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.

On Appeal from the United States District Court for the Southern District of Mississippi, No. 3:17cv791-DPJ-FKB

DEFENDANT-APPELLEE SECRETARY OF STATE WATSON'S RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

This Court should deny rehearing en banc. The panel here applied a sound decades-old precedent, *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), to uphold the rejection of plaintiffs' challenge to the State of Mississippi's law removing the franchise from certain felons. The panel's decision and *Cotton* are correct, they harmonize with Supreme Court precedent, and they do not conflict with a decision of any other court of appeals. Plaintiffs offer no sound reason for further review.

The Constitution recognizes that a State may disenfranchise felons. U.S. CONST., amend. XIV, § 2. At the same time, under Supreme Court caselaw a State may not disenfranchise felons based on "a desire to discriminate ... on account of race." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). So a disenfranchisement law may be invalidated if its challengers prove that racially discriminatory intent motivated the "enactment of the law" and the State has never cured that improper intent. *Id.* at 228, 233. Applying that rule, the Supreme Court in *Hunter* struck down a 1901 Alabama disenfranchisement law that had been adopted based on racial animus and had never been altered to expunge that animus. *Id.* at 233.

The provision at issue here is worlds apart from the law struck down in *Hunter*. The 1890 framers of Section 241 of the Mississippi Constitution targeted crimes they thought were predominantly

committed by black Americans. But Mississippi later changed course. It reconsidered and legislatively altered its disenfranchisement law in 1950 and again in 1968. Each time the State adopted a newly worded Section 241 (one that, over that time, omitted one crime and added others) after a deliberative legislative process.

Those actions removed any discriminatory taint associated with the nineteenth-century version of the State's felon-disenfranchisement provision—as this Court held in *Cotton v. Fordice*. Recognizing the absence of proof that racial discrimination motivated the post-1890 enactments, this Court concluded there that the State's present law does not violate the Equal Protection Clause. 157 F.3d at 391-92.

The panel here applied that precedent to uphold the district court's rejection of this renewed challenge to Section 241. Doc. 00515753740 (Op.). Plaintiffs—two felons barred from voting under Section 241—now seek rehearing en banc. Doc. 00515772691 (Pet.).

Rehearing en banc is not warranted. The panel's decision and the Circuit precedent it applied are correct and harmonize with Supreme Court caselaw, which recognizes the State's power to disenfranchise felons, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), and condemns laws proven to be tainted by racial discrimination, *Hunter*, 471 U.S. at 233—a defect that Mississippi cured long ago. The panel's decision does not

conflict with the decision of any other court of appeals. Indeed, had the panel ruled otherwise it may have created a conflict.

Plaintiffs contend that rehearing en banc is warranted because *Cotton v. Fordice* rests on a historically erroneous view—that voters in 1950 and 1968 were able to choose each crime that would be a disenfranchising offense, when in fact voters could choose only to accept or reject the Legislature's proposed amended Section 241—and so was wrong that the State adopted Section 241 anew. Pet. 8-10. *Cotton* made no such error. *Cotton* correctly relied on the deliberative legislative process that led to the State's revisitation and new enactment of Section 241. 157 F.3d at 391. That voters had a for-or-against choice of the new Section 241 each time does not change what *Cotton* found dispositive—that a deliberative process produced the new law and cleansed it of any discriminatory stain.

Plaintiffs also fault *Cotton* (and thus the panel decision here) for purportedly ignoring "relevant historical context" (Pet. 11)—in particular, the racial composition of the 1950 and 1968 Mississippi legislatures and laws promoting segregation in that era—that purportedly show that the re-enactments of Section 241 could not have cured any discriminatory taint. Pet. 10-13. But *Cotton* rested on direct, on-point historical context: the State's legislative actions in 1950 and 1968—the events bearing on the State's removal of the discriminatory

taint associated with its originally under-inclusive list of disenfranchising crimes. 157 F.3d at 391 & n.8. That sound consideration led to *Cotton*'s correct conclusion.

Plaintiffs finally argue that this Court's precedent conflicts with the Supreme Court's decisions in *Hunter* and in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). Pet. 13-14. But as explained, *Hunter* invalidated a law that had never been legislatively altered since its original flawed enactment. 471 U.S. at 233. And *Perez* merely summarizes *Hunter*—and that summary accords with *Cotton* and does not alter the reasons why *Hunter* invalidated the law before it. Those reasons do not apply to the materially different Mississippi law here.

The petition fails to show that this Court must go en banc to correct any error of law or to maintain uniformity. It raises arguments that this Circuit properly rejected decades ago and that are unworthy of yet further judicial attention. The petition should be denied.

STATEMENT OF THE CASE

Legal Background. A State may deny "the right to vote" "for participation in rebellion, or other crime." U.S. CONST., amend. XIV, § 2; *see Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

Mississippi, like many other States, has always provided for criminal disenfranchisement. The State's 1817 and 1832 Constitutions, and laws enacted under them, prohibited persons "convicted of bribery,

perjury, forgery," or "other high crimes or misdemeanors" from voting. ROA.541-543, 669-696. The State's 1868 Constitution extended the franchise to all males "not disqualified by reason of any crime," ROA.708., and mandated laws excluding persons "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors" from voting. ROA.713. In effect, for more than seventy years, state law denied the franchise to anyone convicted of any felony. *See* ROA.541-545, 669-725.

In 1890, convention delegates enacted the State's fourth Constitution. ROA.790-838. Tracking prior constitutions, the delegates retained "bribery," "perjury," and "forgery" as disqualifying offenses in Section 241 of the 1890 Constitution. ROA.827. But the 1890 framers narrowed the scope of other disenfranchising felonies to cover only convictions for "burglary," "theft," "arson," "obtaining money or goods under false pretenses," "embezzlement," and "bigamy." ROA.827. Consistent with prevalent racial stereotypes of the era, the 1890 framers narrowed Section 241 to target black Americans. As the Mississippi Supreme Court put it:

> 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 robbery and murder and other crimes in which violence was the principal ingredient were not.

Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).

But Mississippi later changed course. In 1950, two-thirds of each legislative house and a 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. In 1968, two-thirds of each legislative house and a majority of the State's electorate broadened Section 241 to include murder and rape—crimes previously excluded from the 1890 framers' under-inclusive law. MISS. LAWS, 1968, ch. 614; ROA.549-550, 554, 870-871, 965.

In the mid-1980s, Mississippi lawmakers revisited felon-disenfranchisement in undertaking a comprehensive review and revision of the State's Election Code. ROA.555-561, 975-1139. Under Democratic Secretary of State Dick Molpus, a bipartisan and racially diverse task force of legislators, state and local officials, political party leaders, and citizens considered whether to expand the disenfranchising felonies, amend Section 241, or leave the law "as is." ROA.1074. The task force determined that leaving the law as-is was the proper course. ROA.1081. The Legislature considered the task force's recommendations and considered expanding the State's disenfranchisement law. ROA.1108-1109. Lawmakers, in a near-unanimous vote, adopted the task force's "as is" recommendation, and conformed the State's statutory categories of

felony disenfranchising crimes to the 1968 version of Section 241. ROA.1128-1132.

Thereafter, a lawsuit claimed that Section 241 violates the Equal Protection Clause because it is traceable to the 1890 version of the law. *Cotton*, 157 F.3d at 391. Upholding the rejection of that theory in *Cotton v. Fordice*, a panel of this Court recognized that "a facially neutral" law could "overcome its odious origin" and ruled that "[t]hat is what has happened here." *Id.* This Court explained that Section 241 had been amended in 1950 to remove "burglary," and then again in 1968, when "the state broadened the provision by adding 'murder' and 'rape'—crimes historically excluded from the list because they were not considered 'black' crimes." *Id.* Those legislative actions, produced through a "deliberative process" (described above) led in 1950 and 1968 to "a re-enactment of § 241" that each time "superseded the previous provision and removed the discriminatory taint associated with the original version." *Id.* Thus, the Court continued, "§ 241 as it presently exists is unconstitutional only if the amendments were adopted out of a desire to discriminate against blacks"—but no proof had been offered on that point. *Id.* at 392. "Because the motives of Mississippi's legislature and voters when § 241 was re-enacted" were "not impugned, and because § 241 now seeks only to penalize all criminals convicted of certain crimes," Section 241 withstood the plaintiff's constitutional challenge. *Id.*

Section 241 thus did not fall under the rule of *Hunter v. Underwood*, 471 U.S. 222 (1985), which struck down a 1901 Alabama disenfranchisement law that had been adopted based on racial animus and had never been legislatively altered to expunge that taint. 157 F.3d at 391 & n.8.

Procedural Background. Plaintiffs Roy Harness and Kamal Karriem are black citizens who have lost their right to vote because they were convicted of forgery (Harness) and embezzling public funds (Karriem). ROA.568-569, 579. In 2017, they filed this lawsuit contending that Section 241 violates the Fourteenth Amendment because the 1890 framers enacted it with racially discriminatory intent. ROA.130-135.[1]

The district court granted summary judgment to the Secretary of State. 2019 WL 8113392, at *5-10 (S.D. Miss. Aug. 7, 2019). First, the court ruled that *Cotton* required the rejection of plaintiffs' claim. *Id.* at *5-8. The court explained that *Cotton* is indistinguishable from plaintiffs' case and that plaintiffs failed to prove the State's 1950 and 1968 enactments were racially motivated. *Id.* Second, the court alternatively held that plaintiffs' claim fails because the State's comprehensive review of its disenfranchisement laws and deliberative legislative actions in the

[1] A suit consolidated with this one below challenges aspects of the State's felon-disenfranchisement and re-enfranchisement laws. That suit does not include a race-based equal-protection challenge to Section 241. The district court dismissed most claims in that suit but certified its order for interlocutory appeal. That appeal is pending and was argued in December 2019. *See Hopkins v. Hosemann*, No. 19-60662 (5th Cir.), *consolidated with* No. 19-60678 (5th Cir.).

mid-1980s established that the State "would have passed section 241 as is without racial motivation." *Id.* at *10; *see id.* at *9-10.

A panel of this Court affirmed. The panel held that *Cotton* foreclosed plaintiffs' argument that Section 241 remained tainted by racially discriminatory intent. Op. 5-6. The panel rejected plaintiffs' three arguments for not following *Cotton*. Op. 6-7. First, the panel rejected the argument that *Cotton* was wrong to treat Section 241 as newly enacted because the voters did not vote on a crime-by-crime basis whether to retain all of the 1890 Constitution's originally tainted list of crimes, but instead voted only for or against the full revision of Section 241 proposed by the legislature. Op. 6. The panel explained that "*Cotton* relied not on the particular options with which voters were presented but, instead, on the 'deliberative process' used to amend § 241." Op. 6 (quoting 157 F.3d at 391). That process of reconsideration produced new versions of Section 241 that cleansed the provision of any taint. *See id.* Second, the panel rejected plaintiffs' reliance on "the racial composition of the Mississippi legislatures and general resistance to desegregation in Mississippi at the time of the" 1950 and 1968 re-enactments of Section 241. Op. 6; *see also* Op. 6-7. The panel emphasized the absence of "any evidence" that the re-enactments were themselves motivated by racial discrimination. Op. 7. The panel also emphasized *Cotton*'s observation that the 1968 amendments—adding new crimes that were not thought to

target black Americans—showed that the State had "'cure[d] the discriminatory taint of the entire provision.'" Op. 7 (quoting 157 F.3d at 391). Third, the panel rejected plaintiffs' argument that *Cotton* was "abrogated" by *Abbott v. Perez*, 138 S. Ct. 2305 (2018). Op. 7. *Perez* described the Supreme Court's prior decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), which struck down an Alabama disenfranchisement law because it remained tainted by racial discrimination. As the panel explained here, *Cotton* accounted for *Hunter* and held that the deliberative legislative process that led to the re-enactments of Section 241 distinguished it from the legislatively untouched state law in *Hunter*. Op. 7.

Plaintiffs petitioned for rehearing en banc.

ARGUMENT

The panel decision and the Circuit precedent that it followed are correct, harmonize with Supreme Court caselaw, and do not conflict with any decision of any court of appeals. The petition's arguments for further review are unsound. The petition should be denied.

The panel's decision and this Court's decision in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), are correct. The Constitution recognizes that a State may disenfranchise felons. Under the Fourteenth Amendment, a State may deny "the right to vote" "for participation in rebellion, or other crime." U.S. CONST., amend. XIV, § 2; *Richardson v.*

Ramirez, 418 U.S. 24, 54 (1974). That is what Mississippi did in Section 241. Section 241 strips "the right to vote" from certain citizens based on their "participation in" the "crime[s]" (Amend. XIV, § 2) of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy" (MISS. CONST., art. XII, § 241). The statute does what the Fourteenth Amendment's plain text allows.

The Supreme Court has recognized limitations on the States' disenfranchisement power—but the panel decisions here and in *Cotton* are consistent with Supreme Court caselaw. Under Supreme Court caselaw a State may not disenfranchise felons based on "a desire to discriminate ... on account of race." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But even when a State at one time acted based on such motives, under *Hunter* a State can remove the discriminatory taint that tarred the original enactment. As *Cotton* recognized, that is what happened here. The 1890 framers of Section 241 targeted crimes they thought were predominantly committed by black Americans. But Mississippi changed course. It legislatively reconsidered, altered, and enacted anew its disenfranchisement law in 1950 and again in 1968. In those new enactments it dropped burglary from the list, then added two other crimes that were "historically excluded from the list because they were not considered 'black' crimes." 157 F.3d at 391. The State's "deliberative process" to amend Section 241 removed any discriminatory

taint associated with the nineteenth-century version of the provision—as *Cotton* recognized. *Id.* Recognizing further the absence of proof that racial discrimination motivated the post-1890 enactments, *Cotton* concluded that the State's present law does not violate the Equal Protection Clause. *Id.* at 392. The panel here applied *Cotton* to uphold the rejection of the plaintiffs' constitutional challenge to Section 241. Op. 4-7. The decisions here and in *Cotton* harmonize with Supreme Court precedent.

The panel decisions here and in *Cotton* also do not implicate any conflict among the courts of appeals. Plaintiffs do not claim otherwise. Indeed, plaintiffs' petition for rehearing en banc is an invitation for this Court to *create* a circuit conflict. *See infra* at 14-15. That is not a sound basis for rehearing en banc. *See* FED. R. APP. P. 35(a)(1), (b)(1)(A) (en banc review aims to promote uniformity of decision).

Plaintiffs make three main arguments for why this Court should rehear this case en banc. Pet. 6-14. None withstands scrutiny.

First, plaintiffs maintain that *Cotton*'s core holding—that the adoption of the 1950 and 1968 versions of Section 241 expelled any discriminatory taint from the provision—was wrong because it rests on an error "of historical fact." Pet. 8; *see also* Pet. 8-10. According to plaintiffs, because the ballots used in the statewide elections required a vote "for" or "against" the 1950 and 1968 versions of Section 241, *Cotton*

failed to appreciate that "voters did not have the option of reenacting or repealing the original portions of Section 241 at issue in this case." Pet. 8. So, plaintiffs contend (Pet. 8-10), *Cotton* was wrong that "Mississippi's procedure resulted both in 1950 and in 1968 in a re-enactment of § 241" that "superseded the previous provision and removed the discriminatory taint associated with the original version." 157 F.3d at 391.

This argument is unsound. To start, *Cotton* recognized that the electorate voted only up or down on the Legislature's 1950 and 1968 resolutions as the last step in the deliberative process leading to their enactment. *See* 157 F.3d at 391 (explaining that the final step of the process required that "a majority of the voters had to approve the entire provision, including the revision"); *id.* (citing the 1950 and 1968 legislative resolutions and the statute governing the State's constitutional-amendment process at those times, which required voters to ratify or reject the 1950 and 1968 resolutions). But more important, in concluding that the State removed the discriminatory taint of the 1890 version of Section 241, "*Cotton* relied not on the particular options with which voters were presented" (Op. 6) but instead on the "deliberative process" that led to the re-enactments of Section 241 (*Cotton*, 157 F.3d at 391). No one disputes that voters in 1950 and in 1968 could not pick and choose categories of disenfranchising felonies. But that does not help

plaintiffs because *Cotton* did not rest on the contrary view. There is no error of historical fact to correct.

Plaintiffs relatedly contend that it was not enough that a deliberative legislative process produced the State's 1950 and 1968 enactments. Pet. 10. Plaintiffs suggest that the State in *Cotton* should have been required to prove that the "Mississippi legislature considered" and "agreed upon nondiscriminatory justifications for[] the original eight crimes that were unaffected by the amendments in 1950 and 1968." *Id.* Thus, instead of putting the burden on plaintiffs to prove that racial discrimination infected the deliberative processes that produced the State's facially neutral post-1890 felon-disenfranchisement laws, plaintiffs contend that the State must disprove that point. *See id.*

Plaintiffs' position is unsound and is not the law in this or any other Circuit. *Cotton* rejected the proposition that merely drawing a connection between a current law and a past alleged discriminatory enactment proves that the different, legislatively altered, present law bears the taint of discriminatory intent. Any other view defies the equal-protection rule that a plaintiff must "pro[ve]" discrimination. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). This Court has applied *Cotton*'s approach in race-based challenges in other historical contexts. *See*, *e.g.*, *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018) (voter-identification laws); *Chen v. City of Houston*, 206 F.3d 502,

521 (5th Cir. 2000) (redistricting). And before and after *Cotton*, other courts of appeals to address historical challenges to felon-disenfranchisement laws and similar enactments have embraced the approach taken in *Cotton* rather than the burden-reversal that plaintiffs urge on this Court. *Hayden v. Paterson*, 594 F.3d 150, 166-67 (2d Cir. 2010); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223-25 (11th Cir. 2005) (en banc); *see also United States v. Johnson*, 40 F.3d 436, 439-40 (D.C. Cir. 1994). Plaintiffs' invitation to *create* a circuit conflict is not a sound reason for granting rehearing en banc. *See* FED. R. APP. P. 35(a)(1), (b)(1)(a) (en banc review is meant to promote uniformity).

Second, plaintiffs fault *Cotton* (and thus the panel decision here) for purportedly ignoring "the relevant historical context" surrounding the 1950 and 1968 enactments. Pet. 11; *see also* Pet. 10-13. Plaintiffs cite the racial composition of the 1950 and 1968 Mississippi legislatures and invoke unrelated laws promoting segregation in that era. Pet. 12. According to plaintiffs, that history shows that *Cotton* erred in finding that the 1950 and 1968 enactments "cleansed Section 241 of its original discriminatory intent." Pet. 13. This too is an unavailing attack on *Cotton*. Far from ignoring historical context, *Cotton* rested on direct, on-point history: it looked to the State's legislative actions in 1950 and 1968—the events bearing on the State's removal of the discriminatory taint associated with its 1890 list of disenfranchising crimes. 157 F.3d at

391 & n.8; *cf. Greater Birmingham Ministries v. Secretary of State for Alabama*, 966 F.3d 1202, 1228 (11th Cir. 2020) (a discriminatory-intent showing is weakened when the evidence for it is "largely unconnected to the passage of the actual law in question"). Nothing in plaintiffs' zoom-out, general history overcomes that on-point history or shows that the recent enactments of Section 241 "were adopted out of a desire to discriminate against" black Americans. 157 F.3d at 392.[2]

Third, plaintiffs contend that *Cotton* conflicts with *Hunter v. Underwood*, 471 U.S. 222 (1985)—a conflict demonstrated, plaintiffs maintain, by *Abbott v. Perez*, 138 S. Ct. 2305 (2018). *See* Pet. 13-14. Plaintiffs are again mistaken.

As explained, *Hunter* struck down a law that is worlds away from this one. *Hunter* dealt with a law that was never legislatively altered or reconsidered and was changed only by *judicial* decisions limiting its scope. Nothing about *Perez*, a redistricting dispute, changes that.

Perez rejected the argument that, under *Hunter*, the State of Texas was required to prove that race did not improperly motivate its 2013 redistricting plans that were based in part on 2011 plans that the district court had earlier ruled discriminatory. 138 S. Ct. at 2324-25. In

[2] The direct evidence shows that the 1950 and 1968 enactments were well intentioned and that racial animus played no part in them. *E.g.*, ROA.549-553, 870-915; *see also* Brief of Defendant-Appellee 26 n.8, Doc. 00515308267. Unrebutted evidence from the State's mid-1980s actions also shows that Section 241 is valid. 2019 WL 8113392, at *9-10; *see* ROA.555-561, 975-1139.

summarizing *Hunter*, *Perez* said that the discriminatory state law in *Hunter* was never "repealed" but "had been pruned" by judicial decisions. *Id.* at 2325. *Perez* added that *Hunter* found those events insignificant "because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted." *Id.*

By plaintiffs' lights, *Perez*'s "description of *Hunter* is precisely the situation that was before the panel in *Cotton*, and which this case presents again"—so under *Hunter* Section 241 must fall. Pet. 14. But *judicial* "pruning" (what *Hunter* and thus *Perez* recognize as insufficient) and a deliberative *legislative* process that generates a new *legislative* enactment (what happened here) are not alike. *Cotton*, 157 F.3d at 391 n.8. Nothing in *Perez*'s description of *Hunter* alters that material distinction. And nothing in *Perez* supports the view that Mississippi's legislative enactments were unable to alter the intent behind any "parts" included in the 1890 version of Section 241. *Perez* does not show any conflict between *Cotton* and *Hunter* or any error in this Court's precedent. This ground for rehearing en banc fails too.

CONCLUSION

The petition for rehearing en banc should be denied.

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: March 22, 2021

s/ Justin L. Matheny
Justin L. Matheny
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the word limitations of FED. R. APP. P. 35(b)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32, it contains 3,882 words.

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Dated: March 22, 2021

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