No. 19-60662

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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 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

Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:18-cv-188

DEFENDANT-APPELLANT'S EN BANC BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument will be heard during the week of January 22, 2024.

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INTRODUCTION

In *Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022) (en banc), the en banc Court rejected a race-based equal-protection challenge to Section 241 of the Mississippi Constitution, which disenfranchises certain felons. *Id.* at 311. Although that claim failed as a matter of law, it at least had a firm basis in Supreme Court precedent. The Supreme Court held long ago that the Equal Protection Clause forbids a criminal-disenfranchisement law that was motivated by a discriminatory purpose and has a discriminatory effect. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Plaintiffs' claims here, which challenge Section 241 and Section 253 (which allows Mississippi's legislature to reenfranchise felons), have no such firm basis. In this case—previously consolidated with *Harness* in the district court—plaintiffs brought five facial claims against those provisions. They claim that Section 241's permanent-disenfranchisement framework violates the Eighth Amendment (applied to States by the Fourteenth Amendment) by inflicting the cruel and unusual punishment of permanent disenfranchisement and violates the Equal Protection Clause by impermissibly burdening the right to vote. And they claim that Section 253's legislative-reenfranchisement mechanism violates the Equal Protection Clause because it is tainted by racial animus, violates the Equal Protection Clause because it is an arbitrary reenfranchisement

framework, and violates the First Amendment by giving the Legislature standardless discretion over whether to allow felons to again exercise political expression by voting.

Unlike the claim brought in *Harness*, these claims have an exceptionally poor judicial track record and are extremely weak against Mississippi's laws in particular. Most of the claims are foreclosed by precedent, some had never succeeded in any court, and some are novel but patently meritless. Constitutional text, history, justiciability rules, and the undisputed record evidence also doom these claims. In a summary-judgment order that largely aligns with these points, the district court rejected most of the claims on the merits, ruling that all but the race-based equal-protection challenge fail as a matter of law.

A panel of this Court overwhelmingly agreed that plaintiffs' claims fail, rejecting all of them but one: plaintiffs' Eighth Amendment challenge to Section 241. On that claim, a divided panel held—for the first time in our Nation's history—that a law disqualifying felons from voting is a cruel and unusual punishment. The panel held that plaintiffs' other claims are nonjusticiable or foreclosed by precedent. This Court granted rehearing en banc after the Mississippi Secretary of State sought review of the panel's ruling on plaintiffs' Eighth Amendment claim.

The en banc Court should reject all of plaintiffs' claims.

Plaintiffs' challenges to Section 241 fail. Section 241 does not violate the U.S. Constitution's prohibition of cruel and unusual punishments. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court rejected the view that a State is barred from indefinitely disenfranchising an entire category of felons. That alone dooms plaintiffs' Eighth Amendment claim. Even if that were not so, Mississippi's disenfranchisement of felons is not a "punishment" subject to the Eighth Amendment. Section 241 is a nonpunitive voting regulation. And even if disenfranchisement were a punishment, it is not "cruel and unusual." The Constitution recognizes that States may disenfranchise felons, it places no temporal limits on that power, nearly every State disenfranchises some felons, and many States still permanently disenfranchise some felons. Invalidating Section 241 under the Eighth Amendment would be revolutionary and destabilizing.

As the panel held, Section 241 comports with the Equal Protection Clause. The Supreme Court's decision in *Richardson* holds that the Fourteenth Amendment permits a State to permanently disenfranchise felons. That precedent forecloses plaintiffs' claim that Section 241 denies equal protection by permanently denying a fundamental right to vote.

Plaintiffs' challenges to Section 253 also fail. That provision authorizes the Legislature to reenfranchise felons on a two-thirds vote of

both houses. In challenging Section 253, plaintiffs sued only the Secretary of State. As the panel held, plaintiffs' challenges to Section 253 are not justiciable. Plaintiffs challenge the legislative process used to obtain a suffrage bill. But the Secretary has no role in that process. He is an executive-branch official with no connection to legislative suffrage bills. He does not sponsor, draft, debate, vote on, or have any role in passing or defeating suffrage bills. Plaintiffs' claimed injury is thus not traceable to and would not be redressed by a judicial decision against the Secretary. And because the Secretary has no role in enforcing Section 253, plaintiffs' challenges to Section 253 are also barred by sovereign immunity because their claims amount to an impermissible suit against the State.

Plaintiffs' claims against Section 253 also fail on the merits. Their race-based equal-protection claim fails on three independent grounds. Plaintiffs never showed that Section 253 has a discriminatory effect; they never showed that it was adopted with discriminatory intent; and the Secretary showed—and this Court's en banc decision in *Harness* requires holding—that the State purged Section 253 of any discriminatory taint anyway. Plaintiffs' arbitrary-reenfranchisement equal-protection claim fails because Section 253 rests on a rational basis. And plaintiffs' First Amendment claim fails because the Constitution squarely allows States

to disenfranchise and plaintiffs have never shown any viewpoint discrimination.

This Court should affirm to the extent that the district court granted summary judgment to the Secretary and should reverse to the extent it allowed one of plaintiffs' claims (the race-based equal-protection challenge to Section 253) to proceed to trial.

STATEMENT OF JURISDICTION

This Court granted jurisdiction over these appeals under 28 U.S.C. § 1292(b). The collateral-order doctrine also authorizes the Secretary's appeal from the denial of sovereign immunity and on related subject-matter-jurisdiction issues.

STATEMENT OF THE ISSUES

I. Section 241 of the Mississippi Constitution makes certain felons indefinitely ineligible to vote. Does Section 241 (A) violate the federal Constitution's prohibition of cruel and unusual punishments or (B) violate the Fourteenth Amendment's Equal Protection Clause by impermissibly burdening the right to vote?

II. Section 253 of the Mississippi Constitution authorizes the Mississippi Legislature to restore a felon's right to vote by a two-thirds vote of both houses. (A) May plaintiffs challenge Section 253, consistent with Article III's limitations on standing and principles of sovereign

immunity, by suing Mississippi's Secretary of State? (B) If so, does Section 253 (1) violate the Equal Protection Clause because it is racially discriminatory, (2) violate the Equal Protection Clause by using an arbitrary reenfranchisement mechanism, or (3) violate the First Amendment?

STATEMENT OF THE CASE

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

The U.S. Constitution recognizes that a State may deny its citizens "the right to vote" "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. Mississippi has always disqualified certain felons from voting. Since 1890 it has done so through lists of disenfranchising crimes in Section 241 of the state constitution. For over 50 years, Section 241 has disqualified those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy." And since 1890, Section 253 of the state constitution has authorized the Legislature to "restore the right of suffrage to any person disqualified by reason of crime" "by a two-thirds vote" of both legislative houses.

The Mississippi Supreme Court has said that the 1890 constitutional delegates adopted the original Section 241's list of disenfranchising crimes (which included burglary but not murder or rape) for racially discriminatory reasons. *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). There is no record evidence of a discriminatory motive behind Section 253's facially neutral legislative mechanism for restoring the right to vote. The relevant record information supports the view that Section 253 was adopted for race-neutral reasons. That part of the record (contained in plaintiffs' expert report) notes a delegate's explanation that someone "disqualified" from voting "for crime" should be able to regain the right to vote if he "reform[s] and become[s] a good citizen." ROA.19-60662.1818; *see* ROA.19-60662.1817-1818.

Since 1890, Section 241's list of disenfranchising crimes has been amended and reenacted twice—in 1950 to drop burglary and in 1968 to add murder and rape. ROA.19-60662.1390-1391, 1513, 3187-3188, 3191-3192. There is no evidence that racial animus drove either reenactment. Section 253 has never been amended.

In the mid-1980s, the State revisited its felon-disenfranchisement laws. In 1984, an Election Law Reform Task Force led by Democratic Secretary of State Dick Molpus was appointed to review the State's election laws and propose election-reform legislation. ROA.19-

60662.1523-1527. The bipartisan, diverse Task Force included legislators, executive-branch officials, local election officials, and members of the public. ROA.19-60662.1528-1530. The Task Force's work included a review of the State's felon-disenfranchisement laws. ROA.19-60662.1613-1619, 1614, 1618, 1620-1627, 1622, 1628-1632, 1629, 1544, 1547. Over several months, the Task Force held public hearings, received written information and public comments, and met with voting-rights lawyers from the Department of Justice. ROA.19-60662.1523-1632. The Task Force then proposed legislation for the 1985 legislative session. ROA.19-60662.1634.

The Legislature then formed a committee that studied the issues, held open meetings, and proposed legislation. ROA.19-60662.1633-1668. The committee recommended expanding the State's disenfranchisement laws to include all felonies except manslaughter and tax evasion, with reenfranchisement after completion of a sentence. ROA.19-60662.1656-1658. At the 1986 legislative session, legislators proposed a bill to establish a new election code that would broaden the disenfranchising felonies to all felonies but manslaughter and tax evasion. ROA.19-60662.1672-1674. In a legislative process that produced a final bill that comprehensively addressed voter qualifications, lawmakers modified the bill to instead leave the list of disenfranchising crimes (as set forth in

Section 241) as it was and left the restoration-of-voting-rights mechanism (as set forth in Section 253) as it was. ROA.19-60662.1676-1679. The legislation passed 51-1 in the Senate and 118-3 in the House. ROA.19-60662.1680. The Department of Justice then precleared the law. ROA.19-60662.1685-1687. Today Mississippi bars from voting anyone "convicted of vote fraud or of any crime listed in Section 241." Miss. Code Ann. § 23-15-11.

2. Plaintiffs are Mississippi citizens who are disqualified from voting because of their felony convictions. ROA.19-60662.18, 20-23. In 2018 they sued the Mississippi Secretary of State, claiming that Section 241's permanent-disenfranchisement framework and Section 253's reenfranchisement mechanism violate the federal Constitution. ROA.19-60662.14-63. They brought five claims, all "facial challenges." ROA.19-60662.52. They claim that Section 241 violates the Eighth Amendment (applied to States by the Fourteenth Amendment) by inflicting the cruel and unusual punishment of permanent disenfranchisement and violates the Fourteenth Amendment's Equal Protection Clause by impermissibly burdening the right to vote. ROA.19-60662.54-55. They claim that Section 253 violates the Equal Protection Clause because it is tainted by racial animus, violates that Clause because it imposes an arbitrary reenfranchisement framework, and violates the First Amendment by

giving the Legislature standardless discretion over whether felons will again be allowed to exercise political expression by voting. ROA.19-60662.56-59.

The district court certified a class of those convicted of listed crimes who have completed their sentences. ROA.19-60662.4848. The court consolidated the case with *Harness v. Hosemann*, No. 3:17-cv-791 (S.D. Miss.), a lawsuit claiming that Section 241 violates the Equal Protection Clause because it is tainted by racial animus. ROA.19-60662.874-876.

The district court granted summary judgment to the Secretary on all claims in both cases, except for the race-based equal-protection claim (against Section 253) in this case, which it allowed to proceed to trial. ROA.19-60662.4857-4885.

The court first rejected the *Harness* plaintiffs' equal-protection challenge to Section 241. ROA.19-60662.4865-4875. The *Harness* plaintiffs claimed that Section 241's list of disenfranchising crimes was adopted in 1890 for racially discriminatory reasons and had never been cleansed of that discriminatory taint. ROA.19-60662.4865-4867. The district court ruled that that claim was foreclosed by *Cotton v. Fordice*, 157 F.3d 388, 391-92 (5th Cir. 1998), which held that the State had purged Section 241 of discriminatory taint by reenacting it in 1950 and

1968 through a deliberative process that was free of racial animus. ROA.19-60662.4865-4872.

The court then rejected plaintiffs' two challenges to Section 241 in this case. ROA.19-60662.4875-4878. On the Eighth Amendment claim, the court reasoned that section 2 of the Fourteenth Amendment recognizes that a State may deny the vote "for participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, and that "it would be internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement" when "[section] 2 of the Fourteenth Amendment permits it." ROA.19-60662.4878. The court ruled that plaintiffs' non-race-based equal-protection claim is foreclosed by *Richardson v. Ramirez*, 418 U.S. 24 (1974), which held that the Fourteenth Amendment allows States to permanently disenfranchise felons and rejected an equal-protection challenge to felon-disenfranchisement laws. ROA.19-60662.4875-4877.

Last, the court rejected two of plaintiffs' challenges to Section 253, but not the third. ROA.19-60662.4864-4865, 4879-4883. To start, the court rejected the Secretary's threshold arguments: that plaintiffs lacked standing to sue him because he has no role in Section 253's suffrage-bill process and so does not cause and cannot redress plaintiffs' injury, and that sovereign immunity bars suit because the Secretary has no role in enforcing Section 253. The court ruled that the Secretary has "some

connection" with Section 253's enforcement and could redress plaintiffs' injury because he is the State's "chief election officer and maintains the [Statewide Elections Management System], which would presumably be involved in one of the final steps in returning a convicted felon to the voting rolls after" a successful suffrage bill. ROA.19-60662.4864-4865.

On the merits, the court denied summary judgment on plaintiffs' race-based equal-protection claim because it perceived factual disputes on whether racial animus motivated Section 253's adoption and whether the State had purged any such animus from Section 253. ROA.19-60662.4882-4883. The court rejected plaintiffs' arbitrary-reenfranchisement equal-protection claim, ruling that Section 253's discretionary, case-by-case approach satisfies the rational-basis review that applies to reenfranchisement laws. ROA.19-60662.4880-4882. And the court rejected plaintiffs' First Amendment claim, reasoning that that Amendment provides no more protection to voting rights than the Fourteenth Amendment, which (on this non-race-based claim) Section 253 satisfies. ROA.19-60662.4879.

The district court severed the lawsuits and authorized interlocutory appeals on all issues resolved in the summary-judgment order. ROA.19-60662.4884-4885. Appeals in both cases followed.

3. *Harness* reached a decision faster. A panel affirmed the rejection of the *Harness* plaintiffs' equal-protection claim. 988 F.3d 818 (5th Cir. 2021). This Court went en banc and again affirmed, ruling that the *Harness* plaintiffs failed to show that racial animus taints Section 241. 47 F.4th 296, 311 (5th Cir. 2022) (en banc). First, the Court ruled that the *Harness* plaintiffs "failed to meet their burden of showing that the current version of Section 241"—the version adopted in 1968—"was motivated by discriminatory intent." *Id.* at 303; *see id.* at 303-10. Second, the Court alternatively held that, even if the *Harness* plaintiffs had shown that discriminatory taint remained after the post-1890 enactments, the State "conclusively show[ed]" that this taint "has been cured." *Id.* at 303. The Court based that ruling on the State's actions in the 1980s. *Id.* at 310-11. "The 1984-86 discussions involving the public, those in the Task Force, and the Mississippi legislative committees illustrate that Section 241 in its current form reflects purposeful and race-neutral contemplation." *Id.* at 310. The State's actions showed that Section 241 "would have been passed in its current form without racial motivation," so any taint "has been cured." *Id.* at 303, 311. The Supreme Court denied certiorari over a dissent. 143 S. Ct. 2426 (June 30, 2023).

4. In August 2023, a divided panel in this case affirmed in part and reversed in part the district court's summary-judgment order.

The panel reversed the summary judgment on plaintiffs' Eighth Amendment claim and held "that permanent disenfranchisement inflicted by Section 241 ... is cruel and unusual punishment." Op. 23 (CA5 Dkt. 165-1). The panel held that Supreme Court precedent does not foreclose this claim (Op. 23-28), that permanent disenfranchisement under Section 241 is "punishment" subject to the Eighth Amendment (Op. 28-32), and that Section 241 imposes a "cruel and unusual" punishment (Op. 32-44). That last holding rested on a perceived national consensus against permanently disenfranchising those who have completed their sentences (Op. 34-39) and the panel majority's "independent judgment" that such disenfranchisement is cruel and unusual (Op. 39-44). The panel remanded "with instructions" to declare "Section 241 unconstitutional" and "enjoin[ ]" its enforcement. Op. 45.

The panel affirmed the district court's ruling rejecting plaintiffs' equal-protection challenge to Section 241. Op. 18-21. The panel agreed with the district court that *Richardson* forecloses this argument. Op. 21.

The panel partially reversed the district court's disposition of plaintiffs' challenges to Section 253, ruling that plaintiffs lack standing to bring those challenges and so all three should have been dismissed. Op. 15-16. The panel explained that plaintiffs claim injury from the allegedly "unconstitutional burden" that Section 253 places on those

"seeking to regain the right to vote through the passage of a suffrage bill." Op. 15. But that legislative process "begins and ends without the Secretary's involvement." Op. 15. So plaintiffs' injury "is not fairly traceable to the Secretary." Op. 16.

Judge Jones dissented from the panel's ruling that Section 241 inflicts cruel and unusual punishment. Diss. 52-67. She maintained that plaintiffs' Eighth Amendment claim fails for three separate reasons: The Supreme Court's decision in *Richardson* forecloses it (Diss. 55-58); felon disenfranchisement is not a punishment (Diss. 59-62); and felon disenfranchisement is not cruel or unusual (Diss. 62-67).

5. The Secretary petitioned for rehearing en banc on the issue of whether Section 241 violates the U.S. Constitution's prohibition of cruel and unusual punishments. Pet. 1 (CA5 Dkt. 181). This Court granted the petition and vacated the panel's decision. CA5 Dkt. 196-2.

SUMMARY OF ARGUMENT

I. This Court should reject plaintiffs' challenges to Section 241 of the Mississippi Constitution, which disqualifies from voting those who commit certain felonies.

A. Section 241 does not violate the U.S. Constitution's prohibition of cruel and unusual punishments. Longstanding Supreme Court precedent rejects the view that a State is barred from indefinitely

disenfranchising an entire category of felons. Even if that were not so, Mississippi's disenfranchisement of felons is not a "punishment" subject to the Eighth Amendment. And even if disenfranchisement were a punishment, it is not "cruel and unusual."

B. Section 241 comports with the Equal Protection Clause. Supreme Court precedent holds that States may, consistent with that Clause, permanently disenfranchise felons. That forecloses plaintiffs' claim.

II. This Court should reject plaintiffs' challenges to Section 253 of the Mississippi Constitution, which authorizes the Legislature to reenfranchise felons on a two-thirds vote of both houses.

A. These claims are not justiciable. Plaintiffs lack standing. They challenge the legislative process used to obtain a suffrage bill. But Mississippi's Secretary of State—the only official who plaintiffs sued—has no role in that legislative process. So plaintiffs' claimed injury is not traceable to and would not be redressed by a decision against the Secretary. And because the Secretary has no role in enforcing Section 253, sovereign immunity also bars these claims.

B. These claims also fail on the merits. Plaintiffs' race-based equal-protection claim fails for three independent reasons: plaintiffs failed to show that Section 253 has a discriminatory effect; they failed to show that it is tainted by a discriminatory purpose; and the Secretary

overcame any such showing of discriminatory purpose. Plaintiffs' arbitrary-reenfranchisement equal-protection claim fails because precedent forecloses it and Section 253 satisfies the rational-basis review that applies to reenfranchisement laws. And plaintiffs' First Amendment claim fails because the Constitution allows States to disenfranchise and plaintiffs have never shown any viewpoint discrimination.

STANDARD OF REVIEW

These appeals arise from the partial grant and partial denial of cross-motions for summary judgment. This Court reviews *de novo* the grant or denial of summary judgment, applying the same Fed. R. Civ. P. 56 "analysis that guides the district court" and reviewing each motion "independently, with evidence and inferences taken in the light most favorable to the nonmoving party." *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 370 (5th Cir. 2005).

ARGUMENT

I. This Court Should Reject Plaintiffs' Challenges To Section 241, The State's Disenfranchisement Provision.

Plaintiffs' two challenges to Section 241 fail on the merits.

A. Section 241 Does Not Violate The U.S. Constitution's Prohibition Of Cruel And Unusual Punishments.

Plaintiffs claim that Mississippi's indefinite disenfranchisement of certain felons violates the U.S. Constitution's prohibition of cruel and

unusual punishments. ROA.19-60662.54-55. The district court rejected this claim. ROA.19-60662.4878. This Court should too. The claim fails for three independent reasons. Opening Br. 55-56 (CA5 Dkt. 47); Response Br. 41-55 (CA5 Dkt. 75).

1. Supreme Court Precedent Forecloses Plaintiffs' Claim That The U.S. Constitution Bars Laws, Like Section 241, That Permanently Disenfranchise Felons.

Supreme Court precedent forecloses any claim seeking to strip Mississippi of its power to disenfranchise felons indefinitely. That is what plaintiffs' lead claim against Section 241 seeks, ROA.19-60662.54-55, so it fails. The panel erred in ruling otherwise. Op. 23-28.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court rejected the view that the Fourteenth Amendment bars a State from indefinitely disenfranchising felons. *Id.* at 56; *see id.* at 41-56. The Court reasoned as follows: Section 2 of the Amendment apportions congressional representation based on state population, but reduces that representation if a State denies the right to vote to certain adult male citizens. U.S. Const. amend. XIV, § 2. That latter rule has one exception: a State is not penalized when it denies the vote "for participation in rebellion, or other crime." *Ibid.* That text means that "the exclusion of felons from the vote has an affirmative sanction in" section 2. 418 U.S. at

54. Section 2's "legislative history" (*id.* at 43; *see id.* at 43-48) and "the historical understanding of the Fourteenth Amendment" (*id.* at 53; *see id.* at 48-53) confirm that that text "mean[s] what it says." *Id.* at 43; *see id.* at 54. And given section 2's text and history, the Equal Protection Clause—in section 1 of the Amendment—cannot prohibit a State from disenfranchising felons. *Id.* at 54-56. Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation" that section 2 "imposed for other forms of disenfranchisement." *Id.* at 55. So the Fourteenth Amendment does not prohibit a State from "exclud[ing] from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56.

Richardson forecloses plaintiffs' claim (ROA.19-60662.54-55) that the Eighth Amendment bars indefinite disenfranchisement of felons who have completed their sentences. Diss. 55-58. The Eighth Amendment applies to the States through section 1 of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962). So plaintiffs' claim rests on the view that section 1 of the Fourteenth Amendment bars what section 2 allows. *Richardson* dooms that view. 418 U.S. at 54-55.

The panel thought that it was free to reach its conclusion because *Richardson* rejected an equal-protection claim and so left open other

challenges to felon disenfranchisement. Op. 23-28. But, as explained, plaintiffs' challenge is rooted in the Fourteenth Amendment, and *Richardson* rejects the view that section 1 of that Amendment overrides section 2. Diss. 55-56. The panel added that *Richardson* does not immunize disenfranchisement laws from constitutional challenge: *Hunter v. Underwood*, 471 U.S. 222 (1985), after all, invalidated a disenfranchisement law because purposeful racial discrimination tainted it. Op. 24, 27-28. But although other constitutional provisions may "limit[ ] ... the exercise of a legitimate power," they "cannot void the power entirely." Diss. 57 (internal quotation marks omitted). The panel ruled that "permanent disenfranchisement" is "entirely unconstitutional"—voiding a large swath of the power recognized in section 2. Diss. 57. *Richardson* bars that.

2. Section 241 Does Not Impose "Punishment" And Thus Is Not Subject To The Eighth Amendment.

Even if *Richardson* left this Court the option of invalidating a category of felon disenfranchisement, plaintiffs' claim would still fail because Section 241 does not impose a "punishment[ ]" subject to the Eighth Amendment. The panel was wrong to hold otherwise. Op. 28-32.

A Supreme Court plurality has already signaled that a disenfranchisement law like Mississippi's "is not a punishment." Diss. 59.

In *Trop v. Dulles*, 356 U.S. 86 (1958), a four-Justice plurality explained: A bank robber "loses his right to liberty and often his right to vote." *Id.* at 96 (plurality opinion). "If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal." *Ibid.* "But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise." *Id.* at 96-97. That explanation alone strongly supports the view that felon disenfranchisement is not punishment.

Even without *Trop*, Supreme Court precedent shows that Section 241 does not impose punishment. In deciding whether a state action is a "punishment" under the U.S. Constitution, that Court assesses whether the legislature "inten[ded] ... to impose punishment" and (if it did not) whether the "statutory scheme is so punitive either in purpose or effect as to negate" the State's intention to deem it "civil and nonpunitive." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted). Under that framework, Section 241 does not impose punishment.

Section 241's text and structure "demonstrate[ ] that it was not intended as a penal measure." Diss. 60. Section 241 defines "a qualified elector." Miss. Const. art. XII, § 241. Only those who meet certain

qualifications—one who is an adult resident citizen, is "duly registered" to vote, and has "never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy"—"is declared to be a qualified elector." *Ibid.* "Nothing on the face of" Section 241 suggests that the adopters "sought to create anything other than" a nonpenal regulation of the franchise. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The provision does not punish but instead "prescrib[es] the qualifications for the duties to be discharged"—voting. *Hawker v. New York*, 170 U.S. 189, 200 (1898) (contrasting prescriptions of qualifications with penalties). Context confirms this. Section 241 is titled "Qualifications for electors," it appears in the state constitution's "Franchise" article, and its implementing statutes are in the Election Code (not the Criminal Code), Miss. Code Ann. §§ 23-15-11, 23-15-19. *See Hendricks*, 521 U.S. at 361 ("placement" within code can "evidence[ ]" nonpenal intent). Section 241 nowhere even "hint[s] at a punitive intent toward felons any more than it implies an intent to punish non-citizens, short-term residents of Mississippi, those unregistered to vote, or those under the age of eighteen." Diss. 61.

Section 241 is also not "punitive ... in purpose or effect." *Smith*, 538 U.S. at 92. Courts have considered several factors in assessing that issue. *See id.* at 97, 105; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69

(1963) (listing factors). But "only the clearest proof" will "override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997). There is nothing remotely approaching such proof here. Every factor supports the view that that Section 241 is not punitive.

First, felon disenfranchisement has not been "regarded in our history and traditions as a punishment." *Smith*, 538 U.S. at 97. It has long been regarded as "a mere disqualification, imposed for protection, and not for punishment." *Washington v. State*, 75 Ala. 582, 585 (1884). By "long tradition," disenfranchisement has operated on a judgment about who should have "the right to participate in making" the laws. Diss. 54. In 1897, the Supreme Court cited criminal disenfranchisement laws as an example of nonpunitive measures to protect the public. *Hawker*, 170 U.S. at 197 (citing *Washington*). Sixty years later, the *Trop* plurality observed that felon disenfranchisement is "nonpenal." 356 U.S. at 97. A decade after that, the Second Circuit held, in a decision by Judge Friendly, that "[d]epriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise.'" *Green v. Board of Elections of City of New York*, 380 F.2d 445, 450 (2d Cir. 1967) (quoting *Trop*, 356 U.S. at 97 (plurality opinion)).

In arguing that disenfranchisement was historically regarded as a punishment, plaintiffs rely on cases that did not hold or even assess whether disenfranchisement is punishment. Plaintiffs' Br. 36-37 (CA5 Dkt. 60); Plaintiffs' Reply Br. 8 (CA5 Dkt. 83). They lead with the Eleventh Circuit's footnoted statement that "throughout history, criminal disenfranchisement provisions have existed as a punitive device." *Johnson v. Governor of Florida*, 405 F.3d 1214, 1218 n.5 (11th Cir. 2005) (en banc). But as the Eleventh Circuit has ruled, that statement was "non-binding dict[um]." *Thompson v. Alabama*, 65 F.4th 1288, 1302 (11th Cir. 2023). Plaintiffs follow up by citing a *vacated* Second Circuit decision, then quoting a few lines that use the word "punishment" (or its variations) near the word "disenfranchisement" (or its variations). But those snippets—which suggest at most that "punishment" (and its variations) is a convenient catchall term for "consequence of committing a crime"—do not overcome the cases cited above that actually assess whether disenfranchisement is a punishment.

Second, felon disenfranchisement imposes no "affirmative disability or restraint." *Smith*, 538 U.S. at 97. It "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Id.* at 100. Disenfranchised felons "are free to move where they wish and to live and

work as other citizens." *Id.* at 101; *compare Does #1-5 v. Snyder*, 834 F.3d 696, 703-04 (6th Cir. 2016) (law regulated where sex offenders "may live, work, and 'loiter,'" thereby imposing "direct restraints on personal conduct" that suggested punishment). And Section 241 does not impose any affirmative duties on disenfranchised felons. *Compare Smith*, 538 U.S. at 101-02 (law imposing reporting duties on sex offenders did not impose an "affirmative disability"). Disenfranchisement just "remove[s] the civil rights of individuals due to their criminal behavior as part of the State's regulatory power." *Thompson*, 65 F.4th at 1306.

Even if disenfranchisement were a "restraint" in some sense, the same could be said of occupational debarment—which the Supreme Court has repeatedly held to be nonpunitive. *See Hudson*, 522 U.S. at 105 (barring participation in banking industry); *De Veau v. Braisted*, 363 U.S. 144 (1960) (work as union official); *Hawker*, 170 U.S. at 190-93, 200 (practice of medicine). Indeed, the Supreme Court has held that some physical restraints—even of indefinite duration—are nonpunitive. *See Hendricks*, 521 U.S. at 363, 369 (potentially indefinite civil commitment); *United States v. Salerno*, 481 U.S. 739, 746-48 (1987) (pre-trial detention of criminal defendant). The loss of the right to vote does not impose a comparable restraint—particularly for felons, who do not stand in the shoes of non-felons since they no longer have a fundamental right to vote.

Williams v. Taylor, 677 F.2d 510, 514 (5th Cir. 1982) (a felon's "interest in retaining his right to vote is constitutionally distinguishable from the 'right to vote' claims of individuals who are not felons").

In contesting this factor, plaintiffs invoke the Supreme Court's observation that, in assessing whether a law imposes an affirmative disability or restraint, courts examine "how the effects of" the law "are felt by those subject to it." *Smith*, 538 U.S. at 99-100. Plaintiffs read this line to mean that this factor turns on plaintiffs' subjective "experiences" and "feeling[s]." *E.g.*, Plaintiffs' Reply Br. 9. That is not what that line means. That line refers to the challenged law's *objective* effects on those subject to it. The Court in *Smith* thus looked at the objective physical effect of the sex-offender-registration law before it, observing that it "imposes no physical restraint" and "does not restrain activities [that] sex offenders may pursue but leaves them free to change jobs or residences." 538 U.S. at 100. The Court did not rest on the challengers' subjective views. *See id.* at 99-102.

Third, felon disenfranchisement does not "promote[ ] the traditional aims of punishment"—deterrence and retribution. *Smith*, 538 U.S. at 97. "It is very unlikely that an individual considering whether to commit a felony would be willing to risk imprisonment but not disenfranchisement." *Thompson*, 65 F.4th at 1307. And nothing in

Section 241 shows a retributive aim or operation. *Contra* Plaintiffs' Br. 38-39. The length of disenfranchisement is not "measured by the extent of the wrongdoing," as is often true of punishments. *Smith*, 538 U.S. at 102. It is instead a blanket, indefinite prohibition for listed felonies based on a judgment about "the qualifications" needed to perform the duty of voting. *Hawker*, 170 U.S. at 200. Section 241's criminal-history qualification stands, moreover, beside other qualifications—on residency, age, citizenship, and registration. Those qualifications are reasonable and relevant to voting—and, as with felon disenfranchisement, none is retributive. *Cf.* Diss. 61.

Fourth, Section 241 "has a rational connection to a nonpunitive purpose" and is not "excessive with respect to this purpose." *Smith*, 538 U.S. at 97. It is rational and "nonpenal" for a State to conclude that one who "breaks the laws" has "abandoned the right to participate" in making them. *Green*, 380 F.2d at 450, 451. And a State "properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to ... criminal laws ... by violating those laws sufficiently important to be classed as felonies." *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978).

Section 241 rationally promotes those nonpunitive purposes and does so in a way that is not excessive. *Contra* Plaintiffs' Br. 39-40. Each

of Section 241's disenfranchising crimes is serious, probative of dishonesty or poor civic virtue, a common-law crime whose gravity has long been recognized, a crime that has commonly triggered disenfranchisement—or a combination of these features. Indefinitely disenfranchising on those grounds is reasonable and enjoys a long tradition. The State "could lawfully disenfranchise all felons permanently." *Thompson*, 65 F.4th at 1307 (citing *Richardson*, 418 U.S. at 56). It "has not exceeded its interest ... by choosing only to disenfranchise individuals who commit felonies" that the State considers especially serious. *Ibid.*

Plaintiffs fault Section 241 for its blanket application. Plaintiffs' Br. 40. But the Supreme Court long ago recognized that legislatures are entitled "to make a rule of universal application" in adopting nonpunitive public-welfare regulations based on judgments about character—even though such rules may sweep in some who "reform and become in fact possessed of a good moral character." *Hawker*, 170 U.S. at 197. In endorsing that authority, the Court cited as an example the rule "in many States" that "a convict is debarred the privileges of an elector." *Ibid.* Such a rule is not punitive. *See id.* at 200. Plaintiffs also fault the Secretary for not furnishing "evidence that Section 241—or any form of lifetime disenfranchisement—promotes any rational nonpunitive purpose."

Plaintiffs' Br. 39; *see* Plaintiffs' Reply Br. 10-11. But it is plaintiffs' burden to provide "the clearest proof" that Section 241 is punitive. *Hudson*, 522 U.S. at 100. They have not done that.

Even if Section 241 did have "punitive aspects," that would not matter because it "serve[s] important nonpunitive goals." *United States v. Ursery*, 518 U.S. 267, 290 (1996); *contra* Plaintiffs' Br. 39-40 (asserting that Section 241's "sole purpose" must be nonpenal). And although voting is important, that too does not undercut the fact that Section 241 serves nonpunitive goals. A person's "strong interest in liberty" is "importan[t] and fundamental," yet the Supreme Court has ruled that infringing that interest is not necessarily punitive. *Salerno*, 481 U.S. at 746, 750. The Court has so ruled even where someone has not been convicted of a crime. *See id.* at 751. Here, someone has been convicted of a crime and thereby become subject to the State's nonpenal disenfranchisement power.

Last, felon disenfranchisement under Section 241 has no scienter requirement and addresses only conduct that is "already a crime." *Smith*, 538 U.S. at 105. Although these factors are often of "little weight," *ibid.*, each supports the view that Section 241 is nonpunitive. *Contra* Plaintiffs' Reply Br. 6-7. Scienter is associated with penalties. *See*, *e.g.*, *Hendricks*, 521 U.S. at 362. The crimes listed in Section 241 thus generally have scienter requirements. But disenfranchisement is different. Section 241

does not itself impose any "scienter requirement for felon disenfranchisement; it is sufficient that the person be convicted of a disqualifying felony." *Thompson*, 65 F.4th at 1307.

Similarly, although disenfranchisement under Section 241 is "tied to criminal activity," here that feature does not suggest punitiveness. *Ursery*, 518 U.S. at 292. States "may impose both a criminal and a civil sanction" for "the same act or omission." *Ibid.*; *see*, *e.g.*, *Hawker*, 170 U.S. at 190, 200 (debarment from practice of medicine based on "conviction of a felony" is not a "penalty"). Section 241 does not use a criminal conviction to impose a new punishment. *Contra* Plaintiffs' Br. 37; Plaintiffs' Reply Br. 7. It uses a criminal conviction because of what that conviction reveals. "[T]he commission of crime, the violation of the penal laws of a State, has some relation to the question of character." *Hawker*, 170 U.S. at 196. Section 241 implements a judgment that those convicted of listed felonies lack the character appropriate for exercising the franchise. *Shepherd*, 575 F.2d at 1115 (felons "have manifested a fundamental antipathy to ... criminal laws," and States may validly "exclud[e]" them from the franchise). That is a nonpenal end.

In sum, every factor supports ruling that Section 241 does not impose punishment. At the least, plaintiffs have not met their "heavy burden" of providing "the clearest proof" that Section 241 is "so punitive

either in purpose or effect as to negate" the adopters' "intention" to deem it "civil." *Hendricks*, 521 U.S. at 361.

Two other circuits have ruled that disenfranchisement laws do not impose punishment. Applying Supreme Court precedent and making many of the points made above, the Eleventh Circuit ruled "that Alabama's disenfranchisement law, which has a history and structure very similar to ... Mississippi's, was nonpenal" and so comports with the Ex Post Facto Clause. Diss. 60; *see Thompson*, 65 F.4th at 1304-08. And as noted, the Second Circuit has rejected the claim that "[d]epriving convicted felons of the franchise" is "a punishment" subject to the Eighth Amendment. *Green*, 380 F.2d at 450. It deemed this Eighth Amendment claim so "lack[ing]" in "substance" that it "did not" even "state a substantial federal claim." *Id.* at 448, 452.

In ruling that Section 241 imposes "punishment," the panel majority did not seriously confront the points set out above. It instead focused on Mississippi's Readmission Act. Op. 28-32; *see also* Plaintiffs' Br. 34-35. That Act barred Mississippi from depriving "any citizen or class of citizens" from voting "except as a punishment." Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68. In the panel majority's view, that Act requires concluding that disenfranchisement in Mississippi is "punishment" for federal constitutional purposes. Op. 29, 32.

That is wrong. The Reconstruction-era Congress itself treated criminal history as a matter of voter qualifications rather than punishment. The Reconstruction Act, which set the stage for the Readmission Act by "establish[ing] conditions on which the former Confederate States would be readmitted to representation in Congress," shows this. *Richardson*, 418 U.S. at 49. The Reconstruction Act set requirements for state elections of delegates to form new state constitutions, provided that States could exclude from such elections persons who were "disenfranchised for participation in the rebellion or for felony at common law," and treated that and other eligibility features as "qualifications" for "the elective franchise." Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 429. The Readmission Act itself recognizes the State's power to disenfranchise. 16 Stat. at 68. That statute does not negate the very power it recognizes. Diss. 62. The panel was wrong to place controlling weight on one word ("punishment") in one statute that did not purport to resolve whether disenfranchisement is a "punishment" for all constitutional purposes. That Act's "punishment" reference should be read in context, to mean "consequence of a crime." Diss. 62.

Last: Ruling that felon disenfranchisement is punitive would—aside from being wrong—have profound unjustifiable consequences. As an illustration, consider jury service. A federal statute disqualifies from

jury service not just anyone convicted of a felony but also anyone who "has a charge pending against him for the commission of ... a crime punishable by imprisonment for more than one year." 28 U.S.C. § 1865(b)(5). That is a severe, highly consequential sanction. After all, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Yet it is hard to imagine the Supreme Court deeming that disqualification to be punitive. Doing so would subject that statutory exclusion to a range of constitutional provisions that come into play for punishments—heightened protections under the Due Process Clause, the Eighth Amendment, the Double Jeopardy Clause, and more. If a felony *charge* is enough to disqualify someone from one of the "most significant opportunit[ies]" to participate in the democratic process without imposing punishment, *ibid.*, then a felony *conviction* is enough to disqualify someone from another of those opportunities without imposing punishment. This is yet another strong reason to rule that felon disenfranchisement is not punitive.

3. Permanent Felon Disenfranchisement Is Not "Cruel And Unusual" And Thus Comports With The Eighth Amendment.

Even if Section 241 imposed punishment, permanent felon disenfranchisement is not "cruel and unusual" and so it comports with the Eighth Amendment. The panel erred in ruling otherwise. Op. 32-44.

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

In line with these points, the Second Circuit has held that even if felon disenfranchisement were a punishment, it is not "cruel and unusual." *Green*, 380 F.2d at 450-51. The court explained that 11 state constitutions "adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons,"

29 States had such provisions when the Fourteenth Amendment was adopted, and 42 States had them by 1967. *Id.* at 450. "[T]he great number of states excluding felons from the franchise forbids a conclusion that this is a 'cruel and unusual punishment' within the context of 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 451 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). As noted, the Second Circuit deemed this Eighth Amendment claim so meritless that it did not "state a substantial federal claim." *Id.* at 448, 452.

If the panel had applied that analysis it could not have reached the judgment it did. But the panel invalidated Section 241 using the analysis the Supreme Court has applied to claims that certain punishments categorically violate the Eighth Amendment. Op. 32-44. That was error.

First, the panel was wrong to apply a categorical analysis. This Court's precedent dictates that it is "improper to undertake a categorical analysis" when the Supreme Court has "never established a categorical rule prohibiting" a practice. *United States v. Farrar*, 876 F.3d 702, 717 (5th Cir. 2017). The Supreme Court has applied a categorical analysis "only for death-penalty cases and those involving juvenile offenders sentenced to life-without-parole." *Ibid.* Supreme Court caselaw treats those situations as "different" from other sentences. *Ibid.* Far from being

categorically "different" from other sentences, lifetime *imprisonment* (at least for non-juveniles) is common in our society and is not subject to the Supreme Court's categorical approach. It follows that the far lesser sanction of lifetime *disenfranchisement* is not subject to that approach either. The panel should have upheld Section 241 on the textual and historical analysis set out above.

Second, even if a categorical analysis applied, plaintiffs' challenge would fail. Under that analysis, a court assesses "objective indicia of society's standards" to discern whether there is a "national consensus against the sentencing practice" and then "determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Farrar*, 876 F.3d at 716-17. There is no "national consensus" against indefinite disenfranchisement. *Richardson* invoked "settled historical and judicial understanding" in upholding California's permanent-disenfranchisement regime. 418 U.S. at 54. About a third of States still use the practice. Op. 45-51 (appendix). Nearly all States disenfranchise in some circumstances. These circumstances cover a broad spectrum; they do not fall into a couple of neat categories. States disenfranchise in such varied ways that a court cannot soundly condemn indefinite disenfranchisement. Diss. 64-65; *see* Response Br. 53-54 (describing national landscape as of late 2018). Although many States

have relaxed their restrictions on the franchise for felons, that is not a solid basis for condemning the States that maintain firmer restrictions. *Cf. Rummel v. Estelle*, 445 U.S. 263, 282 (1980) ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some States will always bear the distinction of treating particular offenders more severely than any other State."). And States that have relaxed their restrictions may later want to change course.

That leaves the panel majority's "independent judgment." To the extent that such a judgment is anything but a legally rootless exercise of raw will (Diss. 66-67), the panel majority's judgment is unsound. The people of Mississippi have resoundingly disagreed with it. No court had embraced it before the panel did here. And the judgments of whether and for how long to disenfranchise felons are legislative, not judicial. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and in judgment) ("[O]ur decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years."). Those judgments call for drawing lines that are "subjective" and thus "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-76. And it would be singularly improper to exercise "independent judgment" to condemn a practice—permanent felon disenfranchisement—that the Fourteenth Amendment

recognizes that States may use. Hesitation is especially warranted where, as here, there is at least serious doubt that the sanction at issue is even a punishment. *Supra* Part I-A-2. Rarely is there such a question in the Supreme Court's categorical-rule cases, which largely involve clear punishments: the death penalty or imprisonment.

Embracing plaintiffs' view would risk nationwide uncertainty. Ruling that Section 241 is a cruel and unusual punishment would cast doubt on the permanent-disenfranchisement laws that nearly a third of the States have, *see* Op. 45-51 (appendix), throw open to question the many state laws disenfranchising felons who are in prison, Diss. 65, and "provide fodder" for attacking other consequences that have long flowed from felony convictions, Diss. 66 & n.11. This Court should avoid those consequences by rejecting plaintiffs' claim outright, as every other court facing every other similar claim has done. Response Br. 47-48.

Last, plaintiffs challenge Section 241 on its face, ROA.19-60662.52, so they must show that "no set of circumstances exists under which" Section 241 would comport with the Eighth Amendment. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs cannot carry that "heavy burden." *Ibid.* There is nothing "disproportionate" (*Farrar*, 876 F.3d at 714) about permanently stripping the right to vote from brutal murderers, child rapists, and egregiously dishonest perjurers—as

Section 241 does. For them, Section 241 imposes a proportionate "punishment" and so does not violate the Eighth Amendment. That dooms plaintiffs' facial Eighth Amendment claim.

B. Section 241 Comports With The Equal Protection Clause.

Plaintiffs also claim that Section 241 violates the Equal Protection Clause because it permanently denies the fundamental right to vote but fails strict scrutiny. ROA.19-60662.55. As the panel and district court ruled, precedent forecloses this claim. Op. 18-21; ROA.19-60662.4875-4877; *see* Opening Br. 52-55; Response Br. 32-41.

Richardson v. Ramirez, 418 U.S. 24 (1974), rejects the view that the Equal Protection Clause bars a State from indefinitely disenfranchising felons. *Id.* at 41-56. *Richardson* involved a challenge, brought by felons who had completed their terms of imprisonment and paroles, to California laws indefinitely disenfranchising those convicted of an "infamous crime." *Id.* at 26-27. The Court held that because "the exclusion of felons from the vote has an affirmative sanction in" section 2 of the Fourteenth Amendment, *id.* at 54; *see id.* at 43-53, section 1's Equal Protection Clause cannot prohibit a State from disenfranchising felons, *id.* at 54-56. The Court ruled specifically that that Clause does not prohibit a State from "exclud[ing] from the franchise convicted felons who

have completed their sentences and paroles." *Id.* at 56. The Court thus squarely rejected the view, pressed by plaintiffs here, that the Equal Protection Clause prohibits permanent disenfranchisement. Op. 18-19.

Plaintiffs say that *Richardson* does not foreclose their equal-protection claim, which rests on what plaintiffs see as a novel parsing of section 2 of the Fourteenth Amendment. Plaintiffs' Br. 42-48. As noted, the first sentence in section 2 apportions congressional representation based on state population. The second sentence then reduces that representation if a State denies the right to vote to certain adult male citizens, but with an exception. That sentence provides: "*But when the right to vote* at any election ... *is denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged, except for participation in rebellion, or other crime*," the State's congressional representation "shall be reduced" proportionally. U.S. Const. amend. XIV, § 2 (emphases added). Plaintiffs argue that the phrase "except for participation in rebellion, or other crime" modifies only the word "abridged," not the word "denied." Plaintiffs' Br. 47. Plaintiffs thus say that section 2 recognizes a State's power only to "temporarily abridge[ ]" (not permanently deny) the right to vote for "participation in rebellion, or other crime." *Id.* at 45-48. They maintain that because Section 241 permanently denies the right to vote,

it falls outside what section 2 allows, is thus subject to strict scrutiny because it burdens a fundamental right, and fails that standard. *Id.* at 48. Plaintiffs claim that *Richardson* did not consider this argument, so it remains viable. *Id.* at 43-45.

They are wrong. *Richardson*'s "specific holding" "was that a state may deny the franchise to that group of 'convicted felons who have completed their sentences and paroles.'" *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (quoting *Richardson*, 418 U.S. at 56). Adopting plaintiffs' argument would require rejecting that holding. Op. 20-21 ("*Richardson* ... applied Section 2's 'other crime' exception to permanent disenfranchisement," so it is "immaterial" whether the Court "thought California's permanent disenfranchisement was a 'denial' of the right to vote or an 'abridgement'"). The upshot of plaintiffs' argument is that a State may not permanently disenfranchise. *Richardson* holds otherwise.

And plaintiffs' argument is flawed anyway. The phrase "except for participation in rebellion, or other crime" modifies both "denied" and "abridged." That modifying phrase is set off from the word "abridged" by a comma. The phrase thus presumptively modifies both verbs preceding it—"denied" and "abridged." *See Sobranes Recovery Pool I, LLC v. Todd & Hughes Construction Corp.*, 509 F.3d 216, 223 & n.19 (5th Cir. 2007) (when modifying language is "set off from the last item in the list by a

comma, this suggests that the modification applies to the whole list and not only the last item"). The Fourteenth Amendment's broader structure confirms that the phrase modifies both verbs. Section 1's Due Process Clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The modifying phrase "without due process of law" is set off by a comma and applies to all three items listed. So too for section 2's second sentence. And section 2 uses the word "is" just once, to join "denied" and "abridged": "is denied ... or ... abridged." That feature confirms that "denied" and "abridged" are linked and are both modified by the "other crime" phrase. Given all these features, section 2 allows States to permanently disenfranchise felons.

II. This Court Should Reject Plaintiffs' Challenges To Section 253, The State's Reenfranchisement Provision.

Plaintiffs' challenges to Section 253 are (as the panel held) not justiciable. On the merits, they fail as a matter of law.

A. Plaintiffs' Challenges To Section 253 Should Be Dismissed Without Reaching The Merits.

The panel was right to hold that plaintiffs lack standing to challenge Section 253. Op. 15-16.

1. Plaintiffs Lack Standing To Sue The Secretary Of State Over Section 253.

In challenging Section 253, plaintiffs sued only the Mississippi Secretary of State. To have standing, they must show an "injury in fact" that is "fairly traceable" to the Secretary's conduct and that would likely be "redressed" by a decision against the Secretary. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (ellipses and brackets omitted); *see* U.S. Const. art. III, § 2. As the panel held, plaintiffs lack standing to challenge Section 253. Op. 15-16; *see* Opening Br. 12-23; Response Br. 4-7. The district court erred in ruling otherwise. ROA.19-60662.4864-4865.

First, plaintiffs' claimed injury from Section 253 is not fairly traceable to the Secretary. Op. 15-16. Their claimed injury is not from the Secretary's enforcement of Section 253. Their claimed injury is from the "legislative process" that Section 253 establishes, ROA.19-60662.56, 60, or (as plaintiffs alternatively frame it) the "unconstitutional burden" that Section 253 allegedly places on those seeking to regain the right to vote through the passage of a suffrage bill, Plaintiffs' Br. 23; *see id.* at 23-25. However framed, plaintiffs challenge the legislative process. And that process "begins and ends without the Secretary's involvement." Op. 15. The Secretary is an executive-branch official with no connection to legislative suffrage bills. He does not sponsor, draft, debate, vote on, or otherwise have any role in passing or defeating suffrage bills. Op. 15-16;

see ROA.19-60662.1138-1139, 1145-1216. So plaintiffs' injury from Section 253 is not traceable to the Secretary. Op. 16; *see Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (no traceability where no "act of the defendants" will injure plaintiffs).

Second, a judgment against the Secretary would not redress plaintiffs' claimed injury from Section 253. The only relief that plaintiffs seek to remedy that alleged injury is a "judgment declaring that" the "legislative process for the restoration of voting rights established by" Section 253 "violates" the Equal Protection Clause and the First Amendment. ROA.19-60662.60. But just as the Secretary does not cause plaintiffs' injury, he cannot redress it. He has no role in passing or rejecting suffrage bills. Op. 15-16. Because the allegedly injurious legislative process begins and ends without the Secretary's involvement, a judicial decision against him cannot redress plaintiffs' injury. *See K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013) ("declaratory and injunctive relief directed to" defendants would not "redress" plaintiffs' injury where defendants did not enforce challenged provision).

The district court thought that plaintiffs' injury was traceable to the Secretary and that a decision against him could redress that injury because the Secretary "return[s] a convicted felon to the voting rolls after he or she successfully files a section 253 petition." ROA.19-60662.4864-

4865. But as the panel recognized, it does not matter that "the Secretary will enforce any suffrage bill the Legislature happens to pass." Op. 16. Plaintiffs' "issue is not with the enforcement of any particular suffrage bill or suffrage bills generally," but with the Legislature's alleged "caprice in failing to enact" those bills "in the first place." Op. 16. Plaintiffs seek relief against the legislative process in which the Secretary plays no role.

As the panel did, this Court should dismiss all of plaintiffs' claims against Section 253 for lack of standing without reaching the merits.

2. Plaintiffs' Challenges To Section 253 Are Barred By State Sovereign Immunity.

Plaintiffs' challenges to Section 253 are also barred by sovereign immunity. Opening Br. 23-25; Response Br. 7-8.

Sovereign immunity bars claims against a State or a state official in his official capacity. *Texas Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). The Secretary is a state official sued in his official capacity, so he is immune from plaintiffs' claims against Section 253.

Plaintiffs contend that their challenges to Section 253 may proceed under *Ex parte Young*, 209 U.S. 123 (1908), which recognizes a "narrow exception" to sovereign immunity that allows certain private parties "to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole*

Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) (citing *Ex parte Young*, 209 U.S. at 159-60). That exception applies where the sued official has "some connection with the enforcement" of the state statute at issue or is "specially charged with the duty to enforce the statute and [is] threatening to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (internal quotation mark omitted).

Plaintiffs' Section 253 claims do not fall within that exception. The Secretary has no connection with Section 253's enforcement and is not charged with enforcing it. Section 253 concerns only the Legislature and legislative process. Miss. Const. art. XII, § 253. The Secretary is an executive-branch official who is constitutionally barred from exercising legislative power. *Id.* art. I, §§ 1, 2.

In ruling that the Secretary has a "connection" to Section 253, the district court reasoned that the Secretary "is the state's chief election officer and maintains [the Statewide Elections Management System], which would presumably be involved in one of the final steps in returning a convicted felon to the voting rolls after" a suffrage bill is passed. ROA.19-60662.4864-4865. But *Ex parte Young* allows suit only if the Secretary has a connection "with the enforcement" of the challenged provision—here, Section 253. *Morris*, 739 F.3d at 746. His status as chief election officer does not give him such a role. And even if he has a role in

enforcing a suffrage bill, this lawsuit does not challenge any such bill. It challenges Section 253, which is "enforced" through a legislative process in which the Secretary is not involved. *Supra* Part II-A-1.

B. Plaintiffs' Challenges To Section 253 Fail On The Merits.

Because the panel ruled that plaintiffs lack standing to bring their Section 253 claims, Op. 15-16, it did not reach the merits of those claims. The district court rejected two of those claims on the merits but let the third proceed to trial. ROA.19-60662.4879-4883. If this Court reaches the merits it should reject all three claims as a matter of law.

1. Plaintiffs' Race-Based Equal-Protection Claim Fails.

Plaintiffs claim that Section 253 violates the Equal Protection Clause because it is tainted by racial animus. ROA.19-60662.58-59. The district court ruled that factual disputes preclude summary judgment on this claim. ROA.19-60662.4882-4883. That was error. Opening Br. 25-39; Response Br. 8-14.

This claim fails as a matter of law. Under the Fourteenth Amendment, States may permanently "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); *see id.* at 54-56; *supra* Part I. The Equal Protection Clause bars States from disenfranchising to "purposeful[ly]" "discriminate ... on account of

race." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But States have broad leeway to disenfranchise on other grounds. *E.g.*, *Richardson*, 418 U.S. at 27, 53-56 (rejecting equal-protection challenge to California laws disenfranchising for a range of crimes).

Section 253 falls well within this authority. Section 253 does not itself even disenfranchise, but instead provides a mechanism for a felon to regain his voting rights. That discretionary mechanism is facially neutral as to race and is a rational means for deciding whether someone should regain his right to vote—a necessarily fact-specific issue involving questions of discretion and judgment that the Legislature is well poised to decide. Section 253 thus satisfies the Equal Protection Clause.

In claiming otherwise, plaintiffs maintain that Section 253 discriminates based on race. ROA.19-60662.58-59. Under "ordinary equal protection standards," to prevail on that claim plaintiffs must show that Section 253 has both "a discriminatory effect and ... a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court applied "ordinary equal protection principles" (*Armstrong*, 517 U.S. at 467) to establish a framework for assessing a race-based equal-protection challenge to a disenfranchisement law. To show discriminatory purpose, the challenger has the initial burden of proving that "racial discrimination was a

substantial or motivating factor in enacting the challenged provision." *Harness v. Watson*, 47 F.4th 296, 304 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426 (2023). If the challengers "succeed on that point," "the burden shifts to the state to demonstrate that the provision would have been enacted without an impermissible purpose." *Ibid.* If a disenfranchisement law "was motivated by a desire to discriminate ... on account of race" (discriminatory purpose) and that law "continues to this day to have that effect" (discriminatory effect), it violates the Equal Protection Clause. *Ibid.* (emphasis omitted).

Hunter applied that framework to affirm a judgment holding unconstitutional as applied to misdemeanants a provision of the 1901 Alabama constitution that was adopted in part to disenfranchise black citizens convicted of certain crimes. 471 U.S. at 225-33. The *Hunter* plaintiffs satisfied the "first step with a wealth of historical evidence" that discrimination motivated Alabama's 1901 disenfranchisement law. *Harness*, 47 F.4th at 304 (citing *Hunter*, 471 U.S. at 229). At the second step, Alabama failed to show that its law would have been enacted without an improper purpose. *Ibid.* (citing *Hunter*, 471 U.S. at 231). So plaintiffs established discriminatory purpose. *Ibid.* And because Alabama's law "continues to this day to have" a discriminatory "effect," it denied equal protection. *Ibid.* (quoting *Hunter*, 471 U.S. at 233).

This Court has recognized that, under *Hunter*, a State can overcome a showing of discriminatory purpose by proving that its disenfranchisement law would have later "been passed in its current form without racial motivation." *Harness*, 47 F.4th at 311.

Under the *Hunter* framework, then, a race-based equal-protection challenge to a disenfranchisement law can fail in at least three ways: if the challenger fails to show a present-day "discriminatory effect," *Armstrong*, 517 U.S. at 465; *see Hunter*, 471 U.S. at 227, 233; *Harness*, 47 F.4th at 304; if the challenger fails to show that the law was enacted with a "discriminatory purpose," *Armstrong*, 517 U.S. at 465; *see Hunter*, 471 U.S. at 233; *Harness*, 47 F.4th at 304; or if the State shows that the law would have later "been passed in its current form without racial motivation." *Harness*, 47 F.4th at 310; *see Hunter*, 471 U.S. at 233.

Here, plaintiffs' challenge fails in each of those ways.

First, plaintiffs failed to show that Section 253 has a present-day "discriminatory effect." *Armstrong*, 517 U.S. at 465; *see Hunter*, 471 U.S. at 227, 233. They claim that black Mississippians are disproportionately "subject to" Section 253. ROA.19-60662.3148; *see* ROA.19-60662.58-59. But that is a complaint about Section *241*—that black Mississippians are disproportionately *disenfranchised* compared to white Mississippians. That complaint is flawed, *see Harness*, 47 F.4th at 312-16 (Ho, J.,

concurring in part and in judgment), but also irrelevant: it does not show a discriminatory effect from Section *253*, to which all felons convicted of disenfranchising crimes are equally "subject"—without regard to race.

Plaintiffs have also noted: "The Mississippi Legislature restored voting rights to six individuals in 2017, [none in 2016,] four in 2015, three in 2014, and one in 2013. ... These fourteen Mississippians appear to have virtually nothing in common." ROA.19-60662.36. That too does not show discriminatory effect. Equal-protection principles require comparing those "similarly situated." *Armstrong*, 517 U.S. at 465. Plaintiffs have not shown that disenfranchised black Mississippians are treated differently under Section 253 from similarly situated disenfranchised white Mississippians.

Last, plaintiffs' expert said that she "did not find any evidence that even one single African American received redress" under Section 253 "between 1890 and 1920." ROA.19-60662.3477. That too does not show a disparity among those similarly situated: it makes no comparison to any other group. And that opinion about events that ended more than 100 years ago does not show that Section 253 "to this day" has a discriminatory effect. *Hunter*, 471 U.S. at 233.

Second, plaintiffs failed to prove "discriminatory purpose" (*Armstrong*, 517 U.S. at 465) by showing that "racial discrimination was

a substantial or motivating factor in enacting the challenged provision." *Harness*, 47 F.4th at 304. Plaintiffs presented no evidence that Section 253—"the challenged provision"—was driven by "racial discrimination." But the record material on that provision's motive—cited by plaintiffs' expert—suggests that Section 253 was adopted for race-neutral reasons. Senator George (one of the delegates who adopted the 1890 constitution) explained that someone "disqualified" from voting "for crime" should be able to regain the right to vote if he "reform[s] and become[s] a good citizen." ROA.19-60662.1818; *see* ROA.19-60662.1817-1818.

It is not enough to say that racial animus motivated Section *241*. That is a different provision. And there is a basis for claiming that Section 241, as adopted in 1890, was motivated by racial animus. The Mississippi Supreme Court recognized that the 1890 delegates adopted Section 241's list of disenfranchising crimes for racially discriminatory reasons. *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). Plaintiffs have identified nothing of the kind for Section 253's facially neutral legislative mechanism for restoring the right to vote. And plaintiffs cite nothing to establish that because racial animus animated one provision of the 1890 constitution, it necessarily animated others. Many provisions of Mississippi's constitution read today as they did in 1890, including the separation-of-powers provisions, the due-process provision, many rules of

legislative procedure, the faithful-executive provision, and the provision on executive reprieves and pardons. Opening Br. 34. Plaintiffs cite nothing to show why those facially race-neutral provisions should be constitutionally suspect just because another provision—Section 241—was adopted based on an improper motive.

Third, even if plaintiffs had proved improper racial motivation behind Section 253's 1890 adoption, the Secretary "conclusively show[ed]" that this taint "has been cured" by proving that Section 253 would have later "been passed in its current form without racial motivation." *Harness*, 47 F.4th at 303, 311.

As explained, *supra* pp. 7-9, in the mid-1980s lawmakers revisited the State's felon-disenfranchisement laws, including Section 253. *E.g.*, ROA.19-60662.1656-1658. A bipartisan, diverse Task Force reviewed those laws over several months, held public hearings, received public input, met with the Department of Justice, and proposed legislation. A legislative committee then studied the issues, held open meetings, and proposed legislation. The committee recommended expanding the State's disenfranchisement laws to include all felonies but manslaughter and tax evasion, with reenfranchisement after completion of a sentence. At the 1986 legislative session, legislators proposed a bill to establish a new election code that would broaden the disenfranchising crimes to all

felonies but manslaughter and tax evasion. In a legislative process that produced a final bill that comprehensively addressed voter qualifications, lawmakers modified the bill to instead leave as it was the list of disenfranchising crimes (as set forth in Section 241) and left as it was the restoration-of-voting-rights mechanism (as set forth in Section 253). ROA.19-60662.1676-1679. The bill passed by wide margins. The Department of Justice then precleared the law. *Supra* pp. 7-9.

Since the original briefing in this case, this Court has held en banc that this process showed that "Section 241 would have been enacted in its current form absent racial discrimination." *Harness*, 47 F.4th at 310; *see id.* at 302, 310-11. "The 1984-86 discussions involving the public, those in the Task Force, and the Mississippi legislative committees illustrate that Section 241 in its current form reflects purposeful and race-neutral contemplation" that purged any racial animus that tainted Section 241. *Id.* at 310.

The same reasoning applies to Section 253. Even if it were tainted at its 1890 adoption, in the 1980s the State fully and carefully assessed its voting and disenfranchisement laws in a "purposeful and race-neutral" way—including a proposal to restore felons' voting rights after completion of a sentence—and retained Section 253 as it stood. 47 F.4th at 310. Section 253 would have "been passed in its current form without

racial motivation" and thus any taint "has been cured." *Id.* at 303, 311. So plaintiffs' race-based equal-protection claim fails on this ground too.

In denying summary judgment on this claim, the district court believed that there were "questions of fact" on all three of these points: "racial impact," "discriminatory intent in 1890," and whether events of the mid-1980s cured any discriminatory taint. ROA.19-60662.4882-4883.

The district court cited nothing in the record to show a genuine issue of material fact on the first and second of those points. ROA.19-60662.4882-4883. And for reasons set out above, the district court was wrong to perceive such an issue. Plaintiffs made no showing of present-day discriminatory effect and no showing that Section 253 was motivated by a discriminatory purpose. As for the events of the 1980s, the district court acknowledged that the Legislature "considered" reenfranchisement in assessing the State's election laws. ROA.19-60662.4883. But the court ruled that the record did not show whether "either chamber" of the Legislature "voted on" or otherwise addressed a "suggested amendment" "eliminating section 253 and allowing convicted felons to regain the right to vote after completing their sentences and probation." ROA.19-60662.4883. But that does not matter. What matters is that, like Section 241, Section 253 "in its current form reflects purposeful and race-neutral contemplation" that purged any racial animus that may have once

tainted it. *Harness*, 47 F.4th at 310. This Court's intervening ruling in *Harness* requires rejecting the district court's conclusion.

Plaintiffs' race-based equal-protection claim fails for one final reason. Plaintiffs challenge Section 253 on its face. ROA.19-60662.52. But they cannot carry their "heavy burden" of showing that "no set of circumstances exists under which" Section 253 "would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Legislature can use Section 253 validly in many circumstances—to refuse, for example, to reenfranchise murderers, rapists, the worst perjurers, and the many felons who are still serving their sentences. Section 253 is "valid" at least in those circumstances. That dooms plaintiffs' facial challenge.

2. Plaintiffs' Arbitrary-Reenfranchisement Equal-Protection Claim Fails.

Plaintiffs also claim that Section 253 violates the Equal Protection Clause because it "establishes no objective criteria for the restoration of voting rights" and so allows the Legislature to act arbitrarily. ROA.19-60662.17, 56-57. The district court was right to reject this claim. ROA.19-60662.4880-4882; *see* Opening Br. 40-45; Response Br. 14-24.

First, Supreme Court precedent forecloses this claim. In *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), a three-judge district court rejected an equal-protection challenge to a Florida law that gave

executive-branch officials discretion to restore felons' voting rights. *Id.* at 184. The court ruled that it was not "a denial of equal protection of law" for state officials "to restore discretionarily the right to vote to some felons and not to others," even though those officials had not established "specific standards" to requests to restore voting rights. *Id.* at 183, 184. The Supreme Court summarily affirmed, 396 U.S. 12 (1969), thereby rejecting the plaintiff's argument that Florida's pardon procedure was unconstitutional because it provides "no ascertainable standards governing the recovery of the fundamental right to vote." Opening Br. 42 & n.7 (quoting *Beacham* plaintiff's jurisdictional statement and explaining effect of Court's summary affirmance).

Beacham requires rejecting plaintiffs' challenge here. Plaintiffs claim that Section 253 denies equal protection because it "establishes no objective criteria for the restoration of voting rights" and instead leaves legislators with "complete discretion to determine whether or not to allow a disenfranchised citizen to vote again." ROA.19-60662.17. That claim is materially the same as the claim rejected in *Beacham*. It does not matter that *Beacham* involved executive-branch actions while this case involves legislative-branch actions. ROA.19-60662.4881; *contra* Plaintiffs' Br. 49-51. States are entitled to place pardoning and other clemency authority outside the executive branch. U.S. Const. amend. X. The complaint in

Beacham and here is about standardless discretion in reenfranchisement decisions. That complaint failed in *Beacham*, so it fails here too.

Second, this claim fails even without *Beacham* because Section 253 rationally furthers legitimate state interests. ROA.19-60662.4881-4882.

As plaintiffs recognize, Plaintiffs' Br. 50-51, this claim is subject at most to rational-basis review. *Shepherd v. Trevino*, 575 F.2d 1110, 1114-15 (5th Cir. 1978) (state law providing for "selective ... reenfranchisement of convicted felons" satisfies equal protection if it has "a rational relationship to the achieving of a legitimate state interest"). And Section 253 satisfies rational-basis review. *Contra* Plaintiffs' Br. 54-55. Section 253 authorizes the Legislature to restore a felon's right to vote upon "a two-thirds vote" in both houses. Mississippi "properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to" criminal laws "by violating those laws sufficiently important to be classed as felonies." *Shepherd*, 575 F.2d at 1115. A case-by-case approach, where the Legislature makes reenfranchisement decisions in its judgment and discretion based on individual circumstances, rationally furthers that interest. The Legislature represents the people of Mississippi and is well positioned to exercise the community's judgment on when voting rights should be restored. And the State could rationally conclude that the Legislature

should have broad discretion in exercising that authority. Acts of clemency "inherently call for discriminating choices because no two cases are the same." *Schick v. Reed*, 419 U.S. 256, 268 (1974).

And it does not matter if Section 253 does not impose standards. *Contra* Plaintiffs' Br. 54-55. A State may adopt a discretionary reenfranchisement mechanism. The pardon power—the state constitution's other mechanism for restoring a felon's voting rights in Mississippi, Miss. Const. art. V, § 124—puts similarly broad discretion in the reenfranchising authority. A State may give the pardoning authority "'unfettered discretion' to grant pardons based on 'purely subjective evaluations'" that leave only "a 'unilateral hope' for pardon." *Hand v. Scott*, 888 F.3d 1206, 1209 (11th Cir. 2018) (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464-66 (1981)). If a State can do that, then it can adopt the discretionary mechanism used in Section 253. *See id.* at 1208-10 (ruling that Florida was likely to defeat a similar equal-protection challenge to a "standardless" reenfranchisement regime).

Last: On this claim too, plaintiffs challenge Section 253 on its face. ROA.19-60662.52. But plaintiffs again cannot show that "no set of circumstances exists under which" Section 253 "would be valid." *Salerno*, 481 U.S. at 745. Section 253 can operate validly to deny

reenfranchisement to (for example) the worst murderers, rapists, and perjurers, as well as felons still serving their sentences.

3. Plaintiffs' First Amendment Claim Fails.

Finally, plaintiffs claim that Section 253 violates the First Amendment by impermissibly "vest[ing]" legislators with "unfettered discretion" to determine who may engage in "political expression" and "political association" by voting. ROA.19-60662.57-58. The district court was right to reject this claim. ROA.19-60662.4879; *see* Opening Br. 45-46; Response Br. 24-30.

The Fourteenth Amendment allows States to disenfranchise and never reenfranchise felons. *Supra* Part I; *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J., sitting by designation) ("[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination."). That is so despite that Amendment's Equal Protection Clause—one of the Constitution's foremost protections of the right to vote. And the Fourteenth Amendment's "specific" text recognizing that a State may indefinitely disenfranchise felons "controls over the First Amendment's more general terms." *Hand*, 888 F.3d at 1212. Thus, "the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment," and plaintiffs' First

Amendment claim fails. *Id.* at 1211. Any other view defies the holding in *Richardson v. Ramirez*, 418 U.S. 24 (1974), that section 1 of the Fourteenth Amendment (through which the First Amendment applies to the States, *see*, *e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938)) does not override section 2's express terms allowing States to disenfranchise felons indefinitely. "Having lost their right to vote," plaintiffs "have no cognizable" First Amendment claim "until their voting rights are restored." *Harvey*, 605 F.3d at 1080 (applying that logic to reject Twenty-Fourth Amendment claim against alleged poll tax).

Even if the First Amendment bars viewpoint-based reenfranchisement, *see Hand*, 888 F.3d at 1211-12, that would not help plaintiffs because they have never shown that Section 253 has been used to discriminate based on viewpoint. The mere risk that it could be used that way does not show discrimination. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 297-99 (1987) (rejecting challenge to framework that allegedly allowed for discriminatory application); *contra* Plaintiffs' Br. 56-57. And again, plaintiffs challenge Section 253 on its face. ROA.19-60662.52. But Section 253 does not facially discriminate based on viewpoint and plaintiffs have not shown any instance of viewpoint discrimination. They cannot meet the high bar for a facial First Amendment challenge. *United States v. Stevens*, 559 U.S. 460, 472-73 (2010).

CONCLUSION

The Secretary is entitled to judgment on all claims. This Court should affirm to the extent that the district court granted summary judgment to the Secretary and should reverse to the extent it allowed one claim (the race-based equal-protection challenge to Section 253) to proceed to trial.

Respectfully submitted,

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October 30, 2023

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: October 30, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,982 words, excluding parts exempted by Fed. R. App. P. 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because its text has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font.

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