No. 22-412

IN THE

Supreme Court of the United States

ROY HARNESS; KAMAL KARRIEM,
Petitioners,

v.

MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Mississippi's brief in opposition begins by quoting Section 2 of the Fourteenth Amendment, which provides that persons may be disfranchised for "participation in * * * crime." Opp. 1. But this case is about Section 1 of that Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The State does not deny that the delegates to Mississippi's 1890 convention chose Section 241's bizarre collection of disfranchising crimes "to obstruct the exercise of the franchise by the negro race" based on the delegates' belief that African Americans were disproportionately likely to commit those crimes. *Ratliff* v. *Beale*, 20 So. 865, 868 (Miss. 1896). In this respect, Section 241 is identical to the Alabama provision that this Court unanimously held unconstitutional in *Hunter* v. *Underwood*, 471 U.S. 222 (1985)—a decision flouted by the Fifth Circuit majority.

Mississippi also does not deny that continued enforcement of a remaining racist trapping of the Jim-Crow era to permanently disfranchise tens of thousands of the State's citizens would raise an issue worthy of this Court's attention. Nor could the State do so. "[T]his Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice.'" *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part) (quoting *Pena-Rodriguez* v. *Colorado*, 580 U.S. 206, 221 (2017)). And there can be no question that Section 241, which was "thoroughly racist in its origins" has "continuing racially discriminatory effects," *id*. at 1419, as thousands of Mississippi's African-American citizens cannot vote today—just as the provision's framers intended. See *Shelby County* v. *Holder*, 570

U.S. 529, 557 (2013) ("[A]ny racial discrimination in voting is too much.").

This Court's review is essential if that Fourteenth Amendment imperative is to be respected. Mississippi has gone to great lengths to defend the discriminatory status quo on the same insubstantial ground advanced by the Fifth Circuit's en banc majority, namely that the State took steps in 1950, 1968 and 1986, to rehabilitate Section 241. But, as the petition explained, the court of appeals misconceived the legal significance of the historical record. Mississippi's citizens were *never* afforded the opportunity to reenact or repeal the racist 1890 provisions at issue, so nothing ever "alter[ed] the intent with which" those provisions "had been adopted." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2325 (2018) (describing *Hunter*). They remain as unconstitutional today as on the day they were adopted. The decision of the court of appeals therefore stands in direct conflict with *Hunter*.

This, then, is not a case in which the passage of time or later developments can "supply an excuse for leaving an uncomfortable past unexamined." *Ramos*, 140 S. Ct. at 1401 n.44. The original disfranchising crimes set forth in Section 241 are more than just a discomfiting artifact of a dark past. They remain in force today and therefore continue to inflict unconstitutional injury on thousands of Mississippi's citizens. The Fifth Circuit has made clear that it will never act to end this affront to our Constitution's most fundamental commitments, an affront that "touches us all." Pet. App. 87a (Graves, J., dissenting). Review by this Court is thus both manifestly appropriate (see S. Ct. R. 10) and urgently needed.

ARGUMENT

A. The decision below conflicts with *Hunter* because the 1950 and 1968 amendments to Section 241 did not remove its unconstitutional taint.

Mississippi's principal contention is that there is no need for review by this Court because "reenactments" of Section 241 in 1950 and 1968 extinguished the provision's original constitutional infirmity. The State relies on this "reenactment" theory to explain away the conflict with *Hunter*; to dismiss this Court's explanation of *Hunter* in *Abbott* v. *Perez*; to claim that the decision below aligns with *Johnson* v. *Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), and *Hayden* v. *Paterson*, 594 F.3d 150 (2d Cir. 2010); and to contend that this case presents only a factual dispute unworthy of this Court's attention. And, indeed, the en banc majority did characterize the 1950 and 1968 votes as "reenactments." Pet. App. 6a, 17a, 20a.

This case is not, however, about the fine points of Mississippi's constitutional processes. The key undisputed fact, which the State does not deny but studiously avoids, is the one identified by Judge Haynes in her dissent: "At no point did the Mississippi electorate have the option of striking the entirety of § 241's disenfranchisement provision." Pet. App. 38a. The eight disfranchising crimes from the 1890 Constitution still on the books today—bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy—draw their authoritative force from the acts of the 1890 Convention, not from any subsequent action of Mississippi voters. Because the voters had no opportunity to repeal or ratify those disfranchising crimes, they continue to embody the

racist intent that marred their original adoption, just like the Alabama provision invalidated in *Hunter*.

The votes in 1950 and 1968 did not extinguish that original racist intent because they did not bestow or restore authoritative legal force to the original provisions. The people's adoption of the 1950 Amendment simply removed burglary from the list; neither a majority vote for or against the amendment would have changed the rest of the original provision. Similarly, the people's adoption of the 1968 Amendment simply added murder and rape to the list; neither a majority vote for or against the Amendment would have changed the original. Thus, the 1890 provisions that remain in force today have never been repealed and later restored for race-neutral reasons. Nor has the question whether they should be retained for race-neutral reasons ever been put to a vote. The 1950 and 1968 Amendments therefore cannot be understood as race-neutral ratifications of the original provisions.[1]

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[1] Belatedly recognizing the weakness of its contention that voters in any era would adopt the bizarre collection of offenses in the 1890 Constitution for race-neutral reasons, the State for the first time contends that because those crimes are "serious" and "probative of dishonesty or poor civic virtue," the provision is "reasonable." Opp. 15. That post hoc rationalization is irrelevant because the crimes were not chosen for race-neutral reasons; they were chosen to further the 1890 Convention's goal of disfranchising African Americans. *Ratliff*, 20 So. at 868. The claim is also implausible. A provision focusing on "serious" crimes that are "probative of dishonesty and poor civic virtue" would not omit kidnapping, aggravated assault, and child molestation, while including the far less serious offenses of forgery and bigamy. There is only one conceivable reason why anyone would choose these crimes alone and it is the reason proclaimed by the delegates to the 1890 Convention. Pet. App.

(footnote continued)

Unable to deny this fact, the State seeks to obscure it by pointing to the en banc majority's labeling of these votes as "reenactments." They were not. To "enact" means to "establish by legal and authoritative act, make into a law." *Enact*, Webster's Third New International Dictionary Unabridged (1966); see Black's Law Dictionary (11th ed. 2019) (defining "enact" as "[t]o make into law by authoritative act"). A reenactment therefore *re*-establishes, or *re*-makes the provision into law; it restores legal authority that had been eliminated through repeal or similar action. See *Black's Law Dictionary* (6th ed. 1990) (defining "re-enact" as "to revive."). Nothing like that happened here. Mississippi's voters could not have "revive[d]" or "restored" the original list of disfranchising crimes in either 1950 or 1968 because that list had never been repealed. By the same token, those votes cannot have ratified the existing provisions for the reason Judge Haynes identified: whether the 1890 disfranchising crimes at issue in this case should remain in force was never put to the voters. Cf. *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356 (2019) (declining to apply ratification canon to adopt judicial gloss on statutory term when Congress never reenacted the term).[2]

40a ("We came here to exclude the Negro. Nothing short of this will answer.").

[2] The State makes much of the fact that the ballots in 1950 and 1968 published the full text of what the amended Section 241 would look like. Opp. 15-16. But that is of no moment. Because the eight disfranchising crimes were never considered for amendment, the full language of the "proposed" amended Section 241 displayed on the ballots in 1950 and 1968 necessarily had to replicate the existing language in Section 241 that would remain un-

(footnote continued)

In all events, for purposes of deciding the question presented, nothing turns on the label one attaches to the 1950 and 1968 votes. What matters is the legal significance of those votes. And the State does not dispute that the 1890 provisions at issue in this case were never repealed (so they could not have been revived for race-neutral reasons) and were never subject to repeal (so they could not have been ratified and retained for race-neutral reasons). These portions of Section 241 therefore have authoritative force solely because of the votes of the delegates to the 1890 Convention. In that dispositive sense, they are exactly the same as the Alabama disfranchisement provision this Court held unconstitutional in *Hunter*.

The State protests that requiring voters to actually vote to retain the discriminatory list of crimes would lead to "preposterous" outcomes. Opp. 24. Not so. If, as the State hypothesizes, Mississippi were to approve a revised Section 241 that replaces the bizarre race-based 1890 list of crimes with the words "any felony," that would present a fundamentally different question. By voting to *replace* the 1890 list with entirely new comprehensive criteria for disfranchisement, these hypothetical voters would have done exactly what the voters in 1950 and 1968 had no opportunity to do: they would have considered whether to retain the discriminatory list of crimes chosen in 1890 or to instead replace that list with different, race-neutral disfranchising criteria. But nothing like that happened in 1950 or 1968.

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changed. Voters could no more approve the "new list" in its entirety than they could endorse or reject the 1890 Convention attendees' archaic reference in Section 241 to "idiots and insane persons."

Finally, the State suggests that the 1968 amendment cleansed Section 241 of its discriminatory animus because the amendment reflected a laudable effort to "delete" certain parts of the provision that the U.S. Commission on Civil Rights had identified as discriminatory. Opp. 4 (internal quotation marks omitted); Pet. App. 6a. That characterization is misleading. As Judge Graves pointed out, "the 1968 amendment did not *delete* anything from the list of crimes in § 241. It added rape and murder." Pet. App. 78a n.16 (Graves, J., dissenting). What the 1968 Mississippi legislators proposed deleting was Section 241's reference to a *poll tax*—which this Court had declared unconstitutional two years earlier in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). ROA.877; ROA.2643; Pet. App.21a.

Once the State's "reenactment" theory is exposed as fallacious, the State's argument against certiorari falls apart.

- The conflict between the decision below and *Hunter* is direct and undeniable.

- The situation here is not equivalent to the situation in *Abbott*, where prior discriminatory legislation had been repealed and replaced *in toto*. It is precisely the situation covered by *Abbott*'s description of *Hunter*, where the provision at issue was "never repealed," and therefore nothing "alter[ed] the intent with which the article, including the

parts that remained, had been adopted." 138 S. Ct. at 2325.[3]

- The decisions of the Eleventh and Second Circuits are inapposite (see Pet. 27-29).

- The case does not turn on a threshold factual dispute, but on the legal significance of undisputed historical facts that the State and the en banc majority have legally mischaracterized to avoid *Hunter*'s controlling force.

The decision below thus squarely conflicts with a unanimous decision of this Court on a constitutional question of enormous practical and symbolic importance.

B. The State has identified no other impediment to reaching the question presented.

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[3] Citing *Abbott*, the State contends that it does "not matter" that Mississippi's voters were afforded no opportunity to decide whether to repeal or ratify the list of 1890 crimes still in force because *any* amendment to an existing law adopted "without discriminatory purpose defeats an equal protection challenge." Opp. 17-18. Unsurprisingly, *Abbott* does not support that extreme argument. The discriminatory redistricting plan at issue in that case was replaced *in toto* by a new law that was enacted without discriminatory intent. And, referencing changes over time to the Alabama law invalidated in *Hunter*, the Court in *Abbott* noted that subsequent pruning of an unconstitutionally motivated law's most objectionable features did not cure its unconstitutionality. 138 S. Ct. at 2324-2325. Thus, far from supporting Mississippi's untenable argument, *Abbott* unambiguously rejected it.

In an effort to manufacture a "vehicle" problem, the State also points to the en banc majority's discussion of the Mississippi legislature's "purposeful and race-neutral contemplation" of changes to Section 241 in the 1980s and to the disparate impact analysis in Judge Ho's separate concurrence, as alternative justifications for the ruling below. Neither provides any reason to deny review. The former is specious and, if taken seriously, actually reinforces the need for review. The latter, which represents the views of one judge alone, itself conflicts directly with *Hunter* and radically misconstrues this Court's equal protection jurisprudence.

1. 1980s Inaction. Neither the State nor the en banc majority was able to point to any authority for the proposition that a legislature's mere "purposeful * * * contemplation" of a change in the law, unaccompanied by any authoritative change in the law itself, can alter a law's meaning or transform the intent of the body that enacted it. That should come as no surprise. The proposition is deeply unsound. As this Court has made clear, textual meaning cannot be inferred from legislative inaction. *E.g.*, *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994). *Hunter* suggested that Alabama's disfranchisement provision might be redeemed if "*enacted*" today "without any impermissible motivation." 471 U.S. at 233 (emphasis added). To state the obvious, "purposeful * * * contemplation" does not enact anything.

Indeed, here the legislature lacks the authority to amend Mississippi's constitution on its own. That requires a vote of the people. So even if one were willing to accept that "purposeful * * * contemplation" could

change the meaning and intent of a constitutional provision, the *legislature's* contemplation provides no basis for inferring what the *people* thought at the relevant time.

Equally to the point, there is no evidence of any such "purposeful and race-neutral contemplation" by the Mississippi legislature in the 1980s. The Election Law Reform Task Force that considered Mississippi's election laws as a whole in the mid-1980s never identified any race-neutral policy objectives that justified retaining the original 1890 crimes. Likewise, there is no evidence that the full legislature debated or otherwise considered proposing to amend Section 241 by ballot. What the legislature did instead was amend Mississippi's Code—a set of statutes—to conform to Section 241. ROA.1131, 1135.

Nothing about that ministerial act bears on the issue in this case. Whatever the Code said, Section 241 disfranchises of its own force, and the legislature proposed no change to Section 241. Thus, nothing that occurred during the 1980s would create an impediment to reaching the constitutional issue presented here.

2. Judge Ho's concurrence. The concurrence, which itself conflicts with *Hunter* and reflects an insupportable understanding of equal protection principles, poses no impediment to deciding the question presented in the petition.

The State ignores that Judge Ho's concurrence cannot be reconciled with this Court's decision in *Hunter*. In *Hunter*, this Court noted that Alabama's disfranchisement provision had continuing discriminatory effects because African Americans were disfranchised at rates that substantially exceeded their percentage of the voting age population. Applying the

exact same metric this Court applied in *Hunter*, the discriminatory effect is even starker here: African-American adults are 2.7 times more likely than white adults in Mississippi to have been convicted of a disfranchising crime. ROA.2737-2738. That is worse than the ratio in *Hunter*. Pet. 32. Judge Ho's suggestion that disparate impact should be assessed using a different metric than the one in *Hunter* thus does nothing to diminish the stark conflict between this Court's decision and the decision below.

In all events, the State does not even attempt to respond to petitioners' showing that the approach advocated in the concurrence is misconceived, and would create a safe harbor for intentional discrimination. This Court has never held that a law enacted with a discriminatory motivation and that harms those at whom it aims is nonetheless constitutional absent additional proof of systemic disparate impact, and many cases refute that proposition. See Pet. 33.

* * * * *

Over the powerful dissents of seven members, the Fifth Circuit refused to carry out its paramount and abiding constitutional duty to strike down an odious vestige of the Jim Crow era that continues to strip tens of thousands of Mississippi citizens of the right to vote, a "fundamental political right * * * preservative of all rights." *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972) (citation omitted). Instead, the majority executed one implausible evasive maneuver after another to avoid doing so. But "succumbing to the temptation to sidestep the usual constitutional rules is never costless. It does damage to faith in the written Constitution as law." *Democratic Nat'l Comm.* v. *Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concur-

ring). It therefore falls to this Court to "secure the protection that the Constitution grants to individuals," by granting certiorari and enforcing the enduring guarantees of the Fourteenth Amendment. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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