No. 22-412

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

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

For over eighty years, the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), has strived to secure the constitutional promise of equal justice under law for all people in the United States. Critical to this mission is ensuring the full, fair, and free exercise of the right to vote for Black people. LDF has participated in multiple cases challenging discriminatory felony disenfranchisement provisions. *See Hunter v. Underwood*, 471 U.S. 222 (1985); *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc); *Hayden v. Paterson*, 594 F.3d 150 (2d. Cir. 2010); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc).

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. It frequently litigates voting rights, criminal justice, and racial discrimination cases, and is committed to remedying the continuing vestiges of racial discrimination wherever they appear.

Amici urge this Court to review a case that undermines both the promise of equal justice under law and the integrity of the federal courts: the Fifth Circuit's sharply divided en banc decision upholding a felony disenfranchisement law enacted by

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have been provided timely notice and consented to the filing of this brief.

Mississippi for the express purpose of disenfranchising Black voters.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1890, a mere twenty-five years after the end of slavery and Mississippi's failed insurrection against the United States, a nearly all-white delegation convened in Jackson, Mississippi, with the express intent of revising the state constitution to permanently disenfranchise Black people. Prohibited by the Federal Constitution's Fourteenth and Fifteenth Amendments from explicitly barring Black people from voting based on race, the delegates purposefully devised facially race-neutral provisions that had the effect of disproportionately excluding Black Mississippians from voting. One of the provisions that the delegation adopted permanently disenfranchised people convicted of nine specific crimes: bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, and bigamy. Miss. Const. art. XII, § 241 ("Section 241"). The delegates selected these crimes based solely on the delegates' belief that Black people were more likely than white people to be convicted of them. Thus, the delegates added Section 241 to the state constitution for this specific racist reason and, even today, Section 241 continues to have its intended impact: disproportionately disenfranchising hundreds of thousands of Black Mississippians. This undisputed fact alone requires Section 241's invalidation.

The right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v.*

Sims, 377 U.S. 533, 555 (1964). This is particularly true when a state's effort to restrict the right to vote is born of overt racial discrimination, which under the Constitution is "odious in all aspects," *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (citation omitted).

This Court recognized as much in *Hunter v. Underwood*, when it invalidated a provision of Alabama's constitution that was also enacted to disenfranchise Black people. 471 U.S. 222, 229 (1985). Despite the fact that Alabama's law was facially race-neutral and earlier state judicial interventions had reduced its discriminatory effect, this Court held that the Alabama law violated the Equal Protection Clause because its "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continue[d] to this day to have that effect." *Id.* at 233.

Like the disenfranchisement provision in *Hunter*, the Mississippi convention of 1890 was part of a racist "movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. Indeed, the drafters of the Alabama provision that this Court struck down in *Hunter* "[b]orrow[ed] from the successful methods of the Second Mississippi Plan"—the Alabama law was modeled on Section 241 in the Mississippi constitution. *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984). The discriminatory origins of Section 241 were never a secret. Only a few years after its passage, the unanimous Mississippi Supreme Court explained in 1896 that the 1890 delegates had intended "to obstruct the exercise of the franchise by the [N]egro race." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). The convention's members settled on nine specific disenfranchising crimes that

they believed Black people were more likely to commit than white people. *Id.* at 867. And the selective enforcement of these nine crimes against Black Mississippians reinforced this belief.

As was the case in *Hunter*, Section 241 has been only superficially modified over the last century. Neither the people of Mississippi nor the legislature have ever re-enacted the challenged list of disenfranchising crimes. Thus, the racist taint of the original law has never been erased: eight of the nine original disqualifying offenses enacted in 1890 to disenfranchise Black people remain and are still having the desired discriminatory effect on Black people. Thus, this Court's precedents concerning the removal of discriminatory taint through re-enactment are inapplicable.

The Fifth Circuit, both in its earlier decision *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), and in the en banc decision below, erroneously disregarded *Hunter* and, instead, validated a law rooted in racism. But "[a]n official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution . . . ." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). Section 241's fundamental purpose to disenfranchise Black people has not been erased and it continues to disproportionately harm Black Mississippians. This Court should correct this error by granting certiorari. Absent intervention, a destructive remnant of Jim Crow will remain enshrined in the Mississippi constitution and the federal courts will have turned a blind eye to the fundamental mandates of our federal Constitution.

ARGUMENT

I. MISSISSIPPI'S HISTORY OF DISENFRANCHISING BLACK CITIZENS

The enactment of Mississippi's felony disenfranchisement provision in its 1890 constitution was a direct reaction to the proliferation of the Black electorate post-Reconstruction. Even before the Civil War, Black people organized and campaigned for their right to vote. Susan Cianci Salvatore et al., Nat'l Park Serv., U.S. Dep't of the Interior, *Civil Rights in America: Racial Voting Rights* 4 (2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf (citing Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 114 (1988) and Philip S. Foner & George E. Walker, *Proceedings of the Black National and State Conventions, 1865-1900* xxi (1986). Free Black people and formerly enslaved people convened statewide conventions to agitate for their political rights, arguing that suffrage was "an essential and inseparable element of self[-]government." *Id.*

A. Black Electorate Engagement Increased During Reconstruction.

After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments prohibited racial discrimination in voting and gave Congress the authority to enforce that prohibition. The Military Reconstruction Acts of 1867 invalidated Mississippi's 1865 Constitution, which restricted suffrage to white male taxpaying property holders over the age of twenty-one, and required the state to adopt suffrage for all male citizens regardless of race. *Quiet*

Revolution in the South: The Impact of the Voting Rights Act, 1965–1990 21 (Chandler Davidson & Bernard Grofman eds., 1994). In addition, following ratification of the Fifteenth Amendment, Congress passed the Civil Rights Act of 1870, which, among other mandates, required that any citizen, otherwise qualified to vote, shall be entitled to vote without distinction to race or previous condition of servitude. U.S. Comm'n on C.R., *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination - Volume VII: The Mississippi Delta Report* (2001), https://www.usccr.gov/files/pubs/msdelta/main.htm. The act also imposed penalties for registrants and other people who attempted to obstruct the right to vote. Enforcement Act of 1870, 16 Stat. 140–42.

These federal protections temporarily afforded Black men the opportunity to exercise their right to vote and elect representatives of their choice. U.S. Comm'n on C.R., *Voting in Mississippi: A Report* 1 (1965) ("*Voting in Mississippi*"). When Mississippi rejoined the Union in February of 1870, Black Mississippians made up more than half of the state's population, and for the first time in the state's history, a significant portion of duly elected officials. *Id*. at 2. In 1871, thirty-nine Black people were elected to the state's legislature. W.E.B. Du Bois, *Black Reconstruction* 441 (1st ed. 1935). By 1873, nine out of the thirty-seven members of the state's senate and fifty-five of the one-hundred and fifteen members of the state's house of representatives were Black, and Black people held three of the seven statewide offices, including Lieutenant Governor, Secretary of State, and State Superintendent of Education. *Id.* at 444, 441. In total, from 1869 to 1901, voters in Mississippi

elected a total of sixty-four Black state legislators and three Black representatives to the United States Congress. *See* U.S. Comm'n on C.R., *Racial and Ethnic Tensions in American Communities, supra* (citing *Historical Statistics of Black America: Volume II* 1289 (Jessie Carney Smith & Carroll Peterson Horton eds., 1995)).

The electoral triumphs of Black citizens, however, were short-lived. The Civil Rights Act of 1870 was functionally defunct after this Court severely limited its reach. *See, e.g.*, *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875). Not long after the electoral gains of Black Mississippians in the early 1870s, white Mississippians began to organize to re-secure total power.

B. Black Political Engagement Was Met with Racial Violence and Intimidation.

Despite Mississippi's readmission to the Union, the state remained committed to the "continuation of a racial caste system." *Moore v. Bryant*, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017). The continuation of this racial caste system included destroying the recent gains made by the Black electorate. Indeed, even when they made the electoral gains described above, Black voters were terrorized with racial violence and economic intimidation. *See Voting in Mississippi*, *supra*, at 2. The Ku Klux Klan formed in 1866 and spread rapidly throughout the South, "orchestrating a 'huge wave of murder and arson' to discourage Black[] [people] from voting." *Jamison v. McClendon*, 476 F. Supp. 3d 386, 398 (S.D. Miss. 2020) (citation omitted); *see also* J. Morgan Kousser, *The Shaping of Southern Politics,*

Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 16 (2d. prtg. 1975).

During the first three months of 1870 alone, sixty-three Black Mississippians were murdered for voting. *Jamison*, 476 F. Supp. 3d at 398. In 1874, twenty-nine Black people were massacred in Vicksburg, Mississippi for political engagement. *Moore*, 205 F. Supp. 3d at 840 (citing Nicholas Lemann, *Redemption* 88, 91 (2006)). By the end of Reconstruction, white Mississippians led "a program of officially encouraged, random, unpunished violence against innocent Negroes with the overall political aim of disenfranchisement." *Id.* at 840 n.22 (quoting Lemann, *supra*, at 98). "Violence also broke out in Meridian, Austin, and Yazoo City, among many other towns in Mississippi." *Moore*, 205 F. Supp. 3d at 840. In some communities, local political clubs threatened unemployment to any Black person who voted for a Republican. *Voting in Mississippi*, *supra*, at 2. In other areas, white mobs stationed themselves at polling locations to intercept and threaten to kill any Black person attempting to register to vote. *Id.*

II. THE 1890 CONVENTION GENERALLY, AND SECTION 241 IN PARTICULAR, WERE DESIGNED TO RE-ESTABLISH WHITE SUPREMACY AND DISENFRANCHISE BLACK CITIZENS.

In 1890, 134 men convened to rewrite the Mississippi constitution. Although Black people were a majority (fifty-eight percent) of Mississippi's population, 133 of the 134 convention members were white. *Voting in Mississippi*, *supra*, at 3. Convention delegates openly expressed that the "avowed purpose

of calling [this] [c]onvention was to restrict the [N]egro vote," *id.*, and to "devise such measures, consistent with the Constitution of the United States, as will enable [Mississippi] to maintain a home government, under the control of the white people of the State." U.S. Comm'n on C.R., *Racial and Ethnic Tensions in American Communities*, *supra*; *see also United States v. Mississippi*, 229 F. Supp. 925, 985 (S.D. Miss. 1964), rev d, 380 U.S. 128 (1965) (Brown, J., dissenting) (quoting Senator George). The president of the convention declared that the delegation assembled "to exclude the Negro. Nothing short of this will answer." Ronald G. Shafer, *The 'Mississippi Plan' to Keep Blacks from Voting in 1890*, Wash. Post (May 1, 2021), https://www.washingtonpost.com/history/2021/05/01/mississippi-constitution-voting-rights-jim-crow/. "In other words, the [c]onvention was not intended to ensure the proper implementation of the post-Civil War Constitutional Amendments, but rather to permit 'white people' to take back their state from the multi-racial coalition which had governed Mississippi after the War." *Moore*, 205 F. Supp. 3d at 844 (citing Lemann, *supra*, at 81). Prominent local newspapers also characterized the convention's goal as identifying what measures were appropriate "to remove the [Black] voter as far as possible to a position where his preponderance will not be felt." *Suffrage and the Force Bill*, Clarion-Ledger, Aug. 2, 1890, at 2.

A. The Convention Adopted Multiple Anti-Black Voting Laws, Including Section 241.

Mississippi's felony disenfranchisement provision was just one of many provisions devised by convention

delegates and embedded in the state constitution to cement the perpetual disenfranchisement and subjugation of Black people. These provisions included a poll tax, literacy test, and residency requirement.

The convention established a two-dollar poll tax for qualified electors to pay before registration. Miss. Const. art. XII, § 243 (repealed 1975); *see Voting in Mississippi*, *supra*, at 4. This provision disproportionately affected Black voters because poverty was pervasive in Black communities. *See Ratliff v. Beale*, 20 So. 865, 869 (Miss. 1896). As the Mississippi Supreme Court explained: the purpose of the poll tax was to restrict access to voting. *Id.*; *see also* Kousser, *supra*, at 67. Delegates believed that Black Mississippians—raked by extreme poverty in the years after slavery's end—could not make the financial sacrifice that a poll tax required, noting that "[t]he very idea of a poll qualification [was] tantamount to the State of Mississippi, saying to the Negro: 'We will give you two dollars not to vote'." *Voting in Mississippi*, *supra*, at 4 (quoting Mr. Coffey of Jefferson County as quoted in Clarion Ledger (Jackson), Sept. 12, 1890, at 1). Shortly after its enactment, one Mississippi congressman estimated that the poll tax would disenfranchise ninety percent of the Black populace. Kousser, *supra*, at 66.

The convention also adopted a literacy test that required an applicant either to read a section of the state constitution or to understand the same when read to him, or to give a reasonable interpretation thereof. *See* Miss. Const. art. XII, § 244 (repealed 1975). The reading clause took advantage of the fact that, in 1890, at least sixty percent of Black

Mississippians—compared to only ten percent of whites—could not read or write. *See Voting in Mississippi*, *supra*, at 4. Indeed, prior to the end of slavery, Mississippi law made it illegal to teach Black people to read. *See* Edward M. Davis, *Extracts from the American Slave Code* 2 (1845). The understanding and interpretation clauses provided a loophole for illiterate white Mississippians by allowing them to "interpret" or state their understanding of a clause when read to them. *See id.* at 5; William A. Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J.S. Hist. 318, 327 (1938). Registrars possessed wide discretion to determine an applicant's ability to read or understand a section of the state constitution. *See Voting in Mississippi*, *supra*, at 5; Mabry, *supra*, at 333. White people were usually asked easy questions, and Black people were asked incomprehensible questions that no one could answer. *See United States v. Mississippi*, 380 U.S. 128, 132–33 (1965); *see also* Salvatore et al., *supra*, at 12.

In addition, the 1890 constitution enacted a durational residency provision that required registrants to prove residency in the state for two years and in their election county for one year preceding the ensuing election. Miss. Const. art. XII, § 241. Delegates believed that this provision would disparately affect Black Mississippians because Black people were less likely to own land and were more migratory than white Mississippians. *Voting in Mississippi*, *supra*, at 6. By 1892, less than six percent of the Black voting age population was registered to vote and ninety-eight percent of Black Mississippians did *not* vote in the Presidential election. *Voting in Mississippi*, *supra*, at 8; Kousser, *supra*, at 145.

B. In Adopting Section 241, the Mississippi Constitutional Convention Employed the Criminal Legal System to Disenfranchise Black Voters.

Like the above provisions, Section 241 was intentionally enacted to disenfranchise Black Mississippians. The convention identified certain crimes that its members believed Black people were more likely to be convicted of than white people and the convention made those crimes, and only those crimes, result in disenfranchisement.

Larceny was one of the nine crimes chosen at the 1890 convention. Prior to 1876, larceny was defined as theft of items valued at twenty-five dollars or more. *Id.* at 937. Under what was known as Mississippi's Pig Law, in 1876, the Mississippi legislature expanded the definition of larceny to include theft of anything worth ten dollars or more and theft of certain livestock valued at one dollar or more based on the belief that Black people were more likely to be convicted of petty theft. *Id.* at 938. Aided by the 1876 revision in the Mississippi penal code that expanded the definition of felony larceny, Black Mississippians were disproportionally prosecuted for larceny and then disproportionately disenfranchised. *See generally* Pippa Holloway, *"A Chicken-Stealer Shall Lose His Vote": Disfranchisement for Larceny in the South, 1874–1890*, 75 J.S. Hist. 931, 941 (2009).

Within three years of this law's enactment, the number of convictions for grand larceny "effectively quintuple[ed]." Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wisc. L. Rev. 1045, 1127 n.353 (2002). Petty offenses that now qualified

as felony larceny were selectively enforced against Black Mississippians. Holloway, *supra*, at 949 A white Republican noted, "[c]olored men came to me constantly . . . and said they were denied the right to register in our county because they had been convicted of petit larceny . . . [And] I know a number of white men, who had before been sent to the penitentiary, and who did register and vote."[2] Democratic Party activists and leaders "worked with local police and judges to increase arrests and convictions for disfranchising offenses" and "on election day partisan challengers accused African American voters of having criminal pasts, election officials upheld these accusations, and cooperative police arrested and jailed individuals who insisted on casting their ballots, charging them with 'illegal voting.'" Holloway, *supra*, at 949.

C. The Felony Disenfranchisement Provision Was Expressly Enacted to Further White Supremacy.

The Mississippians who arrived at the constitutional convention in 1890 made no secret of their intention to disenfranchise Black voters. An editorial in the *Clarion-Ledger* read: "The suffrage question is acknowledged by the ablest man of the State to be of greatest importance . . . It is obvious that the negroes

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[2] *Testimony as to Denial of Elective Franchise in Mississippi at the Elections of 1875 and 1876, Taken Under the Resolution of the Senate of December 5, 1876 Before the Comm. on Privileges and Elections*, 44th Cong. 323 (1876) (Statement of Mitchell), https://blackfreedom.proquest.com/testimony-as-to-denial-of-elective-franchise-in-mississippi-at-the-elections-of-1875-and-1876-taken-under-the-resolution-of-the-senate-of-december-5-1876/.

cannot be allowed the power in government to which their numerical preponderance would entitle them." *Suffrage and the Force Bill*, *supra*, at 2.

Section 241 furthered this end by including nine crimes that permanently disenfranchised voters—bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, and bigamy.[3] Less than a decade after Section 241's enactment, the Supreme Court of Mississippi openly acknowledged the discriminatory intent behind Section 241. *See Ratliff*, 20 So. at 868.

Constrained by the Fourteenth and Fifteenth Amendments and therefore unable to overtly discriminate based on race, Section 241 was crafted based on the belief that Black people were more likely to be convicted of certain crimes. For example, bigamy was a crime that white people believed Black Mississippians were more likely than whites to be convicted of because "slavery had severely upset family structures" and "[o]ften [former] slaves, whose spouses had been sold, remarried without obtaining a divorce or confirming the death of their former spouse"—it was chosen as one of the nine

[3] *See* George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics,* 32 Fordham Urb. L.J. 101, 108 n.61 (2005), https://ir.lawnet.fordham.edu/ulj/vol32/iss5/3 (noting that "[t]heft was often considered a 'black' crime and led to felony disenfranchisement"); Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 541 (1993) (explaining how Mississippi and other southern state legislators crafted criminal disenfranchisement laws based on the "thought that blacks were more likely to commit 'furtive offenses' such as petty theft.").

disenfranchising crimes. Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753, 777 n.124 (2000). The Mississippi court described Black people as "patient, docile people" who were less "prone" to commit the "robust crimes of the whites," like robbery, which were not included among the disenfranchising offenses. *Ratliff*, 20 So. 865 at 868.

In 1899, one observer noted the disparate enforcement of enumerated crimes in Section 241 and the detrimental impact it had on Black Mississippians. John L. Love described the following in the American Negro Academy papers:

> The crimes mentioned as disqualifying from voting are such as it is always easy, when desirable, to convict the Negro of committing. Under the present method of administering justice in the states where these disfranchising constitutions operate, the Negro has neither any guarantee of a fair and impartial trial nor any protection against malicious prosecution or false accusations when it is convenient to convict him.

John L. Love, *The Disfranchisement of the Negro*, *in* 6 American Negro Academy Occasional Papers 16 (1899), https://www.gutenberg.org/files/31333/31333-h/31333-h.htm. As Black people were disproportionately charged with and then convicted of these offenses, the convention achieved its intended goal. *Ratliff*, 20 So. at 867–68.

III. BLACK MISSISSIPPIANS CONTINUE TO BE DISPROPORTIONATELY HARMED BY THE DISENFRANCHISEMENT LAW.

Today, Black Mississippians continue to be disproportionately harmed by Section 241. While Mississippi has the highest percentage of Black Americans of any state in the country, it has not elected a Black person to statewide office since 1890, due in part to Section 241. Jimmie E. Gates, *Black Political Influence in Mississippi Has Slowed Despite Increase in Elected Officials*, Clarion Ledger (Aug. 19, 2017), https://www.clarionledger.com/story/news/politics/2017/08/19/black-political-influence-mississippi-has-slowed-despite-increase-elected-officials/537533001/. Between 1994 and 2017, nearly 50,000 Mississippians were disenfranchised through Section 241, and more than half of those people were Black. ROA.3055. Black adults are thirty-six percent of Mississippi's voting age population, but fifty-nine percent of its disenfranchised people. ROA.2737–38.

Moreover, under the Mississippi Code, restoration of the right to vote for those disenfranchised by Section 241 is nearly impossible. An individual's right to vote can be restored only through: 1) a pardon or executive order from the governor restoring one's civil rights or 2) the suffrage bill passed by two-thirds of the Mississippi legislature in both houses and then approved by the governor. Between 1987 and 2022, a mere 185 people had their voting rights restored through the suffrage bill. Sam Levine, *Mississippi: Felon Disenfranchisement Is a Racist Labyrinth Worthy of Kafka*, The Guardian (Jan. 13, 2022), https://www.theguardian.com/us-

news/2022/jan/13/mississippi-felon-disenfranchisement-is-a-racist-labyrinth-worthy-of-kafka?CMP=share_btn_link.

IV. THE MINOR MODIFICATIONS OF SECTION 241 SINCE ITS ORIGINAL ENACTMENT DO NOTHING TO DISSIPATE THE LAW'S ORIGINAL RACIST TAINT.

By allowing Section 241 to remain on the books, the divided Fifth Circuit has endorsed a Jim Crow law born of explicit racist intent that violates the Fourteenth Amendment. *Hunter v. Underwood*, 471 U.S. 222 (1985) and *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020) directly apply here and confirm that a law steeped in race discrimination is unconstitutional.

In *Hunter*, this Court struck down a disenfranchisement provision that, while neutral on its face, unambiguously targeted Black voters. In 1901, an all-white delegation convened at the Alabama constitutional convention to "establish white supremacy" and added crimes to Alabama's disenfranchisement provision that targeted Black Alabamians. *Hunter*, 471 U.S. at 229. This Court recognized that the "Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South" to disenfranchise Black people. *Id.* at 229. In fact, the Alabama law at issue in *Hunter* was modeled after the voting restrictions that Mississippi adopted in its 1890 constitution, including Section 241. *Underwood v. Hunter*, 730 F.2d at 618. Because of the Alabama law's origins, in *Hunter*, this Court held that the disenfranchisement provision "was enacted with the intent of disenfranchising" Black people and therefore

violated the Fourteenth Amendment. 471 U.S. at 229. This Court also recognized that provisions enacted as part of an intentional scheme to block Black people from voting can violate the Constitution decades after they are enacted, so long as their discriminatory impact persists.[4] *Id.* at 233.

This Court in *Hunter* underscored that even amendments striking parts of the provision did not remove the taint of the original discriminatory intent. And here, like with the Alabama provision at issue in *Hunter*, Section 241 was "enacted with the intent of disenfranchising" Black people, and Mississippi has only modified it in minor ways that do not remove the original taint. 471 U.S. at 229. Indeed, the Court has long recognized that policies that are "traceable" to policies adopted with a discriminatory intent and that still "have discriminatory effects" offend the Constitution. *United States v. Fordice*, 505 U.S. 717, 729 (1992); *see also North Carolina v. Covington*, 138 S. Ct. 2548, 2552–53 (2018); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

In *Ramos*, this Court also recently acknowledged that a state constitutional provision that had Jim Crow origins and ongoing racially discriminatory effects requires the Court's intervention and correction. 140 S. Ct. at 1394. As Justice Kavanaugh explained, "the Jim Crow origins and racially

[4] In *Hunter*, this Court found a sufficient disparate impact where no one disputed that Black people were 1.7 times more likely than white people to be disenfranchised by Alabama's disenfranchisement provision. 471 U.S. at 227 (quoting *Underwood v. Hunter*, 730 F.2d at 620). In Mississippi, Black adults are 2.7 times more likely to be disenfranchised by Section 241 than white adults. ROA.2738.

discriminatory effects [of a provision] . . . should matter," and indeed "should count heavily," even justifying overruling prior precedent to right the wrong. 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part). As in *Ramos*, failing to address the unconstitutional law at issue here "tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects." *Id.* at 1419. Unlike in *Ramos*, however, no precedent needs be overturned to invalidate Section 241.

The Fifth Circuit's continued insistence on validating this disenfranchisement law enacted with racial motive enshrines a remnant of Jim Crow in Mississippi's constitution. If Mississippi adopted a law today with the same express intentionally discriminatory motivation, it would clearly violate the Equal Protection Clause. And nothing that has happened since Section 241 was enacted has neutralized the racist origins of Section 241.

The original eight crimes challenged here have never been reconsidered by the legislature or Mississippi voters. The law has been modified only twice and each time through ballot initiatives that did not reconsider the provision in its entirety. In 1950, voters were solely given the choice to either remove the crime of burglary from Section 241 or to leave the provision unchanged. ROA.2641–42. Similarly, in 1968, voters were asked only whether to add the crimes of murder and rape to Section 241, or to leave it unchanged. Once again, Mississippians had no opportunity to address the continuing validity of the existing provision. ROA.2645. In both 1950 and 1968, regardless of how Mississippians voted, Section 241's

original language and the intent with which it was enacted would remain unchanged. Thus, the delegates of the 1890 constitutional convention—who explicitly proclaimed that their purpose was to "obstruct the exercise of the franchise of the negro race"—are the only Mississippians to have *ever* voted on the original eight crimes listed in Section 241. *Ratliff*, 20 So. at 868.[5] Just as in *Ramos*, the "racially biased origins" of Section 241 "uniquely matter here" because the Mississippi legislature "never truly grappled with [Section 241's] history . . . ." 140 S. Ct. at 1408, 1410 (Sotomayor, J., concurring). [6]

[5] Only three words have changed in Section 241 over the course of time and voters never had the opportunity to engage with the 1890 convention delegates' original racist intent. The minimal changes are akin to the Court's invalidation of an Alabama disenfranchisement provision in *Hunter*. There, although lower courts struck down parts of Alabama's disenfranchisement provision, much of the original provision remained. This Court held that the amendments in *Hunter* did not absolve the original racism of Alabama's disenfranchisement provision because "its original enactment was motivated by a desire to discriminate against blacks on the account of race and the section continues to this day to have that effect," thus, the provision still violated the Fourteenth Amendment. 471 U.S. at 233. The Court should apply *Hunter* in this instant case and hold that Section 241 violates Petitioners' Equal Protection rights.

[6] Not only did the Fifth Circuit err in determining that the 1950 and 1968 amendments re-enacted Section 241, it also ignored the reality that those were periods when racial terror reigned in Mississippi, and Black people faced extreme violence if they attempted to vote. *See, e.g.*, Dernoral Davis, *When Youth Protest: The Mississippi Civil Rights Movement, 1955-1970*, Miss. Hist. Now (Aug. 2001), https://www.mshistorynow.mdah.ms.gov/issue/the-mississippi-civil-rights-movement-1955-1970-when-youth-protest (Black Mississippians jailed at the

This Court and other federal courts have repeatedly intervened to address both racial discrimination in voting and the criminal legal system in Mississippi. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (finding that a state prosecutor engaged in the systematic exclusion of Black jurors); *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming an injunction against a racially discriminatory Mississippi redistricting plan); *Mississippi*, 380 U.S. at 144 (reinstating a constitutional challenge to Mississippi's voting laws, including certain discriminatory provisions of the 1890 constitution); *Operation Push, Inc. v. Mabus*, 932 F.2d 400, 402–03 (5th Cir. 1991) (finding that Mississippi's dual registration requirement, which originated in the 1890 constitution, violated the Voting Rights Act); *see also Young v. Fordice*, 520 U.S. 273 (1997) (holding

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fairgrounds in livestock cages after a 1965 protest against Mississippi's discriminatory voting laws); Ben Greenberg, *Before 'Freedom Summer,' A Wave of Violence Largely Forgotten*, NPR: Code Switch (Aug. 5, 2014), https://www.npr.org/sections/codeswitch/2014/08/05/337777120/before-freedom-summer-a-wave-of-violence-largely-forgotten (the White Knights of the Ku Klux Klan made their debut in 1964 and "unleashed a level of violence not seen in the South in decades," including the killings of civil rights workers who tried to register Black people to vote); *Harness v. Watson*, 47 F.4th 296, 331 (5th Cir. 2022) (Graves, J., dissenting) ("The racial climate in Mississippi leading up to 1968, the year that the legislature and electorate allegedly acted race neutral as to § 241, was characterized by a society-wide crusade to keep Black people as second-class citizens."). It is by no means clear that a re-enacted law passed during those periods would not also have been tainted by discriminatory animus. But, this Court need not consider the issue because there was no re-enactment.

that Mississippi's attempt to reinstate a dual voter registration requirement was subject to preclearance review under the Voting Rights Act).

The Fifth Circuit had the opportunity to correct the racist origins and continuing racially discriminatory effects of Section 241 but failed. *See Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part). The Court should grant review to correct this egregious error and wipe this racist stain from Mississippi's books.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

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