# United States Court of Appeals

*for the*

# Fifth Circuit

Case No. 19-60632

ROY HARNESS; KAMAL KARRIEM,

*Plaintiffs-Appellants,*

v.

MICHAEL WATSON, Secretary of State of Mississippi,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON IN CASE NO. 3:17-CV-791
HONORABLE DANIEL P. JORDAN, III, CHIEF JUDGE

**BRIEF FOR *AMICI CURIAE* DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated; JON O'NEAL and EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated, IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

In accordance with Federal Rule of Appellate Procedure 29(a) and Fifth Circuit Rule 29.2, the undersigned counsel hereby certifies that, in addition to the persons and entities listed in the Certificate of Interested Persons submitted by Plaintiffs-Appellants in their Opening Brief on Rehearing En Banc, the following persons or entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici:

Amici are the named plaintiffs in *Hopkins v. Hosemann*, No. 3:18-cv-188-DPJ-FKB (S.D. Miss.):

Dennis Hopkins,
Herman Parker, Jr.,
Walter Wayne Kuhn, Jr.,
Byron Demond Coleman,
Jon O'Neal, and
Earnest Willhite,

each individually and on behalf of a class of individuals consisting of "[a]ny person who (a) is or becomes disenfranchised under Mississippi state law by reason of a conviction of a disenfranchising offense, and (b) has completed the term of incarceration, supervised release, parole, and/or probation for each such

conviction."[1]

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[1] Order granting class certification in *Hopkins v. Hosemann*, Dkt. 89, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Feb. 3, 2019), at 6.

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## INTERESTS OF AMICI

Dennis Hopkins, Herman Parker, Jr., Walter Wayne Kuhn Jr., Byron Demond Coleman, Jon O'Neal, and Earnest Willhite are among the many victims of Mississippi's punitive and unjust criminal disenfranchisement scheme. Each was convicted of a disenfranchising offense enumerated in the 1890 version of Section 241 of the Mississippi Constitution. None of these individuals may ever vote again under Mississippi law, unless they obtain a pardon from the Governor or a reprieve from the Mississippi Legislature in the form of an individualized "suffrage bill" pursuant to Section 253 of the Mississippi Constitution.

In 2018, Messrs. Hopkins, Parker, Kuhn, Coleman, O'Neal and Willhite, individually and on behalf of a class of similarly situated individuals (the *"Hopkins* Plaintiffs") filed a federal class action lawsuit styled as *Hopkins v. Hosemann* against the Mississippi Secretary of State challenging the state's criminal disenfranchisement scheme on different constitutional grounds than the case at bar. On December 3, 2019, a panel of this Court heard oral arguments on the parties' expedited cross-appeals in *Hopkins;* a decision has not yet been issued.

The *Hopkins* Plaintiffs have a strong personal interest in the dismantling of Mississippi's criminal disenfranchisement scheme, which is rooted in racial discrimination and continues to this day to disproportionately impact Black Mississippians. A ruling in favor of the *Harness* Plaintiffs would restore the right

to vote to each of the *Hopkins* Plaintiffs; and to the majority of the class of Mississippians that the *Hopkins* Plaintiffs represent.

Counsel for the *Hopkins* Plaintiffs drafted this brief in its entirety. No party or counsel for any party drafted any aspect of this brief or contributed resources towards the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

## INTRODUCTION

The right to vote is the cornerstone of citizenship in a democratic society. But in Mississippi, tens of thousands of individuals will never again have the opportunity to cast a ballot because of the state's punitive, unjust and arbitrary criminal disenfranchisement laws. Under Section 241 of the Mississippi Constitution, individuals who are convicted in Mississippi state courts of numerous crimes lose the right to vote for the rest of their lives. A disenfranchised individual may only regain the right to vote at the behest of the Governor, or through the rarity of a "suffrage bill" passed by the Mississippi Legislature pursuant to Section 253 of the Mississippi Constitution. Neither Section 253 nor any Mississippi statute establishes objective criteria for legislators to apply. Instead, Mississippi legislators have complete discretion to decide which disenfranchised individuals may vote again.

In March 2018, six Mississippi residents who had completed their sentences for disenfranchising offenses filed a federal class action against the Mississippi Secretary of State styled as *Hopkins v. Hosemann* challenging Mississippi's criminal disenfranchisement scheme. The *Hopkins* Plaintiffs claim that Section 241's lifetime voting ban violates the Eighth Amendment's prohibition on cruel and unusual punishment; and exceeds the scope of the limited exemption for criminal disenfranchisement laws set forth in Section 2 of the Fourteenth

Amendment. The *Hopkins* Plaintiffs further claim that Section 253 violates the Equal Protection Clause because it was enacted with racially discriminatory intent, has never been amended, and continues to disproportionately impact Black Mississippians. The *Hopkins* Plaintiffs also claim that Section 253 separately violates the Equal Protection Clause because it permits legislators to arbitrarily restore voting rights to some Mississippi residents and not others. Finally, the *Hopkins* Plaintiffs claim that Section 253 violates the First Amendment.[1] None of these claims is asserted by the *Harness* Plaintiffs.

The *Hopkins* Plaintiffs submitted an expert report by historian Dr. Dorothy O. Pratt in support of their race-based equal protection challenge to Section 253. As detailed in that report, the delegates to Mississippi's 1890 Constitutional Convention "recognized that no single [facially] race-neutral restriction, standing alone, would accomplish their goal of white political control."[2] The delegates therefore "specified several requirements to qualify for the elective franchise, including a literacy test and a criminal disenfranchisement provision; these

[1] The *Hopkins* Plaintiffs brought suit on behalf of a class of similarly situated Mississippians who have completed their sentences for disenfranchising offenses. The district court granted the *Hopkins* Plaintiffs' motion for class certification in February 2019. *See* Order, Dkt. 89, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Feb. 3, 2019), at 6.

[2] Report of Dorothy O. Pratt, Ph.D. ("Pratt Rep."), Dkt. No. 65-2, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at ¶ 8(c).

requirements were designed to intertwine and interlock to create an effective barrier to African American political participation within the state."[3]

The delegates meticulously "structured the criminal disenfranchisement provision (enacted as Section 241 of the 1890 Constitution) to narrow the African American franchise base."[4] They limited the reach of the provision "to a carefully selected list of crimes that aimed to ensnare more Africans Americans than whites" by "focus[ing] primarily on property-related offenses."[5] Although Section 241's "criminal disenfranchisement provision was crafted to selectively disqualify African Americans, the delegates were aware that some white men convicted of these same offenses would also lose their right to vote."[6] To address this issue, the delegates enacted Section 253, a companion provision to Section 241, which read then, as it does today, as follows:

> The legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime; but the reasons therefor shall be spread upon the journals, and the vote shall be by yeas and nays.

Miss. Const. art. XII, § 253 (1890).

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[3] *Id.*

[4] *Id.* at ¶ 51.

[5] *Id.*

[6] *Id.* at ¶ 52.

Nothing in the 1890 Constitution provided "specified parameters for legislators' deliberations, nor any requirement that legislators act in a race-neutral manner" in restoring voting rights.[7] Rather, Section 253 "allowed the legislators complete discretion to determine whose voting rights to restore."[8] Section 253 "ensured that whites caught up in the criminal justice system had a possible remedy and could redeem their" right to vote.[9] Dr. Pratt researched the restoration of voting rights pursuant to Section 253 in the first three decades after the 1890 Constitution was enacted, and determined that the Mississippi Legislature restored voting rights to at least 101 individuals during this time.[10] Dr. Pratt found no evidence that even a single African-American individual regained the right to vote between 1890 and 1920.[11]

The criminal disenfranchisement provision of Section 241 and the legislative re-enfranchisement provision of Section 253 together comprised a cohesive racially discriminatory scheme that remains almost completely intact today. All but

[7] *Id.* at ¶ 54.

[8] *Id.*

[9] *Id.* at ¶ 53.

[10] Declaration of Dorothy O. Pratt, Ph.D., Dkt. 77-3, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at ¶ 11.

[11] *Id.* at ¶¶ 11-16.

one of the original disenfranchising offenses selected by the delegates to the 1890 Constitutional Convention are enumerated in the present-day version of Section 241. Section 253 has never been amended since its original enactment.[12] In large part, the present-day version of Mississippi's criminal disenfranchisement scheme continues to carry forward the discriminatory intent of the delegates to the 1890 Constitutional Convention.

This Court should hold that *Cotton v. Fordice* was incorrectly decided and should further hold that Section 241's criminal disenfranchisement provision violates the Equal Protection Clause with respect to the inclusion of the crimes originally selected by the framers of the 1890 Mississippi Constitution. Regardless of how this Court rules, this Court should not reach any of the questions raised by the *Hopkins* Plaintiffs, as none of the claims asserted by the *Hopkins* Plaintiffs are presented in the case at bar. An en banc ruling in favor of the *Harness* Plaintiffs would not dispose of the *Hopkins* Plaintiffs' claims.

[12] *See* Defendant's Response to the *Hopkins* Plaintiffs' First Set of Requests for Admission, Dkt. 65-17, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss.), at 12 (response to Request for Admission 28).

## PROCEDURAL BACKGROUND

In June 2018, the district court granted the Secretary of State's motion to consolidate the *Hopkins* and *Harness* actions.[13] The parties in both cases subsequently filed cross-motions for summary judgment.

In August 2019, the district court denied the *Hopkins* Plaintiffs' motion for summary judgment in its entirety, and granted the Secretary of State's motion for summary judgment with respect to all claims except for the *Hopkins* Plaintiffs' race-based equal protection challenge to Section 253.[14] The district court also denied the *Harness* Plaintiffs' motion for summary judgment, granted the Secretary of State's motion for summary judgment, and severed and dismissed the *Harness* complaint.[15] Finally, the district court certified, *sua sponte*, all of its holdings in *Hopkins* for immediate interlocutory appeal.[16]

A panel of this Court granted permission to appeal in *Hopkins* under 28 U.S.C. § 1292(b), and expedited the appeal.[17] Following merits briefing, oral

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[13] *See* Order, Dkt. 34, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB (S.D. Miss. June 28, 2018).

[14] *See* Order, Dkt. 91, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Aug. 7, 2019).

[15] *See id.*

[16] *See id.*

[17] *See* Order, *Hopkins v. Hosemann*, No. 19-60678 (5th Cir. Sept. 11, 2019); Order, *Hopkins v. Hosemann*, No. 19-60678 (5th Cir. Sept. 24, 2019).

argument in *Hopkins* was held before a panel of this Court on December 3, 2019—nearly seven months before a different panel of this Court heard oral arguments in *Harness*.[18] The *Hopkins* panel has yet to issue its decision.

## ARGUMENT

### I. THE QUESTIONS RAISED BY THE *HOPKINS* PLAINTIFFS ARE NOT BEFORE THE EN BANC COURT AND WILL NOT BE RESOLVED BY A FAVORABLE RULING IN THE CASE AT BAR

The *Hopkins* and *Harness* cases are brought by different plaintiffs seeking entirely different forms of relief, and the two cases share no common questions of law or fact. Three of the *Hopkin*s Plaintiffs' five claims target Section 253, a standardless provision establishing a mechanism for legislative reenfranchisement. Section 253 is not at issue in the *Harness* case. While two of the *Hopkins* Plaintiffs' claims concern Section 241's lifetime voting ban, the *Hopkins* Plaintiffs neither challenge the list of disenfranchising offenses enumerated in Section 241 nor assert a race-based equal protection challenge to this provision. The *Hopkins* Plaintiffs simply claim that lifetime disenfranchisement after sentence completion violates the Eighth Amendment and exceeds the limited exemption for criminal disenfranchisement laws in Section 2 of the Fourteenth Amendment.

Because none of the claims presented in *Hopkins* is asserted by the *Harness*

[18] The *Hopkins* appeal is docketed as *Hopkins v. Hosemann*, No. 19-60662, consolidated with *Hopkins v. Hosemann*, No. 19-60678.

plaintiffs, the legal questions raised by the *Hopkins* Plaintiffs are not before the en banc Court and, respectfully, should not be addressed in the en banc opinion. Moreover, even if this Court rules in favor of the *Harness* Plaintiffs, this Court's decision will not dispose of the *Hopkins* Plaintiffs' claims.

## II. MISSISSIPPI'S CRIMINAL DISENFRANCHISEMENT SCHEME RETAINS ITS ORIGINAL DISCRIMINATORY TAINT

As the Secretary of State has acknowledged, "a disenfranchisement law may be invalidated if its challengers prove that racially discriminatory intent motivated the enactment of the law and the State has never cured that improper intent."[19] Neither the "mere passage of time," *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000), nor a "reenact[ment] … without significant change," *Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010), is sufficient to purge a discriminatory law of its original taint. Rather, the taint is removed only if the revised version of the law does not "use criteria that arguably carr[y] forward the effects of any discriminatory intent on the part of the [prior] [l]egislature." *Abbott v. Perez*, 138 S.Ct. 2305, 2325 (2018).

If a racially motivated law is reenacted with its key discriminatory features intact, however, that law retains its original discriminatory taint. The Supreme

[19] Defendant-Appellee Secretary of State Watson's Response to Petition for Rehearing En Banc ("Opp."), *Harness v. Watson*, No. 19-60632 (5th Cir. Mar. 22, 2021), at 1. Unless otherwise noted, internal quotation marks, citations and internal alterations are omitted throughout.

Court recently made this commonsense principle clear in *Ramos v. Louisiana*, which struck down a racially motivated Louisiana law permitting nonunanimous verdicts for the convictions of serious crimes.[20] Louisiana originally adopted the law following its 1898 constitutional convention, which aimed "to 'establish the supremacy of the white race.'" 140 S. Ct. 1390, 1394 (2020) (Gorsuch, J.). There was no dispute that "race was a motivating factor" in the law's original enactment. *Id.* Louisiana revised and "eventually recodified" the law "in new proceedings untainted by racism." *Id.* at 1401 n.44; *see also id.* at 1426 (Alito, J., dissenting) (noting that "Louisiana's constitutional convention of 1974 adopted a new, narrower [non-unanimous jury] rule, and its stated purpose was judicial efficiency."). Yet the law's key features—nonunanimous jury verdicts for serious offenses—remained unchanged. The *Ramos* Court placed great weight on the law's "racist history" in its constitutional analysis. *Id.* at 1401 n.44; *see also id.* at 1418 (Kavanaugh, J., concurring) (explaining that although "Louisiana's modern policy decision to retain nonunanimous juries … may have been motivated by neutral principles (or just by inertia)," "the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana … should matter and should count heavily in favor" of striking down the law).

[20] The Court considered a challenge under the Sixth Amendment, not the Equal Protection Clause, but its reasoning is nonetheless relevant to the issues before this Court.

As in *Ramos*, there is no dispute that "race was a motivating factor" in the original enactment of Section 241's criminal disenfranchisement provision. *Id.* at 1394. Indeed, the Secretary of State has conceded "[t]he 1890 framers of Section 241 of the Mississippi Constitution targeted crimes they thought were predominantly committed by black Americans" and "narrowed Section 241 to target black Americans."[21] Here, nearly all the key discriminatory features of Mississippi's criminal disenfranchisement scheme—including the imposition of lifelong disenfranchisement for offenses that were originally selected by the delegates to the 1890 Constitutional Convention, as well as the standardless and entirely subjective provision for the legislative restoration of voting rights—have remained unchanged since 1890. Moreover, this scheme continues to disproportionately impact Black Mississippians. Just as Justice Kavanaugh observed with respect to Louisiana's non-unanimous jury law, the "Jim Crow origins" of Mississippi's criminal disenfranchisement scheme "should matter and should count heavily" in favor of striking down Section 241 with respect to all disenfranchising offenses that date back to the original 1890 Constitution. 140 S. Ct. at 1418 (Kavanaugh, J., concurring).

[21] Opp. at 1-2, 5.

## III. THE MISSISSIPPI LEGISLATURE'S FAILURE TO AMEND SECTION 241 IN THE 1980s DOES NOT SATISFY DEFENDANT'S BURDEN UNDER *HUNTER v. UNDERWOOD*

*Hunter v. Underwood* holds that "[o]nce racial discrimination is shown to have been a substantial or motivating factor behind enactment of [a] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." 471 U.S. 222, 228 (1985). *Hunter* does not permit a state to meet its burden simply by showing that a *subsequent* legislature might have enacted the challenged law for race-neutral reasons. Rather, *Hunter* requires courts to consider whether the legislature that enacted the challenged law would have done so "in the absence of the racially discriminatory motivation." *Id.* at 231; *see also Underwood v. Hunter*, 730 F.2d 614, 617, 621 (11th Cir. 1984) (considering the motivations of the 1901 Alabama legislature to determine whether "the same decision would have resulted had the impermissible purpose not been considered"), *aff'd*, 471 U.S. 222 (1985).

Under *Hunter*, the only legally relevant intent is that of the legislature that enacted the provision at issue. But the district court did not confine its analysis to considering whether the 1890 delegates would have enacted Section 241's criminal disenfranchisement provision absent discriminatory intent.[22] Instead, the district

[22] The panel opinion did not address this aspect of the district court's decision.

court incorrectly looked to the Mississippi Legislature's failure to amend Section 241 during a comprehensive review of the state's election laws in the 1980s, and incorrectly concluded that this "shows the state would have passed [S]ection 241 as is without racial motivation."[23] The district court also erroneously considered evidence concerning the Mississippi Legislature's failure to amend Section 253 in the 1980s—nearly a hundred years after Section 253's original enactment—in assessing the Secretary of State's "final burden under *Hunter*."[24]

But a *subsequent* legislature's failure to amend a law has no relevance to the question of whether a *prior* legislature would have enacted that law absent racially discriminatory intent. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("a proposal that does not become law" is a particularly "hazardous basis for inferring the intent of an earlier Congress"); *Medical Center Pharmacy v. Mukasey*, 536 F.3d 383, 400-01 (5th Cir. 2008) ("[A]bsent a valid amendment to alter the statutory structure, the opinion of the 1997 Congress informs us little in deciding what the 1937 Congress intended . . . ."). As a matter of both law and logic, the motivations of the 1980s' Mississippi Legislature in failing to amend Sections 241 and 253 cannot be imputed to the 1890 Mississippi

[23] *See* Order, Dkt. 91, *Harness v. Hosemann*, No. 3:17-cv-00791-DPJ-FKB, then consolidated with *Hopkins v. Hosemann*, No. 3:18-cv-00188-DPJ-FKB (S.D. Miss. Aug. 7, 2019), at 19.

[24] *Id.* at 27.

Legislature.

Moreover, the Mississippi Legislature's failure to amend Sections 241 and 253 in the 1980s cannot be construed as an endorsement of either provision. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (declining to infer legislative intent from a "history of failed legislation" because "congressional inaction lacks persuasive significance in most circumstances"); *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999) (ascribing no significance to Congress's "failure to amend [a] statute," and reasoning that "deductions from congressional inaction are notoriously unreliable"). Otherwise, any legislature could defeat an equal protection challenge to a law motivated by discriminatory intent simply by considering and rejecting a proposal to amend that law. This would effectively eviscerate *Hunter*.

## CONCLUSION

For the foregoing reasons, and those presented by Plaintiffs-Appellants, the panel's decision should be reversed.

Dated: July 29, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit and served on all counsel using the appellate CM/ECF system.

Dated: July 29, 2021

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29 because this brief contains 3,031 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger.

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