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)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Both the brief of the State of Mississippi and the amicus brief of Louisiana and Texas emphasize the statement in *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998), that the 1950 and 1968 amendments "removed the discriminatory taint [of] the original [1890] version." The amici also suggest that these amendments were among "the actions States have taken to amend their laws and ensure equality" and the "dramatic steps [States have taken] towards preserving and insuring democracy for all." Amici Br. at 1, 13. These claims are particularly ironic in the context of this case and in light of the evidence of discriminatory actions by the Mississippi legislature during those time periods --- evidence that was not submitted in *Cotton* or raised before the panel.

This case addresses a list of disfranchising crimes adopted by the racist 1890 Mississippi constitutional convention for the specific purpose of preventing African Americans from voting. The only reduction in that list occurred in 1950 when one of the nine listed crimes was removed. Whatever the reason for that removal, it clearly was not for the purpose of enfranchising African Americans as the Mississippi Legislature in 1950 was aggressively enforcing pervasive discrimination and segregation, and most African Americans in Mississippi could not vote at that time. While the two most serious offenses in the criminal law were added to the list in 1968, that obviously was not for the purpose of allowing more people to vote, and

the addition of those two is not challenged here. No other changes have been made to that provision.

Thus, these were not "actions the States have taken to . . . ensure equality." Amici Br. at 1. With that backdrop, this reply brief addresses the more specific arguments advanced by the appellees and the amici in their briefs.

I. THE DECISION IN *COTTON* 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.

As explained in our opening brief, the decision in *Cotton* does not control the outcome here for three reasons. 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*. The ballots demonstrate that voters were asked only to vote up or down on the amendments but were not asked to decide between approving or rejecting the original list. Contrary to the Fifth Circuit panel's assumption based on the incomplete record in that case, the 1950 and 1968 amendments were not "re-enactments" of the original list. Second, the plaintiffs 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. This evidence shows that, contrary to the Cotton court's holding, the 1950 and 1968 amendments were not steps taken to "remove[] the discriminatory taint [of] the original [1890] version," 157 F.3d at 391, and the amendments did nothing to "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) (citation omitted). Third, in the present case, the plaintiffs 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 Court in *Abbott* called "the parts that remained" in the original list.

In defending the ongoing inclusion of eight of the original list of nine crimes in § 241, the State claims that the ballot forms for the amendments "add[] nothing 'new' *Cotton* did not already consider." Appellee Br. at 23. But they do add something new by demonstrating that voters could only vote "For Amendment" or "Against Amendment" and could not vote to re-enact or reject the original list. *Cotton* obviously did not consider this fact given that the panel erroneously said the amendments constituted a "re-enactment" of the original list by which "a majority of the voters had to approve the entire provision." 157 F.3d at 391. The voters

simply could not "approve the entire provision" but could only approve the amendment.[1]

The State acknowledges this, noting that "the general electorate did not have 'options' to pick-and-choose categories of disenfranchising felonies." Appellee Br. at 24. The State then goes on to say that even though the electorate did not have this choice, "[b]oth in 1950 and 1968, legislators deliberated and debated which categories of felonies to add or remove from Section 241." *Id.* But there is no factual or historical support for this allegation. There is no indication of debate on this subject --- the media never mentioned it.[2] More importantly, the only resolutions on which the legislature voted were to remove burglary in 1950 and add murder and rape in 1968. There is thus no evidence of "deliberation" about adding any felonies

[1] Amici state that "Plaintiffs do not and cannot explain why the voters themselves, as opposed to their representatives, would need the power to edit or disapprove portions of the provision to cleanse it of any taint." Amici Br. at 7-8. But in Mississippi, only the voters can enact a constitutional amendment, and the *Cotton* panel specifically cited the voters' actions as a reason for its holding. Indeed, the amici themselves emphasize the importance of the factually erroneous *Cotton* conclusion that the people of Mississippi "approve[d] the entire provision, including the revision[s]." *Id.* at 8 (quoting *Cotton*, 157 F.3d at 391).

[2] The amendments to the list of disfranchising crimes were not the subject of discussion in the media. While there were several articles in the daily *Clarion-Ledger* in both 1950 and 1968 about proposed constitutional amendments, the only discussion in those articles regarding amendments to Section 241 related to the proposed residency requirement for ministers' wives in 1950 and the proposed change in the general residency requirement in 1968. There was no mention in those articles about the list of disqualifying crimes from 1890 or any changes to it. ROA.2614-2616 (expert report of Dr. Robert Luckett).

or removing any other than burglary in 1950 and none about removing any felonies and adding any other than murder and rape in 1968.

Of course, individual legislators were free to seek repeal of the entire 1890 list and institute some other disfranchisement categories, and if that proposal received enough support in the legislature, there could have been a vote. But that never happened. Instead, the legislature has retained eight of the nine crimes from the bizarre 1890 list that was motivated by race and those eight remain in place today unchanged from their original form in 1890.

The fact that the legislature *could have repealed* most or all of the original list does not mean that the legislature retained it for some non-racial reason. In *Hunter,* the Supreme Court rejected the State of Alabama's similar argument that "events occurring in the succeeding 80 years had legitimated the provision" because "[s]ome of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes -- felonies and moral turpitude misdemeanors -- are acceptable bases for denying the franchise." 471 U.S. at 232-33.

With respect to the extensive evidence of discrimination and racism that infected both the 1950 and 1968 legislatures, the State contends that the *Cotton* panel "was obviously aware of the circumstances existing in Mississippi in the 1950s and 60s." Appellee Br. at 25. It may be that the panel was aware of discrimination in

general in the 1950s and 60s, but the evidence of the specific discrimination by the 1950 and 1968 legislatures was never put in the record by the plaintiff in *Cotton*, called to the panel's attention as a factor it should consider, or mentioned by the panel in its decision. Even if burglary was removed in 1950 and murder and rape were added in 1968 for reasons other than racial animus, the legislative bodies that retained the other eight crimes were otherwise fortifying the walls of segregation. The notion that the retention of eight of the nine crimes chosen for discriminatory reasons somehow "removed the discriminatory taint" would not be credible if the panel had actually been presented with the evidence of the other discrimination committed by those bodies.

The State's brief contends that "even if *Cotton* is somehow not controlling, the facts in this record re-prove *Cotton's* correct conclusion" because "[w]hen the State subsequently eliminated burglary, and added murder and rape . . . the State addressed and removed the under-inclusive 'discriminatory taint' which all the evidence demonstrates was original Section 241's defect." Appellee Br. at 28-29. But the State never explains how eliminating only one of the nine crimes that were listed solely because the 1890 convention targeted "the offenses to which [African Americans] were [believed to be] prone," *Ratliff*, 20 So. at 868, somehow eliminates the discriminatory taint when no reason has been given for retaining the other eight.

The State emphasizes *Cotton*'s statement that "[t]he 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." Appellee Br. at 28 (quoting *Cotton*, 157 F.3d at 391 n.8). But unlike in *Cotton*, the plaintiffs here are not challenging the addition of those two crimes of violence --- murder and rape --- but instead challenge only the retention of eight of the original nine non-violent crimes. Of the ten crimes in the current version of § 241, eight were chosen for that reason, and those are the eight that are challenged here.

Thus, the State is wrong when it asserts that the plaintiffs are "challenging the present-day version of Section 241." Appellee Br. at 30. The plaintiffs are challenging only the eight crimes that were listed in 1890 for racist reasons. The inclusion of those eight makes no sense except for the racism that led to their selection in the first place, and the State has given no non-racial reason for retaining them.[3]

Cotton gave extensive weight to the 1968 addition of the crimes of murder and rape as "remov[ing] the discriminatory taint." Because the present case does

[3] This illustrates the overblown nature of the amici claim that "Plaintiffs seek to endow federal courts with super-legislative powers to reshape facially race-neutral laws that state governments have amended without racial animus." Amici Br. at 1. The plaintiffs are not challenging the crimes added by amendment, but only the remaining eight of nine from the original list from 1890.

not challenge those two crimes, and instead focuses only on the retention of the eight adopted in 1890, *Cotton's* reasoning in that regard does not apply in this case.

The Supreme Court's holding in *Perez* clarifies the importance of focusing on whether the changes in a case like this and *Hunter* "alter[ed] the intent with which the [original] article, including the parts that remained, had been adopted." 138 S. Ct. at 2325 (citation omitted). Both the State and the amici emphasize the portion of *Perez* stating that the burden of proof remains with plaintiffs. Appellee Br. at 26; Amici Br. at 9. Of course, *Perez* is very different from this case. There, a three-judge federal district court in Texas redrew eight congressional districts and twenty-one state house districts as part of an interim plan for the 2012 elections after concluding that the state's original plan contained constitutional defects. 138 S. Ct. at 2316-17. In 2013, the legislature adopted the federal district court's redrawn plan with minor changes in order to end the litigation. *Id.* In these unusual circumstances, the Supreme Court held that the federal district court wrongly concluded that the 2013 legislature acted with discriminatory intent given that the 2013 legislature had adopted the district court's interim plans from 2012 with "good reason to believe that the court-approved interim plans were legally sound." *Id.* at 2328. As the Supreme Court explained:

> In these cases, we do not confront a situation like the one in *Hunter*. . . . Nor did [the 2013 legislature] use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted . . . plans that had been developed by the

> Texas court . . . . *Under these circumstances*, there can be no doubt about what matters: It is the intent of the 2013 Legislature.

Id. at 2325 (emphasis added).

Given that *Perez* "[did] not confront a situation like the one in *Hunter*" or in this case, and given that its holding regarding burden of proof related to "these [unusual] circumstances" in that complicated case, *Perez* is important here not for that holding, which is that the presumption of legislative good faith applies *if* a new legislature repeals the previously infirm plan and enacts a new one based on a federal court's redrawn plan. Instead, *Perez* is important for its statement that *Hunter* requires a focus on whether any changes "alter[ed] the intent with which the [original] article, including the parts that remained, had been adopted." 138 S. Ct. at 2325.

In the present case, the plaintiffs do not attack the amendment itself --- the addition of murder and rape --- but instead "the parts that remain[]." *Id.* The plaintiffs have met their burden in proving that those were adopted in 1890 as a result of racial discrimination and in a situation far different from *Perez*, eight of the nine crimes remain in place unchanged. The intent behind those crimes is the proper focus in this case. That has been proven and nothing has "alter[ed] the intent with which [they] had been adopted." *Id.*

Thus, for all of these reasons, and as explained more fully in the opening brief, *Cotton* does not control here.

II. 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 1980s OR AT ANY OTHER TIME --- ABSENT AN IMPERMISSIBLE MOTIVATION.

Contrary to what the State asserts in its brief, the legislature did not "modif[y]" Mississippi's felon disfranchisement law in any substantive way in 1986. Appellee Br. at 32. The legislature simply altered the disfranchisement statute by removing burglary so that the statute was consistent with the 1950 constitutional amendment that removed burglary as a disfranchising crime. Section 241 provided and still provides that "*[e]very* inhabitant of this state . . . who is a citizen of the United States of America" (emphasis added) is entitled to register and vote as long as he or she meets the qualification in Section 241 and does not fall within one of the specific exceptions, which include the list of disfranchising crimes. The state constitution is paramount as a matter of state law and the legislature could not disfranchise by statute someone who is otherwise qualified to vote and is not disfranchised by the state constitution. Thus, this was not a policy change by the 1986 legislature but something akin to a technical correction.[4]

[4] The State claims that this 1986 action effectively enfranchised all who previously were convicted of burglary. Appellee Br. at 37 n.10. But presumably voter registration officials were following the state constitution and registering applicants despite any convictions for burglary as far back as 1950.

The 1986 legislature also did not "endorse[]" the original list of crimes that was in Section 241. Appellee Br. at 32, 38. The legislators simply declined to change it. In a process that included multiple substantive reports, no one gave a reason as to why the original list should be retained despite its discriminatory origins and there was no endorsement beyond a decision not to change it. To the contrary, as the opening brief explains, the 1986 legislature rejected what the relevant committees concluded was a "more rational" approach to disfranchisement. Appellant Br. at 35. It was likewise wrong for the State to claim that the 1986 legislature "adopted" the original list minus burglary. Appellee Br. at 38. The eight of nine crimes that remain in the original list were adopted in 1890 and have never been revisited by Mississippi voters since.

According to the State: "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." Appellee Br. at 39. Throughout these decades, only one of the nine crimes was removed, and that was in 1950 when the vast majority of African Americans could not vote due to state-sponsored discrimination that was being reinforced by the all-white Mississippi legislature. The remaining eight were never reconsidered. Two more were added in 1968 but

they are not at issue in this case. And despite the erroneous claims that the 1986 legislature's failure to change the constitutional list was somehow a "substantive modification and endorsement" of it, no one over these many decades has provided a non-racial reason for retaining those eight crimes.

The Supreme Court in *Hunter* mentioned, but did not resolve, the hypothetical question about whether the racist Alabama disfranchisement provision "would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. As we explained in our opening brief, there is no non-racial rationale for the otherwise bizarre list of crimes in Section 241 given that they were specifically selected to target African Americans. The State attempts to provide a rationale by claiming that "present day Mississippi law limits disenfranchisement to serious felony offenses." Appellee Br. at 41. But that is not the test. The inquiry is not whether the same list *could*, in some hypothetical universe, be enacted today for race-neutral reasons. The inquiry is whether the list was *actually* enacted based on race-neutral reasons. *See N. Miss. Commc'ns, Inc. v. Jones*, 951 F.2d 652, 656–57 (5th Cir. 1992) (explaining that under *Mt. Healthy*, "the defendant may not prevail by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision" (internal quotation marks omitted)).

But even if *Hunter* allows for ex post facto explanations—which it does not—the State's rationale makes no sense. If the hypothetical race-neutral reason is to

capture all serious felonies, the State offers no explanation for why the Mississippi legislature would choose, for example, false pretenses but not kidnapping, forgery but not aggravated assault, and bigamy but not child molestation. The reason, of course, is that other than murder and rape --- which were added in 1968 and are not challenged here --- all of the crimes in the present day list are included because the 1890 convention sought "to obstruct the franchise by the negro race" by targeting "the offenses to which its weaker members were [believed to be] prone." *Ratliff*, 20 So. at 868. There is no other basis for the listing of those crimes, and the events related to the 1986 legislation --- which simply updated the statute to comport with the 1950 constitutional amendment but left the constitutional provision unchanged --- did nothing to "alter the intent with which the [original] article, including the parts that remained, had been adopted," *Perez*, 138 S. Ct. at 2325.

III. TO THE EXTENT A SHOWING OF DISCRIMINATORY IMPACT IS REQUIRED, THE PLAINTIFFS HAVE MADE IT HERE.

Although the District Court did not address it, the State makes the alternative argument that the plaintiffs failed to prove discriminatory impact as part of the summary judgment proceedings in the District Court. Appellee Br. at 43. Assuming this Court reverses the grant of summary judgment to the State, it should remand the issue of impact to the District Court to resolve in the first instance. But to the extent this Court addresses it, the plaintiffs' showing is more than sufficient.

In *Hunter*, the Supreme Court noted that the Eleventh Circuit in that case had "implicitly found the evidence of discriminatory impact indisputable." 471 U.S. at 227. The Supreme Court quoted the Eleventh Circuit: "This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under Section 182 for the commission of nonprison offenses." *Id.* (quoting *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir. 1984)). The Supreme Court in *Hunter* did not address whether it is *necessary* to prove discriminatory impact in addition to the blatant discrimination that motivated the Alabama disfranchisement provision in 1901. But the Court held that where intent and effect exist in combination --- where the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect" --- the enactment violates the Equal Protection Clause. *Id.* at 233.

The disqualification in Mississippi of people convicted of the crimes that were listed in Section 241 in 1890 and that remain in Section 241 today has a statewide discriminatory impact that exceeds the impact in *Hunter*. Census data estimates from 2011-2015 show that 36% of Mississippi's population 18 and over is African American. However, approximately 59% of the people convicted of those disqualifying crimes in the Mississippi state courts between 1994 and the present are

African American. African American adults in Mississippi are 2.7 times more likely than white adults to be convicted of one of these disfranchising crimes.[5]

According to the State, however, "*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." Appellee Br. at 43 (emphases added). The State faults the plaintiffs for having no impact proof prior to 1994. *Id.* In the relevant passage at that page, the Supreme Court in *Hunter* quotes the Court of Appeals' statement that, in addition to the present-day impact listed above, "[t]he registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites." 471 U.S. at 227.

No one has been able to uncover comparable turn-of-the-century evidence in Mississippi. The Mississippi Administrative Office of Courts keeps data on criminal convictions by race and by crime from 1994 to the present but nothing is available prior to that time.

Dr. Dorothy Pratt, the historical expert for the *Hopkins* Plaintiffs, described in her report an analysis from the United States Commission on Civil Rights showing the immediate impact of the 1890 Convention's multiple disfranchisement measures. As Dr. Pratt stated: "[R]egistration of African American voters dropped from 66.9% of the voting age population in 1867 to 5.7% in 1892. By contrast, for

[5] ROA.2737-2738 (declaration of statistical expert Matthew Williams).

white men, the voter registration percentages remained higher, from 55% of the voting age population in 1867 to 56.5% in 1892." ROA.1279 (footnote omitted) (citing *Voting in Mississippi, A Report of the United States Commission for Civil Rights* 8 (1965)). The State conceded in the District Court that the collection of discriminatory devices "caused a disparate racial impact in the 1890s." ROA.1185. But it contends that proof of the specific immediate effect of the felon disfranchisement list by itself is also required, as well as proof of its impact in 1950, 1968, and 1986. Appellee Br. at 43. But that evidence is simply not available. And nothing in *Hunter* suggests that such evidence is required when it is unavailable.

What *Hunter* says instead is that where "the original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect," the enactment violates the Equal Protection Clause. 471 U.S. at 233. Plaintiffs have clearly demonstrated that the 1890 constitution had an immediate discriminatory impact and that Section 241 has had a discriminatory impact from 1994 to the present, which is the time period for which such statistics are available. That establishes an equal protection violation under *Hunter*.[6]

[6] Moreover, in *Hunter*, the 1903 statistic related to all disfranchisements from Section 182 of the Alabama Constitution, which covered a wide variety of felonies and misdemeanors. The specific challenge in the *Hunter* case was simply to the disfranchisement for misdemeanors in Section 182, and the present-day impact statistic related only to "nonprison offenses" (misdemeanors). 471 U.S. at 226-27. Under the Defendant's approach in the present case, the 1903 evidence would have had to be specific to

The State also claims that the plaintiffs' proof of present-day impact relates to the proportion of black and white adults who are convicted of disfranchising crimes rather than comparing those convicted of disfranchising crimes with those who were convicted of other categories of crimes, such as all crimes or all non-disfranchising crimes. Appellee Br. at 45-46. The Defendant seems to be arguing that because some other disfranchisement scheme --- such as disfranchisement for all felonies --- would also have a discriminatory impact, the scheme actually chosen by the 1890 convention somehow does not have a discriminatory impact. The State cites no support for this position.

Moreover, if the State were correct, the Supreme Court in *Hunter* would have evaluated the Jefferson and Montgomery County impact not in comparison to the overall population, but instead by comparing those statistics for non-prison offenses with some other collection of crimes such as all crimes or perhaps non-disqualifying non-prison offenses. Although the Court noted that "[s]o far as we can tell the impact of the provision has not been contested," it added that "we can find no evidence in the record below or in the briefs and oral argument in this Court that would undermine this finding [of discriminatory impact] by the Court of Appeals." 471 U.S. at 227.

misdemeanors. Obviously, the Supreme Court did not agree with that narrow approach to the requisite proof of impact.

IV. CONTRARY TO THE STATE'S CONTENTION, THE ENTIRE 1890 LIST OF DISFRANCHISING CRIMES WAS ADOPTED FOR RACIALLY DISCRIMINATORY REASONS.

In the lower court, the State admitted that the historical evidence "suggest[s] the 1890 framers' decision to include some disenfranchising crimes in Section 241, but not others, was racially motivated." ROA.1184. But now it also makes the remarkable claim that, despite the fact that the overriding purpose of the electoral provisions of the 1890 Constitution was to prevent African Americans from voting, only some of the disfranchising crimes were included for discriminatory purposes and others were included for non-discriminatory reasons. Appellee Br. at 47-49. First, the State argues that Mr. Harness has no claim regarding his forgery conviction because "[u]nder every constitution and law ever enacted in Mississippi, forgery has always been a disenfranchising crime." *Id*. at 48. Second, he argues that Mr. Karriem has no claim regarding his embezzlement conviction because "[e]mbezzlement is a textbook crime of dishonesty closely associated with the State's other pre-1890 disenfranchising crimes, such as bribery, perjury and forgery." *Id*. at 48-49. In other words, according to the State, the inclusion of any crime of dishonesty in the 1890 list was the result not of racial discrimination but of a desire to stay consistent with previous iterations of the disfranchising provision.

This claim is irreconcilable with the evidence. The Mississippi Supreme Court's 1896 decision in *Ratliff* stated:

> 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. . . . [I]ts criminal members [are] given rather to furtive offenses than to the robust crimes of the 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.

20 So. at 868. Clearly, the "furtive offenses" to which the delegates believed the weaker members of the black race "were prone" were, almost exclusively, crimes of dishonesty. Of the crimes included in the 1890 list --- "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement [and] bigamy" --- all may be fairly characterized as crimes of dishonesty (except perhaps arson). If the Defendant's argument was correct, arson would be the only crime that was included for a discriminatory reason. But that is clearly not the case.

Indeed, all of the historians who have rendered an expert opinion in this case have concluded that the *entire list* was discriminatory. The Harness Plaintiffs' Expert, Dr. Robert Luckett, reviewed the *Ratliff* opinion and the reference to "furtive offenses" and stated that the opinion was strong evidence in support of his ultimate conclusion that "the disqualifying crimes from the original list in Section 241 are the last vestiges of African American disfranchisement from the 1890 Mississippi Constitution." ROA.2612-2613, ROA.2616. He noted that "[i]n her monograph about the convention, historian Dorothy Pratt notes that the disqualifying crimes

were 'perceived at the time to be mainly African American problems, particularly bigamy.'" ROA.2611 (quoting Dorothy Overstreet Pratt, *Sowing the Wind: The Mississippi Constitutional Convention of 1890*, Jackson: University Press of Mississippi, 2018, p. 79). Dr. Pratt, who was the expert for the plaintiffs in *Hopkins v. Hosemann*, the case that was consolidated with this one in the trial court, stated in her expert report in this case that the Convention "focused primarily on property-related offenses" because "[t]he delegates believed that these particular crimes were disproportionately committed by African Americans." ROA.1267. Dr. Pratt also relied upon the Court's opinion in *Ratliff* and the discussion of "furtive offenses" to which the delegates believed African Americans were prone. ROA.1267-68.

While it is true that burglary, perjury, and forgery were in the prior disfranchising provision, their inclusion in the 1890 Constitution, which was convened in order to take the vote away from African Americans, was not simply a historical relic divorced from the discrimination that motivated the other electoral provisions or the product of some race-neutral desire to stay consistent. To the contrary, the record evidence strongly suggests they were included precisely *because* the 1890 convention delegates considered them to be the kinds of "furtive offenses" African Americans were prone to committing. *Ratliff*, 20 So. at 868. The State submitted no expert opinion or other historical evidence to refute plaintiffs' experts or to support the State's contention that discrimination had nothing to do with the

decision to include burglary, perjury, forgery, and other "textbook crimes of dishonesty" such as embezzlement on the list of disfranchising crimes.[7]

Thus, the Plaintiffs have proven that the list of disfranchising crimes contained in the 1890 Constitution was motivated by racial discrimination. It stands as a remaining vestige of the framers' effort to enshrine the doctrine of white supremacy and to prohibit African Americans from participating in the democratic process.

V. PLAINTIFFS HAVE ARTICLE III STANDING TO SUE.

The State's arguments that Plaintiffs lack standing are equally unavailing. The State claims that the Secretary of State—Mississippi's designated "chief election officer" under the National Voter Registration Act of 1993 ("NVRA") and the individual responsible for maintaining "the official record of registered voters in every county of the state," ROA.4313—is somehow disconnected from Section 241's disfranchisement scheme, such that Plaintiffs cannot satisfy the Article III requirements of causal connection and redressability. *See* Appellee Br. at 50-51. That argument is meritless.

[7] The State (at p. 48 of its brief) cites a passage from *Ratliff* stating that "Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder, and other crimes in which violence was the principal ingredient were not." 20 So. at 868. The State seems to imply that the others were added for non-racial reasons. However, *Ratliff* simply listed these as four examples. It never suggested that other "furtive crimes" on the list --- such as embezzlement, which is very similar to theft and false pretenses--- were somehow included for reasons other than the framers' beliefs that these were crimes to which the "weaker members [of the black race] were prone." *Id.*

As the District Court found, the Secretary enforces Section 241's disfranchising scheme by maintaining the Statewide Elections Management System ("SEMS"). ROA.4313-4314. SEMS, by statute, is the "official record of registered voters in every county of the state." Miss. Code Ann. § 23-15-165(1). It is developed and implemented by the Office of the Secretary of State "so that the registrar and election commissioners of each county shall . . . [r]eceive regular reports of death, changes of address, and *convictions for disenfranchising crimes* that apply to voters registered in the county." Miss. Code Ann. § 23-15-165(2) (emphasis added). That information is then disseminated to local county officials, who are trained by the Secretary of State on how to use SEMS and what to do if registered voters have been convicted of the offenses listed in Section 241. ROA.4313-14.

The State's own evidence reveals how this process works. The Secretary's many presentations and trainings on "Voter Roll Maintenance" state that "[i]f a voter is convicted of a disenfranchising crime, he or she must be purged from the voter roll" and that the Administrative Office of Courts imports that data "quarterly into SEMS." ROA.3142, 3164; ROA.3209, 3229; ROA.3296. The presentations also provide guidance on which crimes are disfranchising and how to use SEMS to match registered voters with "persons in the AOC database" convicted "of disenfranchising crimes. ROA.3165, 3180-3181; ROA.3230, 3245-3246; ROA.3297-3299. The

Secretary may not personally "remove convicted felons from the voter rolls," Appellee Br. at 51, but he *instructs* those authorized to carry out purges of the voter rolls on how to identify voters for removal, and he provides the necessary information to effectuate that removal.

As the District Court summarized and the State concedes, the Secretary "receives information regarding disenfranchising convictions, adds that information to SEMS, and trains county officials on the next step." ROA.4314; Appellee Br. at 52. Nonetheless, the State asserts that because "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,'" the Secretary's involvement is too minimal to satisfy Article III's causation and redressability requirements. Appellee Br. at 52 (quoting Miss. Code Ann. § 23-15-151). Not so. What the State conveniently omits is that local officials act *with the assistance of the Secretary of State*. Indeed, the Secretary of State is Mississippi's NVRA-designated "chief election officer" and has the "power and duty to gather sufficient information concerning voting in elections" in Mississippi. Miss. Code Ann. § 23-15-211(1). The Secretary of State sits on Mississippi's State Board of Election Commissioners and is required to sponsor elections seminar and trainings, as well as to certify election commissioners. Miss. Code Ann. § 23-15-211(1)(b), (4). In other words, the Secretary "plays a crucial role in the [disfranchising] process." ROA.4315.

This is more than sufficient to establish a "causal connection between the injury and the conduct complained of" and redressability. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992). Courts do not require that a defendant's actions be "the very last step in the chain of causation" to find adequate causation for Article III standing purposes. *Campaign for S. Equality v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 703 (S.D. Miss. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)); *see also OCA-Greater Houston v. Tex.*, 867 F.3d 604, 612-13 (5th Cir. 2017). It is sufficient that the injury—here, unconstitutional disfranchisement—be "fairly traceable" to the defendant's actions. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). And that requirement has been satisfied.

Moreover, because the Secretary of State would be required to remove persons convicted of the challenged crimes from SEMS in the event portions of Section 241 are struck down, that directly impacts whether Plaintiffs can regain their ability to vote. This is all that redressability requires. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008); *see also K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (concluding redressability is satisfied when a defendant has "definite responsibilities *relating to* the application of" the challenged statute (emphasis added)). The State's arguments to the contrary are meritless.

VI. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS.

The State also asserts that the Eleventh Amendment bars Plaintiffs' suit. This argument, too, is meritless. The *Ex parte Young* doctrine permits plaintiffs to "sue a state official, in his official capacity, in seeking to enjoin enforcement of a state law that conflicts with federal law." *Air Evac EMS, Inc. v. Tex., Dep't of Ins.*, 851 F.3d 507, 515 (5th Cir. 2017). This exception to sovereign immunity applies as long as the state officer has "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908).

The preceding discussion makes clear that this requirement has been met. The Secretary of State not only maintains SEMS, the engine local officials use to determine which registered voters must be purged based on disfranchising conviction under Section 241, his office also trains those officials on how to use SEMS to identify voters convicted of disfranchising crimes. *See* discussion *supra* pp. 21-22. The Secretary is also required by statute to conduct these trainings and to certify election commissioners. *See* Miss. Code Ann. § 23-15-211. He is also Mississippi's chief election officer. *See* Miss. Code Ann. § 23-15-211.1. Together, these actions demonstrate at least "some connection" between the Secretary and enforcement of Section 241. *See, e.g., Mo. Protection & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (concluding the *Ex parte Young* exception applies because "[t]hough broad authority to register voters and to

administer voting and elections is delegated to local 'election authorities'—the county clerk or the local board of election commissioners—the Secretary of State is the chief state election official responsible for overseeing of the voter registration process" and the Secretary of State is obligated by statute "to send local election authorities the names of persons who are adjudged incapacitated" (internal quotation marks omitted)).

Because *Ex parte Young* applies, the Eleventh Amendment does not bar Plaintiffs' suit.

CONCLUSION

For these reasons and the reasons given in Plaintiffs-Appellants' opening brief, the District Court's decision to grant summary judgment in favor of Defendant-Appellee should be reversed.

Dated: March 11, 2020

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: March 19, 2020

By: s/ Donald B. Verrilli, Jr.
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CERTIFICATE OF COMPLIANCE

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Dated: March 19, 2020

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