No. 19-60632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROY HARNESS; KAMAL KARRIEM,

Plaintiffs-Appellants,

v.

MICHAEL WATSON, SECRETARY OF STATE OF MISSISSIPPI,

Defendant-Appellee.

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

PETITION FOR REHEARING EN BANC OF PLAINTIFFS-APPELLANTS ROY HARNESS AND KAMAL KARRIEM

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. The representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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This certificate omits Appellee, who is a government official and thus exempt from the certificate, per this Court's Rule 28.2.1.

FED. R. APP. P. 35(b)(1) STATEMENT

This case concerns the constitutionality of felon disfranchisement provisions set forth in Mississippi Const. art. XII, § 241, which disqualify persons convicted of bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, and embezzlement from voting. It is undisputed that the Mississippi Constitutional Convention of 1890 proposed this list of offenses to advance and entrench white supremacy by stripping the franchise from African Americans, whom the delegates believed had a tendency disproportionately to commit these enumerated offenses. It is also undisputed that these discriminatory provisions continue to strip tens of thousands of Black Mississippians of their right to vote. Believing itself bound by a prior published decision of this Court, *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), however, the panel in this case rejected Appellants' equal protection challenge, restating *Cotton*'s holding that the 1950 amendment to Section 241 removing burglary from the list and the 1968 amendment adding murder and rape somehow cleansed the remaining list of original crimes of their discriminatory taint. Op. at 6.

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This case raises an issue of exceptional importance that meets the rigid requirements of Fed. R. App. P. 35(a) and therefore merits consideration by the full Court. The panel decision in *Cotton*, which bound the panel in this case, resolved an issue of surpassing importance involving the right to vote of thousands of

Mississippi citizens—"a fundamental political right . . . preservative of all rights," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citation omitted)—in an irredeemably flawed manner.

The panel in *Cotton* addressed the constitutionality of the original 1890 provisions of Section 241 *sua sponte*, without full briefing or argument in a case brought by *pro se* plaintiffs. Critically, as the undisputed evidence submitted to the District Court in this case establishes, the *Cotton* panel's ruling rests on a significant error of historical fact. The *Cotton* panel concluded that the 1950 and 1968 amendments constituted a "re-enactment" of the original list in Section 241 by which "a majority of the voters had to approve the entire provision," and that this so-called "re-enactment" "removed the discriminatory taint associated with the original [1890] version." 157 F.3d at 391. But the voters were *not* given the option in 1950 or in 1968 to reenact or repeal the original 1890 provisions of Section 241. Instead, they were given the option only to vote on amendments to the original provision. The votes in 1950 and 1968 therefore could not have cleansed the original provisions of their discriminatory taint.

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This case is thus on all fours with the Supreme Court's unanimous landmark decision in *Hunter v. Underwood*, 471 U.S. 222 (1985) (Rehnquist, J.), which struck down similar disfranchisement provisions of the Alabama Constitution of 1901 that were "motivated by a desire to discriminate against blacks on account of

race and . . . continue[] to this day to have that effect." *Id.* at 233. Indeed, as the Supreme Court explained, the fact that Alabama's Constitution was subsequently amended to eliminate certain disfranchising offenses "did not alter the intent with which the article, including the parts that remained, had been adopted." *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (describing the ruling in *Hunter*). The panel decision in *Cotton* (and therefore the panel decision in this case) cannot be reconciled with *Hunter* and *Perez.*

Given the conflict with binding Supreme Court authority, as well as the insufficient consideration previously given to this important issue by the panel in *Cotton*, en banc review is manifestly warranted. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Serv., Inc. v. Kauffman*, 981 F.3d 347, 383 (5th Cir. 2020) ("*Planned Parenthood*") ("[R]econsideration of circuit—especially panel—precedent is one of the main purposes of *en banc* rehearings.").

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STATEMENT OF THE ISSUES

Whether *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), should be overruled in light of the panel's errors of fact and law in holding that the 1950 and 1968 amendments to Miss. Const. art. XII, § 241, which left intact eight of the nine disfranchising crimes adopted at Mississippi's 1890 Constitutional Convention—crimes the framers believed were "black crimes"—extinguished the framers' unconstitutional discriminatory intent in adopting that list of offenses in 1890. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (discriminatory taint of a law remains unless something is done to "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." (emphasis added)).

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STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The present case is a challenge to a provision of the Mississippi Constitution of 1890 that lists specific disfranchising crimes—and that remains in the Constitution to this day. The offenses set forth in 1890 were those that the drafters believed were committed disproportionately by African Americans. The disqualifying crimes adopted as part of Section 241 in 1890 that are still in effect today are "bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement [and] bigamy." Miss. Const. art. XII, § 241. Burglary was in the original list but was removed in 1950 by constitutional amendment. Murder and rape were added by constitutional amendment in 1968.

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

Roy Harness and Kamal Karriem ("Appellants") are two of thousands of African Americans who have been stripped of their right to vote by Section 241. On September 28, 2017, they filed suit against then-Mississippi Secretary of State Delbert Hosemann,[1] alleging that the disfranchising crimes included when Section 241 was adopted in 1890 violate the Fourteenth Amendment because they were enacted with discriminatory intent. Both parties moved for summary judgment. ROA.535-537, ROA.2604-2607.

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The district court granted summary judgment in favor of Secretary Hosemann, concluding that it was required to hold, under this Court's 1998 decision in *Cotton*, that Mississippi's 1950 and 1968 amendments to Section 241 cleansed the entire provision of its discriminatory animus. *See* ROA.4322. On February 23, 2021, a panel of this Court affirmed the district court's decision in a published opinion ("Op."). The panel first concluded that Appellants had standing to sue the Secretary of State and that the Secretary of State could not invoke sovereign immunity. Op. at 3-4. On the merits, the panel concluded that the rule

[1] Secretary Hosemann was sworn in as lieutenant governor in January 2020. Michael Watson replaced him as Mississippi's Secretary of State and currently occupies that position.

of orderliness required it to give dispositive effect to this Court's prior decision in *Cotton*, which held that Mississippi's amendments to Section 241 in 1950 and 1968 "superseded the [1890] provision and removed the discriminatory taint associated with the original version." *Id.* at 5 (quoting *Cotton*, 157 F.3d at 391). Quoting from *Cotton*, the panel reiterated that "by amendment, a facially neutral provision like § 241 might overcome its odious origin, and § 241 did." *Id.* at 5-6 (quoting *Cotton*, 157 F.3d at 391) (internal quotation marks omitted).

Appellants had argued that *Cotton* should not control because it rested on manifestly erroneous premises. Contrary to the assumptions of the *Cotton* panel, which held that the 1950 and 1968 amendments constituted a "re-enactment" of the original list in Section 241 by which "a majority of the voters had to approve the entire provision," Mississippi voters in fact had no option to reenact or repeal the entirety of Section 241 in 1950 and 1968. They thus could not have reenacted Section 241 in a way that "removed the discriminatory taint associated with the original [1890] version." *Cotton*, 157 F.3d at 391. As the panel saw it, however, *Cotton* relied "not on the particular options with which voters were presented but, instead, on the 'deliberative process' used to amend § 241" by the *legislature*. Op. at 6 (citation omitted).

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The panel likewise rejected Appellants' argument that, given Mississippi's pervasive, vehement resistance to equal treatment for African Americans during

the era in which the amendments were passed, it was implausible that either the legislatures or the voters in 1950 and 1968 were acting in order to "remove[] the discriminatory taint associated with the original [1890] version." *Cotton*, 157 F.3d at 391. The panel stated that all of this historical evidence was "fully available to the *Cotton* court," but that the court nonetheless concluded that the amendments were "sufficient to cure the discriminatory taint of the entire provision"—a determination the panel was not free to revisit. Op. at 7 (citing *Cotton*, 157 F.3d at 391). Finally, the panel concluded that the Supreme Court's recent decision in *Perez* was "not enough" to overcome the rule of orderliness, which requires a court to adhere to prior circuit precedent absent an unequivocal intervening change in the law. *Id.*

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REHEARING EN BANC SHOULD BE GRANTED

Reconsideration of *Cotton*—a step that only this Court sitting en banc may take—is manifestly warranted. *See Planned Parenthood*, 981 F.3d at 383 ("[R]econsideration of circuit—especially panel—precedent is one of the main purposes of *en banc* rehearings."). Appellants' challenge to the felon disfranchisement provisions of Mississippi's 1890 Constitution involves a matter of exceptional importance: the right to vote for thousands of Mississippi citizens. *See Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) ("The right to vote is too important in our free society to be stripped of judicial protection."). Under a proper application of

the Supreme Court's *Hunter v. Underwood* decision, as elucidated by the Court's subsequent decision in *Abbott v. Perez*, the challenged provisions of Mississippi's Constitution deny Appellants the equal protection of the laws. Like the provisions of the 1901 Alabama Constitution struck down in *Hunter*, the provisions of the 1890 Mississippi Constitution at issue here were enacted to entrench white supremacy by denying thousands of African American citizens the right to vote. And just as in *Hunter*, the State's subsequent "amendments did not alter the intent with which the article, including the parts that remained, had been adopted." *Perez*, 138 S. Ct. at 2325 (explaining *Hunter*). Binding Supreme Court precedent therefore requires invalidation of the provisions of the Mississippi Constitution at issue here.

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The irreconcilability of *Cotton* with Supreme Court precedent is reason enough to justify en banc review. But there is an additional reason why the full Court should grant rehearing: The *Cotton* panel did not give the Equal Protection challenge to Mississippi's disfranchisement provisions the thorough consideration it deserves. *Cotton* involved *pro se* litigants who lacked the ability to litigate the issue effectively. In fact, the *Cotton* panel raised the amendments *sua sponte* and did not appoint an amicus or otherwise subject the issue to full adversarial testing before reaching its judgment. It is thus not entirely surprising that the basis on which the panel purported to distinguish *Hunter*—that Mississippi's voters had reenacted the challenged provisions in 1950 and again in 1968 in order to

"remove[] the discriminatory taint associated with the original [1890] version," *Cotton*, 157 F.3d at 391—was based on an incomplete record and wrong. Mississippi's voters have never had the opportunity to reenact the unconstitutionally discriminatory provisions of the 1890 Constitution that are at issue in this case. In all events, the historical context renders implausible any suggestion that the votes on amendments in 1950 and 1968 could have altered the discriminatory intent with which those original portions of Section 241 were enacted.

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This Court regularly sits en banc to consider "the scope of various constitutional guarantees." *Mance v. Sessions*, 896 F.3d 390, 397 (5th Cir. 2018) (Willet, J., dissenting from denial of rehearing en banc) (listing cases). This case poses a constitutional question at least as important as the issues considered in the cases identified in Judge Willett's dissent. The Court should take this opportunity to reconsider its precedent in *Cotton*, with the benefit of robust briefing and access to the full legislative and historical record as well as the Supreme Court's recent decision in *Perez*.

A. *Cotton* Was Wrongly Decided and Did Not Take Into Consideration the Full Legislative and Historical Record.

When Section 241 was enacted in 1890, the delegates frankly acknowledged their intent to "maintain white supremacy," through the "ballot system." E.L. Martin, *Journal of the Proceedings of the Constitutional Convention of the State of*

Mississippi 10, 94 (1890). Just a few years later, the Mississippi Supreme Court explained that "[r]estrained 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" and "swept the circle of expedients to obstruct the exercise of the franchise by the negro race." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). With that ignoble goal in mind, the delegates selected the offenses enumerated in Section 241—burglary, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, and bigamy—based on their belief that "the negro race . . . and its criminal members [were] given rather to furtive offenses than to the robust crimes of the whites." *Id.*

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The *Cotton* court acknowledged that this history and the underlying motivations it reflects would have rendered the original portions of Section 241 "violative of equal protection." 157 F.3d at 391. But the Court then addressed, *sua sponte*,[2] in a case brought by two *pro se* prisoner plaintiffs, whether the 1950 and 1968 amendments to Section 241, which respectively removed burglary and added murder and rape as disfranchising crimes, "cleansed" Section 241 of its discriminatory taint. The *Cotton* panel did so despite the well-established rule that

[2] Neither the *pro se* plaintiffs nor the state raised or otherwise addressed this issue in their respective briefs. ROA.2684-2689, ROA.2731-2735.

courts should exercise the power to "raise and decide questions sua sponte" "sparingly and with full realization of the restrictions and *limitations* inherent in its employment." *McKissick v. United States*, 379 F.2d 754, 759 (5th Cir. 1967) (emphasis added). Importantly, the panel did not appoint an amicus or take any other steps to ensure thorough adversarial presentation of this important question.

The *Cotton* panel's approach paved the way for errors that gravely undermine the court's ultimate holding. *First*, the panel did not have access in the record to the ballot language that accompanied the 1950 and 1968 amendments. As a result, the court mistakenly found that "a majority of the voters had to approve the entire provision, including the revision" proposed by the amendments. 157 F.3d at 391. Based on that misimpression, the panel concluded that the amendments resulted in a *full* "re-enactment of § 241," with "each amendment supersed[ing] the previous provision and remov[ing] the discriminatory taint associated with the original version." *Id.*

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That was wrong as a matter of historical fact. Appellants introduced the 1950 and 1968 ballot language in the District Court in this case. That evidence conclusively establishes that voters did not have the option of reenacting or repealing the original portions of Section 241 at issue in this case. The only choice put to the voters in both instances was to ratify or reject amendments that added or subtracted *other* crimes from the list of disfranchising offenses. ROA.2641-42,

ROA.2645. Voters could cast their ballots *only* "For Amendment" or "Against Amendment." ROA.2641-42, ROA.2645. They could not have "reenacted § 241" with each amendment, as the *Cotton* court found. 157 F.3d at 391. Voters confronted with the 1950 amendment to eliminate burglary could not eliminate the full 1890 list, or any other crimes in it, and similarly could not vote to approve the remainder of the list by choosing to keep it. The same was true of the 1968 amendment, which asked voters to decide whether to add murder and rape to the list.

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It is thus difficult to see how the *Cotton* court could have concluded—consistent with the factual record in the present case—that the 1950 and 1968 amendments represented an intervening change in motivation with respect to those portions of Section 241 that *were never voted on after 1890*. To the contrary, the text of the ballots makes clear that Mississippi never extirpated the discriminatory taint that attached to the original eight crimes at the 1890 Constitutional Convention. In that sense, the amendments were no different than the judicial decisions described in *Hunter*, which struck down *some* portions of Alabama's blatantly discriminatory 1901 Constitution but left others on the books until the Supreme Court invalidated them. 471 U.S. at 232-33. Just as the judicial decisions in *Hunter* could not have changed the discriminatory motivations attached to those "remaining crimes," *id*. at 233, whose inclusion in a

disfranchising statute can be directly traced to racial animus, the amendments here did not—and could not—change the discriminatory intent attached to the original list of eight crimes included in Section 241.

To the extent the *Cotton* court intended to rely "not on the particular options with which voters were presented but, instead on the 'deliberative process' used to amend § 241," as the panel opinion suggested, Op. at 6 (quoting *Cotton*, 157 F.3d at 391), that decision, too, was rife with error. None of the legislative materials cited by the *Cotton* court suggest that the Mississippi legislature considered, much less agreed upon nondiscriminatory justifications for, the original eight crimes that were unaffected by the amendments in 1950 and 1968. 157 F.3d at 391 (citing H. Con. Res. 10 (Miss. 1950) and H. Con. Res. 5 (Miss. 1968)). To the contrary, the relevant legislative resolutions state only their intent to amend Section 241 to either add or remove the specific crime at issue, without opining on the rest of the provision. ROA.2639, ROA.2643. Moreover, in Mississippi, the Constitution cannot be amended without the approval of the voters, which is why the *Cotton* panel spoke, erroneously, of a "re-enactment" by which "a majority of the voters had to approve the entire provision." 157 F.3d at 391.

Second, while the panel may have been correct that the "general Mississippi history" of segregation and racial discrimination was "fully available to the *Cotton* court," Op. at 7, the court gave no indication that it ever *considered* that history,

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much less explained how the amendments could have cleansed Section 241 of its discriminatory origins in light of it. Nor is there any reason to think the *Cotton* court considered this evidence, since the pro se prisoner plaintiffs in *Cotton* never raised this argument. Indeed, *Cotton* itself spends only a few scant paragraphs analyzing the 1950 and 1968 amendments and does not mention the relevant historical context. 157 F.3d at 391-92. Beyond that, *Cotton* specifically states that it was the plaintiffs' obligation to provide proof that the "*amendments* were adopted out of a desire to discriminate against blacks." *Id.* at 392 (emphasis added). But the issue is not whether the amendments resulted from discrimination, it is whether they somehow "removed the discriminatory taint associated with the original [1890] version," *Cotton,* 157 F.3d at 391, and "alter[ed] the intent with which the article, including the parts that remained, had been adopted." *Perez*, 138 S. Ct. at 2325. Moreover, the present case is different from *Cotton* in that the Appellants here are not challenging present-day Section 241 in its entirety, but only the inclusion of the remaining eight crimes from the original discriminatory list. They do not challenge murder and rape and thus have no obligation to prove the 1950 and 1968 amendments were motivated by discrimination.

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Mississippi's history during the 1950s and 1960s is, however, indisputably relevant to the constitutional issue in this case. And on this point, Appellants have introduced ample evidence casting doubt on *Cotton*'s ultimate conclusion that the

amendments "removed the discriminatory taint associated with the original [1890] version." 157 F.3d at 391. For example, Appellants introduced evidence that the 1950 amendment was adopted when the legislature was all-white and the electorate was almost all-white. Appellants also introduced evidence showing that the 1968 amendment was adopted when there was only one Black member of the legislature. ROA.2615.

Far from repealing existing structures of discrimination, the legislatures in 1950 and 1968 extended and entrenched segregation and discrimination. The 1950 legislature passed laws to fortify segregation in secondary education, higher education, prisons, reform schools, and elsewhere. *See* Miss. Laws 1948 Ch. 282, H.B. 459; Ch. 429, H.B. 268; Ch. 498, H.B. 528; Miss. Laws 1950 Ch. 195, S.B. 497; Ch. 253, H.B. 321; Ch. 385, S.B. 501; Ch. 386, S.B. 503. The 1968 legislature, for its part, passed legislation encouraging white students to attend private schools, thereby advancing segregation. *See* Miss. Laws 1968 Ch. 393, H.B. 1114. Indeed, this Court observed in 1963 that "the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom." *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963). *Cotton* mentioned none of this history before concluding that the two amendments—passed by legislatures that each aggressively pursued

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segregationist goals reflecting racial animus—cleansed Section 241 of its original discriminatory intent. 157 F.3d at 391-92. That was error.

There is thus ample reason to reconsider *Cotton*

B. *Cotton* Is Irreconcilable with the Supreme Court's Decision In *Hunter*, As the Court's Subsequent Discussion of *Hunter* in *Perez* Makes Clear.

Granting en banc rehearing will also provide the Court with an opportunity to consider the Supreme Court's most recent guidance in *Perez*. Even if, as the panel concluded, *Perez*'s explication of *Hunter* did not represent an "intervening change in the law," sufficient to overcome the rule of orderliness, Op. at 7 (citation omitted), *Perez* nonetheless bears directly upon the question whether *Cotton* was correctly decided—a determination only the full court can make.

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In *Perez*, the Supreme Court considered the circumstances under which past discrimination carries into the future, such that a finding of past discrimination relieves a plaintiff of proving discriminatory intent. 138 S. Ct. at 2324-25. The Court in *Perez* distinguished the situation before it—a new legislature enacting a *court*'s interim redistricting plans—from *Hunter*, where the original discriminatory law "was never repealed, but over the years, the list of disqualifying offenses had been pruned." *Id.* at 2325. The Court concluded that in the first situation, only the new legislature's intent would matter. *Id.* In contrast, where (as in *Hunter*) "the amendments did not alter the intent with which the article, *including the parts that*

remained, had been adopted," the original discriminatory intent would control. *Id.* (emphasis added).

The *Perez* Court's description of *Hunter* is precisely the situation that was before the panel in *Cotton*, and which this case presents again. For the reasons explained above, neither the 1950 nor the 1968 amendments could have altered the intent with which the original list of crimes in Section 241 was adopted. Those enumerated crimes remain a part of Section 241 today and have never been subjected to another vote, be it a reenactment or a repeal, since 1890. Applying *Perez*'s reasoning, then, it is clear that, as in *Hunter*, no intervening event has severed the discriminatory taint attached to these eight crimes. *Cotton*'s conclusion to the contrary cannot be squared with *Hunter* and *Perez* and warrants the en banc court's reconsideration.

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CONCLUSION

The Court should grant rehearing en banc and reverse the district court.

Dated: March 9, 2021

Respectfully submitted,

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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 9, 2021

By: s/ Donald B. Verrilli, Jr.
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Dated: March 9, 2021

By: s/ Donald B. Verrilli, Jr.
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Counsel for Appellants

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 23, 2021
Lyle W. Cayce
Clerk

No. 19-60632

Roy Harness; Kamal Karriem,

Plaintiffs—Appellants,

versus

Delbert Hosemann, *Secretary of State of Mississippi*,

Defendant—Appellee.

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

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Before Smith, Higginson, and Engelhardt, *Circuit Judges*.

Jerry E. Smith, *Circuit Judge*:

Roy Harness and Kamal Karriem lost the right to vote in Mississippi when they were convicted of crimes enumerated in § 241 of the Mississippi Constitution. They claim that list was enacted with racially discriminatory intent in violation of the Fourteenth Amendment. But they are not the first to make that claim—over twenty years ago, we held that amendments to § 241 cured it of its discriminatory taint. Under the rule of orderliness, we are bound by that decision, so we affirm the summary judgment dismissing their claim.

I.

From the Civil War until 1890, Mississippi denied the franchise to those convicted of any crime punishable by imprisonment in the state penitentiary.[1] But in 1890, Mississippi replaced its generic description of disenfranchising crimes with a list of specific disenfranchising crimes: "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy." MISS. CONST. art. XII, § 241 (1890). Its reason for doing so was discriminatory. The state made no secret of its motive: "Restrained by the federal constitution from discriminating against the negro race, the [1890 Mississippi constitutional] convention discriminated against its characteristics and the offenses to which its weaker members were prone." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). The convention believed that blacks were "given rather to furtive offenses than to the robust crimes of the whites," so "[b]urglary, 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." *Id.*

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Mississippi amended § 241 in 1950, removing burglary from the list, and again in 1968, adding murder and rape. 1950 Miss. Laws 959–60; 1968 Miss. Laws 1074–75. In both instances, § 241 was amended on two-thirds of both legislative houses' agreeing on the newly worded section, and then approval of the new section by a simple majority of the whole electorate.

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[1] *See* THE REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI 86, 618 (1871) (disenfranchising, through ch. 5, art. II, § 343, anyone convicted of "infamous crimes," defined in ch. 59, art. XIII, § 2855, as "offences punished with death, or confinement in the penitentiary"); THE REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI 75, 796 (1880) (disenfranchising, through ch. 4, § 108, anyone convicted of "any felony," defined in ch. 78, § 3104 as "offences punished with death, or confinement in the penitentiary").

Harness and Karriem are black citizens of Mississippi who have lost their right to vote because they have been convicted of crimes enumerated in § 241. They sued Mississippi's Secretary of State, contending that § 241 violates the Fourteenth Amendment because it was enacted with a discriminatory purpose. The district court entered summary judgment for the Secretary of State, reasoning that, per *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), the discriminatory taint of the 1890 provision was removed by the amendment processes in 1950 and 1968.

II.

Before discussing the merits, "we must assure ourselves of our jurisdiction." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007). The Secretary of State contends we lack jurisdiction on the basis of both standing and sovereign immunity.

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A.

"To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). The Secretary of State acknowledges the plaintiffs' injury in fact, averring instead that their injury is traceable not to him but to the county officials responsible for maintaining voter rolls.

But that is not so. In Mississippi, "the 'Statewide Elections Management System' . . . constitute[s] the official record of registered voters in every county of the state." MISS. CODE ANN. § 23-15-165(1). "The Office of the Secretary of State . . . develop[s] and implement[s] the Statewide Elections Management System so that the registrar and election commissioners of each county shall . . . [r]eceive regular reports of . . . convictions for disen-

franchising crimes that apply to voters registered in the county." *Id.* § 23-15-165(2)(c). Thus, under Mississippi law, the office of the Secretary of State "ha[s] a role in" removing convicted felons from the voter rolls "and is in a position to redress it at least in part."[2]

B.

For a similar reason, the Secretary of State's objection that the suit is barred by sovereign immunity cannot be sustained. "Suits for injunctive or declaratory relief are allowed against a state official acting in violation of federal law if there is a sufficient connection to enforcing an allegedly unconstitutional law." *Tex. Democratic Party*, 978 F.3d at 179 (quotation omitted). We have "not spoken with conviction about all relevant details of the 'connection' requirement," but if there is a "a 'special relationship' between the state actor and the challenged statute," there is certainly a sufficient connection. *Id.* That is the case here. The Secretary of State is charged by state law with "develop[ing] and implement[ing] the Statewide Elections Management System," which serves as the "official record of registered voters in every county of the state." MISS. CODE ANN. § 23-15-165(2), (1). County-level officials may also exercise control over voter rolls, but that does not reduce the Secretary of State's connection to the enforcement of § 241.

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III.

States are permitted to disenfranchise felons. U.S. CONST. amend XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). But the Constitution forbids such provisions where their "original enactment was motivated by a desire to discriminate against blacks on account of race and the [provision]

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[2] *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) (opining on Texas's election law), *cert. denied*, 2021 WL 78479 (U.S. Jan. 11, 2021) (No. 19–1389).

continues to this day to have that effect."[3] The plaintiffs contend that the portions of § 241 traceable to its original enactment in 1890[4] are unconstitutional because they were enacted with that precise unconstitutional motive.

We do not write on a blank slate. In *Cotton*, 157 F.3d at 391, we held that amendments to § 241 in 1950 and 1968 "superseded the [1890] provision and removed the discriminatory taint associated with the original version." We recognized that "§ 241 was enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks" and that Mississippi selected the crimes listed in § 241 for that reason. *Id.* On the other hand,

> 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. 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. 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

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[3] *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *see also United States v. Fordice*, 505 U.S. 717, 728 (1992) (requiring states to "eradicate[] policies and practices traceable to" their prior racially-motivated actions); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (noting that a statute's legacy of racial animus may persist so long as the "States' legislatures never truly grappled with the laws' sordid history in reenacting them").

[4] That is, the crimes enumerated in § 241 besides rape and murder, which were added in 1968.

with the original version.

Id. (footnote and citations omitted). In other words, as stated in *Cotton*, "by amendment, a facially neutral provision like § 241 might overcome its odious origin," and § 241 did. *Id.*

The plaintiffs offer three reasons we are not bound by *Cotton*, but none works. First, the plaintiffs suggest that evidence of the actual ballots with which voters approved the 1950 and 1968 amendments, and introduced for the first time in this case demonstrate that voters did not have "the option of re-enacting or repealing the remainder of the original list of disqualifying crimes. Instead, their only options were to vote 'For Amendment' or 'Against Amendment.'" But *Cotton* relied not on the particular options with which voters were presented but, instead, on the "deliberative process" used to amend § 241. *Cotton*, 157 F.3d at 391.[5]

Second, the plaintiffs maintain that because of the racial composition of the Mississippi legislatures and general resistance to desegregation in Mississippi at the times of the amendments, they "could not plausibly be considered steps taken to 'remove[] the discriminatory taint associated with the original [1890] version.'" (quoting *Cotton*, 157 F.3d at 391). *Cotton* did leave

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[5] Recently, *Cotton*'s reasoning was described as relying on the deliberative process:

> Both [the 1950 and 1968] amendments involved, first, *a deliberative process* that required two-thirds votes of both houses of the state legislature and, second, assent of the majority of Mississippi voters to 'the entire provision, including the revision.' *Cotton*, 157 F.3d at 391–92. *In light of that process*, we explained that section 241 in its then-present form could be considered unconstitutional only if the amendments were themselves adopted with discriminatory purpose.

Veasey v. Abbott, 888 F.3d 792, 821 (5th Cir. 2018) (Graves, J., concurring in part and dissenting in part) (emphasis added).

open the possibility that § 241 would be unconstitutional "if the amendments were adopted out of a desire to discriminate against blacks." *Id.* at 392. But the plaintiffs don't offer any evidence that that was so besides general Mississippi history fully available to the *Cotton* court. And, despite that history, the *Cotton* panel was convinced that the 1968 amendment adding crimes that were excluded in 1890 because "they were not considered 'black' crimes" was sufficient to cure the discriminatory taint of the entire provision. *Id.* at 391.

Finally, the plaintiffs posit that *Cotton* was abrogated by *Abbott v. Perez*, 138 S. Ct. 2305 (2018), at least as to the parts of § 241 traceable to 1890. *Perez* described *Hunter* as rejecting the theory that, after certain discriminatory disenfranchising offenses were removed from Alabama's constitution, "the parts that remained," were cured of their taint, "because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted." *Id.* at 2325. But *Cotton* had already distinguished the process of constitutional change at issue in *Hunter*—courts' declaring certain aspects of the provision unconstitutional—from the deliberative legislative amendments at issue here. *Cotton*, 157 F.3d at 391 n.8. *Perez*'s phrase "the parts that remained" refers to the parts of the Alabama constitution that were still enforceable following judicial decisions, not to the parts of a provision that are historically traceable to an earlier enactment.

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Under the rule of orderliness, "an intervening change in the law must be unequivocal, not a mere 'hint' of how the Court might rule in the future." *United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017) (quoting *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013)). The statement in *Perez* is not enough.

AFFIRMED.