
United States Court of Appeals
for the
Fifth Circuit

Case No. 19-60662

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

Plaintiffs-Appellees,

v.

SECRETARY OF STATE MICHAEL WATSON,
in his official capacity,

Defendant-Appellant.

consolidated with

Case No. 19-60678

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

Plaintiffs-Appellees Cross-Appellants,

v.

SECRETARY OF STATE MICHAEL WATSON,
in his official capacity,

Defendant-Appellant Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON, IN
NO. 3:18-CV-188, HONORABLE DANIEL P. JORDAN, III, CHIEF JUDGE

**BRIEF OF 13 NATIONAL AND MISSISSIPPI VOTING RIGHTS,
CIVIL RIGHTS, AND RACIAL JUSTICE ORGANIZATIONS
AND COALITIONS AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES UPON REHEARING *EN BANC***

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that judges of this Court may evaluate potential disqualification or recusal.

A. Plaintiffs-Appellees

Dennis Hopkins
Herman Parker, Jr.
Walter Wayne Kuhn, Jr.
Byron Demond Coleman
Jon O’Neal
Earnest Willhite

The foregoing individuals are the named plaintiffs in *Hopkins, et al. v. Watson*.

They seek to represent the following class, which was certified by the District Court:

Any person who (a) is or becomes disenfranchised under Mississippi state law by reason of a conviction of a disenfranchising offense, and (b) has completed the term of incarceration, supervised release, parole, and/or probation for each such conviction.

Order at 6, *Harness, et al. v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB (S.D. Miss. Feb. 13, 2019), Dkt. 89.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, none of amici has a corporate parent, and no publicly-owned company owns 10% or more stock in any amicus.

INTEREST OF AMICI CURIAE

The **League of Women Voters (“League”)** is a non-profit, non-partisan, grassroots organization committed to protecting voting rights, empowering voters, and defending democracy. The League works to ensure that all eligible individuals have the opportunity and the information needed to vote, with a particular focus on historically disenfranchised and underrepresented communities, including Black voters, other voters of color, and voters impacted by the criminal legal system. The League has more than 500,000 members and supporters and is organized in approximately 750 communities in all 50 states and the District of Columbia. The League is committed to ending felony disenfranchisement, including through legal and policy advocacy, and to preserving the country’s democratic society.

The **League of Women Voters of Mississippi (“LWV-MS”)** is the Mississippi affiliate of the League of Women Voters. It is a non-profit, non-partisan, grassroots organization dedicated to improving governance in Mississippi by engaging all Mississippians in the decisions that impact their lives. LWV-MS has six local Leagues: East-Central Mississippi, Jackson-Area, Mississippi Gulf Coast, Oxford-North Mississippi, Golden Triangle, and Pine Belt. LWV-MS and its local Leagues register, educate, and assist voters, perform public education, conduct research, engage with public officials on issues related to voter registration and voting, and work to get out the vote.

The **Mississippi Center for Justice (“MCJ”)** is a public interest law firm committed to advancing racial and economic justice in Mississippi. MCJ was established in 2003 to improve opportunities for low-income, rural, and minority communities in Mississippi. Among other initiatives, MCJ seeks to challenge policies that impair Black and low-income Mississippians’ opportunities to advance themselves, including voter disenfranchisement provisions. As recently as November 2023, MCJ has represented Mississippi voters of color to challenge unlawful election practices threatening to deny these individuals their right to vote, including through its representation of the plaintiffs before this Court in *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc).

Black Voters Matter (“BVM”) is a non-profit organization dedicated to building electoral and political power for Black and marginalized communities. BVM seeks to increase voter participation throughout Mississippi with particular focus on rural counties and smaller cities and towns that are often ignored. BVM works year-round to support community and local infrastructure related to voter registration and effective voting on election day.

Mississippi Poor People’s Campaign (“MS PPC”) is founded on religious and democratic values, and it seeks to unite Mississippians through organizing and civic engagement to effectively confront poverty and systemic racism. MS PPC

supports a statewide poll monitoring and voter information hotline to help inform and protect voters on election day and beyond.

The **Mississippi Prison Reform Coalition (“MPRC”)** is a group of formerly incarcerated people, families with loved ones in prison, advocacy organizations, and concerned Mississippi residents who advocate for the state to address unnecessary harms caused by Mississippi’s long history of overincarceration. MPRC is committed to addressing Mississippi’s lifetime voting ban, which its members see as having a ripple effect—starting with citizens who, as a result of the ban, are more likely to recidivate, and extending to their children, loved ones, and community members who depend on them.

The NAACP is a non-profit organization founded on the goal of achieving an equitable society for African Americans and communities of color. One of the NAACP’s principal objectives is to protect the right to vote. The organization has spent all 114 years of its existence in pursuit of that goal. The **Mississippi State Conference NAACP (“MS NAACP”)** serves as the statewide arm of the NAACP and has worked toward eliminating race-based discrimination for almost a century. Throughout its history, the MS NAACP has actively fought for voting rights and to eliminate efforts by white officials in Mississippi to intentionally disenfranchise African Americans and other protected minorities.

Mississippi Votes is a non-profit organization that registers eligible people to vote, organizes and encourages civic engagement, and educates communities on voting rights through grassroots organizing, programming, and outreach strategies that empower young people. Mississippi Votes operates a statewide poll monitoring program and voter information hotline, as well as year-round voter registration drives and a voting rights restoration program to assist individuals seeking suffrage bills.

For over eighty years, the **NAACP Legal Defense and Educational Fund, Inc. (“LDF”)** has strived to secure the constitutional promise of equal justice under law for all people in the United States. Critical to this mission is ensuring the full, fair, and free exercise of the right to vote for Black people. LDF has participated in multiple cases challenging discriminatory felony disenfranchisement provisions. *See Harness v. Watson*, 600 U.S. ___ (2023); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc).

One Voice is a civic engagement organization in Mississippi that operates a statewide election protection program to address obstacles voters have in preparing to vote and to secure voting access for eligible Mississippians. One Voice educates voters statewide on the election process, works to identify and respond to voter

irregularities on election day, and organizes in the community to prevent voter suppression, elevate underserved voices, and widen political participation.

The **People's Advocacy Institute ("PAI")** is a non-profit resource, training, and community capacity-building organization that focuses on engaging communities in electoral justice efforts, People's Assemblies, and on initiatives to build alternatives to incarceration and implement community-led solutions to violence. PAI's staff and supporters are largely comprised of people who were incarcerated and now work to end violence in their communities, including through intensive youth mentorship and diversion programs focused on civic engagement, specifically voting, as a key part of keeping communities safe, resilient, and thriving.

The **RECH Foundation** provides wraparound support to re-entering citizens in Mississippi. The Foundation was founded and is operated by people who have long led prison ministries, who are formerly incarcerated, and who are committed to helping others re-establish themselves in Mississippi communities. The Foundation seeks meaningful civic engagement—including voting for those who are eligible—as a cornerstone of success for people rebuilding their lives on the outside. For that reason, the Foundation works to register eligible Mississippians to vote, as many who are impacted by the criminal legal system are eligible and do not know it.

Strong Arms of Mississippi, founded by two men who were previously incarcerated and members of gangs, is a Credible Messenger program designed to

mentor and guide youth who are involved in the juvenile justice system toward a positive path. The motto of Strong Arms of Mississippi—“Rebuilding Communities We Once Helped To Destroy”—refers to Strong Arms’ commitment to fostering a culture of accountability and renewal in their own communities. Education about meaningful civic engagement, including the importance of voting, is part of the Strong Arms mentorship program.

Amici are deeply concerned about the permanent disenfranchisement of an entire community—a community that amici have served for many years. As amici know through their decades of work in the democracy, racial justice, and civil rights arenas, permanently stripping the right to vote from a citizen is an especially harsh punishment and in this instance is a practice deeply rooted in racism.

**STATEMENT OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 29**

No counsel for a party authored any part of this brief. No party, party's counsel or any person other than the amici, their members, or their counsel contributed money that was intended to finance the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The right to vote stands at the heart of American democracy. It means more than simply ticking boxes and casting a ballot on election day; it means having the individual agency to create change, to voice an opinion on important issues, and to choose representatives. It is fundamental to what it means to be a fully participating member of American society and stripping it away for life is excessively punitive. Nothing underscores how fundamental the right to vote is to one's own agency and the ability of a community to gain political power than the centuries-long, state-sponsored, violent resistance to Black Americans gaining the franchise. Mississippi's 1890 Constitution, which was adopted with the express purpose of denying the franchise to Black men, included the felony disenfranchisement provision before this Court. Black Americans were denied true access to the ballot from the founding of the country until the passage of the Voting Rights Act of 1965. Only through persistent struggle against oppression and subjugation did the right to vote become a reality. Even now, relics of Jim Crow remain, including Mississippi's felony disenfranchisement law, Section 241, permanently removing a fundamental right from a significant percentage of Black Mississippians.

This case raises the critical question of whether Section 241 of the Mississippi Constitution violates the Eighth Amendment's prohibition against cruel and unusual punishment by punishing those who have been convicted of certain felony offenses

by permanently taking away their right to vote. To deprive individuals of the right to vote permanently is to deny them an essential element of American citizenship. And to do so as a punitive measure—after they have served their sentences—is redundant, detrimental to successful reintegration into society, and anti-democratic. It is cruel and unusual, especially considering its roots.

With its origins in Jim Crow-era policies, Section 241 was specifically designed to disenfranchise Black voters and, to this day, it disproportionately impacts Black citizens. At a time in the progress of our nation, when the vast majority of states have abandoned or rolled back their felony disenfranchisement provisions, Mississippi's Section 241 stands nearly alone among a vanishing number of laws that deny the franchise to hundreds of thousands of citizens.

For these reasons and the additional reasons set forth below, amici respectfully ask this Court to adopt the panel's decision holding that lifetime disenfranchisement under Section 241 amounts to cruel and unusual punishment under the Eighth Amendment of the United States Constitution and must be barred.

ARGUMENT

I. DISENFRANCHISEMENT IS A FORM OF PUNISHMENT FOR PURPOSES OF THE EIGHTH AMENDMENT.

The right to vote is an essential element of civic life in a democratic society, and the loss of that right disempowers individuals and places them at the mercy of others. The deprivation of such an essential positive good can only harm the

individual, and imposing this deprivation on those who have completed their sentences is an unjustifiably harsh form of punishment.

A. The Right To Vote Is Fundamental.

Revolutionaries rejected British rule on the belief that, as stated in the Declaration of Independence, “Governments are instituted among Men, deriving their just powers from the consent of the governed.” The Declaration of Independence para. 2 (U.S. 1776). Since then, the fundamental nature of the right to vote has been reflected in and expanded by the Constitution, numerous laws, and Supreme Court decisions. Voting has provided citizens with a voice—an opportunity to participate in society. Therefore, as the cornerstone of American democracy, the right to vote must be safeguarded.

Recognizing the centrality of the right to vote to this nation’s system of governance, lawmakers have taken numerous steps to protect the right. Four constitutional amendments have been ratified to preserve, protect, and expand the right to vote. In 1870, Congress ratified the Fifteenth Amendment, guaranteeing citizens, including the recently freed enslaved people, the right to vote, regardless of race, color, or previous conditions of servitude. U.S. Const. amend. XV. Over the next 101 years, three other constitutional amendments were ratified: the Nineteenth Amendment, guaranteeing women the right to vote; the Twenty-Fourth Amendment, prohibiting poll taxes; and the Twenty-Sixth Amendment, extending the right to vote

to all citizens eighteen years of age or older. U.S. Const. amends. XIX, XXIV, XXVI.

Even after the ratification of the substantial Constitutional protections enshrined in the Fourteenth and Fifteenth Amendments, in practice the right to vote continued to be denied, especially to Black citizens, and the movement to achieve equality at the ballot box was a matter of life and death well into the second half of the twentieth century. See Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade, 1962-1965*, 57 S.C. L. Rev. 889, 892 (2006) (“Black Mississippians endured great difficulties in cracking the solid edifice of Jim Crow and disfranchisement. Civil rights supporters in Mississippi virtually disappeared from public view following the reign of terror in the mid-1950s that led to the deaths of Emmett Till and voting rights activist George Lee.”). In 1965, Congress passed the Voting Rights Act, “the most successful civil rights statute in the history of the Nation.” *Allen v. Milligan*, 599 U.S. 1, 2 (2023) (quoting S. Rep. No. 97-417, p. 111 (1982)). The effect of the Voting Rights Act highlights the importance of the right to vote: “The Justice Department estimated that in the five years after [the VRA’s] passage, almost as many black [people] registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.” *Controversies in Minority Voting: The Voting Rights Act in Perspective*, 7, 21 (Bernard Grofman & Chandler Davidson eds. 1992). More

recently, Congress passed the National Voter Registration Act of 1993, setting forth requirements relating to voter registration, and the Help America Vote Act of 2002, establishing standards relating to voting systems, equipment, and procedures.

The fundamental nature of the right to vote has been well-established by the Supreme Court as a bedrock principle upon which other rights are based. Over a hundred years ago, the Supreme Court held that voting “is regarded as a fundamental political right, because [it is] preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“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 of citizens to vote must be carefully and meticulously scrutinized.”). Later, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court recognized that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Id.* at 17.

As these cases recognized, restrictions on the right to vote “strike at the heart of representative government.” *Reynolds*, 377 U.S. at 555, 561, 568. Voting provides an individual with “the opportunity to participate in the collective decisionmaking of a democratic society and to add one’s own perspective to that of his or her fellow citizens.” *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020). This central principle of representative government was borne out in the first

half of the twentieth century when “politicians responded immediately to shifts in electoral preferences as voting rights were extended to women.” Grant Miller, *Women’s Suffrage, Political Responsiveness, and Child Survival in American History*, 143 Q. J. of Econ. 1287, 1288-89 (2008).

In Mississippi, however, people with disenfranchising felony convictions are “precluded from participation within the political process” and are “at the mercy of those who may not care about them.” Atiba Ellis, *Tiered Personhood and the Excluded Voter*, 90 Chi.-Kent L. Rev. 463, 477 (2015).

For people with felony convictions whose voting rights were taken and then restored, the right to vote brings with it benefits beyond serving a democratic function. Voting fosters a sense of reintegration and engagement with one’s community. See Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man’s Land*, 56 Syracuse L. Rev. 85, 86-87 (2005) (“[Voting’s] instrumental function is obvious: Americans vote to advance policies they support. But it serves an equally important expressive function as a ritual of belonging: Americans vote to express their membership in the *polis* . . .”).

For people with past disenfranchising felony convictions, this aspect of the right to vote can be particularly important. Studies have shown that “[c]ivic engagement, including the right to vote, plays an important role in successful reintegration” into society. Kristen M. Budd & Niki Monazzam, *Increasing Public*

Safety by Restoring Voting Rights, The Sentencing Project (Apr. 2023) (collecting research showing that the right to vote or the act of voting is related to decreased recidivism and increased public safety); *see also* Victoria Shineman, *Restoring Voting Rights: Evidence that Reversing Felony Disenfranchisement Increases Political Efficacy*, 41 *Pol’y Stud.* 131, 147 (2020) (reporting on experiment that “suggests that the right to vote doesn’t only affect whether a person registers and votes—it also affects their participatory attitudes and their confidence in their own abilities—attitudes which help people transition into society after being released from prison”).

Disenfranchisement, on the other hand, serves as “a symbol of rejection, not reconciliation; a symbol of difference, rather than commonality; a symbol of domination instead of equality.” *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘the Purity of the Ballot Box’*, 102 *Harv. L. Rev.* 1300, 1317 (1989). Those who do not exercise the right to vote “report lower belief in the efficacy of the election system, lower engagement with news and information about politics, and somewhat lower civic engagement and life satisfaction.” *See* Knight Foundation, *The 100 Million Project: The Untold Story of American Non-Voters*, February 2020, https://knightfoundation.org/wp-content/uploads/2020/02/The-100-Million-Project_KF_Report_2020.pdf.

The positive effects of full participation in representative government extend beyond the affected citizens whose rights have been restored and inures to the benefit of the surrounding community. Recent studies have found that, “[a]mong Americans with a history of criminal legal system involvement, having the right to vote or the act of voting is related to reduced recidivism.” Budd & Monazzam, *supra*.

By contrast, restoring the right to vote to people with disenfranchising felony convictions who have completed their sentences benefits the community as a whole by reducing the risks that these individuals will commit crimes in the future and increasing the likelihood that they will become fully participating and involved members of society who contribute to the common good. *See id.*; *see also* Erika Wood, Brennan Center for Justice, *Restoring the Right to Vote* 12 (2d ed. 2009) (describing how “officials with deep experience in law enforcement . . . recognize that bringing people into the political process makes them stakeholders, which helps steer former offenders away from future crimes”); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 *Colum. Hum. Rts. L. Rev.* 193, 213 (2004) (finding “consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior”).

As lawmakers, courts, and social science research have all recognized, the franchise is thus fundamental to citizenship and must be closely safeguarded.

Accordingly, “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds*, 377 U.S. at 562.

B. The Permanent Removal of Such a Fundamental Right Is an Exceptionally Harsh and Cruel and Unusual Form of Punishment.

Disenfranchisement is fundamentally punitive because it deprives an individual of the ability to exercise one of his or her most basic rights that is otherwise subject to meticulous and elaborate protection under law. *See* Nora V. Demleitner, *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753, 756 (2000) (asserting that “denial of the franchise must be viewed as a penalty”); *see also* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1155 (2004) (concluding that felony disenfranchisement is fundamentally punitive).

Permanent disenfranchisement deprives an individual of a core aspect of citizenship. As the Supreme Court held in *Trop v. Dulles*, 356 U.S. 86 (1958), stripping an individual of the rights of citizenship constitutes a “form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.” *Id.* at 101. The franchise is an especially critical aspect of citizenship, as “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds*, 377 U.S. at 555; *see*

also *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (“[T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . disinherited[, he] 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.”). Permanently depriving Mississippians of the right to vote as punishment entails the same essential cruelty recognized by *Trop* and its progeny that is implicated by the removal of citizenship as punishment for a crime.

Two felonies that trigger lifetime disenfranchisement under Section 241 highlight why permanent disenfranchisement constitutes disproportionate, cruel, and unusual punishment: possession of a stolen firearm and receiving stolen property. *See* Miss. Code Ann. §§ 97-17-70; 97-37-35(1). The state may convict someone of either of these crimes after having demonstrated only that the individual “[had] reasonable grounds to believe [the item or firearm] has been stolen,” Miss. Code Ann. § 97-17-70, or “under circumstances that would lead a reasonable person to believe that it was stolen,” *Taylor v. State*, 179 So. 3d 1237, 1241 (Miss. Ct. App. 2015) (emphasis added). Under this standard, a citizen can be permanently stripped of the right to vote based solely on a jury’s interpretation of a “reasonable” person’s perspective—rather than under a more exacting and precise form of *mens rea* requiring proof of intent or actual, direct knowledge. And a citizen can lose the right

to vote based on only the rightful ownership history of a single piece of personal property of modest value. By categorically penalizing individuals regardless of the severity of their crime, Section 241 thus imposes a form of punishment that is plainly disproportionate relative to the underlying offense in some circumstances. *See Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”); *Ewing v. Cal.*, 538 U.S. 11, 20 (2003) (recognizing that the Eighth Amendment “contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences’”) (quoting *Harmelin v. Mich.*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in judgment)) (plurality opinion).

Permanent disenfranchisement is cruel and unusual even setting aside the proportionality of the punishment relative to the underlying criminal offense. Justice Scalia, in his plurality opinion in *Harmelin* arguing that the Eighth Amendment does not include a proportionality principle, stated that the Eighth Amendment instead “disables the Legislature from authorizing particular forms or ‘modes’ of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.” *Harmelin*, 501 U.S. at 976. Disenfranchisement that continues to apply after all other penalties imposed with respect to a crime have lapsed is just such a mode of punishment, as explained below.

1. Permanent Disenfranchisement Is Punishment Without Purpose.

Disenfranchisement can be justified, if at all, only under a retributive theory of criminal punishment. But even that justification is inapplicable where—as here—disenfranchisement is made permanent across a broad swath of disparate offenses of differing degrees of severity, with different classes of victims, and that are otherwise subject to widely divergent forms of punishment. *See Hopkins v. Sec’y of State Hosemann*, 76 F.4th 378, 409-10 (5th Cir. 2023) (rejecting incapacitation, rehabilitation, and deterrence as plausible justifications for permanent disenfranchisement). Even if some period of disenfranchisement were acceptable under a theory of retribution, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender,” *Graham v. Fla.*, 560 U.S. 48, 71 (2010), and as explained above, that element is lacking here.

The retributivist justification is also unwarranted here in light of the absence of any positive case for the punishment imposed by Section 241. Lifetime disenfranchisement does not in any way serve the interests of the victims of crimes committed by the disenfranchised individuals. *See Thompson v. Sec’y of State for State of Ala.*, 65 F.4th 1288, 1332 (11th Cir. 2023) (Rosenbaum, J., concurring in part and dissenting in part) (“How, exactly, does not letting people who have served their sentence . . . vote ‘compensate’ their victims?”).

2. Recognizing Permanent Disenfranchisement as Punishment Is Not “Incoherent.”

The government asks this Court to uphold permanent disenfranchisement under Section 241 merely because other forms of even more serious punishment are sometimes justified. In dissent, Judge Jones stated that under the panel’s logic, “a state can sentence rapists to life in prison, meaning they can never vote—but if they are spared and eventually released, they must be allowed to vote.” *Hopkins*, 76 F.4th at 424 (Jones, J., dissenting). The dissent’s argument that the panel’s decision leads to an “incoherent” result, *id.*, both is incorrect and assumes a set of facts not before this Court.

Judge Jones takes issue with the majority’s reasoning as it would apply to two categories of conviction that were not challenged by plaintiffs: rape and murder. *See Hopkins*, 76 F.4th at 424. Plaintiffs-Appellees in this case all had prior convictions for different and far less serious felonies for which they have already completed their sentences, so the concern Judge Jones articulated was not before this Court. *See id.* at 407. The majority recognized that “this case does not concern the validity of temporary felon disenfranchisement laws, or the disenfranchisement of the incarcerated, or any other particular mode of disenfranchisement not contained in Section 241.” *Id.* Rather, this Court is “concerned solely with Mississippi’s practice of punishing felons who have completed all terms of their sentences by permanently disenfranchising them for life.” *Id.*

Drawing a distinction between permanent disenfranchisement for those who have fully completed their sentences and supervised release, and disenfranchisement while incarcerated, is likewise by no means “incoherent,” and failing to do so represents an arbitrary and cruel “mode” of punishment. It is reasonable to distinguish the excessiveness of the penalty based on whether the individual remains incarcerated, and to conclude that individuals who have completed their sentences and are otherwise regarded as fit to reintegrate into society should have their vote restored. *See Hopkins*, 76 F.4th at 387 (“In the last fifty years, a national consensus has emerged among the state legislatures against permanently disenfranchising those who have satisfied their judicially imposed sentences.”). Indeed, in this situation, it is imperative for the individual’s right to vote to be restored to ensure that they can be fully and successfully reintegrated into society.

II. SECTION 241 WAS DESIGNED TO DISENFRANCHISE BLACK MEN AND, TO THIS DAY, HAS DISPROPORTIONATELY DISENFRANCHISED THE BLACK COMMUNITY OF MISSISSIPPI.

A. Felony Disenfranchisement in Mississippi Is Rooted in a History of Racial Discrimination and Was Created to Prevent Black Men From Gaining Access to Political Power.

Section 241 was explicitly designed to strip the vote from Black men in Mississippi after the end of Reconstruction. To “exclude the negro” from Mississippi political life, the framers of the 1890 Constitution of Mississippi hatched a plan to circumvent the Fifteenth Amendment’s bar against overt racial

discrimination in voting by adopting indirect voter qualification requirements devised to deny Black men the right to vote. *See* Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* 41 (1990); *see also* *Miss. State Chapter Operation Push, Inc. v. Allain*, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987) (explaining the “Mississippi plan”). The discriminatory intent of Section 241 was so blatant that the Supreme Court of Mississippi observed as early as 1896 that Section 241 was handcrafted to “obstruct the exercise of the franchise by the negro race.” *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896); *accord Williams v. Miss.*, 170 U.S. 213, 222-23 (1898); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (same).

The discriminatory intent of Section 241 is evidenced by the crimes that were selected (and omitted) as the basis for disenfranchisement. Rather than opting for a blanket provision covering all felonies at common law, the framers chose to include only those felonies they believed Black Mississippians “were prone” to commit. *Ratliff*, 20 So. at 868. This led the framers to include crimes such as larceny and bigamy, which were seen as crimes more likely to be committed by Black people (likely because of the nature of discriminatory enforcement), as disqualifying offenses, but to omit more serious crimes such as robbery, which were seen as being among the “robust crimes of the whites.” *See* Demleitner, *supra*, 776-77 & n.124. Indeed, the drafters of Section 241 were careful to ensure that “the crimes mentioned

as disqualifying from voting” were such that it was “always easy, when desirable, to convict the Negro of committing [them].” John L. Love, *The Disfranchisement of the Negro*, The American Negro Academy, Occasional Papers No. 6 (1899), <https://www.gutenberg.org/files/31333/31333-h/31333-h.htm>.

Section 241 was amended in 1950 and 1968, but these amendments did not dispense with the provision’s discriminatory character. During the civil rights era, Black Mississippians were subjected to *de jure* and *de facto* forms of exclusion from voting, expressing political opinions, and holding political office, thereby impeding their ability to participate in the political process. Moreover, pervasive threats of violence from private citizens and government agents discouraged and prevented Black Mississippians from voting on these amendments to Section 241. *See, e.g.*, Dornal Davis, *When Youth Protest: The Mississippi Civil Rights Movement, 1955-1970*, Mississippi History Now (Aug. 2001), <https://www.mshistorynow.mdah.ms.gov/issue/the-mississippi-civil-rights-movement-1955-1970-when-youth-protest>. Thus, it is unsurprising that the framers’ original intent to “obstruct the exercise of the franchise by the negro race” continues to burden Section 241 with a racially discriminatory taint. *Ratliff*, 20 So. at 868.

This is especially true because the original eight crimes challenged here have never been reconsidered by the Mississippi legislature or Mississippi voters. Section 241 has been modified only twice, each time through ballot initiatives that did not

reconsider the provision in its entirety. *Harness*, 47 F.4th at 323 (Graves, J., dissenting). In 1950, voters were given the choice only either to remove the crime of burglary from Section 241 or to leave the law unchanged. *Id.* Similarly, in 1968, voters were asked only whether to add the crimes of murder and rape to Section 241 or leave it unchanged. *Id.* In both 1950 and 1968, regardless of how Mississippians voted, Section 241’s original language and the racist taint with which it was enacted would remain unchanged. *See Harness v. Watson*, 47 F.4th 296, 311 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426, 2427-28 (2023) (Jackson, J., dissenting) (“[F]ar from being subsequently ‘reenacted,’ §241 has persisted, without change—doing the harmful work that it was designed to do—ever since its initial invidious inception.”).

B. The Roots of Felony Disenfranchisement in Mississippi Distinguish This Case From *Richardson*.

Although the Supreme Court upheld California’s felony disenfranchisement law in *Richardson v. Ramirez*, 418 U.S. 24 (1974), Appellant’s reliance on *Richardson* is misplaced because, among other reasons, the principal purpose of the constitutional provision at issue in *Richardson* was to prevent election fraud. *See Ramirez v. Brown*, 9 Cal. 3d 199, 204-05 (1973) (tracing the history of California’s felony disenfranchisement law). Indeed, the California Supreme Court observed that “the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disenfranchisement of persons convicted of crime—is

today the method of preventing election fraud which is the least burdensome on the right of suffrage.” *Id.* at 216. A different analysis should apply here, where the constitutional provision at issue was not put in place to stem election fraud—a legitimate purpose—but to remove Black voters from the democratic process; it otherwise serves no beneficial purpose; and it is being challenged under the Eighth Amendment, as opposed to the provision in *Richardson*, which was challenged under the Fourteenth Amendment’s Equal Protection Clause.

C. Section 241 Disproportionately Punishes Black Mississippians, Perpetuating a Cycle of Disenfranchisement and Underrepresentation.

Empirical data shows that Section 241 has created a deeply inequitable electorate in the State of Mississippi. Between 1994 and 2017, 49,604 individuals were convicted of disenfranchising felony offenses. Of them, 29,052—approximately 59%—were Black, whereas only 18,310—approximately 37%—were white. These figures are especially troubling for a state in which Black people make up only 36% of the voting-age population of citizens. *See* Report of Dov Rothman, at 4-5, *Harness v. Hosemann*, No. 3:17-cv-791-DPJ-FKB (S.D. Miss. Aug. 1, 2018), ECF No. 44-1, [hereinafter “Rothman Report”]; *see also* Advancement Project National Office, *One Voice and Mississippi Votes, Our Voices, Our Votes: Felony Disenfranchisement and Reentry in Mississippi*,

<https://advancementproject.org/wp-content/uploads/2021/03/MS-Reentry-Report24.pdf> [hereinafter “Our Voices, Our Votes”].

In fact, between 1994 and 2017, 3.5% of Mississippi’s Black citizen voting-age population consisted of disenfranchised individuals, whereas only 1.3% of the state’s white citizen voting-age population was similarly disenfranchised. *See* Rothman Report, at 5 (ECF No. 44-1). For the same period, 2.1% of Mississippi’s Black voting-age population consisted of disenfranchised individuals who had served their sentences, whereas only 0.8% of the state’s white voting-age population were similarly disenfranchised despite completing their sentences. *See id.* at 7. These racial disparities extend to the proportion of Black Mississippians—relative to Mississippians of other races—convicted of disenfranchising crimes. Data indicates that Black individuals comprise the largest share of convictions in Mississippi for every qualifying felony except one. *See* Reply Report of Dov Rothman, at 2, *Harness v. Hosemann*, No. 3:17-cv-791-DPJ-FKB (S.D. Miss. Oct. 4, 2018), ECF No. 65-4.

Disenfranchised Mississippians theoretically have two avenues for regaining their right to vote. Specifically, they can petition the governor for a pardon or an executive order to restore their civil rights, or they can lobby the state legislature for a Bill of Suffrage. But efforts to utilize these channels are rarely fruitful, further solidifying the fate of disenfranchised Mississippians. *See* Our Voices, Our Votes,

supra, at 9. Between 2007 and 2017, despite considering 128 applications for a Bill of Suffrage, the Mississippi legislature restored the voting rights of only 45 individuals. *See id.* Indeed, from 2013 to 2017, the legislature restored the voting rights of only 14 people who had completed their sentences. *See Rothman Report*, at 7 (ECF No. 44-1).

Conceptually, the quality of democracy relies on cooperation between those who succeed in elections and those who do not. *See Vesla M. Weaver et al., Detaining Democracy? Criminal Justice and American Civic Life*, 651 *Annals Am. Acad. Pol & Soc. Sci.* 6, 10 (2014). When disenfranchisement renders a population invisible or voiceless, the interests that are politically pursued skew against that population. *See id.* at 10-11. This erodes the legitimacy of the democratic process in the eyes of the public and impacts the civic behavior of those affected by disenfranchisement policies. *See id.*

By way of example, Black Mississippians have been rendered all but invisible in statewide elections. Despite Black Mississippians making up 38% of the state's population, Mississippi has not elected a Black candidate to a statewide office—such as governor, lieutenant governor, or US Senator—since the end of Reconstruction almost 150 years ago. *See Ashton Pittman, First Black Republican Elected To Mississippi House Since Reconstruction*, *Miss. Free Press* (Aug. 10, 2023),

<https://www.mississippifreepress.org/35419/first-black-republican-elected-to-mississippi-house-since-reconstruction>.

Moreover, the negative impacts of disenfranchisement spill over into the ways in which people participate in collective action and form their political identities. *See Weaver, supra*, at 13. In that regard, it is not at all surprising to observe that the disenfranchisement of individuals affects the political behavior of the broader communities to which those individuals belong and the people in those communities who still have the right to vote. For example, one study found that “in states with more restrictive criminal disenfranchisement laws, the overall voter turnout [was] lower than in states with less restrictive criminal disenfranchisement laws.” Aman McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 Va. J. Soc. Pol’y & L. 66, 80 (2003). A possible explanation for this finding is that “an individual’s level of participation in politics is influenced by the political participation of those with whom he or she interacts on a regular basis, e.g., his or her social network.” *Id.* at 72. “[B]y depriving individuals of the right to participate in one of their community’s most basic political activities, voting, criminal disenfranchisement laws effectively erode any tendency that these social networks have to encourage voting among their non-disenfranchised members.” *Id.*

This erosion may occur because less political information would be exchanged within a social network as more and more people lose their right to vote. *See id.*

The same study found that “the probability of voting declines at a greater rate for African Americans compared to Caucasian Americans, when they live in states with restrictive criminal disenfranchisement laws, even for those who have never been convicted of a crime.” McLeod et al., at 80. For example, in comparing states with the least restrictive and most restrictive criminal disenfranchisement laws, the study observed that “the probability of Caucasians voting [in the 1996 and 2000 presidential elections] dropped by about 3% while the probability of voting among African Americans dropped by approximately 8%.” *Id.* at 79. As the authors of this study noted, criminal disenfranchisement laws have had “a substantial and disproportionate impact on the electoral strength of the African-American population in terms of the number of people who are directly disenfranchised,” which likely explains the disproportionate impact on voting behavior between the Black and white voting communities. *Id.* at 74.

CONCLUSION

The right to vote is fundamental. It is the essence of American democracy. To take it away is to render individuals voiceless and invisible in a society built to give people a role in their own self-governance, and to deprive them of a precious right that for many was achieved only at great cost. Thus, to disenfranchise is to

punish, and to disenfranchise permanently is to punish in an exceptionally harsh, and cruel and unusual, way. Here, the scheme to permanently disenfranchise is especially pernicious and cruel because it was expressly designed to remove Black voters from the political process, and it has gone a long way toward accomplishing that goal. The shameful history of Section 241 and the disproportionate impact it has had on Black Mississippians make it even more urgent that this Court find it unconstitutional.

For the reasons stated herein, amici respectfully ask this Court to adopt the panel's decision holding that lifetime disenfranchisement under Section 241 is cruel and unusual punishment under the Eighth Amendment of the United States Constitution and must be barred.

DATED: December 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2023, a true and correct copy of the foregoing brief of *amici curiae* was served via electronic filing with the Clerk of Court and all registered ECF users.

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This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word. Excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6469 words.

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