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

BRIEF IN OPPOSITION

LYNN FITCH
Attorney General
WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
Counsel of Record
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
scott.stewart@ago.ms.gov
(601) 359-3680

Counsel for Respondent

QUESTION PRESENTED

Did the en banc court of appeals err in rejecting petitioners' equal-protection challenge to the Mississippi Constitution's present-day provision disenfranchising certain felons when that provision is facially neutral, petitioners conceded that they have no evidence that the provision was adopted for racially discriminatory reasons, uncontroverted evidence established that the State would again adopt the provision for permissible reasons, and petitioners failed to establish that the provision has a racially disparate impact?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW..1

JURISDICTION..1

STATEMENT 1

REASONS FOR DENYING THE PETITION..........14

I. The Decision Below Is Correct..........................14

II. The Courts Of Appeals Are United In Rejecting Petitioners' Position..21

III. This Case Is Not A Sound Vehicle For This Court's Intervention..25

CONCLUSION...29

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018)........................17, 18, 20, 24

Cotton v. Fordice,
157 F.3d 388 (5th Cir. 1998)..........6, 7, 8, 9, 22, 28

Green v. Bd. of Elections of City of New York,
380 F.2d 445 (2d Cir. 1967) 1

Hayden v. Paterson,
594 F.3d 150 (2d Cir. 2010) 22, 23

Hunter v. Underwood,
469 U.S. 878 (1984)...28

Hunter v. Underwood,
471 U.S. 222 (1985)....... 7-10, 14, 16, 18, 20, 26-28

Jerome v. United States,
318 U.S. 101 (1943)..2

Johnson v. Governor of the State of Florida,
405 F.3d 1214
(11th Cir. 2005) (en banc)........................21, 22, 23

Ratliff v. Beale,
20 So. 865 (Miss. 1896) 3

Richardson v. Ramirez,
418 U.S. 24 (1974).....................................1, 14, 15

State ex rel. Moore v. Molpus,
578 So. 2d 624 (Miss. 1991) 17

United States v. Armstrong,
517 U.S. 456 (1996)..26, 27

Constitutional Provisions

Miss. Const. (1890)..2

Miss. Const. art. IV, § 17 (1868).................................2

Miss. Const. art. VI, § 5 (1817)...................................1

Miss. Const. art. VII, § 4 (1832)..............................1, 2

Miss. Const. art. XII, § 2 (1868)..................................2

Miss. Const. art. XII, § 241 (1890)..............................2

Miss. Const. art. XII, § 241........................ 2-20, 24-28

Miss. Const. art. XV, § 273 (1912)..............................3

Miss. Const. art. XV, § 273 (1959)..............................4

U.S. Const. amend. XIV..........................1, 6, 7, 14, 15

Statutes

28 U.S.C. § 1254 (1982)...28

28 U.S.C. § 1254..1

Miss. Code Ann. § 23-15-11 6

Miss. Code Ann. § 23-15-19 6

Miss. Laws, 1912, ch. 416 3

Miss. Laws, 1950, ch. 569 3

Miss. Laws, 1959 Ex. Sess., ch. 78 4

Miss. Laws, 1968, ch. 614 5

The Revised Code of the Statute Laws
of the State of Mississippi,
ch. 5, art. II, § 343 (1871) 2

The Revised Code of the Statute Laws of the State of Mississippi, ch. 59, art. XIII, § 2855 (1871) 2

The Revised Code of the Statute Laws of the State of Mississippi, ch. 4, § 108 (1880) 2

Other Authorities

3 Charles Z. Lincoln, The Constitutional History of New York (1906) 23

Voting in Mississippi, A Report of the United States Commission on Civil Rights (1965)..................3, 4

OPINIONS BELOW

The court of appeals' en banc opinion (App.1a-90a) is reported at 47 F.4th 296. The court of appeals' panel opinion (App.91a-98a) is reported at 988 F.3d 818. The district court's opinion (App.99a-131a) is not reported but is available at 2019 WL 8113392.

JURISDICTION

The court of appeals' judgment was entered on August 24, 2022. The petition was filed on October 28, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. A State may deny its citizens "the right to vote" "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. This power is broad. States may "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); *see id.* at 54. States have long done that. When the Fourteenth Amendment was adopted, 29 of the 36 States "had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Id.* at 48. A century later, most state constitutions prohibited or authorized the legislature to prohibit felons from voting. *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 450 & nn.5, 6 (2d Cir. 1967) (identifying 42 such provisions).

Mississippi has always prohibited some felons from voting. The State's 1817 and 1832 constitutions excluded from voting those convicted of "bribery," "perjury," "forgery," or "other high crimes or misdemeanors." Miss. Const., art. VI, § 5 (1817); Miss.

Const., art. VII, § 4 (1832). The 1868 constitution included a similar provision, Miss. Const. art. XII, § 2 (1868) (ROA.713), and also expressly excluded anyone "convicted of bribery, perjury, or other infamous crime," *id.*, art. IV, § 17 (ROA.701). Mississippi's 1871 code specified that "[n]o person convicted of bribery, perjury, forgery, or other infamous crimes" may vote, The Revised Code of the Statute Laws of the State of Mississippi, ch. 5, art. II, § 343 (1871) (ROA.719-20), and that "infamous crime[s]" included felonies, *id.*, ch. 59, art. XIII, § 2855 (ROA.721). The 1880 code similarly excluded anyone "who has been convicted of bribery, perjury, forgery, grand larceny or any felony." The Revised Code of the Statute Laws of the State of Mississippi, ch. 4, § 108 (1880) (ROA.724).

In 1890, delegates convened and drafted the State's fourth constitution. Miss. Const. (1890) (ROA.790-838). They addressed felon disenfranchisement in Article XII, Section 241. The provision tracked parts of prior provisions but narrowed the disenfranchising crimes to a list that included several common-law felonies. *See Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (common-law felonies included arson, burglary, and larceny). Besides "bribery," "perjury," and "forgery"—included in all prior versions of the constitution—the 1890 list included "burglary," "theft," "arson," "obtaining money or goods under false pretenses," "embezzlement," and "bigamy." Miss. Const. art. XII, § 241 (1890) (ROA.827).

The Mississippi Supreme Court later stated that the 1890 delegates adopted this list for racially discriminatory reasons. "Restrained by the federal constitution from discriminating against the negro race," the court said, "the convention discriminated against its characteristics and the offenses to which its

weaker members were prone." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). Based on the view that black Mississippians who were criminals were "given rather to furtive offenses than to the robust crimes of the whites," in the 1890 disenfranchisement provision "[b]urglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not." *Ibid.*

In 1950, the State took the first of multiple fresh statewide actions on felon disenfranchisement. That year, the State amended and reenacted Section 241 to drop burglary but continue disenfranchising for the other listed crimes. That process required that two-thirds of each legislative house propose a new version of Section 241, that the Secretary of State publish the new Section 241 before the election, and that voters ratify the new version by majority vote. Miss. Const. art. XV, § 273 (1912); *see* Miss. Laws, 1912, ch. 416. Ballots included the full text of the new Section 241—which listed each crime in the prior list except burglary—and gave voters the option to approve or reject it by voting "For Amendment" or "Against Amendment." ROA.2641 (ballot); *see* App.3a-4a & n.3, 111a-12a. Voters adopted the new version in a 66,077-to-14,362 vote. Miss. Laws, 1950, ch. 569; *see* ROA.842-43 (vote count).

The State again revisited Section 241 in the 1960s. These efforts followed after a federal commission, in 1965, faulted Mississippi's voting laws and practices. The commission concluded that a poll tax and literacy tests imposed in the 1890 constitution were designed to exclude black Americans from voting, and the commission called for repealing them. Voting in Mississippi, A Report of the United States Commission on

Civil Rights 3-6, 61-63 (1965). The commission identified other "disabilities to voting" in Section 241 that "were thought to reflect the racial characteristics" of black Americans. *Id.* at 6. "The requirement of long residency, two years in the State and one year in the election district," the commission said, "was aimed at the supposed" transitory nature of young black Americans. *Ibid.* The commission added that Section 241's "disfranchising crimes" included crimes "to which [black Americans] were thought to be particularly prone," while "[t]he more serious felonies of murder, rape, or assault were not included." *Ibid.* The Mississippi Governor testified at the commission hearing. *Id.* at 59. The commission cited that testimony and other statements as "evidence of the beginning of a change of attitude in Mississippi towards Federal law" and "acceptance of the requirements of the Constitution." *Ibid.*

The State soon addressed issues that the commission identified, including by adopting a new version of Section 241. In 1968, the Mississippi House introduced a resolution that proposed to replace Section 241 through the constitutional-revision process. ROA.876-78; *see* Miss. Const. art. XV, § 273 (1959); Miss. Laws, 1959 Ex. Sess., ch. 78 (ROA.966-68). Through floor amendments, lawmakers relaxed Section 241's residency requirement, eliminated its poll-tax provisions, and deleted an exclusion from voting of "Indians not taxed." ROA.876-78, 891-92. A floor amendment also broadened Section 241's disenfranchising crimes by adding "murder" and "rape." ROA.877. Representatives confirmed that the resolution aimed "to delete certain improper parts of" Section 241. ROA.881 (capitalization altered). Each house approved the resulting proposed new version by

a two-thirds vote. ROA.912, 914-15. The new version of Section 241 was published two weeks before the election. ROA.959-60. Ballots included the full text of the new Section 241 and gave voters the option to approve or reject it by voting "For the Amendment" or "Against the Amendment." ROA.2645 (ballot); *see* App.4a & n.4, 112a-13a. Voters adopted the new version by a 136,846-to-59,888 vote. Miss. Laws, 1968, ch. 614; *see* ROA.965 (vote count).

In the mid-1980s, lawmakers again revisited the State's felon-disenfranchisement laws. In 1984, an Election Law Reform Task Force led by Democratic Secretary of State Dick Molpus was appointed to review and revise the State's election laws. ROA.975-76, 980-82. The bipartisan, diverse Task Force included legislators, executive-branch officials, local election officials, and members of the public. ROA.980-82. Over several months, the Task Force held public hearings throughout the state, received written information and public comments, and met with voting-rights lawyers from the U.S. Department of Justice. ROA.983, 1072; *see* ROA.983-1084. The Task Force considered (among other things) whether to broaden the disenfranchising crimes, amend Section 241, or leave the law "as is." ROA.1074, 1081; *see* ROA.1072-78, 1080-84. The Task Force ultimately determined that Section 241 should be left "as is." ROA.1081.

The legislature responded by forming a committee that studied the issues, held open meetings, and ultimately proposed legislation. ROA.1085-1123. The committee recommended amending Section 241 to expand the State's disenfranchisement laws to include all felonies, except manslaughter and federal tax evasion, with restoration of voting rights after completion of a sentence. ROA.1108-10. 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 federal tax evasion. ROA.1124-26. Lawmakers modified the bill through the legislative process to instead adopt the Task Force's "as is" recommendation. *See* ROA.1128-31. The legislation passed 51-1 in the Senate and 118-3 in the House. ROA.1132. The U.S. Department of Justice then precleared the law. ROA.1137-39. The enactment's felon-disenfranchisement provisions are now codified, in pertinent part, at Miss. Code Ann. §§ 23-15-11 and 23-15-19 (excluding from the vote those "convicted of vote fraud" or of any crime now listed in Section 241).

The only record evidence on the present effects of Mississippi's disenfranchisement laws is data for 1994 to 2017 that petitioners produced in discovery. The data shows that black and white Mississippians convicted of crimes are disenfranchised at about the same rate. Black and white Mississippians accounted for 112,356 and 77,216 total convictions (respectively), excluding the murder and rape convictions that petitioners do not challenge. ROA.563-64, 1143-49. Those totals include 25,353 disenfranchising convictions for black Mississippians and 16,400 for white Mississippians. *Ibid.* So about 22.6% of convictions for black Mississippians (25,353/112,356) and about 21.2% for white Mississippians (16,400/77,216) are disenfranchising.

2. In the 1990s, a lawsuit claimed that Section 241 (as in effect then and as it remains in effect now) violates the Equal Protection Clause because it is traceable to the 1890 version of the law. *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). Upholding the rejection of that claim, a Fifth Circuit panel recognized that "a

facially neutral" law could "overcome its odious origin" and ruled that that "happened here." *Id.* at 391. The court explained that Section 241 was amended in 1950 to remove "burglary" and again in 1968 when "the state broadened the provision by adding 'murder' and 'rape'—crimes historically excluded from the list because they were not considered 'black' crimes." *Ibid.* Those actions, produced through a "deliberative process," led in 1950 and 1968 to "a re-enactment of § 241" that each time "superseded the previous provision and removed the discriminatory taint associated with the original version." *Ibid.* Thus, the court continued, "§ 241 as it presently exists is unconstitutional only if the amendments were adopted out of a desire to discriminate against blacks." *Id.* at 392. But no proof had been offered on that point. *Ibid.* "Because the motives of Mississippi's legislature and voters when § 241 was re-enacted" were "not impugned, and because § 241 now seeks only to penalize all criminals convicted of certain crimes," Section 241 is constitutional. *Ibid.* Section 241 thus did not fall under *Hunter v. Underwood*, 471 U.S. 222 (1985), which affirmed injunctive relief against a 1901 Alabama disenfranchisement law that was adopted for racially discriminatory reasons and had never been altered to expunge that taint. 157 F.3d at 391-92 & n.8.

3. Petitioners Roy Harness (convicted of forgery) and Kamal Karriem (convicted of embezzlement) are disqualified from voting under Mississippi law. ROA.568-69. In 2017, they filed this lawsuit challenging present-day Section 241. ROA.27. They claim that Section 241 violates the Equal Protection Clause because it is tainted by the racial animus behind the 1890 disenfranchisement provision. *See* App.108a. They seek an injunction barring Section 241's

enforcement for all listed crimes except murder and rape. App.100a. They disclaim any challenge to the 1968 addition of those last two crimes. App.100a n.1. The district court consolidated the case with a similar one (*Hopkins v. Hosemann*, S.D. Miss. No. 18-188) and all parties moved for summary judgment.

The district court granted summary judgment to respondent. App.108a-20a. It held that *Cotton* required rejecting petitioners' claims. App.108a-16a. The court explained that *Cotton* is indistinguishable from petitioners' case and that petitioners failed to prove that racial animus tainted the State's 1950 and 1968 enactments. App.110a-16a. The court alternatively held that petitioners' claims fail because the State's comprehensive review of its disenfranchisement laws and deliberative legislative actions in the mid-1980s established that the State "would have passed section 241 as is without racial motivation." App.119a; *see* App.116a-20a. The court also resolved most of the *Hopkins* claims and severed the lawsuits. App.120a-31a. Petitioners appealed. (The *Hopkins* parties separately appealed and cross-appealed. 5th Cir. Nos. 19-60662, 19-60678. Those consolidated appeals were argued in December 2019 and remain pending.)

A panel of the court of appeals affirmed. App.91a-98a. It held that *Cotton* foreclosed petitioners' challenge to Section 241. App.94a-98a. The Fifth Circuit voted to take the case en banc.

The en banc court of appeals affirmed the district court's judgment. App.1a-25a. The court evaluated the case under the framework set forth in *Hunter v. Underwood*, 471 U.S. 222 (1985). App.9a-24a. *Hunter* affirmed a judgment holding unconstitutional as

applied to misdemeanants a provision of the 1901 Alabama constitution that had been adopted in part to disenfranchise black citizens who had been convicted of certain crimes. 471 U.S. at 225-33. Under *Hunter*, the court of appeals explained, the party challenging a disenfranchisement law on equal-protection grounds has the initial burden of proving that "racial discrimination was a substantial or motivating factor in enacting the challenged provision." App.10a. 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.* The court explained that the *Hunter* plaintiffs satisfied the "first step with a wealth of historical evidence" that discrimination motivated Alabama's 1901 provision. *Ibid.* At the second step, Alabama failed to show that its provision would have been enacted without an improper purpose. *Ibid.* *Hunter* also rejected the view that the 1901 provision had been "shorn of its original unconstitutional motive" by judicial decisions "in the ensuing eighty years" that "prun[ed]" the provision of certain other racist features. App.10a-11a. The court noted that *Hunter* declined to decide whether Alabama's law "would be valid if enacted today without any impermissible motivation." App.11a (emphasis omitted).

Applying *Hunter*, reaffirming *Cotton*, and siding with two other circuits, the en banc court upheld Section 241 on two independent grounds. App.13a-24a.

First, the court held that petitioners "failed to meet their burden of showing that the current version of Section 241 was motivated by discriminatory intent." App.9a; *see* App.13a-22a. In evaluating whether petitioners had met their initial burden under *Hunter*, the "critical issue," the court explained, "is

not the intent behind Mississippi's 1890 Constitution, but whether the reenactment of Section 241 in 1968 was free of intentional racial discrimination." App.16a; *see* App.13a-16a. That is because, in contrast to the law in *Hunter*, Section 241 "has been, not only reenacted, but reenacted *twice* according to Mississippi state procedures." App.15a (emphasis in original). "[T]he decisive legal question is the intent of the legislature that enacted the most recent version of an originally tainted law." *Ibid.* Petitioners "do not even allege that the 1968 amendment was enacted with discriminatory intent," App.16a-17a, and "concede that they have provided no evidence that the amendment passed with invidious motives," App.17a.

Yet petitioners claimed that, for two reasons, they had "no obligation" to make that showing because "the reenactments of Section 241 cannot purge the racially discriminatory taint" from the 1890 list of disenfranchising crimes. App.17a. The court rejected both reasons. App.17a-21a.

Petitioners first urged that the reenactments could not purge the taint because the "amendment process did not give voters an opportunity to consider eliminating either in their entirety or individually the bulk of the crimes tainted by racial animus, instead only asking in 1950 whether to remove burglary and in 1968 whether to add rape and murder to the original list." App.17a. Rejecting that argument, App.17a-20a, the court explained that this Court's precedent focuses on contemporaneous "indicia" of intent in assessing whether "discriminatory purpose" motivated a law. App.18a. That precedent does not, the court emphasized, declare that a long-ago tainted provision can be cured only if it is "voted on word for word." *Ibid.* Petitioners' "novel," "radically prescriptive" view, the

court said, provides no basis for attacking the later enactments. App.18a, 19a. Both later versions of Section 241 "were enacted in compliance with state law"; voters approved "the full text of Section 241 as amended, not merely bare propositions" to add or drop crimes; the 1968 enactment also "significantly altered" other parts of Section 241 that "had been originally infected by racial animus"; and evidence on the 1968 enactment "bears no hint of subterfuge to covertly maintain racial discrimination." App.19a-20a. Under state law, the 1890 provision "ceased to exist" after the later enactments, which made "the discriminatory intent behind" the 1890 provision "irrelevant" and "purg[ed] the original taint by reenactments of the whole provision." App.20a.

Petitioners next urged that Mississippi history "'render[s] implausible' the assertion that the amendments were made to remove discriminatory taint." App.17a. Rejecting this argument, App.20a-21a, the court observed that none of this history "refers to or bears on the 1968 amendments to all of Section 241." App.21a. And petitioners had conceded "that 'there is little reason to think' racial discrimination motivated the amendments." *Ibid.* Further, the 1968 enactment responded to the federal commission's objections by "adding supposedly 'non-black' crimes to the disenfranchising list, modifying voter residency requirements, and deleting the poll tax." *Ibid.* "[I]f anything," the court recognized, this history suggests the "opposite" of "discriminatory intent." *Ibid.*

Second, the court alternatively held that, even if petitioners had showed that discriminatory taint remained after the post-1890 enactments, the State "has conclusively shown" that this taint "has been cured." App.9a; *see* App.22a-24a. The State

established that its "current provision would still have been enacted without discriminatory intent." App.22a. The court concluded that the evidence—including the extensive deliberations in the mid-1980s over "Section 241 in its current form," the legislature's enactment of a new election code that "amended existing state statutes, incorporating Section 241 by reference in two code provisions," and federal preclearance of the laws—"reflects purposeful and race-neutral contemplation" and that Section 241 "was carefully evaluated before the legislature opted to leave it unchanged." App.22a-24a. The court rejected the view that these multi-stage deliberations were "legislative inaction" that could not reliably guide the court. App.23a. The court was not using legislative inaction "to interpret statutes or regulations," but was assessing historical events to determine "motivation": "whether Section 241 would have been enacted in its current form absent racial discrimination." *Ibid.* The court ruled that the evidence showed that the State would have so enacted Section 241 and that it was "hard to imagine a stronger showing." App.24a.

Judge Ho concurred in part and in the judgment. App.26a-35a. He was "particularly persuaded by the ample evidence" that the State "would enact" Section 241 "today for reasons wholly unrelated to race." App.29a. He also gave "a separate and distinct reason why the court [was] right to uphold" Section 241: "the absence of any discriminatory effect." App.27a; *see* App.29a-34a. Petitioners' challenge fails as a matter of law, he explained, because "Section 241 does not disproportionately disenfranchise a greater percentage of African-Americans today than would a" law disenfranchising all felons. App.30a. Petitioners had tried to show discriminatory effect by comparing the

number of disenfranchised felons under Section 241 to the State's "entire population." App.32a. But "the relevant baseline" is the "general felon population," so petitioners' challenge fails. App.33a; *see* App.30a-34a.

Judges Elrod and Haynes each wrote a short dissent. App.36a-37a, 38a. Judge Elrod would have remanded on the ground that Section 241 retains a discriminatory taint, App.36a, and "fact issues ... preclude summary judgment" on the question whether the State would have adopted Section 241 without "illicit intent," App.37a. But she "agree[d]" with Judge Ho that petitioners must "show that § 241 continues to have a discriminatory effect." App.37a. Judge Haynes believed that Section 241 was not "reenacted" and so retained a "discriminatory taint." App.38a.

Judge Graves, joined by four other judges, wrote the lead dissent. App.39a-90a. Judge Graves disagreed with each of the en banc court's holdings and with Judge Ho's additional reason for affirmance. First, he argued that Section 241 must fall because petitioners "establish[ed] discriminatory intent" behind the 1890 enactment and the State did not purge that taint. App.46a-47a; *see* App.45a-52a. He maintained that voters never had "an up or down vote" on the original "discriminatory-chosen crimes," so later enactments "had no effect on allegedly altering the intent behind those crimes." App.50a. If the later enactments mattered, he said, summary judgment for respondent was improper because "well-known historical evidence of Mississippi in the 1960s" "creates a factual dispute about whether the 1968 amendment was motivated by discriminatory intent." App.53a; *see* App.52a-79a. Second, he concluded that the State's post-1968 proof "reveals nothing about the electorate or whether the people would have enacted" present-

day Section 241 "without the consideration of race." App.82a; *see* App.79a-86a. At least, a "remand for factfinding" was needed. App.81a. Last, he said, "evidence of discriminatory impact is unnecessary" to establish an equal-protection violation. App.48a n.5.

REASONS FOR DENYING THE PETITION

The en banc court of appeals rejected petitioners' challenge to the Mississippi Constitution's present-day felon-disenfranchisement provision. That decision is correct, it does not implicate any circuit conflict, and this case is a poor vehicle for this Court's intervention. The petition should be denied.

I. The Decision Below Is Correct.

The court of appeals correctly upheld Section 241 on two independent grounds. App.13a-24a. Petitioners' contrary arguments, Pet. 22-27, 29-31, lack merit.

A. The Fourteenth Amendment recognizes that a State may deny citizens "the right to vote" "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. States may "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); *see id.* at 54. 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 otherwise have broad leeway to disenfranchise. *See*, *e.g.*, *Richardson*, 418 U.S. at 27, 53-56 (rejecting equal-protection challenge to California laws disenfranchising for a wide range of crimes).

Section 241 satisfies these standards. It denies "the right to vote" (U.S. Const. amend. XIV, § 2) for "some ... convicted felons" (*Richardson*, 418 U.S. at

53). It disenfranchises those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy." Miss. Const. art. XII, § 241. That is a reasonable choice of crimes. Each listed crime is very serious, probative of dishonesty or poor civic virtue, a traditional common-law crime whose gravity has long been recognized, a crime that has commonly triggered disenfranchisement—or a combination of these features. The listed crimes are facially neutral as to race. And Section 241 is the product of 1950 and 1968 constitutional enactments that—as the record reflects and as petitioners conceded—were not motivated by racial animus. App.16a-17a. Section 241 thus comports with the Constitution.

B. Petitioners claim that Section 241 violates the Equal Protection Clause because it is tainted by the racial animus behind the 1890 disenfranchisement provision. Pet. 22-27, 29-31. As the en banc court held, this claim fails for two independent reasons.

1. Petitioners' claim fails because the State's 1950 and 1968 enactments purged any taint from the 1890 law. App.13a-22a. "Critically," "[s]ince its invidious inception, Section 241 has been reenacted twice according to the state's procedures for enacting constitutional amendments." App.3a. In 1950, the State removed "burglary" from the list of disenfranchising crimes and re-adopted the rest of the list. App.3a & n.3. In 1968, "several significant changes were made to Section 241, including the addition of 'rape' and 'murder' as crimes resulting in denial of the franchise." App.4a. Those changes responded to the federal Civil Rights Commission's 1965 report faulting the State for parts of its voting laws that had been adopted for discriminatory reasons. App.5a. In 1950

and 1968, voters approved in its entirety the new list of crimes by majority vote and without improper purpose. App.3a-4a & nn.3-4, 16a-17a; *supra* pp. 3-5.

Petitioners argue that the decision below conflicts with *Hunter v. Underwood*, 471 U.S. 222. Pet. 22-27; *see also* App.47a-52a (Graves, J., dissenting). They are wrong. *Hunter* held unconstitutional as applied to misdemeanants a provision in Alabama's 1901 constitution that disenfranchised persons convicted of certain crimes, including "any crime ... involving moral turpitude." 471 U.S. at 223, 225. Against evidence that the 1901 provision was "enacted with the intent of disenfranchising blacks," Alabama argued that post-enactment events "had legitimated the provision." *Id.* at 229, 233. It noted that "in the succeeding 80 years," courts had "struck down" "[s]ome of the [law's] more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation." *Id.* at 233. This Court rejected the view that this judicial pruning of the law purged it of discriminatory taint. *Ibid. Hunter* does not help petitioners. Current Section 241 is not a result of mere judicial pruning. It is a result of the State's legislature and voters twice using the multi-stage amendment process to enact a new, different Section 241 that was not motivated by racial animus. App.13a-17a.

Petitioners say that it is wrong "to distinguish *Hunter* on the ground that" the State "reenacted" Section 241 for race-neutral reasons. Pet. 23; *see* Pet. 23-26. They say that voters were asked only "to approve or reject amendments that added or subtracted from the original list of disfranchising crimes," that the "votes presupposed that each one of the original disenfranchising crimes chosen in 1890 (save for burglary after 1950) would remain in the Constitution

regardless of how the vote turned out," and thus that no reenactment occurred. Pet. 24; *see* Pet. 24-25. Petitioners are wrong that there were no "reenactments" in 1950 and 1968. And even if their characterization were right, it would not help them.

The characterization is wrong because voters were not asked to approve or reject discrete proposals to add or drop crimes. In both 1950 and 1968 the legislature proposed a new Section 241 in full. Each time, the proposed Section 241 was substantively different from the existing version. In 1950 the legislature proposed dropping the exclusion for burglars. In 1968 it proposed excluding murderers and rapists (and removing improper parts of Section 241). Each time, voters were presented with and voted for the full new version. App.3a-4a & nn.3-4, 19a-20a; *see* App.111a-13a. After each vote, by operation of state law, "Section 241 as it existed [before] 'ceased to exist.'" App.20a (quoting *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 639 (Miss. 1991)).

Even if the 1950 and 1968 events were not "reenactments," it would not matter. This Court's precedent does not say that a State may cure a law of racial taint only by a "reenactment" or only by asking voters "whether they want[ ] to repeal the offending list of disfranchising crimes in its entirety." Pet. 25; *see* Pet. 25-26. Under this Court's precedent, adopting an amended law without discriminatory purpose defeats an equal-protection challenge. "Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). That burden is "not changed by a finding of past discrimination." *Ibid.* So when faced with sequential provisions adopted by different

bodies, a court must focus on the intent of the body that adopted the current, operative law—and "presume[ ]" that it acted in "good faith." *Ibid*. Whether classed as a "reenactment" or "amendment" (or something else), the provision at issue here is the one the 1950 and 1968 processes produced. Petitioners have conceded that they have no evidence that racial animus drove the 1950 and 1968 enactments. App.16a-17a. Although petitioners now say that "[i]t is inconceivable" that the legislatures of 1950 or 1968 could have acted to purge the taint of the 1890 constitution, Pet. 26, they still cannot identify any racism animating the 1950 or 1968 enactments. And the evidence on the 1968 enactment—which was adopted to address race-related flaws in the State's voting laws—defeats their view. App.5a-6a, 20a-21a.

Last, petitioners argue that a passage in *Abbott v. Perez* undermines the Fifth Circuit's view of *Hunter*. Pet. 26-27. Petitioners ignore most of *Abbott*, including the principles set out above. They focus on *Abbott*'s summary of *Hunter*. *Abbott* paraphrased *Hunter*'s conclusion that "amendments" to Alabama's 1901 provision "did not alter the [discriminatory] intent with which the article, including the parts that remained, had been adopted." 138 S. Ct. at 2325. Petitioners argue that the amendments to Section 241 likewise "did not—indeed they could not—remove the discriminatory taint from the 'parts that remained' unchanged from the original 1890 enactment." Pet. 27. But the "amendments" *Abbott* referred to were *judicial decisions* that over time pruned "[s]ome of the more blatantly discriminatory" parts of Alabama's law. *Hunter*, 471 U.S. at 233. Alabama as a State had not acted to purge its disenfranchisement law of animus. App.16a. But Mississippi repeatedly has done

what Alabama had not. Its legislature and voters revisited its provision and twice adopted a new law without any improper motivation. And numerous features of the selected crimes justify including them on the list. *Supra* p. 15.

2. Section 241 must stand for the independent reason that events of the mid-1980s show "that Section 241 would have been passed in its current form without racial motivation." App.24a; *see* App.22a-24a.

In 1984-1986, the State comprehensively and carefully assessed its voting laws and decided to retain Section 241 as it still stands. *Supra* pp. 5-6. No record evidence suggests that racial animus drove that process or decision. In 1984, a bipartisan and diverse Task Force "considered all aspects of voting in Mississippi, including the impact of any proposed revisions on minority communities." App.23a; *see* App.117a. It held public hearings, gathered information, and met with the U.S. Department of Justice. App.6a. It considered expanding Section 241's list of crimes but ultimately recommended leaving it "as is." App.23a. The legislature then conducted its own review, rejected a proposal to expand the list to include nearly all felonies, and instead adopted the Task Force's recommendation. App.6a-7a, 23a-24a. By overwhelming votes, lawmakers changed the State's election code to incorporate Section 241's list of crimes from the 1968 reenactment. App.24a; *supra* p. 6. The Department of Justice precleared that law. App.24a. This all shows that "Section 241 in its current form reflects purposeful and race-neutral contemplation." App.23a. Based on this unrebutted evidence, the en banc court concluded that "[i]t is hard to imagine a stronger showing that Section 241 would have been passed in its current form without racial motivation." App.24a.

Petitioners contend that "no actual evidence" supports the view that the 1984-1986 events "amounted to a silent affirmance of Section 241," Pet. 30, and that the en banc court improperly relied on "inaction," Pet. 29 (emphasis omitted). That claim ignores the extended deliberation and action the State took on the issues over many years. That action includes not just the 1980s events summarized above, but also the deliberative processes resulting in the 1950 and 1968 reenactments of Section 241. Petitioners have never provided evidence that racial animus drove any of those actions. And the evidence compelled the court's holding that Section 241 "would have been passed in its current form without racial motivation." App.24a.

Petitioners say that the en banc court drew "precisely the sort of negative inference from legislative inaction that this Court has repeatedly rejected as notoriously unreliable." Pet. 30; *see* Pet. 30-31. But the court was not using legislative inaction "to interpret statutes or regulations." App.23a. It was assessing "motivation": "whether Section 241 would have been enacted in its current form absent racial discrimination." *Ibid.* (citing *Hunter*, 471 U.S. at 228). History is relevant to establishing that motivation. *Abbott*, 138 S. Ct. at 2325 ("The historical background of a legislative enactment is one evidentiary source relevant to the question of intent.") (internal quotation marks omitted). The "legislative attention to Mississippi's election laws" after 1968 shows "that Section 241 was carefully evaluated before the legislature opted to leave it unchanged." App.23a. Petitioners elsewhere insist on the importance of historical context. Pet. 6, 14-15, 20, 21. And they are ready to draw conclusions from history when they find it helpful. The historical conclusions the en banc court drew are record-based

and correct. Petitioners have no basis to fault them, and their disagreement with this alternative holding is no reason to grant certiorari.

II. The Courts of Appeals Are United In Rejecting Petitioners' Position.

The decision below does not conflict with any appellate decision. Petitioners acknowledge that the Second and Eleventh Circuits have "ruled that enactment of a new criminal disfranchisement provision can cleanse the discriminatory taint of a prior provision." Pet. 18. Yet they contend that those decisions "highlight" the "inadequacy" of Mississippi's 1950 and 1968 enactments. Pet. 27; *see* Pet. 27-29. They are wrong. Both cases support the decision below and reveal deep problems in petitioners' position.

This case would come out the same way in both circuits to have addressed a similar challenge. In *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), the Eleventh Circuit upheld a 1968 Florida constitutional provision that disenfranchised all felons. *Id.* at 1217-27. The court "assume[d], without deciding," that racial animus motivated Florida's 1868 disenfranchisement law, which covered felons and those convicted of bribery, perjury, larceny, or other infamous crimes. *Id.* at 1221, 1223. But the State used a "deliberative process" to amend and reenact the provision in the 1960s without discriminatory intent. *Id.* at 1223, 1224. Starting in 1965 a legislatively appointed commission considered a range of amendments to the constitution, including on disenfranchisement, then proposed a modified provision that denied the vote only to felons. *Id.* at 1220-22. The legislature adopted that proposal and in 1968 voters approved a revised constitution, including the

modified disenfranchisement provision. *Id.* at 1222. Because there was no evidence that animus motivated the 1968 provision, the Eleventh Circuit held that its adoption "eliminated any taint" from the 1868 provision. *Id.* at 1224. The court relied (*see id.* at 1223-25) on the Fifth Circuit's decision in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998)—the decision the en banc Fifth Circuit adhered to here, App.1a.

In *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010), the Second Circuit upheld New York's 1894 disenfranchisement law against a claim that it was tainted by racial animus that infected disenfranchisement provisions in New York's 1821, 1846, and 1874 constitutions. *Id.* at 164-69. In 1894 the State used the constitutional-amendment process to "substantively change" the existing provision by making felon disenfranchisement mandatory rather than permissive for the legislature, while retaining the longstanding exclusion for felons. *Id.* at 167; *see id.* at 155-56. The plaintiffs did not allege that racial animus motivated the 1894 change. *Id.* at 159, 167. So the challenge to the 1894 provision failed. *Id.* at 167-69. The court relied on *Cotton* and *Johnson*. *See id.* at 166.

The decision here maintains the courts of appeals' "uniform approach." App.13a. As in *Johnson* and *Hayden*, the challengers here failed to show that the current law was enacted for discriminatory reasons. App.16a-17a; *Johnson*, 405 F.3d at 1224; *Hayden*, 594 F.3d at 167. Even if improper motivations tainted a prior version of the law, the State cured any taint by using state processes to amend and reenact its provision without discriminatory intent. App.4a, 17a-22a; *Johnson*, 405 F.3d at 1224; *Hayden*, 594 F.3d at 167. The changes in all cases were substantive. Florida "narrowed the class of disenfranchised individuals,"

Johnson, 405 F.3d at 1224; New York "change[d] how legislatures were permitted to consider, or no longer consider, whether felon disenfranchisement laws should be passed," *Hayden*, 594 F.3d at 167; and Mississippi narrowed the class of excluded felons (by dropping burglars) and then made "significant changes" by broadening that class (by adding murderers and rapists), App.4a; *see* App.3a-4a, 19a-20a. So the challenge failed in all three States.

Petitioners contend that "[t]he very thing that was determinative" in *Johnson* and *Hayden*—"an up or down vote on the entirety of the challenged constitutional provision" ("the opportunity to vote to replace an offending provision in toto")—"never occurred in this case." Pet. 27, 29; *see* Pet. 27-29. But that did occur here. In *Johnson*, in *Hayden*, and here, legislators or delegates proposed a revised disenfranchisement provision and voters had the choice to adopt that entire revised provision—or reject it to retain the existing one. *Johnson*, 405 F.3d at 1222; *Hayden*, 594 F.3d at 167; 3 Charles Z. Lincoln, The Constitutional History of New York 677-78 (1906) (describing New York process; treatise cited at *Hayden*, 594 F.3d at 155-56); App.3a-6a, 19a-20a. In each case voters had the same "opportunity" to "replace" or retain the existing provision "in toto," Pet. 27—and they had no opportunity to simply "remov[e]" the prior provision "*entirely*," Pet. 28.

For all petitioners try to say in favor of *Johnson* and *Hayden*, they reject the result in both cases. In *Johnson* voters amended Florida's law to cover only felonies rather than felonies plus some other crimes. 405 F.3d at 1221-22. In *Hayden*, New York law was changed only to require—not merely permit—the legislature to disenfranchise felons. 594 F.3d at 167. On

petitioners' view, neither change could "remove the discriminatory taint from the 'parts that remained' unchanged from the original ... enactment." Pet. 27. "[T]he voters were never asked whether they wanted to repeal" the tainted provision, Pet. 25, so each law should have fallen.

This all drives home the "novel," "radical[ ]" nature of petitioners' view. App.18a, 19a. On that, imagine that the State's 1950 and 1968 changes had not occurred and that instead in 1990, without any racial animus, the legislature had proposed and voters approved an expanded Section 241 that replaced the disenfranchising list with the words "any felony." That change would be substantive and significant. Yet on petitioners' view it would not free the law from the tainted 100-year-old enactment. The 1990 law would flunk petitioners' rule because voters had not "decide[d] whether to reenact or repeal Section 241 in its entirety." Pet. 21. In effect the blanket ban would just add more felonies to the 1890 list; it would not "g[i]ve the State's citizens the opportunity to reject or reenact the offending provisions of the original Section 241." Pet. 29. A court would have to condemn the 1990 voters despite no evidence that they acted based on racial animus. That is preposterous. It defies this Court's directive that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324. Yet that is petitioners' view. It is baseless, "radical[ ]," and outcome-driven—a bespoke rule tailored at every stitch to eke out a litigation victory. App.18a. No court of appeals has embraced it. This Court need not take this case to reject it too.

III. This Case Is Not A Sound Vehicle For This Court's Intervention.

Several further features make this case a poor vehicle for this Court's intervention.

First, the petition rests on a threshold view of the facts that the courts below rejected. Petitioners maintain that the en banc court made a clear error of fact about the 1950 and 1968 changes to Mississippi's constitution. *E.g.*, Pet. 5 (court's "rationale rests on a clear error of historical fact"); Pet. 6 (court "mischaracteriz[ed] the 1950 and 1968 amendments as 'reenactments' of the entirety of Section 241"); Pet. 7 (court embraced an "insupportable interpretation of straightforward historical facts"); Pet. 21 (court "blind[ed] itself to the undisputed historical fact that the" amendment process "did not permit voters to decide whether to reenact or repeal Section 241 in its entirety"); Pet. 34 (court "grievously erred" by "flouting undisputed historical fact").

Putting aside that petitioners' view of the facts is wrong, *supra* Part I, their heavy reliance on that view drives home the risk that this Court would be unable to reach any important legal question in this case. *Contra* Pet. 33-34. Petitioners' claim of factual error is a threshold assertion. It must be resolved—in petitioners' favor—to reach the legal question that they ask this Court to decide. And any alleged error on that threshold issue is not "clear" or "undisputed." Pet. 5, 21, 34. The en banc court, the three-judge panel, and a chief district judge rejected petitioners' view, App.17a-20a, 96a, 110a-14a, which concerns events in their home circuit (and embeds issues of state law, *see* App.20a). This Court should not grant review in a case whose importance rests not just on a threshold

factual question but also on a view of that question that the lower courts so decisively rejected.

Second, this Court's intervention would not affect this case's outcome. The en banc court held that even if racial animus still tainted Section 241 after 1968, the State in the 1980s eliminated the taint. App.22a-24a; *supra* Part I. The decision below thus rests on an alternative, independent ground that petitioners' question presented ignores. Their question presented concerns only the 1950 and 1968 changes. Pet. i. Prevailing on that question would not help them because they have not asked this Court to resolve any question on the alternative holding. To the extent that the petition addresses this holding, it makes the conclusory and insupportable claim that "no actual evidence" supports the holding. Pet. 30; *see* Pet. 29-31. But ample evidence supports it. App.22a-24a; *supra* pp. 5-6. Petitioners' dismal, ostrich-like response on this holding confirms that this case is a poor vehicle.

And petitioners would lose even without that holding because Section 241 is valid for another independent reason: it has no discriminatory effect. App.27a (Ho, J., concurring in part and in judgment). Petitioners claim that "there is no need" to prove discriminatory effect "where, as here, direct proof of discriminatory intent is overwhelming." Pet. 32; *see* Pet. 31-32. That is doubly wrong. Petitioners failed to establish discriminatory intent behind current Section 241. *Supra* Part I. And they must show discriminatory effect. "[O]rdinary equal protection standards" require showing "discriminatory effect and ... discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *contra* App.48a n.5 (Graves, J., dissenting). *Hunter* thus condemned Alabama's 1901 law because it "was motivated by a desire to discriminate

against blacks on account of race *and the section continues to this day to have that effec*t." 471 U.S. at 233 (emphasis added). Petitioners fail to show discriminatory effect. They compare the population disenfranchised by Section 241 to the general voting-age population. Pet. 32-33. But equal-protection principles require comparing those "similarly situated." *Armstrong*, 517 U.S. at 465; *id.* at 467 ("Our holding [in *Hunter*] was consistent with ordinary equal protection principles, including the similarly situated requirement."). The relevant comparison is between the population disenfranchised by Section 241 and the population of Mississippi *felons*. App.33a (Ho, J.). Petitioners have never argued that Section 241 disproportionately disenfranchises black Mississippians compared to a blanket felon-disenfranchisement law. App.30a (Ho, J.). So they cannot show that Section 241 "produces disproportionate effects along racial lines." *Hunter*, 471 U.S. at 227.

Last, this case does not present the question the petition identifies. Petitioners ask this Court to resolve the question whether "*any* amendment" to a law originally adopted for improper race-based reasons, "*no matter how minor* the amendment and *no matter the historical context*," cleanses the law of its discriminatory origins unless the party challenging the law can prove that the amendment was motivated by racial animus. Pet. i (emphases added). But even if this case involved only "amendments," it does not involve just "any," "minor" amendments. As of 1968, murderers and rapists cannot vote in Mississippi. Those changes—and "several" others—are "significant." App.4a; *supra* pp. 4-5. Petitioners cannot evade that reality by ignoring it or by purporting not to challenge the addition of murder and rape. And the en banc

court accounted for "historical context." The court appreciated the layered nature of that context—and the notable absence of evidence that in 1968 the State adopted Section 241 with a racially discriminatory purpose. Petitioners "provided no evidence" that the legislature and voters acted "with invidious motives" in 1968, App.17a—and the evidence "tends to support the opposite proposition," App.21a. If Mississippi had been as flawed as petitioners so enthusiastically claim, they should have been able to come up with some evidence of racial animus in the decades since *Cotton*. That they still have nothing says much.

Petitioners cannot paper over these problems by arguing that "[t]he same reasons that supported the grant of certiorari in *Hunter* support review here." Pet. 33; *see* Pet. 6-7, 33-34. In *Hunter* this Court did not grant certiorari. It decided an appeal of right from a decision invalidating a state constitutional provision. *Hunter v. Underwood*, 469 U.S. 878 (1984) (noting probable jurisdiction); 28 U.S.C. § 1254(2) (1982). This case is not on the same footing. The decision below upholds a state law, is subject to discretionary review, and flunks the traditional certiorari criteria. This Court had to decide *Hunter* even though—as the Court unanimously held—the court of appeals was right. The en banc court was right here too, and this Court should let that decision stand.

CONCLUSION

The petition should be denied.

Respectfully submitted.

LYNN FITCH
Attorney General
WHITNEY H. LIPSCOMB
Deputy Attorney General
SCOTT G. STEWART
Solicitor General
Counsel of Record
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
scott.stewart@ago.ms.gov
(601) 359-3680

Counsel for Respondent

January 3, 2023