In the United States Court of Appeals for the Fifth Circuit

Case. No. 19-60662

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

Plaintiffs-Appellees,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant,

CONSOLIDATED WITH

Case No. 19-60678

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

Plaintiffs-Appellees Cross-Appellants,

v.

SECRETARY OF STATE MICHAEL WATSON, in his official capacity,

Defendant-Appellant Cross-Appellee.

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

BRIEF OF REASON FOUNDATION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION & ACLU OF MISSISSIPPI AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that—in addition to the persons and entities identified in the party briefs in this case—the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Reason Foundation

American Civil Liberties Union Foundation

American Civil Liberties Union of Mississippi

I hereby certify that I am aware of no persons or entities with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and amicus briefs filed in this case.

Dated: December 6, 2023

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations with strong and sometimes-divergent perspectives on important national issues who nevertheless agree with respect to the issue presented in this case. Amici thus join together to urge the invalidation of Mississippi's mandatory lifetime disenfranchisement scheme.

Reason Foundation (Reason) is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing the critically acclaimed Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org. To further Reason's commitment to "Free Minds and Free Markets," Reason has participated as *amicus curiae* in numerous cases raising significant legal and constitutional issues.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with 1.7 million

[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in any part and no person other than *amici* funded the preparation and submission of this brief.

members, dedicated to the principles of liberty and equality embodied in this nation's Constitution. The ACLU has frequently participated as counsel and/or *amicus curiae* in cases involving voting rights and electoral democracy, including *Allen v. Milligan*, 599 U.S. 1 (2023); *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019); and *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

The American Civil Liberties Union of Mississippi (ACLU of MS) is a statewide nonprofit, nonpartisan organization with nearly 1500 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. A core mission of the ACLU of MS is fighting to ensure the criminal legal system operates fairly and justly and to ensure a bedrock of democracy, voting, is protected.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Mississippi's lifetime felon disenfranchisement scheme is unique. The attributes that make it unique support the conclusion that this particular scheme is cruel and unusual in violation of the Eighth Amendment.

Mississippi's lifetime disenfranchisement provision was instituted in 1890 with the explicit purpose of excluding Black citizens from the political process and restricting their voting power. The taint of invidious racial discrimination, ingrained in Mississippi's lifetime voting ban and reflected even today in its disparate effects and largely unchanged form, support the conclusion that this particular scheme is cruel and unusual. The Eighth Amendment is centrally concerned with harms to human dignity, which include the dignitary harms to the individual and to society that flow from state-imposed discrimination.

Mississippi law also conspicuously lacks any non-arbitrary, accessible process for citizens who have served their sentences to regain the franchise. Instead, it requires a super-majority vote of both houses of the legislature for re-enfranchisement. As a result, Mississippi's voting ban is mandatory, permanent, and effectively irrevocable—even

for certain minor offenses that require no period of incarceration. Mandatory and irrevocable punishments are especially likely to violate the Eighth Amendment due to their inherent disproportionality. The severity, arbitrariness, and irrevocability of Mississippi's particular lifetime voting ban also support the conclusion that it is cruel and unusual.

As a result of these features, Mississippi's lifetime disenfranchisement scheme stands alone among the 50 states. No other state, in the South or elsewhere, still maintains a disenfranchisement scheme so openly originating in Jim-Crow discrimination. Almost no other state has a scheme this severe and irrevocable. Indeed, the national consensus among the states—another salient Eighth Amendment consideration—is towards expanding and regularizing re-entry into civic life for those who have served their time, to the benefit of the individual and society.

Based on the unique elements of this particular irrevocable lifetime voting ban, the Court can and should conclude that the challenged scheme is cruel and unusual in violation of the Eighth Amendment.

ARGUMENT

The Eighth Amendment guarantees that "cruel and unusual punishments" shall not be inflicted. U.S. Const. amend. VIII. In determining whether a particular punishment is cruel and unusual, courts consider central guidelines like personal dignity and disproportionality, including by examining "objective indicia of national consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Ultimately, courts also must exercise "independent judgment" to determine whether the specifics of *this particular* scheme violate the Constitution. *Id.* at 61.

Mississippi's severe, lifetime disenfranchisement scheme is cruel and unusual. Its historical origins in noxious, intentional racial discrimination offend the dignity of the individual and society. Its mandatory nature and lack of an accessible, non-arbitrary path to re-entry make it functionally irrevocable—even for minor offenses that carry short terms of imprisonment, like writing a bad check for $100—and thus grossly disproportionate. And these features help make Mississippi's lifetime voting ban unique among the 50 states. This Court need not make new Eighth Amendment law to strike down Mississippi's disenfranchisement scheme.

I. The Explicitly Racist Origins and Continuing Effects of Mississippi's Lifetime Disenfranchisement Scheme Enhance Its Cruelty.

Mississippi's lifetime disenfranchisement scheme was enacted for the expressly racist, discriminatory purpose of suppressing Black voters. It remains effective at achieving that original aim. While this Court determined in *Harness* that subsequent amendments to the State's disenfranchisement scheme meant that the statute does not violate the Equal Protection Clause, the Eighth Amendment claims at issue in this case require a distinct analysis.

Unlike the Equal Protection Clause, which looks to whether the legislature had discriminatory intent at a particular moment in time—the Eighth Amendment considers whether the punishment at issue is cruel and unusual, *today*. Here, imposing Mississippi's lifetime voting ban, in substantially unchanged form, not only deprives Mississippians of their right to vote, but also causes dignitary harms—a key Eighth Amendment concern—that enhance the cruelty of the scheme's continued application.

A. The Eighth Amendment Is Fundamentally Concerned with Dignitary Harms—and Racial Discrimination Causes Dignitary Harm.

In considering whether a particular punishment is cruel and unusual in violation of the Eighth Amendment, the dignitary harms that punishment inflicts are of paramount concern. The "human dignity inherent in all persons" "animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *E.g.*, *Brown v. Plata*, 563 U.S. 493, 510 (2011) (internal quotation marks omitted); *accord Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("The [Eighth] Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency") (internal quotation marks omitted).

This protection for "the dignity of all persons" "reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Fla.*, 572 U.S. 701, 708 (2014). Consistent with that, punishments that constitute an affront to individuals' dignity—even things like "taunting" and "humiliation" from prison officials in certain instances, for example—can help establish an Eighth Amendment violation. *E.g.*, *King v. Rubenstein*, 825 F.3d 206, 219 (4th Cir. 2016).

The Eighth Amendment's central focus on dignitary harm is relevant here because intentional racial discrimination inflicts serious harms on personal dignity. Racial discrimination, such as a law designed to target individuals based on their race, "demeans the dignity and worth of a person," judging them "by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *accord Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 220 (2023).[2] And the noxious social effects of intentional discrimination amplify dignitary and stigmatic harms by "pit[ting] the races against one another, exacerbat[ing] racial tension, and 'provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'" *Parents Involved*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (opinion of Thomas, J.)).

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[2] *See also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007); *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 834 (7th Cir. 2019) ("[S]tigmatic injury is 'one of the most serious consequences' of discrimination." (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984))); *James v. Cir. City Stores, Inc.*, 370 F.3d 417, 420 (4th Cir. 2004) ("Racial discrimination . . . is a fundamental injury to the individual rights of a person." (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987))).

B. The Noxious Origin and Continuing Effects of Mississippi's Scheme Cause Dignitary Harm and Enhances the Scheme's Cruelty.

The indelible stain of invidious racial discrimination inherent in Mississippi's lifetime voting ban continues to inflict dignitary and substantive harms, which enhance its cruelty as a punishment.

Mississippi's mandatory lifetime disenfranchisement scheme was intentionally contrived to exclude Black Mississippians from political and civic life. *See Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc). As this Court recounted, the State's infamous 1890 constitutional convention—at which Sections 241 and 253, the provisions at issue in this case, were enacted—"was steeped in racism and . . . 'motivated by a desire to discriminate against blacks . . . .'" *Id.* (quoting *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)); *see id.* at 312 (Ho, J., concurring in part and in the judgment) ("[T]he history of felon disenfranchisement in the State of Mississippi is indisputably tainted by racism"). The convention's president openly boasted that the gathering's explicit purpose was "to exclude the Negro," and its delegates identified their "chief duty" as "maintain[ing] a home government, under the control of the white people of the State." *Harness*, 47 F.4th at 318

(Graves, J., dissenting) (internal quotations omitted). Mandatory lifetime disenfranchisement—implemented through Sections 241 and 253—was a primary method of achieving this goal. *See id.* at 316 (Elrod, J., dissenting) (recognizing that because the convention could not explicitly discriminate against Black people, legislators relied on facially neutral disenfranchisement schemes).

Since 1890, Section 241 has automatically and permanently disenfranchised voters who commit certain enumerated crimes that were specifically chosen because legislators subscribed to stereotypes associating Black people with those crimes. As drafted, Section 241 included only "furtive offenses" as disenfranchising offenses—namely, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, and bigamy—based on the drafters' perception that "patient, docile" Black people were more inclined to commit those over "the robust crimes of the whites." *Ratliff v. Beale*, 20 So.. 865,, 868 (1896); *see* Miss. Const. art. XII, § 241 (1890). In other words, Mississippi "cherry-picked felonies" for inclusion within Section 241's lifetime voting ban "with the deliberate, explicit, and noxious purpose" of suppressing the Black vote. *Harness*, 47 F.4th at 313 (Ho, J.,

concurring in part and in the judgment) (citing *Cotton*, 157 F.3d at 388, 391).

To assuage fears that Section 241 might inadvertently disenfranchise poor white men, the delegates devised safety valves. Chief among these was the suffrage restoration process in Section 253, which grants the State Legislature unfettered discretion to restore a person's right to vote on a two-thirds vote. *See* ROA.19-60662.1794; Miss. Const. art. XII, § 253. Though drafted as separate provisions, Sections 241 and 253 were intended to operate as a singular scheme, in service of a single invidious purpose.

In 1896, the Mississippi Supreme Court acknowledged as much: obstructing the Black franchise was the "consistent, controlling directing purpose governing the convention by which [these disenfranchisement] schemes were elaborated and fixed." *Ratliff*, 20 So. at 868. And Section 241 today is largely untouched, save for two amendments since 1890: first in 1950, when "burglary" was removed from the list of disenfranchising crimes, and then in 1968, when "rape" and "murder" were added. *See Harness*, 47 F.4th at 300–301. Even so, after 133 years, Section 241 is remarkably similar in form to the law as originally enacted in 1890.

And Sections 241 and 253 remain remarkably effective at disenfranchising Black Mississippians. Between 1994 and 2017, over 29,000 Mississippians who were convicted of disenfranchising offenses completed their sentences. ROA.19-60662.1771. Of these individuals, 58% are Black, *id.*, despite the fact that, during this time frame, only around 37% of Mississippi's total population was Black, *see* U.S. Census Bureau., *2010 Census: Mississippi Profile* (last visited Dec. 6, 2023), https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Mississippi.pdf. Today, more than 15% of Black adults in Mississippi are permanently disenfranchised—an indication of Section 241's continued effectiveness at achieving its original aims.[3]

The history behind Mississippi's lifetime disenfranchisement scheme, and its continued effects today, have special resonance in the Eighth Amendment context. In *Harness*, this Court rejected a challenge to Section 241 brought under the Equal Protection Clause. The Court

[3] *See* Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, The Sentencing Project (Oct. 25, 2022), https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/.

concluded that "[i]f Section 241 had never been amended, the provision would violate the Equal Protection Clause pursuant to *Hunter* [*v. Underwood*, 471 U.S. 222, 233 (1985)]," which invalidated a similar provision in Alabama law. *Harness*, 47 F.4th at 300. But because the provision had been twice amended through a deliberative process "[s]ince its invidious inception," the discriminatory taint from its framers' purpose in 1890 "ha[d] been cured" for Equal Protection Clause purposes. *Id.* at 300, 303; *see also id.* at 307 (it is "the most recent enactment . . . that must be evaluated under the Equal Protection Clause").

Harness's focus on legislative intent within the operative lawmaking process is in keeping with the seminal *Arlington Heights* framework, which governs Fourteenth Amendment intentional discrimination claims, such as those at issue *Harness* and similar cases.[4] The *Arlington Heights* inquiry is principally concerned with "[l]egislative

[4] In particular, the Court in *Harness* looked to a number of recent Equal Protection cases holding that, in some cases, "a subsequent legislative re-enactment can eliminate the taint from a law that was originally enacted with discriminatory intent" if "the law was re-enacted through a deliberative process." *Thompson v. Sec'y of State of Ala.*, 65 F.4th 1288, 1298 (11th Cir. 2023) (internal quotation marks omitted); *see also Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005); *Cotton*, 157 F.3d at 391.

motivation or intent" in enacting the challenged policy. *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (quoting *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000)). Such Equal Protection claims thus focus on the relevant legislative process to determine the nature of the violation. *Id.* at 230–31. Indeed, the core *Arlington Heights* factors center around this question of discerning intent via examining the legislative process, including "the specific sequence of events leading up to the decision," "departures from the normal procedural sequence," "the historical background of the decision," and "legislative history." *Id.* at 231 (internal quotation marks omitted).

But the *Arlington Heights* framework does not govern in this case. While the Fourteenth Amendment is concerned with legislative purpose and process, the Eighth Amendment's focus is on the nature of the harm imposed by a challenged scheme.[5] The Eighth Amendment inquiry asks

[5] The Eighth Amendment and the Fourteenth Amendment differ in numerous ways, emphasizing the distinctness of the two analyses. For example, while disproportionate effects alone are insufficient to prove racial discrimination in violation of the Equal Protection Clause, *see Washington v. Davis*, 426 U.S. 229, 239 (1976), prohibiting "disproportionate punishment is the central substantive guarantee of the Eighth Amendment," *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). Further, although an "abstract stigmatic injury" is not cognizable under

whether the continued imposition of a lifetime, mandatory voting ban with no meaningful prospect of relief, that is rooted in noxious and intentional racial discrimination and continues to have disproportionate racial effects, is a cruel and unusual form of punishment. Even if the procedure used to amend the Section 241 was free from evidence of renewed discriminatory intent, *see Harness*, 47 F.4th at 309, Section 241 remains largely unchanged from its original enactment in 1890 (and its companion provision, Section 253, is untouched).

The Eighth Amendment's emphasis on the dignitary implications of punishment allow for consideration of the "continued hurt and injury," *Students for Fair Admissions*, 600 U.S. at 221 (internal quotation marks omitted), that comes from the imposition of lifetime disenfranchisement under a scheme originally designed for the express purpose of excluding Black Mississippians from civic life. The dignitary harms from Mississippi's disenfranchisement regime flow unabated—and they support the conclusion that this lifetime ban on voting, rooted in invidious and brazen discrimination, is unconstitutionally cruel.

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the Equal Protection Clause, *Allen*, 468 U.S. at 755, such dignitary injuries implicate "[t]he basic concept underlying the Eighth Amendment," *Brown*, 563 U.S. at 510.

II. The Mandatory Nature of Mississippi's Lifetime Disenfranchisement Scheme and the Lack of Any Meaningful Process for Rights Restoration Enhance the Scheme's Cruelty.

Mississippi law provides no meaningful system for individuals to re-enter civic life once they are subjected to Section 241's mandatory, lifetime voting ban. The essentially irrevocable nature of Mississippi's lifetime disenfranchisement scheme, and the arbitrary, illusory process by which a person's rights may theoretically be restored, create serious risks of disproportionate punishment, which offends "the central substantive guarantee of the Eighth Amendment." *Montgomery*, 577 U.S. at 206. Those features support the conclusion that Mississippi's scheme is cruel and unusual.[6]

[6] The panel disagreed with the district court's conclusion that plaintiffs have standing to challenge Section 253. *See Hopkins v. Hosemann*, 76 F.4th 378, 395 (5th Cir.), *reh'g en banc granted, opinion vacated*, 83 F.4th 312 (5th Cir. 2023). *Amici* take no position on that standing issue with respect to a direct challenge to Section 253. But the fact that state law provides for no effective, non-arbitrary means of rights restoration (whether through legislative reinstatement, executive action, or otherwise) is independently relevant to the question the cruelty and unusualness of Section 241's mandatory disenfranchisement scheme.

A. Mandatory and Irrevocable Punishments Are More Likely to Offend the Eighth Amendment's Protection Against Disproportionate Punishment.

"The concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. Particularly when a challenge involves a punishment that "applies to an entire class of offenders who have committed a range of crimes," the Eighth Amendment requires a case-specific inquiry into "the severity of the punishment in question" as compared to "the culpability of the offenders at issue in light of their crimes and characteristics." *Graham*, 560 U.S. at 61, 67; *see Pulley v. Harris*, 465 U.S. 37, 42–43 (1984).

Mandatory punishments are more likely to be cruel because they inherently carry a higher risk of disproportionality. Such penalties, "by their nature," fail to "tak[e] account of" specific characteristics of the offender or circumstances of the offense and, therefore, pose a greater "risk of disproportionate punishment." *Miller v. Alabama*, 567 U.S. 460, 476, 479 (2012).[7]

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[7] The point is not that the mandatory nature of a punishment *standing alone* renders it unconstitutional. *See Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991). But the fact that it is mandatory increases the odds of disproportionate punishment and the likelihood that the

Punishments are also more likely to be unconstitutionally cruel when they are irrevocable. Although permanent disenfranchisement is undoubtedly in a different category of punishment than life without parole or capital punishment, the Supreme Court's reasoning when addressing Eighth Amendment challenges to those punishments is instructive. In *Graham*, the Court reasoned that life without parole is a particularly harsh punishment, in part, because "the sentence alters the offender's life by a forfeiture that is irrevocable," such that it "deprives" individuals of "basic liberties without giving hope of restoration." 560 U.S. at 69–70.[8]

Given the danger posed by mandatory, irrevocable punishments, the Supreme Court has frequently emphasized the importance of

scheme as a whole is unconstitutionally cruel and unusual. *See Miller*, 567 U.S. at 476, 479; *see also Harmelin*, 501 U.S. at 994.

[8] The Supreme Court has raised similar concerns regarding irrevocable punishments in the context of other constitutional rights. For example, in *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court held that the Due Process Clause required heightened procedural protections before a state could terminate parental rights due to neglect. The Court emphasized that—unlike "juvenile delinquency adjudications, civil commitment, deportation, and denaturalization," which "are all *reversible* official actions"—"a New York decision terminating parental rights is *final* and irrevocable," and "[f]ew forms of state action are both so severe and so irreversible." *Id.* at 759.

meaningful review of such punishments in the Eighth Amendment context. Some form of individualized "proportionality review" "serves as a check against the random or arbitrary imposition" of disproportionate punishment. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *see Walker v. Georgia*, 555 U.S. 979, 982 (2008) (Stevens, J., respecting denial of petition of writ of certiorari) (indicating that "a thorough proportionality review . . . mitigate[s] the heightened risks of arbitrariness and discrimination"); *Proffitt v. Fla.*, 428 U.S. 242, 250, 253 (1976) (denying Eighth Amendment challenge to Florida's death penalty scheme, in part, because "[t]he statute provide[d] for automatic review by the Supreme Court of Florida," which "assure[d] that the death penalty will not be imposed in an arbitrary or capricious manner").

Accordingly, the mere formal availability of a reconsideration process "does not mitigate" the cruelty of a punishment; rather, it matters whether such review is arbitrary in nature or ineffectual in practice. *Graham*, 560 U.S. at 69–70 (explaining that the formal availability of relief through discretionary "executive clemency" was a "remote possibility" that "does not mitigate the harshness of the sentence"); *cf. Gregg*, 428 U.S. at 205 (emphasizing that "[i]t is apparent that the

Supreme Court of Georgia has taken its review responsibilities seriously"). In many contexts, courts view unfettered governmental discretion over protected rights with intense suspicion. *See, e.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (explaining that the Constitution "prohibits the vesting of . . . unbridled discretion in a government official").[9] To matter for Eighth Amendment purposes—that is, to provide comfort that a severe, lifetime, mandatory punishment is not cruel and unusual—there must some real, effectual review process, and it must be performed with "rationality and consistency." *See Proffitt*, 428 U.S. at 258–59.

There is no such process with respect to Mississippi's lifetime disenfranchisement scheme.

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[9] *See, e.g.*, *Forsyth Cnty.*, 505 U.S. at 133 (identifying First Amendment violation when provision had "no articulated standards" and "[t]he administrator [wa]s not required to rely on any objective factors"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (identifying a "long line of precedent" that establishes the Court's skepticism of "placing unbridled discretion in the hands of a government official or agency"); *United States v. Atkins*, 323 F.2d 733, 740 (5th Cir. 1963) (enjoining use of standardless voter registration test, which posed a "cognizable danger" of "discrimination" due to broad discretion given to registrars, "the lack of any standards whatsoever," and the "failure to keep any record of the exact reason for rejection").

B. Mississippi's Lifetime Disenfranchisement Scheme Is Mandatory and Effectively Irrevocable, Enhancing Its Cruelty

Section 241 is mandatory; it automatically and permanently revokes the voting rights of people convicted of enumerated felonies, no matter how minor, without consideration of whether that punishment is justified by the facts of their case, or proportional to the underlying offense. *See* Miss. Const. art. XII, § 241. And unsurprisingly, the mandatory scheme results in disproportionate punishments: someone convicted of writing a bad check is subject to the same mandatory lifetime disenfranchisement as someone convicted of premeditated murder. *See id.*; Miss. Code. §§ 97-19-67(1)(d), 97-3-19.

In addition, disenfranchisement under Section 241 is effectively irreversible. Although state law ostensibly offers a few "safety valves" for rights restoration, their use is so infrequent and arbitrary as to be effectively meaningless. Accordingly, affected individuals lack any accessible, non-arbitrary process to contest or overcome their lifetime voting bans and fully re-enter civil life.

The main formal safety valve for Mississippi's lifetime disenfranchisement scheme is legislative reinstatement under Section

253 of the Mississippi Constitution. That provision establishes that "[t]he Legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime . . . ." Miss. Const. art. XII, § 253. The provision was enacted expressly for the purpose of permitting disqualified white people to be re-enfranchised. Section 253 was added to the 1890 Constitution as part of a collection of provisions, including Section 241, meant to "maintain a home government, under the control of the white people of the State.'" ROA.19-60662.1948, 2291; *see also Ratliff*, 20 So. at 868 (concluding that "obstruct[ing] the exercise of the franchise by the negro race" was the "controlling directing purpose governing the convention"). The provision's discriminatory pedigree—in operation with Section 241—is well settled.

Section 253 was "designed as [a] safety net[]" for any "white men" who "might be ensnared" unintentionally by Section 241's disenfranchisement provision. ROA.19-60662.1793-1794; *see* ROA.19-60662.1816-1817. Accordingly, delegates to the state's 1890 constitutional convention did not dictate any objective criteria to govern the legislature's decision to restore a person's voting right. Instead, they

gave the legislature unfettered discretion to decide whom to welcome back into the electorate. ROA.19-60662.1817. That standardless safety net, enacted with racially discriminatory intent to benefit white people with disqualifying convictions, has never been amended. ROA.19-60662.1992.

Unbounded discretion is on display at every step of the prolonged, labyrinthine legislative process that a disenfranchised person must navigate to obtain a reprieve. *See* ROA.19-60662.3116-3117 (describing steps of legislative restoration process).[10] A disenfranchised individual must first convince a State Representative or Senator to write and sponsor an individualized suffrage bill. If they successfully obtain sponsorship, their suffrage bill must then be introduced in the respective chamber's Judiciary B Committee, at which point the committee chair has discretion to determine whether to allow a vote on the bill or simply let it die. If a vote moves forward, the bill must be approved by the committee. If the bill manages to pass out of committee, it must then be approved by a two-thirds supermajority of the full initial chamber. *See*

[10] *See also* ACLU of Miss., *Voting Rights Restoration Project*, (last visited Dec. 6, 2023), https://www.aclu-ms.org/en/campaigns/voting-rights-restoration-project.

Miss. Const. art. XII, § 253.[11] Assuming the suffrage bill makes it this far, it then faces the same discretionary committee approval and two-thirds vote requirement in the second legislative chamber. No voice votes or unanimous consent are allowed; rather, Section 253 specifies that legislators must vote publicly, up or down, on an individual rights restoration measure. *Id.* If any suffrage bill makes it through this process, it is further subject to another discretionary chokepoint: the Governor's veto pen.

This process would be exceedingly difficult to navigate for a well-resourced, professional lobbying firm. For disenfranchised individuals trying to re-enter society, it is a mirage. In the 2023 legislative session, zero suffrage bills were passed. Senator Joey Fillingane, the chairman of the Senate Judiciary B Committee, explained that he did not bring the individual suffrage bills up for a vote "because he did not think he could garner the two-thirds majority needed to pass each bill." Bobby Harrison, *Legislature Restores No Voting Rights During 2023 Session*, Miss. Today,

[11] This constitutionally required two-thirds supermajority for restoring a single person's right to vote is the same steep threshold required for the legislature to propose an amendment to the state constitution, *see* Miss. Const. art. XV, § 273.

Apr. 4, 2023, https://mississippitoday.org/2023/04/04/no-voting-rights-restored-2023-session/. He reasoned that "[i]t seemed like there was not enough support," so "[i]nstead of embarrassing anyone by calling them up and having them defeated, we decided not to call them up." *Id.*

The results speak for themselves. Even though Section 241 disenfranchises tens of thousands of Mississippians, between 2013 and 2018, the Mississippi Legislature restored the right to vote to just 18 individuals. ROA.19-60662.1922-1924. Such review cannot be considered "meaningful" by any standard. *Cf. Proffitt*, 428 U.S. at 251, 253 (emphasizing that "meaningful" review of death sentences led to vacating nearly forty percent of sentences reviewed). Despite these miniscule numbers, the Mississippi Office of the Attorney General has described legislative reinstatement as the "[m]ost common way to have one's suffrage restored." Office of the Attorney General, *Re: Disenfranchising Convictions*, 2000 WL 1511821, at *1 (Miss. Aug. 25, 2000).

The two other theoretical methods of rights restoration are even less practically viable. One is under a 1948 law providing restoration for persons who "served honorably in any branch of the armed forces of the

United States during the periods of World War I or World War II" after their conviction and "received an honorable discharge." Miss. Code. Ann. § 99-19-37(1). That class of eligible individuals is now closed and has been for 77 years.

A second, similarly illusory restoration method is through executive action—either a gubernatorial pardon, *see* Miss. Const. art. V, § 124, or an executive order restoring voting rights, *see* Miss. Code. Ann. § 47-7-41. But much like legislative reinstatement, a Governor's clemency determinations are entirely arbitrary and discretionary. Former Governor Phil Bryant didn't grant any pardons in his entire eight-year tenure in office. *See* Ross Adams, *"I Will Not Pardon Anyone," Bryant Says*, WAPT16, November 13, 2019, https://www.wapt.com/article/karen-irby-seeks-pardon-in-crash-that-killed-couple/29783865# ("I'm not considering any pardons. I don't intend to have one pardon before I leave (as) governor, or after. I will not pardon anyone."). Current Governor Tate Reeves hasn't granted any either. *See* Wicker Perlis, *Tate Reeves Issues His First Ever Pardon as Governor, to a Turkey*, MISS. CLARION LEDGER, Oct. 22, 2022,

https://www.clarionledger.com/story/news/2022/10/21/governor-tate-reeves-pardons-mississippi-ahead-of-thanksgiving/69578763007/.

Mississippi's scheme thus imposes permanent and effectively irrevocable disenfranchisement for a broad range of felony offenses, including very minor ones that don't result in custodial sentences. Far from an effectual or rational process of rights restoration, Section 253 merely tantalizes, ostensibly offering a formal mechanism for rights restoration that is ever out of reach in practice. *Cf. Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (upholding finding of Eighth Amendment excessive bail violation when officer "manipulated the bail level to a cruelly tantalizing figure just out of appellee's reach"). The deprivation of the fundamental civil right to participate in political life, on a permanent basis without any effectual or rational process of restoration, creates grave risks of disproportionality and further supports the conclusion that the challenged scheme violates the Eighth Amendment.

III. Mississippi's Lifetime Disenfranchisement Scheme Is an Unusual Outlier.

To determine whether a punishment is cruel and unusual, courts also consider "objective indicia of society's standards, as expressed in

legislative enactments and state practice, to determine whether there is a national consensus against the . . . practice at issue." *Graham*, 560 U.S. at 61 (internal quotation marks omitted). "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 62 (cleaned up). On that score, Mississippi's mandatory, effectively permanent system of disenfranchisement is also uniquely unusual.

Mississippi's scheme is unusual in its severity. Until recently, only four other states—Florida, Iowa, Kentucky, and Virginia—still imposed lifetime disenfranchisement upon conviction of a single felony. All four states have since abolished permanent felony disenfranchisement, re-enfranchising more than two million previously disenfranchised individuals in the process[12] and making Mississippi's scheme even more of an outlier.

Mississippi's scheme is also unusual in preserving a form of punishment that is clearly and definitively rooted in express racial

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[12] Nicole D. Porter, et al., *Expanding the Vote: State Felony Disenfranchisement Reform*, The Sentencing Project (October 18, 2023), https://www.sentencingproject.org/reports/expanding-the-vote-state-felony-disenfranchisement-reform-1997-2023/.

animus. *Amici* are aware of *no* other state felony disenfranchisement laws or constitutional provisions still operative despite a federal court concluding that they were originally enacted with "racist motivation," as this *en banc* Court did in *Harness*, 47 F.4th at 306.[13] The continued stain of invidious racial discrimination makes Mississippi's lifetime voting ban an unusual punishment—there is no other like it in the Nation.[14]

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[13] Such a finding of racial animus is an extraordinarily high bar. For example, the *en banc* Eleventh Circuit in *Johnson* determined that Florida's felony disenfranchisement law was not rooted in racial animus despite having "no[] doubt that racial discrimination may have motivated certain other provisions in Florida's 1868 Constitution such as a legislative apportionment scheme that diminished representation from densely populated black counties," and despite the fact that one of the state's political "leaders stated in 1872 that he had kept Florida from becoming 'n*****ized'" by expanding the felony disenfranchisement law. *Johnson*, 405 F.3d at 1219 & n.10; *see also* Tim Elfrink, *The long, racist history of Florida's now-repealed ban on felons voting*, THE WASHINGTON POST, Nov. 7. 2018, https://www.washingtonpost.com/?utm_term=.245da2b22c04 (noting that the intent of the expansion of Florida's felony disenfranchisement law in 1868 "was quite clear: to eliminate as many black voters as possible.").

[14] Mississippi's preservation of its lifetime voting ban despite its explicitly racist origins is unusual *within Mississippi as well*. Over time, Mississippi has steadily turned away from Jim-Crow-era measures that originate in express racial discrimination. In 2021, for example, Mississippi ratified its new State flag, replacing a former flag featuring a Confederate battle emblem. *See* Veronica Stracqualursi, *Mississippi*

Mississippi's scheme is also unique in its irrevocability—breaking sharply with the policy consensus among the States. Recognizing that the restoration of voting rights is critical to civic integration, most States allow some form of re-entry into civic life. Restoring the voting rights of formerly incarcerated individuals encourages prosocial behavior and strengthens communities and individuals' connections to their neighbors and society.[15] Voting is correlated with reduced recidivism and fosters the skills and capacities that help individuals become law-abiding citizens, reaching their full civic, social, and economic potential.[16] By contrast, disenfranchisement "act[s] as a barrier to successful

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ratifies and raises its new state flag over the state Capitol for the first time, CNN, Jan. 13, 2021, https://www.cnn.com/2021/01/12/politics/mississippi-new-state-flag-flown/index.html. The old flag was initially adopted in 1894, *id.*, four years after Section 241's inclusion in the 1890 Constitution.

[15] Kristen M. Budd, et al., *Increasing Public Safety by Restoring Voting Rights,* The Sentencing Project (Apr. 25, 2023), https://www.sentencingproject.org/policy-brief/increasing-public-safety-by-restoring-voting-rights/#footnote-ref-1.

[16] Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 413–414 (2012).

rehabilitation" by isolating individuals and continuing to stigmatize the offender and not the offense.[17]

The "national consensus," *Graham*, 560 U.S. at 61, is in the direction of expanding and automating re-enfranchisement systems to make them more accessible, standardized, and free of arbitrary decision making. In total, 36 states automatically restore voting rights to all formerly incarcerated individuals, regardless of the offense they have committed: 22 states automatically restore upon release from prison, one state automatically restores after release from prison and discharge from parole, and 13 states automatically restore rights to all individuals after release from prison and completion of probation and parole.[18] Two states do not disenfranchise any people with criminal convictions, even while incarcerated.[19]

Of the 11 remaining states that do not automatically restore voting rights to all individuals, many have eliminated arbitrary decision-

[17] *Id.*

[18] *See* The Brennan Center, *Disenfranchisement Laws*, https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws.

[19] 3*Id.*

making from their restoration processes.[20] While Arizona permanently disenfranchises persons with two or more felony convictions, the state recently allowed the restoration of voting rights to individuals convicted of first-time felony offenses, regardless of whether they have paid legal financial obligations.[21] Since 2017, Wyoming has restored voting rights after five years to people who complete sentences for first-time, non-violent felony convictions.[22] In 2019, Kentucky Governor Andy Beshear issued an executive order restoring voting rights to those who had completed sentences for nonviolent offenses.[23] In 2016, Alabama simplified the restoration process for people who have not been convicted of a crime of "moral turpitude," outlining clear criteria for these individuals to receive a Certificate of Eligibility to Register to Vote and only allowing the Board of Parole to deny such applications if an individual does not meet these legal requirements.[24] As of October 2020, Florida restores the voting rights of most people who have completed

[20] *See* Uggen et al., *supra* note 3.

[21] Id.

[22] *Id.*

[23] *Id.*

[24] *Id.*

their sentences if they have paid all related fines and fees.[25] And in 2020, Iowa Governor Kim Reynolds signed an executive order restoring voting rights to individuals with non-homicide convictions who have completed their sentences, including all terms of confinement, parole, probation, or other supervised release, irrespective of whether these individuals have settled other court-ordered financial obligations.[26]

Mississippi's decision to maintain an illusory, arbitrary, inaccessible process as its only route to rights restoration is dramatically out of step with the overwhelming majority of states and their movement towards accessible, standardized forms of re-entry.

* * *

This Court must make its "own independent judgment"—ultimately, a "moral judgment"—about whether the "punishment in question violates the Constitution." *Graham*, 560 U.S. at 58, 61. Mississippi's mandatory, irrevocable, lifetime disenfranchisement scheme, rooted in noxious racism, and unique in its arbitrariness and severity, is cruel and unusual.

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[25] *Id.*

[26] *Id.*

CONCLUSION

Mississippi's lifetime disenfranchisement scheme should be invalidated.

Respectfully submitted,

Dated: December 6, 2023

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I, Ari J. Savitzky, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

SO CERTIFIED, this 6th day of December, 2023.

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