No. _____

IN THE

Supreme Court of the United States

ROY HARNESS; KAMAL KARRIEM,
Petitioners,

v.

MICHAEL WATSON, SECRETARY OF THE STATE OF MISSISSIPPI,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are African-American citizens of Mississippi who are disfranchised by a provision of Mississippi's Constitution that was adopted in 1890 for the express purpose of "obstruct[ing] the exercise of the franchise by the negro race." *Ratliff* v. *Beale*, 20 So. 865, 868 (Miss. 1896). This Court struck down a materially identical provision of Alabama's 1901 constitution in *Hunter* v. *Underwood*, 471 U.S. 222 (1985). Yet in this case, the Fifth Circuit, in a deeply divided en banc decision, upheld Mississippi's 1890 disfranchisement provision on the ground that voters, in approving minor amendments to the provision in 1950 and 1968 that left most of the provision untouched and in its original form, cleansed the original provision of its racially discriminatory taint.

The question presented is:

Whether any amendment to a law originally adopted for an impermissible racially discriminatory purpose, no matter how minor the amendment and no matter the historical context, cleanses the law of its racist origins for Fourteenth Amendment purposes unless the party challenging the law can prove that the amendment itself was motivated by racial discrimination.

PARTIES TO THE PROCEEDINGS

Petitioner Roy Harness was Plaintiff in the district court and Plaintiff-Appellant in the court of appeals.

Petitioner Kamal Karriem was Plaintiff in the district court and Plaintiff-Appellant in the court of appeals.

Respondent Michael Watson, Secretary of the State of Mississippi was Defendant in the district court and Defendant-Appellee in the court of appeals.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Harness v. Watson, No. 19-60632 (5th Cir. Aug. 24, 2022)

Harness, et al. v. Hosemann, No. 3:17-cv-791 (S.D. Miss. Aug. 7, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Roy Harness and Kamal Karriem respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App., *infra*, 1a-90a) is reported at 47 F.4th 296. The panel opinion of the court of appeals (Pet. App., *infra*, 91a-98a) is reported at 988 F.3d 818. The opinion of the district court (Pet. App., *infra*, 99a-131a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1, clause 2 of the Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, section 241 of the Mississippi Constitution states:

> Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he

offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.

INTRODUCTION

In *Hunter* v. *Underwood*, 471 U.S. 222 (1985), this Court invalidated a provision of the Alabama Constitution, enacted at the 1901 Alabama constitutional convention, that disfranchised people convicted of crimes "involving moral turpitude." *Id.* at 226, 232-33. This Court explained that "[t]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id*. at 229. Based on conclusive evidence that the "crimes selected for inclusion" in the provision at issue "were believed by the delegates" to that convention "to be more frequently committed by blacks," the Court unanimously held that the provision "was enacted with the intent of disenfranchising blacks" in violation of the Fourteenth Amendment. *Id.* at 227, 229.

The first of the post-Reconstruction southern constitutional conventions occurred eleven years earlier in Mississippi. That convention, too, adopted a felon disfranchisement provision. See Miss. Const. art. XII, § 241 ("Section 241"). Just as in Alabama, in Mississippi the offenses set forth in the 1890 Constitution were those that the drafters believed were disproportionately committed by African Americans. Indeed, the Mississippi Supreme Court confirmed six years later that the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting "the offenses to which its weaker members were prone." *Ratliff* v. *Beale*, 20 So. 865, 868 (Miss. 1896). The disqualifying crimes listed in Section 241 in 1890 were "bribery, burglary, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement [and] bigamy." Miss. Const. art. XII, § 241.

Burglary was removed from Section 241 in 1950 by constitutional amendment, and murder and rape were added to the provision in 1968. In all other respects Section 241 has remained unchanged since 1890.

Petitioners brought this suit to enjoin the continued enforcement of the list of eight remaining disfranchising crimes adopted in 1890.[1] That list is unconstitutional for the same reason the Alabama provision struck down in *Hunter* v. *Underwood* was unconstitutional: Section 241 was enacted in 1890 "with the intent [to] disenfranchis[e] blacks," 471 U.S. at 229, and the eight disqualifying crimes adopted in 1890 that still remain in Section 241 continue to disproportionately disfranchise African Americans to this day. No one denies that those provisions have exactly the same racist provenance as the Alabama provision this Court declared unconstitutional in *Hunter*.

A deeply divided en banc Fifth Circuit nevertheless upheld the 1890 Mississippi provisions. Following the reasoning of a 1998 Fifth Circuit panel decision (in a case brought by pro se prisoners who introduced no historical evidence), the majority purported to distinguish *Hunter* on the theory that Mississippi's voters purged the provisions of their racist taint when amending Section 241 in 1950 (to remove burglary from the list of disfranchising crimes) and again in 1968 (to add murder and rape). Pet. App. 24a-25a (following *Cotton* v. *Fordice*, 157 F.3d 388 (5th Cir. 1998)). The majority described the 1950 and 1968 amendments as "reenactment[s]" of the entirety of Section 241 that occurred in the absence of any indication that

[1] The 1968 inclusion of rape and murder is not challenged in this case.

the amendments were adopted for discriminatory reasons. Pet. App. 11a, 24a.

But that rationale rests on a clear error of historical fact. In both 1950 and 1968, Mississippi's voters were offered only the option to vote for or against the amendment—not to reenact or reject Section 241 as a whole. Whichever way they voted on the amendments, the remainder of the original 1890 version of Section 241 would remain in place and unaffected. As Judge Haynes observed in dissent, the original 1890 list of disfranchising crimes was not "'reenacted' via amendment in 1950 or 1968" because "[a]t no point did the Mississippi electorate have the option of striking the entirety of § 241's disenfranchisement provision." Pet. App. 38a (Haynes, J., dissenting). Judge Elrod made the same point in her dissent, Pet. App. 36a, as did Judge Graves in his dissent for five members of the court. Pet. App. 39a.

Thus, just as in *Hunter*, where this Court rejected the argument that the subsequent excision of some of the most blatantly racist features of Alabama's disfranchisement law removed the discriminatory taint of the remaining provisions, nothing occurred here to "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018) (explaining *Hunter*'s holding that subsequent changes to Alabama's felon disfranchisement law did not expurgate the unconstitutional taint of its remaining original provisions) (emphasis added). As this Court's decisions in *Hunter* and *Abbott* make clear, the intent of those who voted on the 1950 and 1968 amendments to Section 241 is irrelevant. Because those voters were not given the option to reenact or repeal the eight 1890

disqualifying offenses at issue here—bribery theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy—approval of the 1950 and 1968 amendments cannot have altered the discriminatory intent that infected the original adoption of that list of offenses. It was only by mischaracterizing the 1950 and 1968 amendments as "reenactments" of the entirety of Section 241 that the majority was able to uphold it as free of discriminatory intent.

The majority's rationale is also impossible to square with the broader historical context. In 1950, Mississippi's legislature was all-White, and in 1968 it had only one African American member. The era was characterized by massive resistance to all forms of racial integration in Mississippi. See pp. 14-15 *infra*. Given the tenor of the times, it is implausible that the 1950 and 1968 amendments to Section 241 were adopted in order to "cure" the discrimination that infected the original 1890 provision by substituting a race-neutral justification for the originally unconstitutional one.

The Fifth Circuit's decision is thus egregiously wrong. It conflicts directly with *Hunter*, and cannot be defended on the basis of the majority's fallacious effort to distinguish this Court's unanimous ruling in that case. The unconstitutional 1890 list of disfranchising crimes in Section 241 that the court of appeals left in place has stripped the right to vote from many thousands of Mississippi citizens for more than a century and, if left undisturbed, will disfranchise many more in the years to come.

Review by this Court is thus at least as warranted as it was in *Hunter*. By granting review in *Hunter*, this Court recognized both the concrete importance of

ending the disfranchisement of thousands of voters for discriminatory reasons, as well as the symbolic importance of repudiating such practices as antithetical to our most fundamental constitutional commitments. If anything, the need for review in this case is more acute. The Fifth Circuit has now reaffirmed its 1998 refusal to give controlling effect to *Hunter*, and has done so on the basis of an insupportable interpretation of straightforward historical facts. Section 241's 1890 list of disfranchising crimes is the sole "trapping[] of the Jim Crow era" remaining from Mississippi's infamous 1890 Constitution. See *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1394 (2020); see p. 10 *infra*. That this list has remained on the books for over 130 years and for nearly forty years since *Hunter* was decided is a continuing injustice against thousands of Mississippi citizens that should not be tolerated any longer, especially given the fundamental importance of the right to vote. As importantly, it is a stain on our Constitution that this Court should remove.

STATEMENT

A. Section 241 and the 1890 Convention

In 1890, Mississippi held a constitutional convention for the purpose of stripping all electoral power from African Americans in the State.

The convention was a direct response to African Americans' increasing political influence. In 1867, African Americans comprised 66.9% of registered voters in Mississippi. For a time White Mississippians managed, through intimidation and fraud, to keep many African Americans from voting. Record On Appeal (ROA) 1249, 1279. But in the 1880s, Mississippi's African Americans experienced a political resurgence, buoyed by the Reconstruction era's reforms.

ROA.1250. African Americans began to organize, joining groups such as the Colored Farmers Alliance, which advocated for political and economic reforms. *Id*. By 1889, all but 60 of the 254 delegates to the State's Republican Convention were African American. *Id.*

Mississippi's White leaders called for a new constitutional convention to re-establish their power and suppress that of African Americans. The convention's supporters hoped to replace the existing extralegal system of violent suppression with a "legal" disfranchisement policy, which would guarantee the long-term stability of White political power while reducing the risk of federal intervention. The State's senior senator, James Z. George (a former Confederate colonel), who was later credited as an architect of the disfranchisement provisions, explained that the convention's "first duty" would be to "devise such measures" that would ensure "a home government, under the control of the white people of the State." ROA.1250-1251 & n.9. The convention's president, Judge Solomon Saladin Calhoon (a former Confederate Lieutenant Colonel) was equally blunt: "Let's tell the truth if it bursts the bottom of the universe. We came here to exclude the Negro. Nothing short of this will answer." Pet. App. 40a, ROA.1405.

Such views predominated at the convention. A Bolivar County delegate submitted draft constitutional provisions declaring that it was "the manifest intention of th[e] Convention to secure to the State of Mississippi 'white supremacy.'" ROA.1255. A Kemper County delegate declared that Mississippi's government should be "for all time in the control of the white race—the only race fit to govern in this country." *Id.*

An Oktibbeha County delegate declared that he attended "to assist in making a constitution that would give the power of the State into the hands of the white people, and there it should be lodged." *Id.*

To implement that overwhelming sentiment among Mississippi's White leaders, the convention adopted a constitution designed to disfranchise African American citizens. Section 241 was an important piece of the scheme. As adopted, it stated:

> Every male inhabitant of this State, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote, and who is duly registered as provided in this article, *and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy*, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church shall be entitled to vote after six months residence in the election district, if otherwise qualified.

Miss. Const. art. XII, § 241 (1890) (emphasis added).

As the Mississippi Supreme Court confirmed six years later, this otherwise strange collection of disfranchising crimes—burglary, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy—was based on the delegates' belief that "the negro race . . . and its criminal members [were] given rather to furtive offenses than to the robust crimes of the whites," and that this list "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting "the offenses to which its weaker members were prone." *Ratliff*, 20 So. at 868.

The 1890 Constitution also included other provisions designed to prevent African Americans from voting. For example, Section 243 required payment of a poll tax, which would eventually be recognized as a distinctive "trapping[] of the Jim Crow era." *Ramos*, 140 S. Ct. at 1394.[2] And Section 244 imposed a literacy and understanding clause.[3]

Those provisions effectively ended African American political participation in Mississippi. To hasten the amendments' effect, Section 244 required all voters to re-register before the next election following January 1, 1892, ensuring that no African Americans would be grandfathered onto the voting rolls. ROA.1279. The African American share of the registered voter population plummeted from 66.9% in 1867

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[2] That poll tax requirement was later invalidated in *United States* v. *Mississippi*, No. 3791 (S.D. Miss. Mar. 31, 1966), which applied this Court's decision in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), and the provision was not formally repealed until 1975. Miss. Laws 1975 Ch. 524.

[3] Section 244 was nullified by the federal Voting Rights Act of 1965. It also was not formally repealed until 1975. Miss. Laws 1975 Ch. 523.

to 5.7% in 1892. ROA.1279. It was not until the enactment and enforcement of the Voting Rights Act three quarters of a century later that African Americans were able to vote in substantial numbers in Mississippi. And although the Voting Rights Act eliminated most vestiges of the 1890 Constitution's disfranchising plan, the provisions of Section 241 enacted in 1890 continue to disproportionately disfranchise African American voters to this day. See *infra* p. 33.

B. The 1950 and 1968 Amendments to Section 241

In 1950 and again in 1968, Mississippi's voters considered whether to amend Section 241 by adding to or subtracting from the original disqualifying crimes selected by the delegates at the 1890 convention. In Mississippi, a constitutional amendment requires approval by two-thirds of each house of the legislature and a majority of voters. Miss. Const. art. XV, § 273. At the relevant times, if the legislature approved a proposed amendment, then the Mississippi Secretary of State would publish a full text version of the provision, as it would appear if the amendment were adopted, within two weeks before voters went to the polls. Miss. Code Ann. § 4211 (1942). Although voters were presented with the full text of the amended Section 241, the only option before them was whether to approve or reject the proposed amendments. Voters therefore had no opportunity to decide whether to approve or repeal the entirety of Section 241 or the collection of crimes included in it.

In 1950, the Mississippi legislature passed a resolution to amend Section 241 for multiple purposes, including removing burglary from the list of disqualifying crimes. The first paragraph of the resolution stated: "A CONCURRENT RESOLUTION to amend

section 241 of the Mississippi constitution of 1890 so as to provide the qualifications of electors, and amending by providing that the wife of a minister of the gospel legally residing with him shall be qualified to vote after a residence of six months in the election district, or incorporated city or town, if otherwise qualified." ROA.2639. The resolution then stated that the Legislature resolved "[t]hat the following amendment to the Constitution of the State of Mississippi be submitted to the qualified voters of the state for ratification or rejection . . . viz: Amend section 241 of the constitution of the State of Mississippi, so that it shall read as follows . . . ." ROA.2639-2640. The text of the proposed Section 241 was listed, with the crime of burglary omitted and additional language regarding electors and the residency requirements for ministers' wives. ROA.2640.

The ballot contained the exact same language as the resolution and was followed by two options from which the voter could select: "For Amendment" or "Against Amendment." It did not offer voters the option of choosing to retain or repeal the remainder of the original 1890 list of disqualifying crimes. Voters could vote only on the amendment. ROA.2641-2642. A majority voted "For Amendment."

Events unfolded similarly in 1968, when the Mississippi legislature passed a resolution to amend Section 241 for multiple purposes, including adding murder and rape as disqualifying crimes. The first paragraph of the resolution stated: "A CONCURRENT RESOLUTION to amend Section 241, Mississippi Constitution of 1890, to provide for one-year residency within the State and County and a six-month residency within the election precinct to be a qualified elector; to delete certain improper parts of the Section;

and for related purposes." ROA.2643. The resolution then stated that the Legislature resolved "[t]hat the following amendment to the Constitution of the State of Mississippi be submitted to the qualified electors of the State for ratification or rejection . . . viz: Amend Section 241, Mississippi Constitution of 1890, so that it will read as follows: . . . ." ROA.2643. The text of the proposed Section 241 was then set forth in a form identical to the original 1890 version (except for the omission of burglary) with the addition of murder and rape. ROA.2643-2644.

As in 1950, the 1968 ballot contained the same language as the resolution and was followed by two options from which the voter could select: "For the Amendment" or "Against the Amendment." ROA.2645. And as in 1950, the ballot again did not afford voters the option to decide whether to retain or repeal the other crimes on the list, which were part of the original 1890 provision. ROA.2645. The voters' only option was to approve or reject "the Amendment[s]." A majority voted "For the Amendment."

No historical evidence suggests that either the Mississippi legislature or the State's citizenry ever gave any thought to whether the provisions of Section 241 challenged in this case should be re-enacted or removed from the State's Constitution—presumably because neither the legislature nor the citizenry was ever asked to vote on the issue. The journals of the Mississippi House and Senate chambers give no indication that any such deliberations occurred. And press coverage of the amendments focused exclusively on provisions having nothing to do with felon disfranchisement. ROA.2614-2616 (expert report of Dr. Robert Luckett).

Nor does the historical context suggest that eliminating the discriminatory taint of the originally enacted Section 241 was an object of either of the amendments. Racial animus in Mississippi did not end with the 1890 convention. It is schoolbook history that the 1950s and 1960s were a notorious period of opposition throughout the south to the advances of the civil rights movement, nowhere more so than in Mississippi. The tenor of these times was reflected in the Fifth Circuit's observation in 1963 that "Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom." *United States* v. *City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963).

The all-White 1950 legislature (which was elected in 1947 and held sessions in 1948 and 1950) enacted laws to fortify segregation in secondary education, higher education, prisons, reform schools, and 4-H clubs for young people. Miss. Laws 1948 Ch. 282, H.B. 459; Ch. 429, H.B. 268; Ch. 498, H.B. 528; Miss. Laws 1950 Ch. 195, S.B. 497; Ch. 253, H.B. 321; Ch. 385, S.B. 501; Ch. 386, S.B. 503. The 1960s were defined by "blatant defiance of federal civil rights decrees," including the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and redoubled legislative efforts to prevent African American voters from exercising electoral power within the State. Pet. App. 58a; see *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971) (stating that the legislatures and political party committees in Mississippi had "adopted laws or rules since the passage of the [Voting Rights Act] which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters"); *United States* v. *Mississippi*, 380 U.S. 128, 133-135 (1965).

The 1968 legislature had only one African American member. It maintained discriminatory voting provisions designed to limit the effect of the Voting Rights Act of 1965. Miss. Laws 1968 Ch. 394, H.B. 260; Ch. 564, H.B. 102. It increased tuition assistance to private school students, Miss. Laws 1968 Ch. 393, H.B. 1114—a law later struck down because "[t]he statute, as amended, encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (three-judge court). And it funded the notorious Mississippi State Sovereignty Commission, which since 1956 had served as Mississippi's official watchdog, harassment, and propaganda agency for the promotion of segregation. Miss. Laws 1968 Ch. 214, H.B. 1195; *Sovereignty Commission Online*, Miss. Department of Archives & History, (https://www.mdah.ms.gov/arrec/digital_archives/sovcom/scagencycasehistory.php.

There is, in short, nothing in the historical record suggesting that those same legislative bodies sought to extinguish the discriminatory taint that infected Section 241 in its original form.

C. Procedural History

1. Petitioners are African American citizens of Mississippi who have been disfranchised under Section 241's original list of crimes. Roy Harness was convicted of forgery in 1986. Kamal Karriem, a former city council member in Columbus, was convicted of embezzlement in 2005. Both have completed their sentences. ROA.538, 2754-2755, 2763-2764, 2765-2766.

2. In 2017, petitioners filed this suit against the Mississippi Secretary of State. Petitioners did not challenge the inclusion of murder or rape in the list of disqualifying offenses in 1968, but contended that disfranchisement based on the original list of crimes selected by the 1890 constitutional convention violates the Fourteenth Amendment because those crimes were selected for a racially discriminatory purpose. ROA.29, ROA.30, ROA.46. Petitioners requested declaratory and injunctive relief. ROA.137-138.[4]

The district court granted respondent's motion for summary judgment. The court concluded that it was bound by the Fifth Circuit's holding in *Cotton* v. *Fordice*, 157 F.3d 388 (5th Cir. 1998), that Mississippi had "removed the discriminatory taint associated with the original version" when it amended Section 241 to remove burglary in 1950 and to add rape and murder as disfranchising crimes in 1968. Pet. App. 95a (citing *Cotton*, 157 F.3d at 391).[5] The *Cotton* panel asserted that in both 1950 and 1968 "a majority of the voters had to approve the entire provision" in order to amend it, and that neither purported "re-enactment" was shown to have been motivated by any discriminatory animus, thereby redeeming Section 241 from its unconstitutional provenance. 157 F.3d at 391.

The district court also concluded that, even apart from the purported cleansing effect of the 1950 and

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[4] The district court consolidated petitioners' case with *Hopkins* v. *Harness*, a case raising distinct challenges to section 241.

[5] The *Cotton* panel raised the issue of Section 241's constitutionality *sua sponte* in a *pro se* case brought by two incarcerated individuals, who—having never raised the issue themselves—introduced no historical evidence regarding the 1950 or 1968 amendments.

1968 amendments, evidence established that "the state would have passed section 241 as is without racial motivation" in the 1980s. Pet. App. 119a. As support, the district court cited the Mississippi legislature's failure in 1986 to alter or repeal Section 241 after convening a "multi-year, biracial, bipartisan" Election Law Reform Task Force to review the State's election laws. ROA.4326, ROA.4328.

3. A panel of the Fifth Circuit affirmed. The panel concluded that it was bound by *Cotton*. Pet. App. 95a-96a. The panel rejected petitioners' arguments that *Cotton* should not be deemed controlling because the evidentiary record developed in this case refuted the essential factual premise of the prior panel's decision—*i.e.*, that the 1950 and 1968 amendments to Section 241 provided occasions for the State's voters to reenact Section 241 in its entirety for nondiscriminatory reasons. Pet. App. 96a.

4. Petitioners sought en banc rehearing, which the court of appeals granted. The en banc court affirmed the district court in a per curiam opinion, with seven judges dissenting.

i. The ten-judge en banc majority acknowledged that Mississippi's 1890 constitutional convention was "steeped in racism" and that the "state was motivated by a desire to discriminate against blacks" in adopting the 1890 constitution, Pet. App. 2a. The majority also acknowledged that Section 241, in particular, was a "device that the convention exploited to deny the franchise to blacks." *Id.* at 2a. Nonetheless, the majority held that petitioners had failed to prove discriminatory intent, because any taint associated with Section 241 "ha[d] been cured." *Id.* at 9a.

Adopting almost word-for-word the reasoning of the 1998 panel decision in *Cotton*, the majority asserted that the offending provision had been "not only reenacted, but reenacted *twice* according to Mississippi state procedures." Pet. App. 15a. Finding the 1968 amendment most relevant because it established the version of Section 241 that remains operative today, the majority concluded that the record lacked evidence that the amendment was motivated by a discriminatory purpose. *Id*. at 5a.

The majority asserted that what it described as the "reenactment" of Section 241 distinguished the present case from *Hunter* v. *Underwood*, because *Hunter* had left open whether a discriminatory provision could be redeemed if later reenacted without any impermissible motivation. See Pet. App. 16a (stating that the provision at issue in *Hunter* had remained "virtually intact . . . from the time of its patently racist enactment"). The majority also stated that its decision was consistent with decisions of two other courts of appeals. Pet. App. 11a. Both of those courts ruled that enactment of a new criminal disfranchisement provision can cleanse the discriminatory taint of a prior provision. See *Johnson* v. *Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Hayden* v. *Paterson*, 594 F.3d 150 (2d Cir. 2010).

The majority rejected petitioners' argument that passage of the 1968 amendment could not have "reenacted" Section 241 because the amendment process did not give voters the option of either ratifying or repealing the provision, but rather only asked them whether murder and rape should be added to the original list of disfranchising crimes. Pet. App. 14a. The majority described petitioners' argument as a "radically prescriptive" one that "would require the revision of state

amendment processes, supplanting those provisions with some kind of constitutional plebiscite." *Id*. at 18a. The majority found it sufficient that the amendments were "enacted in compliance with state law," and that the ballots presented voters with "the full text of Section 241 as amended." *Id*. at 19a-20a.

The majority also concluded that, even if the 1968 amendment had not cured Section 241's constitutional infirmity, Section 241 should be deemed constitutional because it would have been reenacted in the 1980s for race-neutral reasons. Pet. App. 22a-23a. Adopting the analysis of the district court, the en banc majority found it persuasive that Mississippi had convened a "multi-racial" Election Law Reform Task Force in the mid-1980s that deliberated over the State's election laws, including "the broadening of disenfranchising crimes to include all felonies," but ultimately left the law "as is." Pet. App. 6a.

ii. Judge Ho concurred in part and concurred in the judgment. He would have ruled that petitioners were required to show not just that Section 241 was enacted with a discriminatory intent but also that its challenged provisions have ongoing disparate impact. He acknowledged petitioners' showing that Section 241 disfranchises a far higher percentage of African Americans than of Whites. But he deemed that showing insufficient on the ground that Section 241 does not disfranchise a greater percentage of African Americans than would a blanket felon disfranchisement law, which he thought would be "indisputably constitutional." Pet. App. 30a. In his view, a State can enforce a targeted disfranchisement provision for the purpose of discriminating on the basis of race so long as its ra-

cially disparate impact does not exceed that of a blanket ban. *Id*. at 30a ("logic would dictate that the greater power should include the lesser power.").

iii. Seven judges dissented, in three separate opinions. All seven pointed out the implausibility of the majority's conclusion that Mississippi had "reenacted" the entirety of Section 241 in 1950 and again in 1968. Judge Elrod would have held that Mississippi was "stuck with its discriminatory intent," because voters "were never given the option to remove the racially tainted list." Pet. App. 36a. Judge Haynes agreed that Section 241 was not reenacted in a manner that purged its discriminatory origins, because "[a]t no point did the Mississippi electorate have the option of striking the entirety of § 241's disfranchisement provision." Pet. App. 38a.

Judge Graves wrote the principal dissent, joined by Judges Stewart, Dennis, Higginson, and Costa. His dissent joined those of Judges Elrod and Haynes in pointing out that the historical foundation on which the majority opinion rests is wrong and therefore provides no basis for distinguishing *Hunter*. Judge Graves went on to situate this case in its proper historical context. He elaborated on just how central denial of the franchise was to Mississippi's long and shameful history of denying African American citizens any semblance of equal citizenship and equal rights to participate in the political process, as well as economic and social life, that the Fourteenth and Fifteenth Amendments guaranteed them. Pet. App. 53a-79a.

REASONS FOR GRANTING THE PETITION

The right to vote, along with the right to serve on a jury, is "the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2238 (2019).

Time and again, this Court has intervened to protect those rights against derogation by States acting out of discriminatory racial animus, by removing "the trappings of the Jim Crow era." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1394 (2020); *id*. at 1419 (Kavanagh, J. concurring in part) (*stare decisis* effect should not be afforded to precedent permitting non-unanimous jury verdicts because doing so would "tolerate[] and reinforce[] a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects."); *Hunter*, 471 U.S. at 233; *Foster* v. *Chatman*, 578 U.S. 488, 514 (2016). In so doing, the Court has emphasized that the overriding importance of those civic rights requires particular vigilance against attempts to circumvent the Constitution's guarantees, and that reviewing courts must not "blind" themselves to circumstances that bear on the "sensitive inquiry" into discriminatory intent. *Foster*, 570 U.S. at 501 (citation omitted).

In this case, the Fifth Circuit failed to honor this Court's teachings. No one disputes that Section 241 was adopted with the exact same virulently racist motive as the Alabama provision struck down in *Hunter*. Yet the Fifth Circuit circumvented *Hunter* by purporting to find that Mississippi's citizens, voting on segregation-era amendments to the provision, purged Section 241 of its discriminatory intent. The majority could reach that result only by blinding itself to the undisputed historical fact that the referenda did not permit voters to decide whether to reenact or repeal Section 241 in its entirety. The reality is that Section 241 was never reenacted at all, much less for race-neutral reasons; instead, the "original enactment," which "was motivated by a desire to discriminate against blacks on account of race," persists to this day in each of the original disfranchising crimes that remain in

Section 241, just as was true of the provision struck down in *Hunter*. 471 U.S. at 233. That petitioners did not establish that the 1950 and 1968 amendments were enacted for racially discriminatory reasons is therefore irrelevant to whether the eight disqualifying crimes enacted in 1890 are unconstitutional. In all events, it is difficult to imagine a race-neutral rationale that could justify reenacting the list of crimes from the 1890 Constitution—a list that omits such serious offenses as kidnapping, aggravated assault, and child molestation, while including such comparatively inconsequential offenses as bigamy.

Today, in 2022, many thousands of Mississippi's African-American citizens are disfranchised by a provision that was enacted in 1890 to ensure "a home government under the control of the white people of the State." ROA.1250-1251 & n.9. Mississippi voters have never had the opportunity to repeal or reenact that provision. The persistence of a disfranchisement provision enacted with discriminatory intent cannot be reconciled with either *Hunter* or the abiding promise of the Fourteenth Amendment. This Court should grant certiorari.

A. The Fifth Circuit's Decision Conflicts With *Hunter* v. *Underwood*

The decision of the court of appeals conflicts with this Court's decision in *Hunter* v. *Underwood*. See S. Ct. Rule 10; S. Shapiro et. al, Supreme Court Practice § 4.5, p. 20 (11th ed. 2019) (conflict with a decision of this Court is one of the "strongest possible grounds for securing the issuance of a writ of certiorari"). That the en banc majority had to rely on such a flimsy rationale to distinguish *Hunter—i.e.,* the false assertion that Section 241 was reenacted in its entirety in 1950 and again in 1968 without any discriminatory purpose—

makes it difficult to reach any other conclusion than that the majority was simply unwilling to follow Justice Rehnquist's opinion for a unanimous Court in *Hunter*. The refusal of an en banc court of appeals to follow a controlling decision of this Court, particularly in a case as important as this one, amply justifies a grant of certiorari. See *American Tradition P'ship* v. *Bullock*, 567 U.S. 516, 516-517 (2012) (granting certiorari and summarily reversing where a State's "arguments in support of the judgment below either were already rejected in *Citizens United* [558 U.S. 310 (2010)], or fail to meaningfully distinguish that case.").

In *Hunter,* this Court held that a 1901 Alabama disfranchisement provision violated the Fourteenth Amendment because the "crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks," and the "evidence . . . demonstrate[d] conclusively that [the provision] was enacted with the intent of disenfranchising blacks." 471 U.S. at 227, 229. The exact same thing is true here. The original list of crimes in Mississippi's 1890 Constitution was selected for the specific purpose of disenfranchising African Americans. As the Mississippi Supreme Court confirmed just six years later, the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race." *Ratliff*, 20 So. at 868. This case is therefore on all fours with *Hunter*, and the court of appeals had no choice but to follow that decision.

The majority purported to distinguish *Hunter* on the ground that Mississippi reenacted the offending provisions of Section 241 for race-neutral reasons, and thereby cleansed the 1890 enactment of its unconstitutional taint, when the State's citizens voted on amendments to the provision in 1950 and 1968. The

majority reiterated the conclusion of the prior Fifth Circuit decision in *Cotton* that "a majority of the voters had to approve the *entire provision*" in order to amend it, thereby redeeming Section 241. Pet. App. at 18a (quoting *Cotton*, 157 F.3d at 391) (emphasis added).

But saying that voters of Mississippi approved "the entire provision" in 1950 and 1968 does not make it so—as the seven judges who dissented from the ruling all recognized. In fact, no part of the original 1890 provision was ever reenacted. The only choice ever put to voters was to approve or reject amendments that added or subtracted from the original list of disfranchising crimes. In 1950, voters were asked to consider whether to subtract one of the original nine offenses (burglary), and in 1968, whether to add two crimes to the list (murder or rape). Both votes presupposed that each one of the original disenfranchising crimes chosen in 1890 (save for burglary after 1950) would remain in the Constitution regardless how the vote turned out. The amendment votes are therefore no different than the judicial decisions described in *Hunter*, which struck down *some* portions of Alabama's constitution but left others on the books until this Court invalidated them. 471 U.S. at 232-233.

That the amendments could not have removed Section 241's discriminatory taint is therefore clear. The majority was able to conclude otherwise only by engaging in groundless speculation. The majority rejected petitioners' contention in large part based on the puzzling assertions that accepting the contention would require a "revision of state amendment processes" or the holding of "some kind of constitutional plebiscite." Pet. App. 18a. But nothing of the sort is true. Mississippi's voters could easily have been given an actual

opportunity to vote to retain or reject the unconstitutional 1890 list. No change to Mississippi's existing procedures for amending the state constitution would be necessary to give the voters such an option, and the majority's suggestion that "some kind of a constitutional plebiscite" would be needed to do so is fanciful.

What the majority appears to suggest in making those assertions is that the votes in 1950 and 1968 can be deemed reenactments of the original provisions of Section 241 because the voters had before them the complete text of what Section 241 would look like if the amendment passed. In other words, the majority appears to believe that the voters might have thought that they were being asked to reenact Section 241 in its entirety because the full text of the provision was included in the materials given to them before they voted. Pet. App. 19a-20a (noting that the ballots presented voters with "the full text of Section 241, as amended").

Any such rationale would, of course, be baseless. The voters were given clear instructions to vote "For Amendment" or "Against Amendment." ROA.2641-2642, 2645. No one would have thought that a vote against the amendment was a vote for wholesale repeal of Section 241. Nothing in the materials provided to the voters suggests such a thing, and the voters were never asked whether they wanted to repeal the offending list of disfranchising crimes in its entirety. Moreover, what matters is the operative legal significance of the votes cast by the citizens of the State, not speculation about what voters might or might not have thought they were doing when they voted. The simple fact is that Mississippi's voters have never been given the opportunity to repeal or reenact

the original 1890 provisions of Section 241. Unfounded speculation about what voters might have been thinking cannot change that.

Indeed, the implausibility of the majority's speculation runs deeper still. It is inconceivable that the all-White legislature in 1950 or the virtually all-White legislature in 1968 (or the overwhelmingly White electorate of that era of massive resistance) would have affirmatively acted to cure the 1890 discrimination by "reenacting" eight of the nine original crimes listed in Section 241 for some unknown nonracial reason. And it is equally difficult to conceive of any race-neutral justification—in 1950, 1968 or at any other time—for reenacting the strange list of disfranchising crimes set forth in the 1890 constitution. That list, after all, denies the vote to citizens who commit bigamy or forgery but retains the franchise for those convicted of kidnapping, aggravated assault, child molestation and other serious offenses that bear directly on the character of the persons who commit them. After years of litigation, Mississippi has never been able to articulate a race-neutral explanation for this list, either before or after the 1950 and 1968 amendments. That is doubtless because no such explanation is possible.

Any doubt that the present case is indistinguishable from *Hunter* is dispelled by this Court's subsequent explanation of *Hunter* in *Abbott* v. *Perez,* 138 S. Ct. 2305 (2018). In *Abbott*, this Court considered whether the Texas Legislature had acted with discriminatory intent in implementing a redistricting plan after an identical prior plan (which never went into effect) was found to be discriminatory. The district court had invalidated the new plan on the ground that it was tainted by the discriminatory intent of the legislature that passed the prior plan. In reversing, this Court

distinguished the situation before it—a new legislature enacting a new redistricting plan—from *Hunter*, where the original discriminatory law was "never repealed, but over the years, the list of disqualifying offenses had been pruned." *Id.* at 2324-2325. The Court concluded that in the first situation, only the new legislature's intent would matter. But where (as here and in *Hunter*) "the amendments did not alter the intent with which the article, *including the parts that remained* had been adopted," the original discriminatory intent would control. *Id.* (emphasis added).

As in this case, then, Alabama's disfranchisement provision had been changed in subsequent years to remove some of its discriminatory provisions. But those changes did not—indeed they could not—remove the discriminatory taint from the "parts that remained" unchanged from the original 1890 enactment. Thus, even with respect to the question of subsequent amendments to Section 241, this case remains on all fours with *Hunter*.

B. The Eleventh and Second Circuit Decisions on which the En Banc Majority Relied Do Not Support its Reasoning

The decisions of the Eleventh and Second Circuit on which the Fifth Circuit relied to support the conclusion that Section 241 had been purged of its discriminatory taint in fact highlight the amendments' inadequacy in that regard. Pet. App. 11a-12a (citing *Johnson* v. *Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc), and *Hayden* v. *Paterson*, 594 F.3d 150 (2d Cir. 2010)). Those courts considered intervening enactments adopted after a process that gave legislators and voters the opportunity to vote to replace an offending provision in toto—the precise opportunity that Mississippi did not give its voters here.

In *Johnson*, the Eleventh Circuit considered an equal protection challenge to the criminal disfranchisement provision in Florida's Constitution. 405 F.3d at 1218. The court assumed that "racial animus motivated the adoption of" the original disfranchisement provision in Florida's 1868 Constitution. *Id.* at 1223. A century later, Florida held a new constitutional convention, which considered removing the 1868 disfranchisement provision *entirely*, but ultimately adopted a modified version disfranchising only those convicted of a felony. The new constitution was then approved by both houses of the legislature and ratified by Florida voters. *Id.* at 1224. The Eleventh Circuit concluded that any animus infecting the 1868 disfranchisement provision had been purged when the provision was "substantively altered and reenacted in 1968 in the absence of any evidence of racial bias" through the convention. *Id.* at 1225. Thus, in *Johnson*, the voters did more than make minor alterations to the original provision. The Florida legislature and Florida's citizenry voted to adopt an entirely new constitution, including a new and different disfranchisement provision.

The circumstances were essentially the same in the Second Circuit's *Hayden* decision. 594 F.3d at 154. There, the plaintiff challenged various iterations of New York's felon disfranchisement law, but the complaint "include[d] no specific factual allegations of discriminatory intent that post-date[d] 1874." *Id.* at 159. That omission was determinative, because in 1894 New York convened a constitutional convention that adopted numerous changes to the State's constitution, including a new iteration of the disfranchisement provision. New York voters then ratified the new constitution, including the new disfranchisement provision. *Id.* at 167. Given that history, the plaintiff's failure to

allege "discriminatory intent reasonably contemporaneous with the challenged decision" in 1894 was fatal to the equal protection challenge. *Id.* (internal quotation marks omitted).

In vivid contrast to the actions taken by citizens that *Johnson* and *Hayden* considered, Mississippi's citizens did *not* vote to adopt an entirely new constitution in 1950 or in 1968. Nor did they vote to adopt an entirely new criminal disfranchisement provision. As the seven dissenting here recognized, the only option before the voters in 1950 was to adopt or reject an amendment removing burglary from Section 241's list of disfranchising crimes. And voters' only option in 1968 was to vote for or against an amendment adding rape and murder to the list of disfranchising crimes. Neither vote gave the State's citizens the opportunity to reject or reenact the offending provisions of the original Section 241.

Indeed, when considered in light of the accurate historical record, the decision of the Fifth Circuit in this case *conflicts* with *Johnson* and *Hayden*. The very thing that was determinative of the equal protection question in those cases—an up or down vote on the entirety of the challenged constitutional provision—is what never occurred in this case.

C. The En Banc Majority Erred in Relying on Legislative Inaction to Purge Discriminatory Intent

The en banc majority also based its decision that the original Section 241 had been purged of its discriminatory taint on the actions—or more precisely the *inaction*—of an Election Law Reform Task Force convened in the mid-1980s, combined with the absence of any legislative action to repeal or alter Section 241 in response to the Task Force. The majority found it

persuasive that the Task Force "considered all aspects of voting in Mississippi" and after "much discussion concerning the broadening of disenfranchising crimes to include all felonies," left Section 241 "as is." Pet. App. 23a. According to the majority, decisions by the Task Force and the legislature in the 1980s to do nothing proved that Mississippi's voters would, if given the chance, have reenacted for race-neutral reasons the original list of disfranchising crimes in the 1890 Constitution. Pet. App. 22a, *Hunter*, 471 U.S. at 228.

One problem with the majority's reasoning is that there is no actual evidence to support it. Neither the respondent nor the court of appeals identified any evidence indicating that the inaction of the legislature amounted to a silent affirmance of Section 241, and no such evidence exists.

The majority thus based its decision on precisely the sort of negative inference from legislative inaction that this Court has repeatedly rejected as notoriously unreliable. See e.g., *Rapanos* v. *United States*, 547 U.S. 715, 749-750 (2006) (Scalia, J.) (explaining the Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction"). Mississippi's apparent decision not to alter or repeal Section 241 could accommodate a range of inferences, including "approval of the status quo," "inability to agree upon how to alter the status quo" or "indifference to the status quo." *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J. dissenting). For that reason, a court "walk[s] on quicksand" when it grounds a controlling principle in the "absence of corrective legislation." *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940).

Inferring intent from legislative inaction is particularly inappropriate in this context. The issue this

Court left open in *Hunter* was whether a discriminatory provision could be valid if "*enacted* today without any impermissible motivation." 471 U.S. at 233 (emphasis added). Here, of course, the only reason for this bizarre list of crimes in the 1890 Constitution is that those who adopted the list believed that African Americans were more likely to commit those particular crimes. It is hard to conceive of any race-neutral justification for reenacting it today. In all events, no such reenactment occurred. If anything, the legislature's inaction in the 1980s reinforces *petitioners'* contention. Because neither the legislature nor the voters took any action that could be interpreted as a race-neutral reenactment of the original provisions of Section 241, nothing occurred in 1986 that could have "alter[ed] the intent with which the [original] article, including the parts that remained, had been adopted." *Abbott*, 138 S. Ct. at 2325.

D. Disparate Impact Evidence Is Unnecessary When Direct Evidence Establishes Discriminatory Intent, But In Any Event, the Record Establishes Disparate Impact

Contrary to the suggestion in Judge Ho's concurring opinion, the decision below cannot be upheld on the alternative ground that petitioners failed to show a disparate impact. Pet. App. 28a.

To begin with, discriminatory impact is not invariably required to prove a Fourteenth Amendment violation. To be sure, proof of discriminatory impact may well provide a basis for inferring such intent when direct proof of such intent is lacking. See *Vill. of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial

and direct evidence of intent as may be available . . . [t]he impact of the official action . . . may provide an important starting point."). But where, as here, direct proof of discriminatory intent is overwhelming, there is no need for a plaintiff to prove discriminatory impact as a window into a defendant's motivations. See *Batson* v. *Kentucky*, 476 U.S. 79 (1986) (no disparate impact showing needed when peremptory challenges are used for racially discriminatory reasons); *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018), (no disparate impact showing needed when direct evidence of racial gerrymander exists). Requiring proof of disparate impact in a case such as this one would, among other things, produce the exceedingly odd consequence that a provision adopted for discriminatory reasons could fluctuate in and out of unconstitutionality depending on what impact it was having at any given time.

The Court need not decide whether disparate impact is invariably required, however, because disparate impact exists here in exactly the same form as it did in *Hunter* v. *Underwood*. Although in *Hunter* the Court did not hold that such evidence is *necessary*, the Court noted that the Eleventh Circuit had "implicitly found the evidence of discriminatory impact indisputable." 471 U.S. at 227. The Court quoted the Eleventh Circuit: "This disparate effect persists today. In Jefferson and Montgomery Counties[,] blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under Section 182 for the commission of nonprison offenses." *Underwood* v. *Hunter*, 730 F.2d 614, 620 (11th Cir. 1984).

The statewide discriminatory impact proven in this case is far greater than the impact found in *Hunter*. African Americans constitute 36% of Mississippi's vot-

ing age population, but 59% of its disfranchised individuals. African American adults are thus 2.7 times more likely than white adults to have been convicted of a disfranchising crime. ROA.2737-2738.

Judge Ho found this evidence inadequate on the ground that it does not show disparities exceeding the disparities that would exist if Mississippi instead disfranchised all felons. He contends that such a showing is required, because the power to adopt Section 241 is only a "lesser power" included within the authority to enact a blanket felon disfranchisement provision, which he presumed would be constitutional. Pet. App. 30a. The concurrence cites no authority to support those remarkable propositions, nor could it. A measure is unconstitutional when it is motivated by a discriminatory intent to inflict an adverse impact based on race. *Arlington Heights*, 429 U.S. at 265. Such an intent may be present even if a State could cause the same numerical impact for constitutional reasons, as impact is "not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Indeed, under Judge Ho's reasoning, a government would have carte blanche to discriminate intentionally so long as some, hypothetical non-racist policy would have a similar effect on the population being discriminated against.

E. The Question Presented Is of Enormous Importance

The same reasons that supported the grant of certiorari in *Hunter* support review here with even greater force. Nearly 50,000 individuals have been disfranchised in Mississippi between 1994 and 2017, including nearly 29,000 African Americans.

ROA.3055. This group includes 14,000 African Americans under the age of 45, who have already served the entirety of their criminal sentences but will be denied the right to vote in the decades to come. ROA.3055, 3059. They cannot vote because the attendees to Mississippi's 1890 Constitutional Convention conspired to eliminate African American voting and thereby cement white political power in the State, and because Mississippi has taken no action in the intervening years to separate the disfranchisement provision from the delegates' invidious plan. The court of appeals grievously erred when it carried forward this injustice into the present day. It could reach that result only by flouting undisputed historical fact, and applying reasoning that is contradicted by this Court's unanimous decision in *Hunter*. This Court has never hesitated to step in when lower courts have failed to enforce this Court's Fourteenth Amendment precedents guaranteeing critical rights of civic participation. It should not hesitate now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDICES