[ ] other provisions of the Constitution." *Harness v. Watson*, 47 F.4th 296, 311 (5th Cir. 2022) (Ho, J., concurring).

the Mississippi Constitution, individuals who are convicted in Mississippi state courts of numerous crimes lose the right to vote for the rest of their lives. 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. Neither Section 253 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.

Both Sections 241 and 253 were enacted with racially discriminatory intent by the delegates to the 1890 Constitutional Convention. Together, these provisions established a cohesive racially discriminatory scheme that remains almost completely intact today. All but one of the original disenfranchising offenses selected by the delegates to the 1890 Constitutional Convention are enumerated in the present-day version of Section 241. Section 253 has never been amended since its original enactment.[5] In large part, the present-day version of Mississippi's criminal disenfranchisement scheme continues to carry forward the discriminatory intent of the delegates to the 1890 Constitutional Convention. Despite the uncontroverted racially-motivated origins of Sections 241 and 253, an en banc majority of the Court of Appeals for the Fifth Circuit incorrectly determined that Section 241 has been cleansed of its discriminatory taint through

5. *See* Defendant's Response to the *Hopkins* Plaintiffs' First Set of Requests for Admission, Dkt. 65-17, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at 12 (response to Request for Admission 28).

amendments that retained all but one of the crimes originally selected by delegates to the 1890 Constitutional Convention. The en banc majority further determined, erroneously, that the Mississippi Legislature's failure to amend Section 241 in the 1980s demonstrates that the Mississippi Legislature would have passed Section 241 in its current form regardless of racial animus. Both of these holdings flout this Court's unanimous decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), as well as the guidance provided by this Court in *Abbott v. Perez*, 138 S. Ct. 2305 (2018) and *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Amici respectfully submit that this Court should grant certiorari to review these grave errors of law, which render *Hunter* a virtual nullity in the Fifth Circuit. Regardless of whether or not this Court decides to grant certiorari, significant and meritorious constitutional challenges to Mississippi's criminal disenfranchisement scheme would remain pending until the full conclusion of the *Hopkins* class action litigation.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER MISSISSIPPI'S CRIMINAL DISENFRANCHISEMENT SCHEME RETAINS ITS ORIGINAL DISCRIMINATORY TAINT

As the Mississippi Secretary of State has acknowledged, "a disenfranchisement law may be invalidated if its challengers prove that racially discriminatory intent motivated the enactment of the law and the State has

never cured that improper intent."[6] Neither the "mere passage of time," *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000), nor a "reenact[ment] … without significant change," *Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010), is sufficient to purge a discriminatory law of its original taint. Rather, the taint is removed only if the revised version of the law does not "use criteria that arguably carr[y] forward the effects of any discriminatory intent on the part of the [prior] [l]egislature." *Abbott v. Perez*, 138 S.Ct. 2305, 2325 (2018).

If a racially motivated law is reenacted with its key discriminatory features intact, however, that law retains its original discriminatory taint. The Supreme Court recently made this commonsense principle clear in *Ramos v. Louisiana*, which struck down a racially motivated Louisiana law permitting nonunanimous verdicts for the convictions of serious crimes.[7] Louisiana originally adopted the law following its 1898 constitutional convention, which aimed "to 'establish the supremacy of the white race.'" 140 S. Ct. 1390, 1394 (2020) (Gorsuch, J.). There was no dispute that "race was a motivating factor" in the law's original enactment. *Id.* Louisiana revised and "eventually recodified" the law "in new proceedings untainted by racism." *Id.* at 1401 n.44; *see also id.* at 1426 (Alito, J., dissenting) (noting that "Louisiana's constitutional

6. Defendant-Appellee Secretary of State Watson's Response to Petition for Rehearing En Banc ("Opp."), *Harness v. Watson*, No. 19-60632 (5th Cir. Mar. 22, 2021), at 1. Unless otherwise noted, internal quotation marks, citations and internal alterations are omitted throughout.

7. The Court considered a challenge under the Sixth Amendment, not the Equal Protection Clause, but its reasoning is nonetheless relevant to the issues before this Court.

convention of 1974 adopted a new, narrower [non-unanimous jury] rule, and its stated purpose was judicial efficiency."). Yet the law's key features—nonunanimous jury verdicts for serious offenses—remained unchanged. The *Ramos* Court placed great weight on the law's "racist history" in its constitutional analysis. *Id.* at 1401 n.44; *see also id.* at 1418 (Kavanaugh, J., concurring) (explaining that although "Louisiana's modern policy decision to retain nonunanimous juries … may have been motivated by neutral principles (or just by inertia)," "the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana … should matter and should count heavily in favor" of striking down the law).

Here, as in *Ramos*, there is no dispute that "race was a motivating factor" in the original enactment of Section 241's criminal disenfranchisement provision. *Id.* at 1394. The Fifth Circuit found it "uncontroverted that the state constitutional convention was steeped in racism and that 'the state was motivated by a desire to discriminate against blacks' when the 1890 Constitution was adopted." *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (quoting *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)). Indeed, the Secretary of State has conceded that "[t]he 1890 framers of Section 241 of the Mississippi Constitution targeted crimes they thought were predominantly committed by black Americans" and "narrowed Section 241 to target black Americans."[8]

According to the expert report of historian Dr. Dorothy O. Pratt in support of the *Hopkins* Plaintiffs' race-based equal protection challenge to Section 253, the

8. Opp. at 1-2, 5.

delegates to Mississippi's 1890 Constitutional Convention "recognized that no single [facially] race-neutral restriction, standing alone, would accomplish their goal of white political control."[9] The delegates therefore "specified several requirements to qualify for the elective franchise, including a literacy test and a criminal disenfranchisement provision; these requirements were designed to intertwine and interlock to create an effective barrier to African American political participation within the state."[10]

The delegates meticulously "structured the criminal disenfranchisement provision (enacted as Section 241 of the 1890 Constitution) to narrow the African American franchise base."[11] They limited the reach of the provision "to a carefully selected list of crimes that aimed to ensnare more Africans Americans than whites" by "focus[ing] primarily on property-related offenses."[12] Although Section 241's "criminal disenfranchisement provision was crafted to selectively disqualify African Americans, the delegates were aware that some white men convicted of these same offenses would also lose their right to vote."[13] To address this issue, the delegates enacted Section 253, a companion provision to Section 241, which read then, as it does today, as follows:

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9. Report of Dorothy O. Pratt, Ph.D. ("Pratt Rep."), Dkt. No. 65-2, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at ¶ 8(c).

10. *Id.*

11. *Id.* at ¶ 51.

12. *Id.*

13. *Id.* at ¶ 52.

> 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 (1890).

Nothing in the 1890 Constitution provided "specified parameters for legislators' deliberations, nor any requirement that legislators act in a race-neutral manner" in restoring voting rights.[14] Rather, Section 253 "allowed the legislators complete discretion to determine whose voting rights to restore."[15] Section 253 "ensured that whites caught up in the criminal justice system had a possible remedy and could redeem their" right to vote.[16] Dr. Pratt researched the restoration of voting rights pursuant to Section 253 in the first three decades after the 1890 Constitution was enacted, and determined that the Mississippi Legislature restored voting rights to at least 101 individuals during this time.[17] Dr. Pratt found no evidence that even a single African-American individual regained the right to vote between 1890 and 1920.[18]

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14. *Id.* at ¶ 54.

15. *Id.*

16. *Id.* at ¶ 53.

17. Declaration of Dorothy O. Pratt, Ph.D., Dkt. 77-3, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at ¶ 11.

18. *Id.* at ¶¶ 11-16.

Nearly all the key discriminatory features of Mississippi's criminal disenfranchisement scheme—including the imposition of lifelong disenfranchisement for offenses that were originally selected by the delegates to the 1890 Constitutional Convention, as well as the standardless and entirely subjective provision for the legislative restoration of voting rights—have remained unchanged since 1890. Moreover, this scheme continues to disproportionately impact Black Mississippians. Just as Justice Kavanaugh observed with respect to Louisiana's non-unanimous jury law, the "Jim Crow origins" of Mississippi's criminal disenfranchisement scheme "should matter and should count heavily" in favor of striking down Section 241 with respect to all disenfranchising offenses that date back to the original 1890 Constitution. 140 S. Ct. at 1418 (Kavanaugh, J., concurring).

Despite this Court's guidance in *Ramos*, the Fifth Circuit, sitting en banc, erroneously held that Section 241's discriminatory taint was cleansed by subsequent amendments that carried forward the list of disenfranchising crimes selected by the delegates to the 1890 Constitutional Convention. The Court should grant certiorari to review the Fifth Circuit's flawed ruling.

II. THIS COURT SHOULD ALSO GRANT REVIEW TO CONSIDER WHETHER THE MISSISSIPPI LEGISLATURE'S FAILURE TO AMEND SECTION 241 IN THE 1980s COULD SATISFY RESPONDENT'S BURDEN UNDER *HUNTER v. UNDERWOOD*

Hunter v. Underwood holds that "[o]nce racial discrimination is shown to have been a substantial or motivating factor behind enactment of [a] law, the burden shifts to the law's defenders to demonstrate that the

law would have been enacted without this factor." 471 U.S. 222, 228 (1985). *Hunter* does not permit a state to meet its burden simply by showing that a *subsequent* legislature might have enacted the challenged law for race-neutral reasons. Rather, *Hunter* requires courts to consider whether the legislature that enacted the challenged law would have done so "in the absence of the racially discriminatory motivation." *Id.* at 231; *see also Underwood v. Hunter*, 730 F.2d 614, 617, 621 (11th Cir. 1984) (considering the motivations of the 1901 Alabama legislature to determine whether "the same decision would have resulted had the impermissible purpose not been considered"), *aff'd*, 471 U.S. 222 (1985).

Under *Hunter*, the only legally relevant intent is that of the legislature that enacted the provision at issue. But the en banc majority did not confine its analysis to considering whether the 1890 delegates would have enacted Section 241's criminal disenfranchisement provision absent discriminatory intent. Instead, the Fifth Circuit incorrectly looked to the Mississippi Legislature's failure to amend Section 241 during a comprehensive review of the state's election laws in the 1980s, and concluded that "Section 241 would have been passed in its current form without racial motivation." *Harness*, 47 F.4th at 311. While the Fifth Circuit did not consider Section 253, *id.* at 300 n.1, the district court erroneously considered evidence concerning the Mississippi Legislature's failure to amend Section 253 in the 1980s—nearly a hundred years after Section 253's original enactment—in assessing the Secretary of State's "final burden under *Hunter*."[19]

19. *See* Order, Dkt. 91, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Aug. 7, 2019), at 19.

But a *subsequent* legislature's failure to amend a law has no relevance to the question of whether a *prior* legislature would have enacted that law absent racially discriminatory intent. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("a proposal that does not become law" is a particularly "hazardous basis for inferring the intent of an earlier Congress"); *Medical Center Pharmacy v. Mukasey*, 536 F.3d 383, 400-01 (5th Cir. 2008) ("[A]bsent a valid amendment to alter the statutory structure, the opinion of the 1997 Congress informs us little in deciding what the 1937 Congress intended . . . ."). As a matter of both law and logic, the motivations of the 1980s Mississippi Legislature in failing to amend Sections 241 and 253 cannot be imputed to the delegates to the 1890 Constitutional Convention, who enacted these provisions, or to the Mississippians who voted in favor of the amendments to Section 241 in 1950 and 1968.

Moreover, the Mississippi Legislature's failure to amend Sections 241 and 253 in the 1980s cannot be construed as an endorsement of either provision. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (declining to infer legislative intent from a "history of failed legislation" because "congressional inaction lacks persuasive significance in most circumstances"); *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999) (ascribing no significance to Congress's "failure to amend [a] statute," and reasoning that "deductions from congressional inaction are notoriously unreliable"). Otherwise, any legislature could defeat an equal protection challenge to a law motivated by discriminatory intent simply by considering and rejecting a proposal to amend that law. This would

effectively eviscerate *Hunter*. This Court should grant review to determine whether statutes originally enacted with discriminatory intent may be cleansed of that discriminatory taint merely through legislative inaction.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioners, *amici* request that this Court should grant the petition for certiorari.

Respectfully submitted,

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