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. 3:17cv791-DPJ-FKB)

BRIEF OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

No. 19-60632

Undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Roy Harness and Kamal Karriem, Plaintiffs-Appellants;

2. Donald B. Verilli, Jr., Xiaonan April Hu, and the law firm of Munger, Tolles & Olson, LLP, counsel for Plaintiffs-Appellants;

3. Robert B. McDuff and the law firm of Robert B. McDuff, counsel for Plaintiffs-Appellants;

4. Beth L. Orlansky and Jeremy Eisler of the Mississippi Center for Justice, counsel for Plaintiffs-Appellants;

5. Fred L. Banks, Jr. and the law firm of Phelps Dunbar LLP, counsel for Plaintiffs-Appellants;

6. Armand Derfner and the law firm of Derfner & Altman LLC, counsel for Plaintiffs-Appellants;

7. David M. Lipman and the Lipman Law Firm, counsel for Plaintiffs-Appellants;

8. Michael Watson, Secretary of State of Mississippi, Defendant-Appellee[1]; and

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[1] On January 9, 2020, after this appeal was filed, Michael Watson succeeded Delbert Hosemann as the duly-elected Secretary of State of Mississippi. Plaintiffs-Appellants are prosecuting this appeal against the Secretary in his official capacity, thus Secretary Watson is automatically substituted pursuant to Fed. R. App. P. 43(c)(2).

9. Justin L. Matheny, Krissy C. Nobile, and the Office of the Mississippi Attorney General, Counsel for Defendant-Appellee.

SO CERTIFIED, this the 12th day of February, 2020.

s/Justin L. Matheny
Justin L. Matheny
Counsel for Defendant-Appellee

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STATEMENT REGARDING ORAL ARGUMENT

The District Court below granted the Secretary of State's summary judgment motion, denied the Plaintiffs-Appellants' competing motion, and correctly dismissed this lawsuit based on this Court's controlling precedent and undisputed facts of record. The Secretary welcomes the opportunity for oral argument to further explain the reasons the District Court reached its correct result, and to further rebut Plaintiffs-Appellants' arguments on appeal.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants ("Plaintiffs") asserted the District Court had jurisdiction over their claims under 28 U.S.C. § 1331. ROA.120. On August 28, 2019, Plaintiffs timely appealed the District Court's August 7, 2019 order on cross-motions for summary judgment and final judgment dismissing their claims. ROA.4339-4341. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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Like most States, Mississippi law has always disenfranchised felons in one form or another. The law's particular disenfranchising crimes have changed several times. Current Mississippi law disqualifies persons from voting upon conviction of the following categories of felony offenses: murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, bigamy, and vote fraud. Miss. Const., art. XII, § 241; Miss. Code Ann. §§ 23-15-11, 23-15-19. This appeal concerns changes to the law over the past 130 years, and why the two Plaintiffs' current disenfranchisement due to their forgery and embezzlement of public funds convictions comports with the Fourteenth and Fifteenth Amendments.

The specific issues for review include:

(1) Did the District Court below correctly award summary judgment to the Secretary of State and dismiss Plaintiffs' claims pursuant to this Court's controlling precedent in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), which held the State altered and enacted the disenfranchising crimes provision of present-day state constitution's Section 241 through deliberative post-1890 legislative actions, and thereby removed the original version's alleged discriminatory taint?

(2) Did the District Court below correctly award summary judgment to the Secretary of State and dismiss Plaintiffs' claims on alternative grounds, established by undisputed facts, that the State further modified its disenfranchisement laws and endorsed present-day Section 241 following a thorough deliberative process in the mid-1980s?

(3) Do Plaintiffs' lack of impact proof, and/or failure to prove that race motivated the 1890 framers to include their particular disenfranchising felonies in the original version of Section 241, justify the District Court's ultimate dismissal of their claims?

(4) Do Plaintiffs lack Article III standing, and/or does the Eleventh Amendment bar their claims targeting the Secretary of State, although the District Court held otherwise before ultimately rendering dismissal?

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STATEMENT OF THE CASE

The Evolution of Mississippi's Felon Disenfranchisement Laws

Mississippi's 1817 and 1832 Constitutions, and laws enacted under them, provided for criminal disenfranchisement. ROA.541-543, 669-696. In that period only white male suffrage existed, and the laws prohibited persons "convicted of bribery, perjury, forgery," or "other high crimes or misdemeanors" from voting. ROA.541-543, 669-696.

After the Civil War, the States (including Mississippi) ratified the Fourteenth and Fifteenth Amendments which established universal male suffrage. U.S. Const., amend. XIV, XV. The Fourteenth Amendment affirmatively sanctions felon disenfranchisement. U.S. Const., amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). When the Amendment was ratified, "29 [of 36] States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48.

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In Mississippi, similar to other States and its own antebellum laws, the Reconstruction-era government's 1868 Constitution mandated laws excluding persons "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors" from voting. ROA.543-544, 713. The 1872 Code specified that

"[n]o person convicted of bribery, perjury, forgery or other infamous crimes shall be registered" to vote, ROA.544, 719-720., and that "infamous crime" included felonies, ROA.544, 721. The 1880 Code similarly excluded any person "who has been convicted of bribery, perjury, forgery, grand larceny or any felony" from voting. ROA.545, 724.

In 1890, delegates convened and drafted the State's fourth Constitution. ROA.790-838. The 1890 framers addressed felon disenfranchisement in Article XII, Section 241. Consistent with the law since statehood, the 1890 framers' Section 241 included "bribery, perjury, and forgery" as disqualifying offenses. Miss. Const., art. XII, § 241 (1890). However, the 1890 version of Section 241 effectively narrowed the scope of other disenfranchising felonies to also disqualify persons convicted of "burglary, theft, arson, obtaining money or goods under false pretenses, embezzlement or bigamy" from voting. *Id*. In the same fashion, the 1892 Code specified that only persons convicted of the 1890 framers' felony categories were disqualified from voting. ROA.839-840.

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Six years after the 1890 convention, the Mississippi Supreme Court stated that, based on prevalent racial stereotypes in that era, the framers under-inclusively limited their version of Section 241 to target African Americans:

> 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 whites, a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given to rather furtive offenses than to the robust crimes of whites. 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. . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while murder and robbery and other crimes in which violence was the principal ingredient were not.

Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896). After *Ratliff*, the 1890 framers' version of Section 241 remained undisturbed for almost sixty years.

Then, in 1950, the State took the first of multiple legislative actions regarding the law. Two-thirds of each legislative house, and a 66,077 to 14,862 majority of the State's electorate, eliminated burglary from Section 241's categories of felonies. Miss. Laws, 1950, ch. 569; ROA.547-548, 842-843.

Almost two decades later, the State revisited Section 241 again. In 1968, two-thirds of each legislative house, and a 136,846 to 59,888 majority of the State's electorate, broadened Section 241 to include murder and rape. Miss. Laws, 1968, ch. 614; ROA.549-550, 554, 870-871, 965. After the 1950 and 1968 legislative actions, Section 241 disqualified persons "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury,

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forgery, embezzlement or bigamy" from voting. Miss. Laws, 1968, ch. 614.

Nearly twenty years elapsed. Then, for a third time, in the mid-1980s, Mississippi lawmakers revisited the felon disenfranchisement issue again when they undertook a comprehensive review of the State's election laws, and enacted new legislation to overhaul the Election Code. ROA.555-561, 975-1139.

Over the course of four months in 1984, under Democratic Secretary of State Dick Molpus, a bipartisan and diverse Task Force of legislators, state and local officials, political party leaders, and citizens investigated, debated, considered, and proposed changes to the State's election laws, including felon disenfranchisement provisions. ROA.555-557, 975-1084. The Task Force held public hearings across the state, received written information, and met with the U.S. Department of Justice. ROA.983-1064, 1072-1079. During the process, the Task Force recognized the State's then-existing code included burglary as a disenfranchising felony category, and thus did not conform to the current version of Section 241's disenfranchising felonies provision, as enacted in 1968. ROA.556-557, 1072, 1074. The Task Force also explicitly considered whether to expand the disenfranchising felonies, amend Section 241, or leave the law "as is." ROA.1074, 1081. The Task Force ultimately determined the law should be left "as is." ROA.1081.

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In response to the Task Force's work, the 1985 Legislature formed committees that studied the issues, held open meetings, and ultimately proposed legislation. ROA.1085-1127. In December 1985, the House and Senate committees issued a formal report. ROA.1085-1120. As to felon disenfranchisement, the report recommended further expanding the State's disenfranchisement laws to include all felony convictions, except manslaughter and felony tax evasion, with restoration of voting rights upon completion of a convicted felon's sentence. ROA.1108-1109.

At the 1986 session, legislators introduced Senate Bill 2234 ("SB 2234"). ROA.1124-1126. The proposed legislation incorporated the committee recommendation to broaden the categories of disenfranchising felonies to all felonies, excepting manslaughter and felony tax evasion. ROA.1124-1126. Through the legislative process, however, lawmakers modified SB 2234 to effectively adopt the Task Force's "as is" recommendation, conform the state statutes' categories of felony disenfranchising crimes to the 1968 enactment's version of Section 241, and thereby eliminate burglary as a disenfranchising crime. ROA.1128-1131.

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In April 1986, SB 2234 passed the Legislature by a vote of 51-1 in the Senate, and 118-3 in the House. ROA.1132. The U.S. Department of Justice

subsequently pre-cleared the law. ROA.1137-1139. The 1986 legislation thereafter took effect, and is now codified, in pertinent part, at Mississippi Code Sections 23-15-11 and 23-15-19 (excluding as qualified electors any persons "convicted of vote fraud or of any crime listed in Section 241, Mississippi Constitution of 1890").[2]

Proceedings Below

Plaintiffs-Appellants Roy Harness and Kamal Karriem are currently disqualified from voting under current Mississippi law. In 1986, Harness was convicted of forgery. ROA.568, 579. In 2005, Karriem, a former Columbus, Mississippi city council member, was convicted of embezzlement of public funds. ROA.568-569.

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In September 2017, Plaintiffs sued then-Mississippi Secretary of State Delbert Hosemann, in his official capacity (the "Secretary"),[3] challenging present-day Section 241. ROA.27. Plaintiffs' amended complaint alleged Section 241's current categories of disqualifying felonies violate the Fourteenth and Fifteenth

[2] In 2012, the Legislature added the felony category of vote fraud, and its modification took effect upon pre-clearance by the Justice Department. Miss. Laws, 2012, ch. 517. Plaintiffs do not challenge the 2012 enactment.

[3] After Plaintiffs filed this appeal, on January 9, 2020, Michael Watson succeeded Delbert Hosemann as Mississippi Secretary of State. Secretary Watson has been nominally substituted as the official capacity Defendant-Appellee. *See* Fed. R. App. P. 43(c)(2).

Amendments because the 1890 framers enacted their version of Section 241 with racially-discriminatory intent, notwithstanding the State's prior and subsequent legislative enactments regarding its felon disenfranchisement laws. ROA.130-135. Plaintiffs sought equitable relief declaring most of Section 241's disenfranchising felonies provision invalid and enjoining the Secretary from enforcing it, except for felonies classified as murder and rape. ROA.138.

During discovery, the District Court consolidated Plaintiffs' lawsuit with another suit filed against the Secretary targeting Section 241 and other state laws.[4] After completing discovery, all the parties separately moved for summary judgment. *See* ROA.535, 1200, 1537, 2604.

On August 7, 2019, the District Court decided the competing summary judgment motions. ROA.4309-4337. The District Court granted the Secretary's motion on the merits as to Plaintiffs' claims, and denied Plaintiffs' cross-motion. ROA.4309-4327, 4336-4337.[5] The District Court severed the lawsuits and entered

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[4] The second lawsuit, filed by lead plaintiff Dennis Hopkins and others (the "*Hopkins* plaintiffs") in March 2018, implicated some similar claims and defenses as Plaintiffs' suit but did not include a race-based challenge to the State's disenfranchisement laws.

[5] As to the *Hopkins* plaintiffs' claims, the District Court granted the Secretary's summary judgment motion in part, denied the competing motion, dismissed most of the *Hopkins* claims, and certified those rulings for interlocutory appeal. ROA.4309-4316, 4327-4337. The Secretary and the *Hopkins* plaintiffs appealed. *See* Fifth Circuit No. 19-60662 *consolidated with* No. 19-60678. The pending consolidated appeals are fully briefed, and were argued on December 3, 2019, but no decision has issued, as of this writing.

final judgment dismissing Plaintiffs' claims with prejudice. ROA.4338. Plaintiffs appealed three weeks later. ROA.4339-4341.

SUMMARY OF THE ARGUMENT

The Fourteenth Amendment affirmatively sanctions facially neutral state laws that disqualify convicted persons from voting. *Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974); U.S. Const., amend. XIV, § 2. But a limited exception exists. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the plaintiffs proved lawmakers who enacted an Alabama misdemeanant disenfranchisement law in 1901 were racially-motivated. Alabama never re-examined the law or legislatively modified it over the course of eighty years. Given those facts, the Supreme Court invalidated Alabama's 1901 law on equal protection grounds.

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No matter how many times or different ways Plaintiffs here contend otherwise, their case against Mississippi's present-day felon disenfranchisement law is not *Hunter*. In 1890, Mississippi delegates addressed felon disenfranchisement in Section 241 of the state constitution. Based on then-existing racial stereotypes, the 1890 framers limited their disenfranchisement provision to some serious felonies and excluded more violent offenses. Far different from *Hunter*, however, the 1890 framers' under-inclusively tainted version of Section 241 no longer exists. The State's subsequent, multiple, substantial, and race-

neutral enactments altering its felon disenfranchisement laws over the past 130 years removed the discriminatory taint previously associated with it.

Concretely-established dispositive distinctions separate Plaintiffs' case from *Hunter*. In *Cotton v. Fordice*, 157 F.3d 188 (5th Cir. 1998), this Court rejected a challenge to the same law on the same theory Plaintiffs assert here. Based on the State's legislative enactments in 1950 and 1968, this Court held those legislative actions removed the 1890 version of Section 241's discriminatory taint. Plaintiffs' regenerated arguments relying on supposedly "new" evidence fail to prove *Cotton* was wrongly decided. *Cotton* controls and forecloses Plaintiffs' claims.

Furthermore, in the mid-1980s, the State re-examined its felon disenfranchisement laws and took additional legislative actions that *Cotton* had no occasion to consider. Those actions further demonstrate the State modified and endorsed its present-day felon disenfranchisement laws following a thoroughly deliberative process free from any discriminatory motivation. Plaintiffs offer no proof to counter the State's legislative actions, and offer no valid reason to ignore them. Even assuming *Cotton* and the State's 1950 and 1968 enactments alone somehow do not foreclose Plaintiffs' claims, the State's legislative actions in the mid-1980s independently defeat them.

For good measure, beyond *Cotton* and all the State's post-1890 legislative

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actions, Plaintiffs' claims still lack merit. They have failed to prove the State's disenfranchisement law caused a past and present-day discriminatory impact. They further have failed to prove their particular alleged injuries (disenfranchisement for their forgery and embezzlement of public funds convictions) follow from alleged racial motivations of the 1890 framers—even if the State's subsequent legislative actions that removed Section 241's alleged discriminatory taint had never occurred.

Finally, Plaintiffs lack Article III standing to sue the Secretary and Eleventh Amendment immunity bars their claims. The Secretary cannot register Plaintiffs to vote, prevent them from registering, or require any officials to do or not do those things. Although the District Court determined otherwise, the Secretary's maintenance of the statewide voter registration system and status as the State's "chief election official" do not sufficiently connect the Secretary to Plaintiffs' alleged injuries.

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For any or all of these reasons, the District Court correctly dismissed Plaintiffs' claims and this Court should affirm.

ARGUMENT

Standard of Review

This Court reviews a grant of summary judgment on cross-motions *de novo*, applying the same Rule 56 "analysis that guides the district court," and reviewing the competing motions "independently, with evidence and inferences taken in the light most favorable to the nonmoving party." *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 370 (5th Cir. 2005).

I. The District Court Correctly Granted Summary Judgment to the Secretary and Denied Plaintiffs' Competing Motion.

A. State criminal disenfranchisement laws and *Hunter v. Underwood*.

Mississippi and most other States have always disqualified felons from voting in some form or fashion. The Fourteenth Amendment specifically acknowledges the States' policy-making authority in that regard. U.S. Const., amend. XIV, § 2. It is well-established that legitimate state interests support felon disenfranchisement. For example, the policy is derived from the philosophy of republican government and theory of social compact: "[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate further in administering the [social] compact." *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). And, before the Fourteenth Amendment, and

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for over a century after it, state laws disqualifying felons convicted of serious crimes from voting were never legally controversial. *Id.* at 451-52; *see also*, *e.g.*, *Fincher v. Scott*, 352 F. Supp. 117, 118-19 (M.D. N.C. 1972), *aff'd*, 411 U.S. 961 (1973); *Beacham v. Braterman*, 300 F. Supp. 182, 183-84 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969).

In 1974, the Supreme Court confirmed the Fourteenth Amendment condones felon disenfranchisement. The Court held "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," *Richardson*, 418 U.S. at 54, and facially neutral state laws permanently disenfranchising felons, for that reason alone, do not violate the Equal Protection Clause, *id.* at 56; *see Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (Section 2 "grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens"), *cert. denied*, 439 U.S. 1129 (1979). *Richardson* has never been overruled.

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A decade after *Richardson*, however, the Supreme Court considered the constitutionality of an Alabama *misdemeanant* disenfranchisement law enacted in 1901 and never legislatively revisited since. In *Hunter v. Underwood*, two individuals, on behalf of themselves and a class of other misdemeanants, asserted a

race-based equal protection challenge to a 1901 Alabama constitutional provision that, in catch-all fashion, prohibited persons "convicted of, among other offenses, 'any crime . . . involving moral turpitude'" from voting. 471 U.S. 222, 223 (1985) (quoting Ala. Const., art. VIII, § 182, alteration in original). The Eleventh Circuit determined Alabama lawmakers enacted the 1901 misdemeanant provision with discriminatory intent, and invalidated it. *Id.* at 225. The Supreme Court affirmed, applying a burden-shifting test to the *Hunter* plaintiffs' discriminatory intent claim. *Id.* at 226-33.

Hunter initially required the plaintiffs to prove the never-altered Alabama enactment's past and present-day discriminatory impact, and that race was a "substantial" or "motivating" factor behind its adoption in 1901. *Id.* at 227-28. If the plaintiffs satisfied those obligations, the burden then shifted to the defendants "to demonstrate that the law would have been enacted without this factor." *Id.* at 228.

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In applying its test, the Supreme Court observed the *Hunter* plaintiffs' past and present impact evidence was undisputed, and Alabama essentially conceded race discrimination motivated its 1901 enactment's extension to misdemeanor convictions. *Id.* at 227-31. The Court dismissed Alabama's proffered explanations for the law. *Id.* at 231-32. Alabama also argued that intervening judicial decisions

invalidated "[s]ome of the more blatantly discriminatory" parts of the law and thereby legitimized it. *Id.* at 233. The Supreme Court acknowledged subsequent legislative alterations to the law could alter the analysis, in that the Court declined to address whether Alabama's 1901 enactment "would be valid if enacted today without any impermissible motivation[.]" *Id.* However, because Alabama's challenged law had remained unchanged by any legislative action for over eighty years, *Hunter*'s carve out lacked application to it. *Id.*

B. Plaintiffs' case is not *Hunter*.

Hunter is superficially analogous to Plaintiffs' case but factually and legally anomalous. Despite their best efforts to align themselves with the *Hunter* plaintiffs, in this Court and below, Plaintiffs' challenge to Mississippi's present-day felon disenfranchisement law differs materially. The following chart highlights examples of those differences:

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Material Distinction	***Hunter*'s Findings Regarding Alabama's 1985 Misdemeanant Disenfranchisement Law**	**Mississippi's Present-day Felon Disenfranchisement Law**
Scope of law's application	Applied to all felons and many misdemeanants, and included a vaguely-defined catch-all for "any . . . crime involving moral turpitude" encompassing misdemeanors. *Hunter*, 471 U.S. at 226.	Applies to certain felons convicted of serious offenses under state law, and lacks any application to misdemeanor convictions. ROA.545, 562-563, 1140-1142.
Disparate impact	Proven disparate impact contemporaneous to enactment and then present-day. *Hunter*, 471 U.S. at 227.	No proof of disparate impact contemporaneous to original enactment or the State's subsequent legislative modifications to the law's scope, and insufficient present-day impact proof.
Modifications to original law	Judicial invalidation of a some misdemeanor provisions over eighty years after the original enactment. *Hunter*, 471 U.S. at 232-33.	Legislative modification twice in 1950 and 1968 through the State's constitutional amendment process, including adoption of legislative resolution by two-thirds of each house and approval of majority of State's electorate. ROA.547-548, 841-843, 549-555, 870-973. 1986 Legislature deliberately adopted prior amendments to the law (after *Hunter* was decided), following a multi-year review process, and through legislation approved by virtually every member of each house. ROA.555-562, 975-1139.
Significance of modifications to original law	Insignificant judicial invalidation of original enactment's application to some misdemeanor crimes. *Hunter*, 471 U.S. at 232-33.	Significant legislative actions broadened original enactment's scope which addressed its allegedly racially-motivated under-inclusivity, and eliminated disenfranchisement of more than an estimated one-third of all felons who would have been affected by the prior law. ROA.547-548,841-843, 549-562, 870-1139, 1150.

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Not only do the foregoing facts and other record evidence materially distinguish Plaintiffs' case from *Hunter*, since 1985, federal courts have applied *Hunter*. The Circuits have universally rejected various race-based challenges to present-day disenfranchisement laws allegedly traceable to their predecessor nineteenth century enactments. *Hayden v. Paterson*, 594 F.3d 150, 161-62 (2nd Cir. 2010); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1223-27 (11th Cir.) (en banc), *cert. denied*, 546 U.S. 1015 (2005). Federal courts have also rejected claims similar to *Hunter*'s, including Voting Rights Act challenges targeting present-day felon voting proscriptions.[6] No post-*Hunter* felon disenfranchisement challenge has ever succeeded.

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C. *Cotton v. Fordice* forecloses Plaintiffs' claims.

Plaintiffs' case is undoubtedly not *Hunter*. Like its sister-circuits, this Court has applied *Hunter* to a race-based equal protection claim targeting a State's present-day felon disenfranchisement law. In fact, over twenty years ago in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), a unanimous panel of this Court rejected the exact same challenge, based on the exact same theory, attacking the exact same

[6] *E.g.*, *Farrakhan v. Gregorie*, 623 F.3d 990, 992-94 (9th Cir. 2010) (en banc); *Simmons v. Gavin*, 575 F.3d 24, 30-42 (1st Cir. 2009), *cert. denied*, 562 U.S. 980 (2010); *Hayden v. Pataki*, 449 F.3d 305, 322 (2nd Cir. 2006) (en banc); *Johnson*, 405 F.3d at 1227-34; *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984, at *1-2 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255, 1258-63 (6th Cir. 1986).

Mississippi law that Plaintiffs challenge now.

In *Cotton*, two plaintiffs, like the two Plaintiffs here, challenged the present-day version of Mississippi Constitution Section 241's disenfranchising felonies provision on the theory that the 1890 version was enacted with racist intent. 157 F.3d at 391.[7] Based on the 1896 *Ratliff v. Beale* decision, and other reported cases, this Court initially assumed race motivated the 1890 framers' version of Section 241, and their version would have failed under *Hunter*, similar to Alabama's 1901 misdemeanant disenfranchisement law. *Id.* (citing *Hunter*, 471 U.S. at 229-31; *Williams v. State*, 170 U.S. 213 (1898); *Ratliff*, 20 So. at 868; *McLaughlin v. City of Canton*, 947 F.Supp. 954, 976-78 (S.D. Miss. 1995)). Unlike Alabama's never-altered 1901 law, however, the Mississippi framers' 1890 enactment "was not the end of the story." *Id.*

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Cotton held "*Hunter* . . . left open the possibility that by amendment, a facially neutral provision like § 241 might overcome its odious origin," and "[t]hat is what happened here." *Id.* To reach that conclusion, *Cotton* relied on legislative actions, documented in the public record, proving the State twice revisited Section

[7] Prior to its published decision, this Court dismissed one plaintiff's claims under 28 U.S.C. § 1915(g). *Cotton*, 157 F.3d at 389 n.1. Also, before analyzing the merits of the remaining plaintiff's race-based equal protection claim, the Court held the "theft" felony category in the present-day version of Section 241 encompassed his armed robbery conviction. *Id.* at 390-91.

241 and substantially altered it through later enactments:

> Section 241, as enacted in 1890, was amended in 1950, removing "burglary" from the list of disenfranchising crimes. Then, in 1968, the state broadened the provision by adding "murder" and "rape"—crimes historically excluded from the list because they were not considered "black" crimes. *See McLaughlin*, 947 F. Supp. at 977. Amending § 241 was a deliberative process. Both houses of the state legislature had to approve the amendment by a two-thirds vote. The Mississippi Secretary of State was then required to publish a full-text version of § 241, as revised, at least two weeks before the popular election. *See* Miss. Code Ann. § 4211 (1942); H. Con. Res. 10 (Miss. 1950); H. Con. R. (Miss. 1968). Finally, a majority of the voters had to approve the entire provision, including the revision. 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.

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Id. Due to those legislative actions, *Cotton* concluded "§ 241 as it presently exists is unconstitutional only if the amendments were adopted out of a desire to discriminate against blacks." *Id.* at 392. Further, given the *Cotton* plaintiff's case rested on *Ratliff*'s statements regarding the 1890 version of Section 241, the Court held "*Hunter* does not condemn § 241." *Id.*

In over two decades since *Cotton*, no Fifth Circuit decision has ever doubted its logic or result. To the contrary, this Court has confirmed that *Cotton* "broadly stands for the important point that when a [state law] is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Chen v. City of Houston*, 206 F.3d

502, 521 (5th Cir. 2000).

This Court most recently reiterated *Cotton* established that "substantial, race-neutral alterations in an old unconstitutional law may remove [the law's] discriminatory taint." *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018). In his *Veasey* dissent, Judge Graves further aptly observed that, in *Cotton*, the Mississippi Constitution's 1890 version of Section 241 had "a thread of discriminatory intent running through it," but "[t]he passage of time and the actions of intervening parties cut the thread of intent in *Cotton*: two legislatures, acting eighteen years apart (with the first acting sixty years after the offending constitutional provision was enacted) approved the amendments by two-thirds majorities, and then the entire sections—not just the amendments—were subject to statewide votes in favor of full reenactment." *Id.* at 822 (Graves, J., dissenting).

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Cotton's analysis was correct. Its rationale is solid Circuit precedent. And *Cotton* is controlling here. *Technical Automation Services Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) (neither a district court nor a panel of this Court can overturn controlling precedent "absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court or by our *en banc* court" (internal quotes omitted)). *Cotton* is indistinct from Plaintiffs' case challenging the same law, on the same theory, and ultimately the same proof.

Cotton controls and forecloses Plaintiffs' claims, as the District Court correctly held.

D. Plaintiffs' attempts to brush aside *Cotton* are meritless.

To their credit, Plaintiffs acknowledge *Cotton* is binding precedent. In the District Court below, Plaintiffs nevertheless contended *Cotton* was wrongly decided and should be disregarded. They failed. On appeal, they again insist that *Cotton* got it wrong for three reasons. None has any merit.

The ballot form fixation. Plaintiffs first attack the process underlying the State's legislative actions in 1950 and 1968. They specifically contend that the 1950 and 1968 statewide ballot forms—which are supposedly "new" evidence not in *Cotton*'s record—prove *Cotton* wrongly held that "Mississippi's procedure resulted both in 1950 and in 1968 in a re-enactment of § 241, each amendment superceded the previous provision and removed the discriminatory taint associated with the original version." *Cotton*, 157 F.3d at 391. The ballot form in 1950 and 1968, under Plaintiffs' theory, "establishes that the ballot[s] did not give voters the option of re-enacting or repealing the remainder of the original list of disqualifying crimes" because voters' "only options were to vote 'For Amendment' or 'Against Amendment.'" Plaintiffs' Br. at 29. Thus, contrary to *Cotton*'s holding but according to Plaintiffs here, the statewide "votes were obviously not re-enactments

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of Section 241." Plaintiffs' Br. at 30.

Plaintiffs' ballot form argument gets them nowhere. Paper copies of the 1950 and 1968 ballots were not in *Cotton*'s court file. But that fails to prove *Cotton* wrong.

Cotton accounted for the fact that voters exercised the choice of voting up or down on the Legislature's 1950 and 1968 resolutions as the last step of the process leading to their enactment. In describing the deliberative legislative process that produced the enactments, *Cotton* recognized that "a majority of the voters had to approve the entire provision, including the revision." *Cotton*, 157 F.3d at 391. *Cotton* also explicitly referenced the 1950 and 1968 legislative resolutions, and the statute governing the State's constitutional amendment process at those times. *Id.* (citing Miss. Code Ann. § 4211 (1942); H. Con. Res. 10 (Miss. 1950); H. Con. Res. 5 (Miss. 1968)). The cited statutorily-prescribed process, and the cited legislative resolutions themselves, make plain voters were asked to ratify or reject the resolutions. *See* Miss. Laws, 1950, ch. 569; Miss. Laws, 1968, ch. 614. The ballots utilized for those votes adds nothing "new" *Cotton* did not already consider, and fails to prove *Cotton* was wrongly decided.

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Plaintiffs' misplaced ballot form argument also ignores *Cotton*'s irrefutable holding that "a deliberative process" produced the legislative enactments that

legally superceded the prior versions of Section 241. *Cotton*, 157 F.3d at 391. Although the general electorate did not have "options" to pick-and-choose categories of disenfranchising felonies, submitting interrogatories to voters is not the measure of a deliberative process. Both in 1950 and 1968, legislators deliberated and debated which categories of felonies to add or remove from Section 241, and enacted resolutions by a two-thirds vote of each house. Then, the resolutions were approved overwhelmingly at statewide elections, following advance publication, just as the State's then-current constitutional amendment process required.

Plaintiffs' ballot form argument provides no means to circumvent *Cotton*.

Allegedly "new" circumstantial evidence. Plaintiffs' second argument targets *Cotton*'s substantive holding that the 1950 and 1968 legislative "amendment[s] superceded the previous provision [of Section 241] and removed the discriminatory taint associated with the original version." *Cotton*, 157 F.3d at 391. Plaintiffs again claim so-called "new" evidence undermines *Cotton*. For support, they argue the legislative enactments added to Section 241's categories of disenfranchising felonies instead of repealing them, "the 1950 legislature was all-white and the 1968 legislature had only one black member," and 1950 and 1968 were generally "times of massive resistance by Mississippi's government and

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white populace to desegregation." Plaintiffs' Br. at 30.

None of those things undercuts *Cotton*'s holding. *Cotton* obviously rejected the notion that, to be effective, the 1950 and 1968 enactments had to "repeal" all the prior version of Section 241's disenfranchising felony categories. If that was required, *Cotton* would never have held the 1950 and 1968 legislative enactments, following the deliberative process that produced them, "removed the discriminatory taint associated with the original version." *Cotton*, 157 F.3d at 391.

Plaintiffs' purportedly "new" evidence, consisting largely of quotes from cases about other kinds of laws, fares no better. The 1950 and 1968 Legislatures' demographics, and generalizations regarding the State's racial struggles in the 1950s and 60s, do not establish *Cotton*'s holding was infirm. When this Court decided *Cotton*, just as now, it was obviously aware of the circumstances existing in Mississippi in the 1950s and 60s, as described in this Court's reported decisions and elsewhere. However, as the District Court correctly recognized, despite those well-known events, *Cotton* still concluded the State's 1950 and 1968 enactments removed the original version of Section 241's "discriminatory taint."

Plaintiffs' so-called "new" evidence about the 1950s and 60s is really just new argument. It does not diminish *Cotton*, much less afford Plaintiffs a way

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around its controlling precedent.[8]

To bolster their attack on *Cotton*, Plaintiffs further contend quotes from the Supreme Court's recent decision in *Abbott v. Perez*, 138 S.Ct. 2305 (2018) belie *Cotton*'s conclusion that the 1950 and 1968 legislative enactments removed the "discriminatory taint" associated with the 1890 version of Section 241. Plaintiffs' Br. at 31. Their invocation of *Perez* is misplaced.

In *Perez*, a redistricting remedy dispute, the plaintiffs argued *Hunter* obligated Texas to prove race did not improperly motivate its 2013 redistricting plans based in part on 2011 plans the district court earlier found were discriminatory. *Perez*, 138 S.Ct. at 2324-25. The Supreme Court rejected that burden-flipping maneuver. *Id.* at 2324. In doing so, before distinguishing *Hunter* from the Texas redistricting dispute, briefly summarized *Hunter*'s facts and

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[8] Not only does Plaintiffs' circumstantial evidence fail to undermine *Cotton*, it also fails to establish race motivated the State's 1950 and 1968 enactments. Plaintiffs' principal brief does not contend their cited cases and authorities regarding other Mississippi laws passed in the 1950s and 60s, and that time period generally, satisfy their burden to prove that race motivated the 1950 and 1968 enactments. *Cotton*, 157 F.3d at 392. They have forfeited that argument. *See United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009) ("This court does not entertain arguments raised for the first time in a reply brief."). But even if they assert that argument for the first time on rebuttal, it lacks merit. Direct evidence, and other proof in the record, establishes the enactments were entirely well-intentioned, and race played no part in them. As one example, the direct legislative history of floor actions and debates regarding the 1968 enactment proves legislators acted only on legitimate race-neutral motives when they substantively changed Section 241 to delete its poll tax and "Indians not taxed" provisions, reduce voter residency requirements, and include murder and rape as disenfranchising crimes. ROA.549-553, 870-915.

decision as follows:

> *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. The article disenfranchised anyone convicted of any crime on a long list that included many minor offenses. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. This Court rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today."

Id. at 2325.

Plaintiffs contend *Perez* "makes it clear that the discriminatory taint of a law like" Mississippi's 1890 version of Section 241 "does not disappear unless something is done to 'alter the intent with which the [original] article, including the parts that remained, had been adopted.'" Plaintiffs' Br. at 31 (quoting *Perez*, 138 S.Ct. at 2325, alteration in original).

Cutting-and-pasting *Perez*'s summary gets Plaintiffs nowhere. *Cotton* held that Mississippi's 1950 and 1968 constitutional amendments *were* "something" that *did* "alter the intent" with which the 1890 version of Section 241 was adopted. The 1950 and 1968 legislative actions, as *Cotton* specifically held, "resulted in a re-enactment of § 241" and "removed the discriminatory taint associated with the

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original version" by eliminating burglary, and later broadening the State's felon disenfranchisement law "by adding 'murder' and 'rape'—crimes historically excluded from the list because they were not considered 'black' crimes." *Cotton*, 157 F.3d at 391.

Furthermore, to the extent Plaintiffs attach significance to *Perez*'s description of the judicial decisions in *Hunter* that "pruned" Alabama's 1901 misdemeanant disenfranchisement law, *Cotton* already rejected the notion that Alabama's judicial decisions were akin to Mississippi's legislative actions. *Cotton* explicitly distinguished *Hunter* in that regard:

> The changes made to § 241 are fundamentally different from those made to the Alabama provision discussed in *Hunter*. The voters of Mississippi willingly broadened § 241 through the constitutional amendment process to include violent criminal acts not previously included in the list of disenfranchising crimes. The Alabama alterations, on the other hand, were made through the judicial process of striking certain crimes which had the effect of limiting the coverage of the disenfranchising clause. *See Hunter*, 471 U.S. at 228, 105 S.Ct. at 1920. Only these latter, "involuntary amendments" were discounted by the Supreme Court.

Cotton, 157 F.3d at 391 n.8. The immaterial judicially-imposed alterations to Alabama's misdemeanant law in *Hunter*, as *Cotton* held, were nothing like the relevant substantive legislative changes made to Mississippi's felon disenfranchisement law. Nothing in *Perez*, or *Hunter* itself, undermines *Cotton*.

What's more, even if *Cotton* is somehow not controlling, the facts in this

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record re-prove *Cotton*'s correct conclusion: the 1950 and 1968 legislative enactments removed the original version of Section 241's "discriminatory taint." The 1890 Mississippi constitutional framers fashioned their Section 241 from long-standing disenfranchising crimes of dishonesty, with additional property crimes and bigamy. *Compare* Miss. Const., art. XII, § 2 (1968); Miss. Const., art. VII, § 4 (1832); Miss. Const., art. VI, § 5 (1817) *with* Miss. Const., art. XII, § 241 (1890). The 1890 framers' under-inclusive additions, according to Plaintiffs' own evidence in this case, constituted the "discriminatory taint" in their version of Section 241.[9] When the State subsequently eliminated burglary, and added murder and rape, as *Cotton* correctly held, the State addressed and removed the under-inclusive "discriminatory taint" which all the evidence demonstrates was original Section 241's defect.

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Neither Plaintiffs' spin on supposedly "new" circumstantial evidence, nor

[9] Plaintiffs' sole original source evidence is the 1896 *Ratliff* decision. *Cotton* explicitly considered *Ratliff* in reaching its holding. *Cotton*, 157 F.3d at 391 (citing *Ratliff*, 20 So. at 868). *Ratliff* identified the 1890 version of Section 241's under-inclusion of "burglary, theft, arson, and obtaining money under false pretenses," but not more violent crimes, as its discriminatory defect. *Ratliff*, 20 So. at 868. Plaintiffs' other evidence of the 1890 enactment's "discriminatory taint" in the record is second-hand statements of historians premised on *Ratliff*. One asserted that the 1890 version of Section 241's "disqualifying crimes were perceived at the time to be mainly African American problems, particularly bigamy." ROA.2611. (internal quotes omitted). Speaking to the discriminatory defect in the 1890 version, the other historian contended that the 1890 convention's "Franchise Committee limited Mississippi's criminal disenfranchisement provision to a carefully selected list of crimes that aimed to ensnare more African Americans than whites. The list notably omitted violent crimes, such as murder and rape, and instead focused on property-related offenses." ROA.1267.

their twists on *Perez*'s summary of *Hunter*, create a viable path around *Cotton*.

(Mis)framing their claims. Plaintiffs' third and final attempt to circumvent *Cotton* characterizes their claim as supposedly different from the *Cotton* plaintiff's claim. Then, they pivot back to their other two already discredited anti-*Cotton* arguments. Plaintiffs avow that, allegedly unlike *Cotton*, they do not challenge Section 241 "as it presently exists" but "only the parts that remain of the original version." Plaintiffs' Br. at 31. That self-declared constraint, according to Plaintiffs, renders their case "different from *Cotton*," which they say only challenged "the entire provision as it has existed since 1968." Plaintiffs' Br. at 31-32.

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Plaintiffs' wordplay is worthless. They are, of course, challenging the present-day version of Section 241. They are only presently disenfranchised under the State's present-day law, not some prior version.

In any event, no matter how self-described, Plaintiffs' claims are indistinct from *Cotton*. The *Cotton* plaintiff challenged a "part" of the 1890 version of Section 241 "that remained" in the present-day version of the law. 157 F.3d at 390-91 (holding the plaintiff's conviction for "armed robbery" constituted "theft" as specified in the present-day and prior versions of Section 241). Here, Plaintiffs alleged they have been unconstitutionally disqualified from voting under the

State's present-day law due to their forgery and embezzlement of public funds convictions. ROA.568-569, 579. Their present-day disqualifying forgery and embezzlement convictions were "parts" of Section 241's 1890 version, just like the *Cotton* plaintiff's theft conviction. Plaintiffs' claims are on equal footing with the *Cotton* plaintiff's claim, and equally doomed by *Cotton*'s holding.

Plaintiffs' claims are also substantively indifferent from *Cotton*. In *Cotton*, the plaintiff focused on the 1890 version of Section 241 and argued "that § 241 is unconstitutional because it was originally drafted with the intent to disenfranchise blacks." 157 F.3d at 391. The claim failed because the intervening 1950 and 1968 legislative enactments "removed the discriminatory taint associated with the original version." *Id.*

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No matter how cleverly they disguise it, Plaintiffs' argument also focuses on the original version of Section 241. Nominally limiting their challenge to the 1890 version of Section 241, as opposed to the post-1968 version, fails to distinguish Plaintiffs' claims from *Cotton*. *Id.* at 391-92; *see also Hayden*, 594 F.3d at 162-67 (affirming dismissal of plaintiffs' race-based equal protection claim that focused only on New York's 1821, 1846, and 1874 disenfranchisement laws due to the State's 1894 enactment); *Johnson*, 405 F.3d at 1223-27 (affirming summary judgment dismissing plaintiff class's race-based equal protection claim

concentrated solely on Florida's 1868 disenfranchisement law because of the State's 1968 enactment).

Cotton forecloses Plaintiffs' claims, and all of their creative attempts to skirt its controlling holding lack merit.

E. As the District Court correctly held in the alternative, the State's post-1968 legislative actions also defeat Plaintiffs' claims.

Even assuming the District Court somehow mistakenly held *Cotton* alone forecloses Plaintiffs' claims, the District Court still correctly awarded the Secretary summary judgment. Post-1968 legislative actions, which *Cotton* had no occasion to consider, prove that lawmakers—in a separate and distinct era from the 1890 constitutional framers, as well as legislators in the 1950s and 60s—modified and endorsed the State's present-day felon disenfranchisement laws following a thoroughly deliberative process free from any discriminatory motivation. Those actions, above-and-beyond the 1950 and 1968 enactments *Cotton* relied on, independently confirm Plaintiffs' claims lack merit.

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The indisputable facts. Mississippi's current Election Code was first enacted in 1986, nearly a year after the Supreme Court decided *Hunter*. The State's modern felon disenfranchisement laws include Section 241, as well as Code Sections 23-15-11 and 23-15-19, which together govern voter qualifications and prohibit felons convicted of serious crimes from registering to vote, absent

reenfranchisement through one of the various available means. In enacting the modern Code, lawmakers modified the State's felon disenfranchisement scheme, and aligned it with present-day Section 241. A robust multi-year deliberative process produced the Legislature's actions. And most important to this case, racial discrimination surely did not factor in the process.

In 1984, then-Secretary of State Dick Molpus assembled a bipartisan, biracial Election Law Reform Task Force to undertake a comprehensive review of the State's election laws and propose election reform legislation. ROA.555, 975-979. The Task Force included a diverse group of legislators, executive branch officials, local election officials, and members of the public-at-large. ROA.555-556, 980-982. For many months, the Task Force conducted public meetings, accepted public comments, met with U.S. Department of Justice officials, and deliberated on nearly every aspect of the existing election laws. ROA.556, 983-1064. The Task Force's extensive work included a review of the State's felon disenfranchisement laws. The Task Force discussed and considered a range of different options, including expanding the State's disenfranchising crimes to all felonies, amending Section 241, and leaving the disenfranchisement laws "as is." ROA.556-557, 1065-1084. The Task Force concluded the law should be left "as is," and also recognized then-existing Code Section 23-5-35, which specified voter

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qualifications and the State's disenfranchising crimes, predated present-day Section 241 and had never been amended to exclude burglary. ROA.556-557, 1072, 1074, 1081.

After the Task Force completed its work, it proposed legislation for the 1985 Regular Legislative Session. The Legislature responded by forming study committees. ROA.557, 1085-1120. The committees investigated election law reforms, held several public meetings, and considered extending disenfranchisement to all felonies, among other things. ROA.557-558, 1086-1087, 1089, 1093, 1121-1122.

Prior to the 1986 Session, the House committee issued a formal report, endorsed by its Senate counterpart. ROA.558, 1085-1120. The report's felon disenfranchisement findings included:

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• a recognition that the State's then-present disenfranchising felony categories effectively included those in present day Section 241 and burglary in Code Section 23-5-35, and suffrage may be restored through passage of a suffrage bill under Section 253 or gubernatorial pardon;

• proposals to expand the scope of disenfranchising felonies to all felonies, including federal and other states' convictions, except manslaughter and felonious violations of the Internal Revenue Code, and to restore suffrage to felons following completion of their sentence to reduce the Legislature's need to act on suffrage bills; and

• a resolution to propose constitutional amendments to effectuate the committee's proposals.

ROA.558, 1108-1109. Following the report, legislators introduced 1986 Senate Bill 2234 which would completely overhaul the State's election laws. ROA.558-559, 1124-1126.

As originally introduced and modified in the Senate, SB 2234 proposed new laws to repeal and replace Code Sections 23-5-35 and 23-5-85. Those then-existing laws prohibited the registration of, and required removing from the voter rolls, any persons convicted of "murder, rape, bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy." ROA.560-561, 1135-1136. The initial version of SB 2234 proposed to change those operative provisions to provide for disqualification of persons "convicted in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code." ROA.558-559, 1124-1126. Throughout the deliberative legislative process, lawmakers debated and modified proposed SB 2234, culminating in a final conference report. The report settled on a repeal and replacement of Code Sections 23-5-35 and 23-5-85 that adopted present-day Section 241 and reduced the scope of the Code's felon disenfranchisement laws to persons "convicted of any crime listed in Section 241, Mississippi Constitution of 1890." ROA.559-560, 1128-1131.

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SB 2234 eliminated burglary and endorsed Section 241's present-day version (as amended and re-enacted in 1950 and 1968) as the State's felon disenfranchisement scheme. The Legislature passed the final version of SB 2234 on an overwhelming bipartisan basis, with a House vote of 118 to 3, and a Senate vote of 51 to 1. ROA.560, 1132.

In late-December 1986, and early-January 1987, the Department of Justice pre-cleared SB 2234 under Section 5 of the Voting Rights Act. ROA.561, 1137-1139. SB 2234 then took effect, including its adoption of present-day Section 241 as the State's modern disenfranchising crimes, and it was formally codified where it presently exists in today's Election Code. *See* Miss. Code Ann. §§ 23-15-11, 23-15-19.

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The 1986 legislative actions defeat Plaintiffs' claims. The Legislature's actions in 1986, and the deliberative process which led to them, establish Plaintiffs' claims lack merit for at least two reasons. First, the 1986 legislation independently confirms *Cotton*'s holding that substantial, race-neutral alterations, produced through a deliberative process, have removed the "discriminatory taint" of the 1890 framers' version of Section 241. *Cotton*, 157 F.3d at 391. The 1986 Legislature—after considering the 1984 Task Force's extensive study, the 1985 legislative committees' further investigation and recommendations, and a broader

change to Section 241—voted overwhelmingly to alter the State's felon disenfranchisement laws to conform with Section 241 and endorse it, as the law was changed by the 1950 and 1968 enactments. The Legislature's actions were significant, legally and practically.[10] And Plaintiffs have failed to allege, much less carried their burden to prove, that race discrimination played any part in the State's deliberative process in the mid-1980s. That failure alone extinguishes Plaintiffs' claims. *Cotton*, 157 F.3d at 391-92; *see also Hayden*, 594 F.3d at 166-67; *Johnson*, 405 F.3d at 1223-24.

Second, even if this Court determines Plaintiffs have discharged their burden of proving race discrimination motivated each of the State's 1950 and 1968 enactments, and thereby shifted the burden to the Secretary, the unrebutted record

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[10] Even if it could make a difference, Plaintiffs' assertion that "[n]othing was done in 1986 to change the law" is misleading. Plaintiffs' Br. at 36. The 1986 legislation not only endorsed and conformed the State's Election Code to present-day Section 241, it also effectuated the elimination of burglary as a disenfranchising felony, consistent with the 1950 and 1968 enactments. By doing so, the Legislature drastically reduced the number of disenfranchised individuals under state law. Based on undisputed record data, 24,385 individuals (14,098 African American and 9567 white, and over half of the total number of 42,890 disenfranchised individuals at issue), were effectively enfranchised due to the 1986 legislation. ROA.1150.

On a related note, the summary of Plaintiffs' argument cites the inapposite cases of *Rapanos v. United States*, 547 U.S. 715, 749-50 (2006) and *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001), for the proposition that the 1986 Legislature's actions prove nothing about their motivations. Unlike those statutory interpretation disputes, this case does not involve agency deference or the meaning of code provisions. Moreover, as the record proves, the 1986 legislation, and thoroughly deliberative process leading to it, were legislative actions, not "inaction" that was not probative of interpretative intent, as in *Rapanos* and *Solid Waste Agency*.

here establishes the State's present-day law "'would have been enacted without'" racial animus. *Cotton*, 157 F.3d at 391 (quoting *Hunter*, 471 U.S. at 228); *see Johnson*, 405 F.3d at 1224-25. The Secretary's burden, if activated, rests on whether the State would have adopted its present-day disenfranchisement law absent a racial motive. It indisputably did. Race did not factor in the deliberative legislative process leading to the 1986 legislation. Plaintiffs have never even alleged race factored in the process. The State endorsed Section 241, as it then-existed, and conformed the Election Code to it. Whether or not *Cotton* directly forecloses Plaintiffs' claims, and even assuming Plaintiffs could satisfy all their proof obligations, the State's mid-1980s legislative actions thwart their case.

Plaintiffs lack a valid response. In the District Court, Plaintiffs failed to offer any proof of the 1986 Legislature's motives. Instead, they unsuccessfully tried to marginalize the legislative actions taken in the 1980s because Section 241 was not formally amended, and there was no statewide vote. ROA.4326.

On appeal, Plaintiffs abandoned that approach. Relying on *Hunter* and employment discrimination cases, Plaintiffs now assert the 1986 legislation only matters if the Secretary affirmatively proves legislators acted on "a race-neutral reason that, standing alone, would have justified enacting Section 241" in its present form. Plaintiffs' Br. at 34. Their attempts to shift and inflate the

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Secretary's burden lack merit.

This is not a mixed-motive case like *Hunter* where proven race discrimination motivated the 1901 Alabama constitutional convention to enact its never-substantively-altered misdemeanor law, and thereby obligated the State to prove the same decision-makers would have passed the 1901 law in any event. *Hunter*, 471 U.S. at 228. Nor is it a retaliation case targeting the motivation of a few discrete decision-makers who made a single contemporaneous employment decision, such as *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) and *Prof'l Ass'n of Coll. Educators v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258 (5th Cir. 1984), cited at page 35 of Plaintiffs' brief.

This case involves different eras, different decision-makers, different decision-making processes, and different decisions. Many decades separated the 1890 framers' passage of their version of Section 241, the superceding 1950 and 1968 enactments that substantively altered Section 241, and 1980s lawmakers' deliberative legislative process that produced their own substantive modification and endorsement of the State's present-day felon disenfranchisement law. Plaintiffs have both failed to prove that race motivated the State's 1950 and 1968 enactments, and do not even argue impermissible motivations attended the 1986 Legislature's decision-making process. In these circumstances, and far different

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from *Hunter*, *Mt. Healthy*, or *El Paso*, the Secretary's proof shows the State *did enact* and *would have enacted* its present-day felon disenfranchisement law without an impermissible racial motive—and that is all he must prove. *Cotton*, 157 F.3d at 391-92; *see Johnson*, 405 F.3d 1214 (rejecting plaintiffs' argument that the State "must demonstrate that it acknowledged racial discrimination tainted the 1868 provision, and yet knowingly reenacted the disenfranchisement provision for non-discriminatory reasons in 1968").

Plaintiffs also downplay the 1986 legislation with a circular argument that the State's so-called "bizarre" law "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." Plaintiffs' Br. at 34. Plaintiffs' failure to prove race motivated the 1950 and 1968 enactments, and the 1986 Legislature's decision, undercuts their contention. Moreover, it is patently incorrect that no legitimate rationale supports the State's present-day disenfranchisement law.

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Even though lawmakers in the 1980s considered further expanding the State's felon disenfranchisement laws, and the 1985 committee report remarked that approach would be "more rational," as page 35 of Plaintiffs' brief points out, it does not follow that race motivated the adoption of current state law. Nor do those points establish that the State's current disenfranchisement laws are irrational.

The Fourteenth Amendment affirmatively sanctions felon disenfranchisement. U.S. Const., amend XIV, § 2; *see also Ramirez*, 418 U.S. at 53-54 (recognizing the Supreme Court had "indicated approval" of state laws excluding "some or all felons from the franchise," and "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment"). Most states have exercised their authority to prohibit felons from voting in the past, and nearly all still disqualify some or all felons from voting in some form or another, consistent with their own policy determinations.[11] After all its changes over the years, present-day Mississippi law limits disenfranchisement to serious felony offenses. Focusing on those serious offenses under state law, on a facially-neutral basis, is reasonably related to the legitimate bases for felon disenfranchisement, including social contract principles, penal considerations, the State's interest in safeguarding elections from fraud and corruption, and other legitimate state policy aims.[12]

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[11] The record includes a description of States' various disenfranchisement and reenfranchisement laws, current as of October 2018. *See* ROA.3544-3595, 3596-3699.

[12] *See Green*, 380 F.2d at 451-52; *see also Theiss v. State Administrative Bd. of Election Laws*, 387 F. Supp. 1038, 1040-41 (D. Md. 1974); *Kronlund v. Honstein*, 327 F. Supp. 71, 72 (N.D. Ga. 1971). Moreover, the disqualifying felonies of the two particular Plaintiffs here underscore the rationality of present state law as applied to them. The State undoubtedly has a legitimate interest in treating their serious convictions for forgery and embezzlement of public funds as disqualifying. Forgery has always been a disqualifying offense under every state constitution and law enacted since Mississippi's statehood. Embezzlement of public funds is a breach of public trust, and likewise a serious felony offense of dishonesty, for which

Plaintiffs' attempts to minimize the State's mid-1980s legislative actions are meritless. Even if *Cotton* and the State's 1950 and 1968 enactments do not alone foreclose Plaintiffs' claims, the subsequent legislative actions in the 1980s conclusively defeat them.

II. Plaintiffs' Claims Alternatively Fail Due to Their Deficient Impact Proof, and Lack of Individualized Proof that Race Motivated Their Disenfranchisement.

Because *Cotton* and the State's post-1890 legislative actions so clearly resolve Plaintiffs' claims, the District Court did not examine anything else. However, Plaintiffs' lack of impact proof, and other proof problems inherent their particular claims, are alternative reasons to affirm the District Court's final judgment. *See Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 273 (5th Cir. 2015) ("We may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court.").

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A. Plaintiffs' failure to satisfy their impact burdens.

A lonely footnote in Plaintiffs' brief contends that currently African American adults "constitute 36% of Mississippi's voting age population but 59%

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disqualification from voting and other civil disabilities attach under state law. *E.g.*, Miss. Code Ann. § 25-1-113 (disqualification of persons convicted of embezzlement of public funds from public employment).

of its disenfranchised individuals" and "are 2.7 times more likely than white adults to have been convicted of a disenfranchising crime in Mississippi." Plaintiffs' Br. at 27 n.3. Those terse statements, and the record evidence behind them, fail to satisfy Plaintiffs' burden of proving discriminatory impact.

Hunter obligated its plaintiffs to prove that Alabama's misdemeanant disenfranchisement law caused both a discriminatory impact contemporaneous to its 1901 enactment and at present. 471 U.S. at 227; *see also Cotton*, 157 F.3d at 392 n.9 (noting plaintiff must prove discriminatory intent and effects). Plaintiffs here have no evidence regarding the alleged impact of the 1890 version of Section 241's disenfranchising felonies provision. They have no impact proof relative to the versions of Section 241 enacted in 1950 and 1968. They do not even have impact proof bearing on the 1980s, when the Legislature revisited the State's laws. Plaintiffs have failed to establish all those essential elements of their case.

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In addition to their lack of required historical proof, Plaintiffs' present-day impact argument is off-base. Plaintiffs' statistics ignore key data, including statewide convictions for non-disenfranchising crimes and statewide convictions broken down by felony categories. That overlooked information, drawn from the same source and same time frame as Plaintiffs' calculations, is in the record and illustrated as follows:

Mississippi Criminal Convictions 1994-2017
by Crime Category and Race[13]

	African American	White	Other	Total
Disenfranchising Felony Convictions				
Bigamy	8 (47%)	9 (53%)	0	17
Bribery	23 (57.5%)	14 (35%)	3 (7.5%)	40
Perjury	82 (70.69%)	33 (28.45%)	1 (0.86%)	116
Forgery	529 (56.64%)	379 (40.58%)	26 (2.78%)	934
Arson	544 (48.92%)	536 (48.2%)	32 (2.88%)	1112
Embezzlement	2367 (50.4%)	2228 (47.44%)	101 (2.15%)	4696
False Pretenses	2716 (53.36%)	2175 (42.73%)	199 (3.91%)	5090
Theft	19084 (61.79%)	11026 (35.7%)	775 (2.51%)	30885
Total	25353 (59.12%)	16400 (38.23%)	1137 (2.65%)	42890
Non-Disenfranchising Convictions	87003 (56.84%)	60816 (39.73%)	5237 (3.24%)	153056

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The foregoing data illuminates at least two flaws in Plaintiffs' impact contentions. First, Plaintiffs' statistical percentages, and proposition that African Americans adults are "2.7 times more likely" than white adults to have been disqualified for a felony conviction, rely on comparing disenfranchised felons to otherwise eligible voters. But that comparison does not square with Plaintiffs'

[13] ROA.563-564, 1143-1149. This chart's data was taken from records of the Mississippi Administrative Office of Courts produced by Plaintiffs and analyzed by their expert. The chart excludes convictions for felonies categorized as murder and rape, because Plaintiffs have elected not to challenge those crimes, and also excludes felony shoplifting convictions which were excluded from Plaintiffs' expert's analysis of the data.

merits approach. They rightly do not claim that the State cannot enforce any felon disenfranchisement laws. Plaintiffs instead contend that, because of an alleged connection to intentional discrimination over a century ago, Mississippi's present-day disenfranchisement laws unconstitutionally include felony crimes for which African Americans are disproportionately convicted.[14]

The record evidence, viewed in light of Plaintiffs' asserted legal theory, does not establish the State's present-day disenfranchisement laws have created a "2.7 times more likely" disparate impact among similarly situated individuals. As the chart above details, African American and white individuals respectively accounted for 112,356 and 77,216 criminal convictions between 1994 and 2017. Among persons convicted of crimes, the number of persons convicted of disenfranchising felonies, by race, included 25,353 and 16,400.

Those figures mean that, among African American persons convicted of any crime, approximately 29% (25,353/112,356) were convicted of a disenfranchising

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[14] Plaintiffs' "2.7 times more likely" argument apparently comes from a quote in *Hunter* using a statistic in the Eleventh Circuit's underlying opinion: "In Jefferson and Montgomery Counties blacks are even by the most modest estimates at least 1.7 times as likely as whites to suffer disenfranchisement under Section 182 for the commission of nonprison offenses." 471 U.S. at 227. Neither the Supreme Court's opinion nor the Eleventh Circuit's decision explain the methodology used to calculate those impact figures. But the quote suggests a comparison among convicted misdemeanants, which makes sense given that *Hunter*, unlike this case in so many ways, concerned whether Alabama could enforce its never-legislatively-altered 1901 misdemeanant disenfranchisement law under any circumstances.

felony. In the same time frame, among white persons convicted of any crime, approximately 27% (16,400/77,216) were convicted of a disenfranchising felony. A statistical disparity among disenfranchised felons exists. However, it is a two point percentage difference, not a significant disparity. And it is certainly not evidence that convicted African American persons are "2.7 times as likely" to have been convicted of disenfranchising felonies than convicted white persons.

Second, Plaintiffs' impact argument fails to account for felony-specific data relevant to their particular alleged injuries, which are inexorably linked to their felony convictions' inclusion in the State's present-day felon disenfranchisement laws. Plaintiff Karriem was convicted in 2005 for embezzling public funds. ROA.568-569. Based on Plaintiffs' own data source, the record evidence shows 2367 African American persons and 2228 white persons convicted of embezzlement. ROA.1146. For approximately every 10 African American embezzlement convictions, there were approximately 9.3 white embezzlement convictions (2228/2367). That is not a statistically significant disparity.

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Similarly, Plaintiff Harness was convicted of forgery in 1986. ROA.568, 579. The record shows 934 forgery convictions in Plaintiffs' data source, including 529 African American persons and 379 white persons. ROA.1146. For approximately every 10 African American forgery convictions, there were

approximately 7.16 white forgery convictions (379/529). It is a slightly larger disparity than for embezzlement convictions. But it hardly puts Plaintiff Harness's impact argument in the alleged "2.7 times as likely" range. Plaintiffs' deficient impact evidence simply fails to carry their burden of proof.

B. Plaintiffs' failure to prove race motivated their disenfranchisement under the 1890 version of Section 241.

Even assuming Plaintiffs could satisfy their impact burdens, they have also failed to prove they are disqualified from voting due to racial motivation of the 1890 framers. Disenfranchisement has always been a civil consequence of some felony convictions in Mississippi, even before African Americans could vote. The State's first three constitutions specified the felony offenses of bribery, perjury, and forgery were disenfranchising. Miss. Const., art. VII, § 2 (1868); Miss. Const., art. VII, § 4 (1832); Miss. Const., art. VI, § 5 (1817); *see also* ROA.541-545, 669-724. Racial motivation did not factor into the 1817 and 1832 enactments. Before the Civil War, only white males could vote. Impermissible motivations likewise did not drive the Congressionally-approved 1868 enactment, and Plaintiffs have never argued to the contrary.

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The 1890 framers' version of Section 241 retained their predecessors' non-discriminatory crimes of bribery, perjury, and forgery. Miss. Const., art. XII, § 241 (1890). Then, the 1890 framers added other crimes to the Reconstruction

government's enactment. *Id.* The *Ratliff* decision, Plaintiffs' sole original source evidence regarding the 1890 framers' intent, identified the framers' inclusion of "[b]urglary, theft, arson, and obtaining money under false pretenses" and exclusion of more violent crimes as the original version of Section 241's discriminatory defect. *Ratliff*, 20 So. at 868. *Ratliff* does not prove the two Plaintiffs' purported discrimination case. Even if *Cotton* and all the subsequent legislative enactments that modified the State's felon disenfranchisement laws did not exist, Plaintiffs' particular claims targeting the 1890 version of Section 241 remain fatally flawed.

Alleged racial motivations of the 1890 framers lack a connection to Plaintiffs' particular alleged injuries, *i.e.*, their disqualification from voting. Plaintiff Harness's injury stems from his 1986 forgery conviction. ROA.568, 579. Racial motivation does not account for the inclusion of forgery in the 1890 framers' version of Section 241. Under every constitution and law ever enacted in Mississippi, forgery has always been a disenfranchising crime, before and after African Americans could vote. No proof, from *Ratliff* or otherwise, establishes the 1890 framers retained the always-disenfranchising crime of forgery on account of race.

Plaintiff Karriem has a similar problem. His disqualification resulted from a 2005 conviction for embezzlement of public funds. ROA.568-569. No evidence

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proves race motivated the 1890 framers to include embezzlement in Section 241. Embezzlement is a textbook crime of dishonesty closely associated with the State's other pre-1890 disenfranchising crimes of bribery, perjury and forgery. Although *Ratliff* spoke to other ill-motivated inclusions and exclusions, neither the decision nor any other evidence suggest the original version of Section 241 included embezzlement on account of racial motivation.

Like the District Court, this Court should not have to look beyond *Cotton* and the post-1890 legislative actions to confirm Plaintiffs' claims lack merit. But, if any other issues must be reached, Plaintiffs' deficient impact proof and particularized merits problems alternatively justify dismissal of their claims.

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III. Plaintiffs Lack Article III Standing to Sue the Secretary, and Eleventh Amendment Immunity Bars Their Claims.

Finally, the District Court correctly granted the Secretary's motion for summary judgment on the merits and ultimately dismissed Plaintiffs' claims. But it should have simply dismissed Plaintiffs' case for lack of Article III standing and/or due to the Secretary's Eleventh Amendment immunity.

Plaintiffs' opening brief says nothing about standing or the Eleventh Amendment. To establish an Article III case or controversy, Plaintiffs must prove: (1) they have suffered an "injury in fact," (2) there is a "causal connection between the injury and the conduct complained of," and (3) "the injury will be redressed by

a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotes omitted). A failure to prove each element precludes federal courts from exercising jurisdiction over their claims. *Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Mmgt. Council*, 364 F.3d 269, 273 (5th Cir. 2004).

Injury in fact. Plaintiffs' inability to vote due to their respective forgery and embezzlement of public funds convictions demonstrates an "injury in fact" sufficient to challenge those two particular felonies as disenfranchising under present-day Mississippi law. An injury alone, however, does not establish Plaintiffs can sue the Secretary in federal court.

Lack of causation and redressability. Plaintiffs' disqualification from voting is connected to local election officials' enforcement of Mississippi's felon disenfranchisement laws—but not to the Secretary. *Lujan*, 504 U.S. at 560. The Secretary does not enforce Section 241, or the State's other felon disenfranchisement laws. He lacks the requisite causal connection to Plaintiffs' alleged injuries, and the ability to remedy them, sufficient to establish Plaintiffs' Article III standing. *Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

The Secretary has no investigative or prosecutorial duty with regard to any potential violation of any election laws. ROA.587. He has no duty or authority to

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supervise local election officials. ROA.584-585. And he lacks any authority or duty to prohibit convicted felons from registering, or to remove convicted felons from the voter rolls. Miss. Code Ann. § 23-15-151.

The District Court found that the Secretary's duty to maintain the Statewide Elections Management System ("SEMS"), and "chief election officer" designation for purposes of the National Voter Registration Act of 1993 ("NVRA"), "provide enough basis" to satisfy Article III's causation and redressability requirements. ROA.4313. Neither rationale satisfies those standing elements.

SEMS is a computerized information system that includes the county voter rolls, and programs that local officials can use to maintain them. Miss. Code Ann. § 23-15-165. One of SEMS's programs filters and maintains felony conviction information supplied by the Mississippi Administrative Office of Courts. ROA.581-582, 585-587. When a local county election official logs on to SEMS to register voters or maintain their county voter rolls, SEMS can provide a potential match report showing voters who may have been convicted of a disenfranchising felony. ROA.581-582, 585-587. It is then up to the local official to gather more information and decide whether or not to take action, if necessary. ROA.581-582, 585-587.

Just because SEMS contains information about felony convictions, and the

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Secretary maintains SEMS, does not mean the Secretary enforces the State's felon disenfranchisement laws. It is true, as the District Court recognized, that the Secretary "receives information regarding disenfranchising convictions, adds that information to SEMS, and trains county officials on the next step." ROA.4314. However, SEMS is merely one resource for local officials. They have the sole duty and authority to take action regarding someone who may have been convicted of a disqualifying felony. Miss. Code Ann. § 23-15-151. SEMS or no SEMS, the Secretary lacks any duty or authority to supervise any county officials. ROA.584-585. With or without SEMS (or SEMS training), local officials must keep their own "full and complete list, in alphabetical order, of persons convicted of voter fraud or of any crime listed in Section 241," Miss. Code Ann. § 23-15-151, and are solely responsible for voter registration and voter roll maintenance. ROA.590. SEMS fails to establish the requisite connection between the Secretary and Plaintiffs' alleged injuries to make the Secretary a proper target of their lawsuit.

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The Secretary's designation as Mississippi's "chief election officer" for purposes of the NVRA, and his duties as such, likewise fail to establish Article III's causation and redressability elements. Plaintiffs do not assert a NVRA claim. That fact, together with the Secretary's lack of state law authority to prohibit convicted felons from voting or to compel local officials to do so, distinguish

Plaintiffs' case from the constellation of "chief election official" cases the District Court's standing analysis rested upon. ROA.4314-4315.[15]

For Article III purposes here, the Secretary lacks the coercive power under state law to cause Plaintiffs' complained-of injury or redress it. *Okpalobi*, 244 F.3d at 246; *see also Duit Constr. Co. Inc. v. Bennett*, 796 F.3d 938, 941 (8th Cir. 2015) (no causation or redressability where state defendants lacked authority to correct state commission's challenged practices); *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) (elements of Article III causation and redressability not satisfied because state law charged other officials with enforcement of challenged statute); *City of San Antonio v. Edwards Aquifer Authority*, 2014 WL 12496605, at

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[15] Each case the District Court's standing analysis cited, unlike here, involved NVRA claims against a Secretary of State designated as "chief election official" under the Act, and/or state laws which clothed the targeted Secretary with enforcement power over local officials. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017) (challenge to Texas election code provisions under the Voting Rights Act (which itself negated the state's Eleventh Amendment immunity), finding plaintiffs had standing to sue the Texas Secretary of State because state law required the Secretary "to obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code"); *Scott v. Schedler*, 771 F.3d 831, 838-39 (5th Cir. 2014) (finding standing to assert NVRA claims against Louisiana Secretary of State based on authority to enforce state agency compliance with the federal Act); *United States v. Missouri*, 535 F.3d 844, 846 n.1 (8th Cir. 2008) (noting United States government sued both Missouri and the Missouri Secretary of State under the NVRA over the federal Act's voter roll maintenance requirements); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1275-76 (N.D. Fla. 2018) (finding standing to pursue claims against Florida Secretary of State who had state law authority to adopt rules, provide written directions to local election officials, and enforce the rules on the local officials); *Voting for America, Inc. v. Andrade*, 888 F. Supp. 2d 816, 832 (S.D. Tex. 2012) (finding standing to sue the Texas Secretary of State on NVRA and other claims where state law obligated local officials to obey the Secretary's instructions), *rev'd on other grounds*, 732 F.3d 382 (5th Cir. 2013).

*6 (W.D. Tex. Mar. 31, 2014) (Texas Secretary of State's designation as "chief election official" and permissive state law authority to take actions to protect citizens' voting rights failed to establish Article III causation and redressability elements for apportionment claims). The Secretary does not enforce Section 241. He cannot register Plaintiffs to vote, prevent them from registering, remove them from voter rolls if they registered, or command local officials to do or not do those things. Plaintiffs thus lack Article III standing to sue him.

Eleventh Amendment immunity. Based on similar reasons that Plaintiffs lack standing, the Secretary's Eleventh Amendment immunity bars their claims. The Eleventh Amendment prohibits federal courts from entertaining suits against a State, agencies considered "arms of the state," and state officials sued in their official capacities. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). The Secretary of State is a state official, sued in his official capacity. He thereby enjoys Eleventh Amendment immunity from Plaintiffs' claims.

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The District Court determined that Plaintiffs' claims fall within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908). The narrow *Ex parte Young* doctrine, however, only applies in a suit challenging a state law if the defendant has "'some connection with the enforcement of the act' in question or [is] 'specifically charged with the duty to the

enforce the statute' and [is] threatening to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi*, 244 F.3d at 414-15). "The required 'connection' is not 'merely the general duty to see that the laws of the state are implemented,' but 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *Id.* (quoting *Okpalobi*, 244 F.3d at 416).

Contrary to the District Court's conclusion, the Secretary lacks the requisite enforcement connection to trigger *Ex parte Young*. The Secretary does not enforce Section 241 or the State's other felon disenfranchisement laws. He cannot register a voter, deny a voter's registration, or remove a voter from the voter rolls. Miss. Code Ann. § 23-15-33(1); ROA.584-585, 590. He cannot compel local election officials to apply, or not apply, the State's felon disenfranchisement laws when they carry out those duties. ROA.584-585, 590.

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Absent a more particularized duty or enforcement authority regarding the State's felon disenfranchisement laws, the *Ex parte Young* doctrine does not exempt Plaintiffs' claims from the Secretary's Eleventh Amendment immunity. *Morris*, 739 F.3d at 746; *see also Perez v. Martinez*, 707 F.3d 1197, 1205-06 (10th Cir. 2013) (state agency director's maintenance of concealed carry permit information database utilized by local officials to enforce challenged state permit

laws failed to establish sufficient causal nexus between director and enforcement of the challenged laws). Thus, in addition to lacking substantive merit, whether analyzed in terms of a lack of causation, redressability, or "some enforcement connection," Plaintiffs' claims targeting the Secretary fail for lack of jurisdiction under Article III and/or the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the district court's final judgment dismissing Plaintiff-Appellants' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: February 12, 2020

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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Dated: February 12, 2020

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