No. 19-60632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROY HARNESS; KAMAL KARRIEM,

Plaintiffs-Appellants,

v.

DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Mississippi (No. 3:17-CV-791)

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

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3. Jeremy Eisler of the Mississippi Center for Justice, Counsel for Plaintiffs-Appellants;
4. Roy Harness, Plaintiff-Appellant;
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument. Given the significant constitutional questions and rights raised in this appeal, oral argument is necessary for a full and fair consideration of this case.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On August 7, 2019, the district court granted summary judgment in favor of the defendant. Plaintiffs filed a notice of appeal on August 28, 2019. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the 1950 and 1968 amendments to Miss. Const. art. XII, § 241, which left intact eight of the nine disfranchising crimes adopted at Mississippi's 1890 constitutional convention—crimes the framers believed were "black crimes"—remove the framers' discriminatory intent to include those offenses?

2. Did the state prove that proceedings before Mississippi's Election Law Reform Task Force and the 1986 Mississippi legislature—which had no impact on Section 241—show that the otherwise bizarre collection of crimes adopted in 1890 would have been newly enacted in 1986 for reasons unrelated to the discriminatory intent that originally motivated their inclusion?

INTRODUCTION

In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court struck down as unconstitutional a portion 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. As the Court explained, "the Alabama Constitutional Convention of 1901 was part of a movement that swept the

post-Reconstruction South to disenfranchise blacks;" the "crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks;" and the "evidence . . . demonstrates conclusively 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. Similar to *Hunter,* the present case is a challenge to a provision of the Mississippi Constitution of 1890 that lists specific disfranchising crimes—and that remains in the constitution to this day. The offenses set forth in 1890 were those that the drafters believed were committed disproportionately by African Americans. 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 adopted as part of Section 241 in 1890 that are still in effect today are "bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement [and] bigamy." Miss. Const. art. XII, § 241. Burglary was in the original list but was removed in 1950 by constitutional amendment. Murder and rape were added by constitutional amendment in 1968.

This lawsuit seeks to nullify and strike only those crimes in the original list. It does not challenge the subsequent inclusion of murder and rape as disqualifying crimes.

In this case, the district court rejected plaintiffs' challenge to the eight of nine crimes that remain from the original list and that resulted from the 1890 discrimination. According to the district court, Section 241 is constitutional because of the 1950 amendment that displaced burglary, the 1968 amendment that added murder and rape, and the proceedings before a mid-1980s Electoral Law Reform Task Force and the 1986 legislature that led to no changes in the list. The discrimination of 1890 was treated as irrelevant even though the net effect of these changes on the original list was to eliminate only one of the nine disfranchising offenses and even though no one ever gave a non-racial reason for retaining the other eight.

The district court's reasoning was based in part on the 1998 decision by a panel of this Court in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). The panel recognized that "§ 241 [of the Mississippi Constitution] . . . was motivated by a desire to discriminate against blacks" when the provision was enacted in 1890. *Id.* at 391. Accordingly, said the panel, "we would be bound by *Hunter*," but for *Hunter's* reservation of the question whether "constitutional alterations could cure an originally defective constitutional provision." *Id.* at 391 & n.7, see also *Hunter*, 471 U.S. at 232-233 (declining to answer "whether [the discriminatory provision]

would be valid if enacted today without any impermissible motivation.") The *Cotton* court then concluded that the 1950 and 1968 amendments constituted a "re-enactment" of the original list in Section 241 by which "a majority of the voters had to approve the entire provision," and that this so-called "re-enactment" removed the discriminatory taint of the original version and rendered Section 241 constitutional. 157 F.3d at 391.

The present case was filed in 2017. It differs from *Cotton* in three ways that require this Court to consider factual and legal arguments that were not before the court in *Cotton*. First, the plaintiffs in this case submitted the actual ballots from the 1950 and 1968 amendments—which were not placed in evidence by the pro se plaintiff in *Cotton.* Those ballots demonstrate that the voters were asked only to vote up or down on the amendments. Voters were not offered the option of approving or rejecting the original discriminatory list of disfranchising crimes. Thus, contrary to the *Cotton* panel's assumption based on the woefully incomplete record in that case, the 1950 and 1968 amendments were not "re-enactments" of the original list at all. The original discriminatory provisions that remained in the 1890 constitution were not affected by the later amendments in any way.

Second, the plaintiffs in this case submitted evidence—which again was not included in the *Cotton* record—that the 1950 legislature was all-white and the 1968 legislature had only one black member, that those legislatures failed to repeal the

extensive structure of discriminatory legislation that existed at the time and instead took steps to add to it, and that the 1950 and 1968 amendments occurred during times of massive resistance by Mississippi's government and white populace to desegregation. Thus, contrary to the *Cotton* court's conclusion based on the sparse record before it, the 1950 and 1968 amendments cannot reasonably be understood as steps taken to "remove[] the discriminatory taint associated with the original [1890] version." *Cotton*, 157 F.3d at 391. Even if there were race-neutral reasons for removing burglary in 1950 and adding murder and rape in 1968, these amendments—like certain judicial changes to the Alabama provision at issue in *Hunter*—did nothing to repudiate or "alter the intent with which the [original] article, *including the parts that remained*, had been adopted," *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (emphasis added). To the contrary, the Supreme Court's recent decision in *Perez*, which was issued twenty years after *Cotton* and which elaborates on *Hunter*, makes it clear that the discriminatory taint of a law like the Mississippi provision at issue here is not expurgated unless something is done to "alter the intent with which the [original] article, including the parts that remained, had been adopted." *Id*. That is precisely what *did not* happen here.

Third, in contrast to *Cotton*, the plaintiffs in this case did not challenge the entirety of Section 241 as amended, and specifically did not challenge the addition of murder and rape in 1968, but instead challenged only what the Supreme Court in

Perez called "the parts that remained" in the original list. The "parts that remained" were all of the 1890 discriminatory list except burglary, which was deleted in 1950.

Thus, this is not a situation that comes within the hypothetical question mentioned in *Hunter* of "whether [the provision] would be valid if enacted today without any impermissible motivation," 471 U.S. at 232–33. The otherwise bizarre list of crimes included in the 1890 Constitution could not be enacted today without any impermissible motivation because there is no conceivable reason for including these crimes other than the impermissible motivation of race which engendered the list in the first place. For purposes of the challenge in this case—which goes only to the "parts that remain" of the original list—*Cotton* is, therefore, not binding. The district court was wrong to hold that it is, and the district court was wrong to grant summary judgment for the defendant in this case.

The district court also erred in holding that the recommendation of the Election Law Reform Task Force, which was convened in Mississippi in the mid-1980s, to leave the disfranchisement provision as is, and the decision of the 1986 legislature to do nothing to change the list, "shows that the state would have passed Section 241 as is without racial motivation." ROA.4327. As just noted, this otherwise bizarre list would never have been adopted without impermissible racial motivation. Like *Kirksey v. Bd. of Supervisors of Hinds Cty.*, this is a situation "where purposeful and intentional discrimination already exists [and is] perpetuated

into the future by neutral official action" that cannot cleanse the original discriminatory intent. 554 F.2d 139, 148 (5th Cir. 1977) (en banc). Accordingly, the district court's decision should be reversed.

STATEMENT OF THE CASE

Section 241 and the 1890 Convention

As adopted in 1890, Section 241 read as follows:

> 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).

This otherwise strange collection of crimes was listed in Section 241 for one reason and one reason only: the 1890 framers believed them to be disproportionately committed by African Americans. The framers chose 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. This poll tax requirement was later invalidated in *United States v. Mississippi*, No. 3791 (S.D. Miss. Mar. 31, 1966), which applied *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and the provision was formally repealed in 1974. Section 244 imposed a literacy and understanding clause. That provision was nullified by the federal Voting Rights Act of 1965 and was formally repealed in 1975.

Section 241's list of disfranchising crimes was an integral piece of the overall structure put in place at the 1890 constitutional convention to take the vote away from African Americans in Mississippi. "Devices used by Mississippi to inhibit black voters include poll taxes, literacy tests, residency requirements, 'good moral character' tests, a disenfranchising crimes provision, and white primaries." *Mississippi State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400, 402 (5th Cir. 1991) (emphasis added).

The 1950 and 1968 Amendments to Section 241

In 1950, the Mississippi legislature passed a resolution to amend Section 241 for multiple purposes, including the removal of 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 set forth in a form identical to the original 1890 version, except that the crime of burglary was omitted. ROA.2640.

The November 1950 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." The ballot did not offer voters the option of choosing whether to retain or repeal the remainder of the original 1890 list of disqualifying crimes. They could vote only on the amendment. And regardless of how they voted, the remaining eight crimes were guaranteed to remain unchanged as part of Section 241. ROA.2641-2642.

Events unfolded in a similar way 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 (with burglary omitted) with the addition of the crimes of murder and rape. The resolution also instructed the Secretary of State to place the resolution on the ballot. ROA.2643-2644.

The June 1968 ballot contained the exact 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. The ballot 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. Regardless of how they voted, the

eight crimes from the original list that remained after 1950 would still remain after 1968. ROA.2645.

Accordingly, in passing the 1950 and 1968 amendments, neither two-thirds of the legislature nor a majority of the voters had any opportunity to decide whether to approve the entirety of Section 241 or the list of crimes that were originally included in it. Their only option was to approve or reject "[the] Amendment[s]."

Moreover, both amendments occurred during periods of rampant racial discrimination and massive resistance by all levels of Mississippi government, and by most of the white populace, to desegregation. The 1950 amendment was adopted when the legislature was all-white and the electorate was almost all-white. The 1968 amendment was adopted when there was only one black member of the Mississippi legislature. The only reason he was there, and the only reason the electorate included some black voters, was the passage by the United States Congress of the Voting Rights Act of 1965. That legislator, Robert Clark, remained the only African American among Mississippi's 174 legislators until 1975. ROA.2615.[1]

In 1950, Pauli Murray published her extensive survey, *States Laws on Race and Color* (1950) (Davison Douglas ed., reprint 1997), which documented

[1] When Rep. Clark first arrived at the legislature at the beginning of the 1968 session, he was assigned a seat where no other legislator would sit next to him. It took another eight years before someone would occupy the seat next to him. *See* Robert G. Clark Oral History Interview, Library of Congress, p. 27, https://www.loc.gov/resource/afc2010039.afc2010039_crhp0075_-Clark_transcript/?sp=1&st=slideshow#slide-27.

Mississippi's laws requiring segregation throughout society, including in hospitals, railway, prisons, schools (including the school for the blind). Historian James Silver stated in his 1964 book *Mississippi: The Closed Society*, that "[t]he all-pervading doctrine, then and now, has been white supremacy, whether achieved through slavery or segregation." James W. Silver, *Mississippi: The Closed Society* 6 (1964). As the Fifth Circuit observed in 1963: "[T]he State of 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). As late as 1973, the "Mississippi highway patrol ha[d] never in its history employed a member of the Negro race as a sworn officer." *Morrow v. Crisler*, 479 F.2d 960, 961–62 (5th Cir. 1973).

Far from repealing the existing structure of discriminatory legislation, the legislatures that sat in 1950 and 1968 took many steps to extend and entrench it. For example, the 1950 legislature (which was elected in 1947 and held sessions in 1948 and 1950) passed legislation during those years 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. It also passed a number of resolutions in defense of racial discrimination. Soon after that legislature was elected in 1947, Governor Fielding Wright claimed

in his inaugural address that proposed federal anti-lynching, anti-poll tax, and anti-segregation legislation "aimed to wreck the South and our institutions" and called on Mississippians to "bolt" the national Democratic Party if it moved forward with efforts to pass those bills. Frederick D. Drake & Lynn R. Nelson, *States' Rights and American Federalism: A Documentary History* 183 (1999); ROA.2613. The legislature then passed a resolution praising Wright's inaugural address and proclaiming that the legislators "join the governor in the warning given to leaders of the National Democratic Party and to the nation, that Mississippians and Southerners will no longer tolerate these abuses and efforts to destroy the South and her institutions, and hereby pledge our full support to the governor in his efforts to protect and uphold the principles, traditions and way of life of our beloved Southland." Miss. Laws 1948 Ch. 536, H. Con. R. 15. The same legislature subsequently passed a resolution expressing "vigorous opposition . . . to the recommendations of President Truman's committee on civil rights," which had proposed a federal anti-lynching law, anti-poll tax measures, and a permanent Fair Employment Practices Commission, claiming those recommendations would lead to the "subjugation of the majority to the demands of various minority groups, and *not least among these recommendations, certain ones whose effect would be to deprive the states of their rights with regard to suffrage and elections laws*." Miss. Laws 1948 Ch. 541, H. Con. R. 22. (Emphasis added).

This reference to the states' rights "with regard to suffrage and elections laws" by the 1948-1951 legislature was emblematic of Mississippi's continuation of the mission of the 1890 constitution to prevent African Americans from voting and to dilute any political influence they could attain in the event some of them did vote. That effort continued unabated for at least the next two decades. "In 1955, Mississippi enacted a series of statutes with the obvious intent of preventing or inhibiting black voter participation . . . ., [i]n 1960, the Mississippi Constitution was amended to require 'good moral character' as a qualification for voting . . . [and] [i]n 1962, the Mississippi legislature enacted an additional series of statutes . . . to impede black registration . . . ." *Mississippi State Chapter, Operation PUSH v. Allain,* 674 F. Supp. 1245, 1251–52 (N.D. Miss. 1987), *aff'd* 932 F.2d 400 (5th Cir. 1991).

The Mississippi legislature's crusade against African American political participation persisted even after Congress enacted the 1964 Civil Rights Act and the 1965 Voting Rights Act. "Mississippi, which was one of the leaders of the black disfranchisement movement in the South with the 'Mississippi Plan' of 1890, once again led the way with the black vote dilution strategy developed and implemented in Mississippi's massive resistance legislative session in 1966. Before the session ended, the all-white state legislature enacted thirteen major pieces of legislation which racially altered Mississippi's election laws and made it more difficult for black candidates to get elected and for the newly enfranchised black voters to gain

representation of their choice." Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 36 (1990).

Many of the legislators in the 1966 session were re-elected in 1967 and served in the session in 1968 that considered the amendment to Section 241. In many ways, they maintained the discrimination of the past. For example, during the 1968 session, they amended yet maintained many of the discriminatory laws passed in 1966, including provisions allowing counties to switch from district to at-large elections of county boards of supervisors and to switch from elected to appointed school superintendents. Miss. Laws 1968 Ch. 394, H.B. 260; Ch. 564, H.B. 102.

The 1968 legislature also amended a 1964 law authorizing the State to provide financial tuition assistance to students attending private schools by increasing the amount of assistance available to each private school student. Miss. Laws 1968 Ch. 393, H.B. 1114. That law was struck down in 1969 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 Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (three-judge court). And the 1968 legislature funded the notorious Mississippi State Sovereignty Commission, which since 1956 had served as Mississippi's official watchdog, investigation, harassment, and propaganda agency for the promotion of segregation.

Miss. Laws 1968 Ch. 214, H.B. 1195; https://www.mdah.ms.gov/-arrec/digital_archives/sovcom/scagencycasehistory.php.

The Supreme Court in 1971 quoted the United States Civil Rights Commission's 1969 report to Congress that "State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the [Voting Rights Act of 1965] which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters." *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) (citation omitted).

It was in the context of these times that the 1950 and 1968 amendments to Section 241 were adopted—amendments that preserved eight of the nine disfranchising crimes from the discriminatory 1890 list.

The Election Law Reform Task Force and the 1986 Legislature

In 1984, Mississippi assembled an Election Law Reform Task Force to assess whether and how the state's election laws should be reformed. ROA.977-978. Among many other things, the task force considered the issue of criminal disfranchisement but did not recommend any changes to Section 241. No reason was given for the failure to do so. In response to the Task Force efforts on a wide array of election laws, the legislature formed committees prior to the 1986 legislative session to consider election law changes. The House Election Law Reform Study Committee and a subcommittee of the Senate Elections Committee recommended

that the list of crimes be changed to include all felonies except manslaughter and federal tax violations, and to provide for re-enfranchisement upon completion of sentence. A joint report of the Senate Elections Committee and the House Apportionment and Elections Committee issued a separate report commending this approach and stating that it "would certainly provide a more rational basis" for disqualifying and re-enfranchising persons convicted of crimes. ROA.1123. But even though the legislature passed a comprehensive election law reform bill in 1986, this proposal to change the law regarding criminal disfranchisement made absolutely no progress in the legislature and was not adopted. The only portion of the bill pertaining to felon disfranchisement simply insured that the state's election code conformed to Section 241, which remained unchanged from 1968 and continued to include all but one of the crimes first set forth in the 1890 constitution. ROA.1081, 1092-1094, 1107-1109, 1123, 1128-1131). No reason was ever given for retaining these original crimes from 1890.

Plaintiffs' Suit

Plaintiffs are two African Americans in Mississippi who have been disfranchised under Section 241's original list of disfranchising crimes. One is Roy Harness, who was convicted of forgery in 1986 and has completed his sentence. In 2018, at the age of 62, Mr. Harness completed his baccalaureate degree in Social Work from Jackson State University and was awarded a scholarship to pursue his

Master's degree. The other is Kamal Karriem, a former city council member in Columbus, who was convicted of embezzlement in 2005 and has completed his sentence. Mr. Karriem is a pastor and is one of the owners and operators of his family's restaurant. (ROA.2754-2755; ROA.2763-2764; ROA.2765-2766).[2]

Plaintiffs filed this suit on September 28, 2017 against Mississippi Secretary of State Delbert Hosemann challenging, under the Fourteenth Amendment, portions of Section 241 of the Mississippi Constitution of 1890 that list certain crimes that would forever prevent a citizen from voting. ROA.29, 38, 46. They subsequently amended their complaint to include a Fifteenth Amendment challenge as well. ROA.137. Plaintiffs contend that the adoption of the 1890 list was motivated by racial discrimination. They do not challenge the existence of the disfranchising crimes of murder and rape which were not part of the 1890 list, but instead were added to Section 241 in 1968. Plaintiffs requested both declaratory and injunctive relief. ROA.138.

On June 28, 2018, the district court consolidated this case with the separate case of *Hopkins v. Hosemann*, which was filed several months after this one. The *Hopkins* plaintiffs challenged Section 241 on different grounds than in this case and also challenged Mississippi's felon re-enfranchisement provision as contained in Section 253 of the Mississippi Constitution.

[2] Two other listed plaintiffs were dismissed by stipulation. ROA.522-525.

On October 4, 2018, the parties filed cross-motions for summary judgment in this case, ROA.535-537, ROA.2604-2607. The district court granted the defendant's motion for summary judgment in this case on August 7, 2019, and denied plaintiffs' motion. ROA.4309-4337. The district court concluded that it was bound by the holding in *Cotton* that the 1950 and 1968 amendments to Section 241 removed the provision's original discriminatory taint. ROA.4322. The district court concluded in the alternative that even if the 1950 and 1968 amendments did not work a cleansing effect, the legislature's failure in 1986 to change Section 241 demonstrated that "the state would have passed section 241 as is without racial motivation." ROA.4327.

The parties in *Hopkins* also filed motions for summary judgment. In the same order, the district court granted the defendant's summary judgment motion with respect to the *Hopkins* plaintiffs' challenges to Section 241—which were based on different grounds from the challenge in the present case—and denied summary judgment regarding their challenges to Section 253.

In that order, the district court also severed the two cases. It entered final judgment in favor of the defendant in the present case. ROA.4336; ROA.4338. The district court also certified the open claims in *Hopkins* for interlocutory appeal. ROA.4336. Plaintiffs in the current case filed their notice of appeal on August 28,

2019. The *Hopkins* plaintiffs also filed a notice of appeal and their appeal is proceeding on a separate track. *Hopkins v. Hosemann*, No. 19-60662 (5th Cir.).

SUMMARY OF ARGUMENT

As in *Hunter v. Underwood*, 471 U.S. 222 (1985), where the Supreme 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 original list of disfranchising crimes in Mississippi's 1890 constitution was chosen for the specific purpose of disfranchising African Americans. Mississippi's 1890 convention was the first of the southern constitutional conventions that later included Alabama's 1901 convention and that the Supreme Court in *Hunter* described as "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." 471 U.S. at 229. The offenses listed in Section 241 were those the Mississippi delegates believed were disproportionally committed by African Americans. As confirmed by the Mississippi Supreme Court just six years later, the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting for disfranchisement "the offenses to which its weaker members were prone." *Ratliff*, 20 So. at 868.

This Court's conclusion in *Cotton* that the 1950 amendment to Section 241 removing burglary and the 1968 amendment adding murder and rape "removed the discriminatory taint associated with the original version" of Section 241, 157 F.3d at 391, depended on the Court's assumption that the 1950 and 1968 amendments constituted a "re-enactment" of the original list in Section 241 by which "a majority of the voters had to approve the entire provision." *Id.* But evidence presented in this case (that was not presented by the *pro se* prisoner plaintiffs in *Cotton*) establishes the opposite. The voters in 1950 and 1968 did not—because they were given no opportunity to—decide to re-enact the original list of crimes in the provision. The only choice before them was whether to vote "For Amendment" or "Against Amendment." Whichever way they voted, at least eight of the nine crimes on the original list would remain. Moreover, the plaintiffs submitted evidence—which again was not included in the Cotton record—establishing the extensive hostility of the legislature and much of the white populace to equal rights in 1950 and 1968, fatally undermining the plausibility of the conclusion that the 1950 and 1968 amendments were steps taken to "remove[] the discriminatory taint associated with the original [1890] version," 157 F.3d at 391. In reality, those amendments did nothing to "alter the intent with which the [original] article, including the parts that remained, had been adopted," which is the standard described in the Supreme Court's recent decision in *Perez* for cases like *Hunter* and this one. 138 S. Ct. at

2325. Further, in the present case, and unlike *Cotton*, the plaintiffs do not challenge the entirety of Section 241 as amended, and specifically do not challenge the addition of murder and rape in 1968, but instead challenge only what the Court in *Perez* called "the parts that remained" in the original list. *Id*. Those parts were clearly motivated by discrimination and the 1950 and 1968 amendments do not justify their continued existence. Thus, for all of these reasons, *Cotton* should not control the outcome in this case.

The district court also erred in concluding that the proceedings of the Election Law Reform Task Force in the mid-1980s and the 1986 Mississippi legislature "shows the state would have passed section 241 as is without racial motivation." ROA.4327. Nothing was done in 1986 to change the law and nothing was done to justify retaining the eight of nine crimes that remained from the original list. As a general matter, inferences drawn from legislative inaction are notoriously unreliable. *See Rapanos v. United States*, 547 U.S. 715, 749–50 (2006) (Scalia, J.) (explaining the Supreme Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction"); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 (2001) (Rehnquist, C.J.) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." (internal quotation marks omitted)). And in this case in particular, the state's evidence does not reveal any alternative, race-neutral motivations that show

the legislature would have enacted Section 241 in its current form regardless of any discriminatory intent. To the contrary, this otherwise bizarre list would not have been enacted in 1986 "as is" without any impermissible motivation because there is no reason for it other than the impermissible motivation of race that led to the list in the first place. And while the relevant legislative committees recommended amending Section 241 in 1986 to reflect what they called a "more rational" approach of including almost all felonies and re-enfranchising people upon completion of their sentences, that proposal made no progress in the legislature. The bare fact that a more rational approach was considered, but not adopted, cannot be enough to "alter the intent with which the [original] article, including the parts that remained, had been adopted," *Perez*, 138 S. Ct. at 2325, particularly where no non-racial reason was given for retaining the crimes that remained from the original list. *Cf. Solid Waste Agency*, 531 U.S. at 169–70 ("The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing § 404(a) is . . . considerably attenuated.").

The state's inability to demonstrate that the law in its current form would have been enacted absent a racially discriminatory motive, combined with Section 241's obviously discriminatory original purpose, is fatal to its argument that these challenged parts of Section 241 can survive constitutional scrutiny. The district court's grant of summary judgment in favor of the defendant should be reversed and

the case should be remanded to the district court with instructions to enter summary judgment for plaintiffs or for a trial.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment, "construing all facts and inferences in the light most favorable to the nonmoving party." *Naquin v. Elevating Boats, LLC*, 817 F.3d 235, 238 (5th Cir. 2016). "Summary judgment is proper when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. THE 1890 LIST OF DISFRANCHISING CRIMES IN SECTION 241 WAS DESIGNED TO EFFECTUATE WHITE SUPREMACY BY PREVENTING AFRICAN AMERICANS FROM VOTING.

When Mississippi convened its constitutional convention in 1890, it did so with one primary purpose in mind: to prevent African Americans in the state from voting. As one delegate put it to his fellow attendees, "What are you here for, if not to maintain white supremacy, especially when a majority of whites stand for a great principle of public morals and public safety?" E.L. Martin, *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi* 94 (1890). The president of the convention, for his part, called upon delegates to "arrange[]"

the "ballot system . . . to effect one object[:]" the continued rule of a white race "whose rule has always meant prosperity and happiness." *Id.* at 10.

It is no coincidence that these remarks closely parallel the ones that so troubled the Supreme Court in *Hunter* when it considered the constitutionality of Alabama's disfranchisement provision. After all, Mississippi's 1890 constitutional convention was both inspiration and blueprint for Alabama's convention eleven years later. *See Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984) (explaining that the Alabama 1901 convention "[b]orrow[ed] from the successful methods of the Second Mississippi Plan," which formed the basis for the 1890 Mississippi Constitution), *aff'd*, 471 U.S. 222 (1985).

A decade before white supremacy "ran rampant," *Hunter*, 471 U.S. at 229, at the 1901 Alabama convention, it roamed freely at the 1890 Mississippi convention, where it dictated the contours of the new state constitution. *See* Martin at 275 ("It is the manifest intention of this Convention to secure to the State of Mississippi, 'white supremacy.'"), 701 ("[W]e are willing . . . to do all things except to yield up the common civilization of our common country, which civilization was constructed, has been maintained and can be continued only by the white race."); *Female Suffrage Day*, Jackson Daily Clarion-Ledger (Sept. 10, 1890), at 1 (recounting one delegate's satisfaction that the constitution "places the commonwealth of Mississippi for all time in the control of the white race—the only race fit to govern in this country" and

another delegate's concern that Mississippi "may never again have the opportunity of . . . insur[ing] and perpetuat[ing] the supremacy of the white race in Mississippi").

To effectuate this purpose, the delegates enacted a number of provisions, including Section 241, which labeled as disfranchising those crimes the delegates believed were committed disproportionately by African Americans. As the Mississippi Supreme Court explained just six years later:

> Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites.

Ratliff, 20 So. at 868. The Court added: "Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone." *Id.* These allegedly "furtive offenses" were "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, [and] bigamy." *Id*. at 867

It is therefore beyond question that the crimes first selected for inclusion in the list were selected for discriminatory reasons. *See Cotton*, 157 F.3d at 391

("Although § 241 was facially neutral and technically in compliance with the Fourteenth Amendment, the state was motivated by a desire to discriminate against blacks."). Except for burglary, all of these offenses remain in Section 241 today.[3]

II. THE DECISION IN *COTTON v. FORDICE* DOES NOT CONTROL THE OUTCOME IN THIS CASE AND THE 1950 REMOVAL OF BURGLARY AND 1968 ADDITION OF MURDER AND RAPE DO NOT CLEANSE THE REMAINING ORIGINAL CRIMES OF THE DISCRIMINATORY INTENT THAT MOTIVATED THEIR INCLUSION IN THE FIRST PLACE.

The panel's decision in *Cotton v. Fordice* does not control this case. *Cotton* was an unusual case. The panel raised the issue of the two amendments *sua sponte* and then decided the issue in the absence of critical evidence about those amendments or argument by either party. The plaintiffs were two incarcerated men named Jarvious Cotton and Keith Brown, both of whom proceeded pro se and lacked the ability to present a detailed factual record. ROA.2646. They alleged that Section 241 was unconstitutional because the provision's list of disfranchising crimes was intended to discriminate against African Americans. ROA.2646, 2648-2651. Neither the district court's order granting summary judgment to the defendants nor

[3] This discrimination has a continuing impact. African Americans constitute 36% of Mississippi's voting age population but 59% of its disfranchised individuals. African American adults are 2.7 times more likely than white adults to have been convicted of a disfranchising crime in Mississippi. ROA.2737-2738.

the magistrate judge's report and recommendation mentioned the amendments to Section 241. ROA.2646-2653; ROA.2654-2655. Instead, both the report and recommendation and the final order dismissed Mr. Cotton and Mr. Brown's claims of discriminatory intent as "pure[] speculation and conjecture." ROA.2650.

Mr. Cotton and Mr. Brown, again proceeding pro se, appealed. ROA.2657.[4] Unsurprisingly, given the district court's decision, their briefs before this Court addressed only Section 241's discriminatory origins. ROA.2684-2689, ROA.2731-2735. The state's brief simply mentioned the differences between the current version of the list and the 1890 version and argued that "[t]he present inclusion of the violent crimes of murder and rape and the deletion of burglary makes Ratliff inapplicable to Section 241 as it reads today." ROA.2723.

A panel of this Court affirmed the grant of summary judgment. After citing *Ratliff*, the panel said: "Although § 241 was facially neutral and technically in compliance with the Fourteenth Amendment, the state was motivated by a desire to discriminate against blacks." *Cotton*, 157 F.3d at 391. The opinion continued: "Were this the end of the story, we would be bound by *Hunter*, which, construing an Alabama provision of similar age and intent, held it violative of equal protection. *Hunter*, however, left open the possibility that by amendment, a facially neutral

[4] Jarvious Cotton's appeal was severed and dismissed because of issues relating to prior cases and whether he qualified to proceed *in formal pauperis* in the appeal. Nevertheless, both Brown and Cotton listed their names as lay counsel for Brown in the Fifth Circuit briefing.

provision like § 241 might overcome its odious origin. That is what has happened here." 157 F.3d at 391 (footnote omitted). The opinion went on to state that burglary was removed in 1950, that murder and rape (which were not considered "black" crimes in 1890) were added in 1968, that the amendments were "a deliberative process," that two-thirds of each house had to approve them to put them on the ballot, that the Secretary of State was required to publish a full text version of the proposed revised provision within two weeks of the election, and that "a majority of the voters had to approve the entire provision, including the revision." *Id*. "Because Mississippi's procedure resulted both in 1950 and in 1968 in a re-enactment of § 241, each amendment superseded the previous provision and removed the discriminatory taint associated with the original version." *Id*. (footnote omitted).

There are at least three key distinctions between the present case and *Cotton*, each of which demonstrates that the result in *Cotton* should not be given controlling effect in this case.

First, the ballot language was not introduced into the record by the pro se plaintiffs in *Cotton* or discussed in the briefs or the panel's opinion. That evidence, which has been introduced in this case, establishes that the ballot did not give voters the option of re-enacting or repealing the remainder of the original list of disqualifying crimes. Instead, their only options were to vote "For Amendment" or "Against Amendment."

Thus, in both 1950 and 1968, the voters had no opportunity to re-enact or approve the entirety of Section 241 or the list of crimes that were originally included in it. At most, they were given the opportunity to approve the amendments by voting "For Amendment[s]." These votes were obviously not re-enactments of Section 241. The Fifth Circuit's language regarding a "re-enactment" therefore was not based on a record, briefing, or argument that addressed the issue.[5]

Second, the plaintiffs in this case submitted evidence—which again was not included in the *Cotton* record—that the 1950 legislature was all-white and the 1968 legislature had only one black member; that those legislatures failed to repeal the extensive structure of discriminatory legislation that existed at the time and instead took steps to add to it; and that the 1950 and 1968 amendments occurred during periods of massive resistance by Mississippi's government and white populace to desegregation. This evidence shows that, contrary to the *Cotton* court's assumption,

[5] The district court repeated the ballot language in its order and then stated: "This language mirrors the Fifth Circuit's description of the ballots. As quoted more fully above, the court recognized that 'a majority of the voters had to approve *the entire provision, including the revision.*' *Cotton*, 157 F.3d at 391 (emphasis added)." ROA.4321. However, that ballot language, quoted by the district court, plainly allows voters only two options: "For Amendment" or "Against Amendment." It is certainly true that the ballot language repeated the entire provision as it would be amended. But a negative vote would not eliminate the entire provision. It simply would leave it as it was. Thus, voters clearly did not have to "approve the entire provision" and did not have the option to do so. The district court also cited Judge Graves's description of *Cotton* in his dissent in *Veasey v. Abbott*, 888 F.3d 792, 821 (5th Cir. 2018) (Graves, J., dissenting). ROA.4322. However, Judge Graves's description of the opinion is not relevant to the issue here, which is whether *Cotton* is controlling in light of evidence and arguments presented here that were not presented in *Cotton* and were not discussed in the *Cotton* opinion.

the 1950 and 1968 amendments could not plausibly be considered steps taken to "remove[] the discriminatory taint associated with the original [1890] version." 157 F.3d at 391. Even if there were non-racial reasons for removing burglary in 1950 and adding murder and rape in 1968, these amendments—like certain judicial changes to the Alabama provision at issue in *Hunter*—did nothing to repudiate or "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." *Perez*, 138 S. Ct. at 2325 (emphasis added). Indeed, the Supreme Court's decision in *Perez*, which was issued twenty years after *Cotton* and which discusses the reasoning in *Hunter*, makes it clear that the discriminatory taint of a law like the Alabama provision in *Hunter*—and the Mississippi provision at issue here—does not disappear unless something is done to "alter the intent with which the [original] article, including the parts that remained, had been adopted." *Id.*

Third, in the present case, the plaintiffs do not challenge the entirety of Section 241 as amended, and specifically do not challenge the addition of murder and rape in 1968, but challenge only what the Court in *Perez* called "the parts that remain[]" in the original list. This is different than *Cotton*, where the panel said:

> . . . § 241 as *it presently exists* is unconstitutional only if the amendments were adopted out of a desire to discriminate against blacks. *See Hunter*, 471 U.S. at 228. Brown has offered no such proof regarding the current version of § 241; he relies exclusively on the Mississippi Supreme Court's now-irrelevant

> admission in *Ratliff* that *the original version* of § 241 was adopted for the purpose of discriminating against blacks.

157 F.3d at 392 (emphasis added). Here, Plaintiffs challenge not the amended version of Section 241 "as it presently exists," but only the parts that remain of the "original version." The "parts that remain[]" are all of the crimes contained in the 1890 discriminatory list (except burglary). Thus, the intent in 1890, and the statements in *Ratliff,* remain centrally relevant to this challenge to the "parts that remain[]" even if they were held to be irrelevant to the challenge in *Cotton* to the entire provision as it has existed since 1968.

The only reason those original crimes were chosen is because the 1890 framers believed they were the "offenses to which [African Americans] were prone." *Ratliff,* 20 So. at 868. This is not a situation encompassed within the hypothetical question raised in *Hunter* of "whether [the provision] would be valid if enacted today without any impermissible motivation." 471 U.S. at 232–33. The otherwise bizarre 1890 list would not be enacted today without any impermissible motivation because there is no reason for it other than the impermissible motivation of race. As demonstrated by the evidence presented in this case (but not in *Cotton*), there was no "enactment" or "re-enactment" in 1950 or 1968 because the only votes taken were to adopt the amendments, not to re-enact the original list. And as the evidence presented in this case (but not in *Cotton*) also demonstrates, it is implausible to conclude that the 1950 and 1968 legislatures—both of which were engaged in

extensive resistance to civil rights—took affirmative steps to "remove[] the discriminatory taint associated with the original version," *Cotton*, 157 F.3d at 391, or to "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." *Perez*, 138 S. Ct. at 2325 (emphasis added).[6]

Thus, for purposes of the challenge in this case—which goes only to the parts that remain of the original list—*Cotton* is not binding. As the Supreme

Court has noted, decisions "cannot be read as foreclosing an argument that [the court] never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). The district court was wrong to hold that *Cotton* is binding and wrong to grant summary judgment for the defendant in this case. Because eight of the nine original crimes on the 1890 list remain in place, and because the amendments did not remove the discriminatory taint associated with the original version, summary judgment should have been granted to the plaintiffs, not the defendant.

III. BECAUSE THE OTHERWISE BIZARRE COLLECTION OF CRIMES IN THE 1890 LIST WAS ENACTED SOLELY BECAUSE OF DISCRIMINATION, THERE WOULD BE NO REASON FOR ANYONE TO ENACT IT ANEW—IN THE

[6] These points are all clear irrespective of the burden of proof. But to the extent it is relevant, the burden of proof as to whether an amendment—or even a re-enactment—"remove[s] the discriminatory taint associated with the original version" and "alter[s] the intent with which the [original] article . . . had been adopted," falls upon the State. This is indicated by the discussion in *Perez*, where the Court said that "[t]he allocation of the burden of proof [which usually falls upon the plaintiff]. . . [is] not changed by a finding of past discrimination," except in "a situation like the one in *Hunter*" or "a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature . . . . us[ing] criteria that arguably carried forward the effects of any discriminatory intent." 138 S. Ct. at 2324–25.

1980s OR AT ANY OTHER TIME—ABSENT AN IMPERMISSIBLE MOTIVATION

Citing to *Hunter's* hypothetical question about whether the racist Alabama disfranchisement provision "would be valid 'if enacted today without any impermissible motivation,'" ROA.4327, *quoting* 471 U.S. at 233, the district court in this case held that the proceedings of the Election Law Reform Task Force and the 1986 Mississippi legislature "shows the state would have passed section 241 as is without racial motivation." ROA.4327. But as just stated with respect to the 1950 and 1968 amendments, this otherwise bizarre list would not have been enacted in 1986 without any impermissible motivation because there is no reason for it other than the impermissible motivation of race.[7]

Moreover, the question here is not whether the Mississippi legislature had a race-neutral reason in 1986 for keeping Section 241 in its present form—the question is whether the legislature had a race-neutral reason that, standing alone, would have justified enacting Section 241 with the same list of "furtive" offenses. See *Mt.*

[7] Earlier in the *Hunter* opinion, the Supreme Court pointed to the longstanding rule that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." 471 U.S. at 228. This language refers to whether the law would have been enacted at the time it actually was enacted even without the discriminatory motivation. It is the later passage from *Hunter*—stating that the Court was not "deciding whether § 182 would be valid *if enacted today* without any impermissible motivation," *id.* at 233 (emphasis added)—that refers to a re-enactment years after the original passage. Just as the burden of proof with the former "shifts to the law's defenders," it stands to reason that it also shifts with respect to the latter.

Healthy City Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977); *Prof'l Ass'n of Coll. Educators v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 265 (5th Cir. 1984) ("In short, the question is not whether the employer justifiably could have made the same decision but whether it actually would have done so."). Hunter requires that there be some race-neutral motive capable of severing the connection between the legislators' discriminatory intent and the enacted law. See *Mt. Healthy*, 429 U.S. at 285–86; *Bueno v. City of Donna*, 714 F.2d 484, 490–91 (5th Cir. 1983). And the burden of proving this falls upon the State.[8]

As already noted, there is no way to prove this collection of "furtive" offenses would have been enacted anew absent discrimination because there is no conceivable non-discriminatory reason for the collection. Further, the relevant legislative committees believed that expanding Section 241 in 1986 to include all felonies except manslaughter and federal tax violations, and to re-enfranchise people when they completed their sentences, would have been a "more rational" approach to disfranchisement. But for unexplained reasons, that proposal made no progress in the legislature. ROA.1092-1094,1108-1110, 1123). This suggests that rationality, a race-neutral reason, was not a factor in Mississippi's decision to keep all but one of the 1890 constitution's list of disfranchising crimes.

[8] *See* n.7.

Akin to the scenario faced by this Court sitting *en banc* in *Kirksey*, this is a situation "where purposeful and intentional discrimination already exists [and is] perpetuated into the future by neutral official action" that does not cleanse the original discriminatory intent. 554 F.2d at 148. Nothing was done in 1986 to change the law or justify retaining the eight of nine crimes that remained from the original list. The simple fact that a more rational approach was considered, but not adopted, is not enough to "alter the intent with which the [original] article, including the parts that remained, had been adopted," *Perez*, 138 S. Ct. at 2325, particularly where no non-racial was given for retaining the parts that remained of the original list. The district court erred in its conclusion that the intent was cleansed and that the State would have passed Section 241 as is without racial motivation.

CONCLUSION

The amendments to Section 241 in 1950 and 1968, and the events of 1986, left intact eight of the nine original disfranchising offenses adopted because 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*, 20 So. at 868. No one has ever given a non-racial reason for retaining those eight offenses. Their presence violates the Constitution.

For the foregoing reasons, the district court's grant of summary judgment for the defendant should be reversed and the case remanded with instructions to grant

summary judgment for the plaintiffs, or in the alternative, remanded for further proceedings.

Dated: December 12, 2019

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*

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CERTIFICATE OF SERVICE

I, Donald B. Verrilli, Jr., hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: December 12, 2019

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CERTIFICATE OF COMPLIANCE

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