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. 3:17-CV-791)

APPELLANTS' OPENING BRIEF ON REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

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

1. Fred L. Banks, Jr. of Phelps Dunbar LLP, Counsel for Plaintiffs-Appellants;

2. Armand Derfner of Derfner & Altman LLC, Counsel for Plaintiffs-Appellants;

3. Roy Harness, Plaintiff-Appellant;

4. Michael Watson, Secretary of State of Mississippi, Defendant-Appellee;

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8. Justin Lee Matheny, Special Assistant Attorney General, Counsel for Respondent-Appellee;

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By: *s/ Donald B. Verrilli, Jr.*
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled for the week of September 20, 2021.

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JURISDICTIONAL STATEMENT

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

STATEMENT OF ISSUES

1. Did the 1950 and 1968 amendments to Miss. Const. art. XII, § 241, which did not disturb eight of the nine disfranchising crimes adopted at Mississippi's 1890 constitutional convention—crimes the framers selected because they were considered "black crimes"—remove the framers' discriminatory intent to include those offenses?

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

INTRODUCTION

In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court struck down as unconstitutional a portion of the Alabama Constitution, enacted at the 1901 Alabama constitutional convention, that disfranchised people convicted of crimes

"involving moral turpitude." *Id.* at 226, 232-33. As the Court explained, "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks"; the "crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks"; and the "evidence . . . demonstrates conclusively that [the provision] was enacted with the intent of disenfranchising blacks" in violation of the Fourteenth Amendment. *Id.* at 227, 229.

The first of the post-Reconstruction southern constitutional conventions occurred eleven years earlier in Mississippi. That convention, too, adopted a felon disfranchisement provision for the express purpose of disfranchising African Americans. *See* Miss. Const. art. XII, § 241 ("Section 241"). Just as in Alabama, the offenses set forth in the 1890 Mississippi Constitution were those that the drafters believed were disproportionately committed by African Americans. Indeed, the Mississippi Supreme Court confirmed six years later that the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting "the offenses to which its weaker members were prone." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). The disqualifying crimes adopted as part of Section 241 in 1890 that are still in effect today are "bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement [and] bigamy." Miss. Const. art. XII, § 241.

In this case, the district court rejected plaintiffs' challenge to the eight crimes that remain from the original list and that resulted from the 1890 discrimination. Upholding the challenged provisions, the district court distinguished *Hunter* on the theory that Mississippi eliminated the discriminatory taint infecting the original provisions when it amended Section 241 in 1950 to remove burglary from the list of disfranchising offenses; amended Section 241 again in 1968 to add murder and rape; and considered a change to Section 241 in the mid-1980s. The discrimination of 1890 was treated as irrelevant even though the net effect of these changes on the original list was to eliminate only one of the nine disfranchising offenses and even though no one ever gave a non-racial reason for retaining the other eight.[1]

The district court's reasoning largely tracked the 1998 decision by a panel of this Court in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). The panel in *Cotton* recognized that "§ 241 [of the Mississippi Constitution] . . . was motivated by a desire to discriminate against blacks" when the provision was enacted in 1890. *Id.* at 391. Accordingly, said the panel, "we would be bound by *Hunter*," but for *Hunter's* reservation of the question whether "constitutional alterations could cure an originally defective constitutional provision." *Id.* at 391 & n.7, *see also Hunter*, 471 U.S. at 232-33 (declining to answer "whether [the discriminatory provision]

[1] The plaintiffs do not challenge the use of murder and rape as disfranchising crimes, the only ones added to Section 241's list since 1890.

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

The factual and legal premises that supported the panel's holding in *Cotton* were, however, in error. Plaintiffs in this case introduced evidence—that was not submitted to the court by the incarcerated *pro se* plaintiffs in *Cotton*—conclusively establishing that Mississippi's voters were not given the opportunity to vote "to approve the entire provision" when they considered the 1950 and 1968 ballot amendments. They were asked to vote only on whether to accept or reject the proposed amendments to Section 241. However they voted, the remainder of the original Section 241 would remain in place. Thus, contrary to the *Cotton* panel's assumption based on the incomplete record in that case, the 1950 and 1968 amendments were not "re-enactments" of the original list at all. A majority of voters did not "approve the entire provision" and therefore took no step that could have eliminated the discriminatory taint infecting the original Section 241.

The plaintiffs in this case also 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 African American 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. As that historical context makes plain, the 1950 and 1968 amendments cannot plausibly be understood as steps taken to "remove[] the discriminatory taint associated with the original [1890] version." *Cotton*, 157 F.3d at 391.

Thus, even if there were race-neutral reasons for removing burglary in 1950 and adding murder and rape in 1968, those amendments—like certain subsequent judicial changes to the Alabama provision at issue in *Hunter*—did nothing to repudiate the discriminatory taint infecting the originally listed crimes in Section 241. To the contrary, the Supreme Court's recent decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which was issued twenty years after *Cotton* and which elaborates on *Hunter*, makes clear that the discriminatory taint of a law like Section 241 is not expurgated unless something is done to "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." *Id*. at 2325 (emphasis added). That is precisely what *did not* happen here.

The district court also erred in holding that the recommendation of the Election Law Reform Task Force, which was convened in Mississippi in the mid-

1980s, and the decision of the 1986 legislature to do nothing to change Section 241, "shows the state would have passed section 241 as is without racial motivation." ROA.4327. Neither the legislature nor the voters of Mississippi took any action at all in the 1980s to change Section 241; their *inaction* plainly did not alter the intent with which the original provisions of Section 241 had been adopted. Indeed, the otherwise bizarre list of crimes included in the 1890 Constitution could not be enacted today without any impermissible motivation because there is no conceivable reason for including these crimes—while excluding similar but more serious crimes—other than the impermissible motivation of race which engendered the list in the first place.

In sum, two straightforward points resolve this case. First, binding Supreme Court precedent establishes that the original provisions of Section 241 discriminate on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. Second, nothing has happened in the 131 years since those provisions were adopted that alters the discriminatory intent with which the original provisions had been adopted. Accordingly, this en banc Court should overrule *Cotton* and reverse the district court. Mississippi's long history of discriminatory disfranchisement is tragic and wrong, and it must be brought to an end.

STATEMENT OF THE CASE

Section 241 and the 1890 Convention

As adopted in 1890, Section 241 read as follows:

> Every male inhabitant of this State, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote, and who is duly registered as provided in this article, *and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy*, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church shall be entitled to vote after six months residence in the election district, if otherwise qualified.

Miss. Const. art. XII, § 241 (1890) (emphasis added).

This otherwise strange collection of crimes was listed in Section 241 for one reason and one reason only: the 1890 framers believed them to be disproportionately committed by African Americans. The framers chose to "obstruct the exercise of the franchise by the negro race" by targeting "the offenses to which its weaker members were prone." *Ratliff*, 20 So. 865 at 868.

The 1890 Constitution also included other provisions designed to prevent African Americans from voting. For example, Section 243 required payment of a poll tax, which would eventually be recognized as one of the many "trappings of the

Jim Crow era." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020). This poll tax requirement was later invalidated in *United States v. Mississippi*, No. 3791 (S.D. Miss. Mar. 31, 1966), which applied *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and the provision was formally repealed in 1974. Section 244 imposed a literacy and understanding clause. That provision was nullified by the federal Voting Rights Act of 1965 and was formally repealed in 1975.

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

The 1950 and 1968 Amendments to Section 241

In 1950, the Mississippi legislature passed a resolution to amend Section 241 for multiple purposes, including removing burglary from the list of disqualifying crimes. The first paragraph of the resolution stated: "A CONCURRENT RESOLUTION to amend section 241 of the Mississippi constitution of 1890 so as to provide the qualifications of electors, and amending by providing that the wife of a minister of the gospel legally residing with him shall be qualified to vote after a residence of six months in the election district, or incorporated city or town, if

otherwise qualified." ROA.2639. The resolution then stated that the Legislature resolved "[t]hat the following amendment to the Constitution of the State of Mississippi be submitted to the qualified voters of the state for ratification or rejection . . . viz: Amend section 241 of the constitution of the State of Mississippi, so that it shall read as follows . . . ." ROA.2639-2640. The text of the proposed Section 241 was set forth in a form identical to the original 1890 version, except that the crime of burglary was omitted. ROA.2640.

The November 1950 ballot contained the exact same language as the resolution and was followed by two options from which the voter could select: "For Amendment" or "Against Amendment." The ballot did not offer voters the option of choosing to retain or repeal the remainder of the original 1890 list of disqualifying crimes. They could vote only on the amendment. Regardless of how they voted, the remaining eight crimes were guaranteed to remain unchanged as part of Section 241. ROA.2641-2642. A majority voted "For Amendment."

Events unfolded in a similar way in 1968, when the Mississippi legislature passed a resolution to amend Section 241 for multiple purposes, including adding murder and rape as disqualifying crimes. The first paragraph of the resolution stated: "A CONCURRENT RESOLUTION to amend Section 241, Mississippi Constitution of 1890, to provide for one-year residency within the State and County and a six-month residency within the election precinct to be a qualified elector; to delete

certain improper parts of the Section; and for related purposes." ROA.2643. The resolution then stated that the Legislature resolved "[t]hat the following amendment to the Constitution of the State of Mississippi be submitted to the qualified electors of the State for ratification or rejection . . . viz: Amend Section 241, Mississippi Constitution of 1890, so that it will read as follows: . . . ." ROA.2643. The text of the proposed Section 241 was then set forth in a form identical to the original 1890 version (with burglary omitted) with the addition of the crimes of murder and rape. The resolution also instructed the Secretary of State to place the resolution on the ballot. ROA.2643-2644.

The June 1968 ballot contained the exact same language as the resolution and was followed by two options from which the voter could select: "For the Amendment" or "Against the Amendment." ROA.2645. The ballot did not afford voters the option to decide whether to retain or repeal the other crimes on the list, which were part of the original 1890 provision. Regardless of how they voted, the eight crimes from the original list that remained after 1950 would still remain after 1968. ROA.2645. Accordingly, in passing the 1950 and 1968 amendments, neither two-thirds of the legislature nor a majority of the voters had any opportunity to decide whether to approve the entirety of Section 241 or the list of crimes that was originally included in it. Their only option was to approve or reject "[the] Amendment[s]." A majority voted "For Amendment."

Additionally, there is no historical evidence suggesting that either the Mississippi legislature or members of the public ever gave any thought to the question of whether the provisions of Section 241 challenged in this case should be re-enacted or rejected—presumably because they were never asked to vote on the issue. The journals of the Mississippi House and Senate chambers give no indication that any such deliberations occurred. And press coverage of the amendments focused exclusively on provisions having nothing to do with the issue of felon disfranchisement. 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).

Nor does the historical context support the notion that eliminating the discriminatory taint of the originally enacted Section 241 was an object of either the 1950 or the 1968 amendments. The amendments occurred during periods of rampant racial discrimination and massive resistance by all levels of Mississippi government, and by most of the white populace, to desegregation. The 1950 amendment was adopted when the legislature was all-white and the electorate was almost all-white.

The 1968 amendment was adopted when there was only one African American member of the Mississippi legislature. The only reason he was there, and the only reason the electorate included some black voters, was the passage by the United States Congress of the Voting Rights Act of 1965. That legislator, Robert Clark, remained the only African American among Mississippi's 174 legislators until 1975. ROA.2615.[2]

In 1950, Pauli Murray published her extensive survey, *States Laws on Race and Color* (1950) (Davison Douglas ed., reprint 1997), which documented Mississippi's laws requiring segregation throughout society, including in hospitals, railway, prisons, schools (including the school for the blind). Historian James Silver stated in his 1964 book *Mississippi: The Closed Society,* that "[t]he all-pervading doctrine, then and now, has been white supremacy, whether achieved through slavery or segregation." James W. Silver, *Mississippi: The Closed Society* 6 (1964). As the Fifth Circuit observed in 1963: "[T]he State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom." *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963) (footnotes omitted). As late as 1973, the "Mississippi Highway Patrol ha[d]

[2] When Rep. Clark first arrived at the legislature at the beginning of the 1968 session, he was assigned a seat where no other legislator would sit next to him. It took another eight years before someone would occupy the seat next to him. *See* Interview by John Dittmer with Robert G. Clark, in Pickens, Miss. (Mar. 13, 2013), Library of Congress, pp. 34-35, https://tile.loc.gov/storage-services/service/afc/afc2010039/afc2010039_crhp0075_Clark_transcript/afc2010039_crhp0075_Clark_transcript.pdf.

never in its history employed a member of the Negro race as a sworn officer." *Morrow v. Crisler*, 479 F.2d 960, 961-62 (5th Cir. 1973).

Far from dismantling the existing structure of *de jure* discrimination, the legislatures that sat in 1950 and 1968 took many steps to extend and entrench it. For example, the 1950 legislature (which was elected in 1947 and held sessions in 1948 and 1950) passed legislation during those years to fortify segregation in secondary education, higher education, prisons, reform schools, and 4-H clubs for young people. Miss. Laws 1948 Ch. 282, H.B. 459; Ch. 429, H.B. 268; Ch. 498, H.B. 528; Miss. Laws 1950 Ch. 195, S.B. 497; Ch. 253, H.B. 321; Ch. 385, S.B. 501; Ch. 386, S.B. 503. It also passed a number of resolutions in defense of racial discrimination. In fact, soon after that legislature was elected in 1947, Governor Fielding Wright claimed in his inaugural address that proposed federal anti-lynching, anti-poll tax, and anti-segregation legislation "aimed to wreck the South and our institutions." Frederick D. Drake & Lynn R. Nelson, *States' Rights and American Federalism: A Documentary History* 183 (1999); ROA.2613. He then called on Mississippians to "bolt" the national Democratic Party if it moved forward with efforts to pass those bills. Frederick D. Drake & Lynn R. Nelson, *States' Rights and American Federalism: A Documentary History* 183 (1999); ROA.2613. The legislature then passed a resolution praising Wright's inaugural address and proclaiming that the legislators "join the governor in the warning given to leaders of the National

Democratic Party and to the nation, that Mississippians and Southerners will no longer tolerate these abuses and efforts to destroy the South and her institutions, and hereby pledge our full support to the governor in his efforts to protect and uphold the principles, traditions and way of life of our beloved Southland." Miss. Laws 1948 Ch. 536, H. Con. R. 15. The same legislature subsequently passed a resolution expressing "vigorous opposition . . . to the recommendations of President Truman's committee on civil rights," which had proposed a federal anti-lynching law, anti-poll tax measures, and a permanent Fair Employment Practices Commission, claiming those recommendations would lead to the "subjugation of the majority to the demands of various minority groups, and *not least among these recommendations, certain ones whose effect would be to deprive the states of their rights with regard to suffrage and elections laws*." Miss. Laws 1948 Ch. 541, H. Con. R. 22. (emphasis added).

This reference to the states' rights "with regard to suffrage and elections laws" by the 1948-1951 legislature was emblematic of Mississippi's continuation of the mission of the 1890 constitutional convention to prevent African Americans from voting and to dilute any political influence they could attain in the event some did vote. That effort continued unabated well into the 1900s. "In 1955, Mississippi enacted a series of statutes with the obvious intent of preventing or inhibiting black voter participation . . . . , [i]n 1960, the Mississippi Constitution was amended to

require 'good moral character' as a qualification for voting. . . . [and] [i]n 1962, the Mississippi legislature enacted an additional series of statutes . . . to impede black registration . . . ." *Mississippi State Chapter, Operation PUSH v. Allain,* 674 F. Supp. 1245, 1251-52 (N.D. Miss. 1987), *aff'd* 932 F.2d 400 (5th Cir. 1991) (citation omitted).

The Mississippi legislature's assault on African American political participation persisted even after Congress enacted the 1964 Civil Rights Act and the 1965 Voting Rights Act. "Mississippi, which was one of the leaders of the black disfranchisement movement in the South with the 'Mississippi Plan' of 1890, once again led the way with the black vote dilution strategy developed and implemented in Mississippi's massive resistance legislative session in 1966. Before the session ended, the all-white state legislature enacted thirteen major pieces of legislation which racially altered Mississippi's election laws and made it more difficult for black candidates to get elected and for the newly enfranchised black voters to gain representation of their choice." Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965* 36 (1990).

Many of the legislators in the 1966 session were re-elected in 1967 and served in the session in 1968 that considered the amendment to add murder and rape as disfranchising crimes to Section 241. In many ways, they perpetuated Mississippi's discriminatory heritage. For example, during the 1968 session, they amended yet

maintained many of the discriminatory laws passed in 1966, including provisions allowing counties to switch from district to at-large elections of county boards of supervisors and to switch from elected to appointed school superintendents. Miss. Laws 1968 Ch. 394, H.B. 260; Ch. 564, H.B. 102.

The 1968 legislature also amended a 1964 law authorizing the State to provide financial tuition assistance to students attending private schools by increasing the amount of assistance available to each private school student. Miss. Laws 1968 Ch. 393, H.B. 1114. That law was struck down in 1969 because "[t]he statute, as amended, encourages, facilitates, and supports the establishment of a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (three-judge court). And the 1968 legislature funded the notorious Mississippi State Sovereignty Commission, which since 1956 had served as Mississippi's official watchdog, investigation, harassment, and propaganda agency for the promotion of segregation. Miss. Laws 1968 Ch. 214, H.B. 1195; https://www.mdah.ms.gov/arrec/digital_archives/sovcom/scagencycasehistory.php.

Mississippi's actions did not escape notice by the courts. The Supreme Court in 1971 quoted the United States Civil Rights Commission's 1969 report to Congress that "State legislatures and political party committees in Alabama and Mississippi

have adopted laws or rules since the passage of the [Voting Rights Act of 1965] which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters." *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) (citation omitted).

It was in the context of these times that the 1950 and 1968 amendments to Section 241 were adopted—amendments that neither addressed nor altered eight of the nine disfranchising crimes from the discriminatory 1890 list.

The Election Law Reform Task Force and the 1986 Legislature

In 1984, Mississippi assembled an Election Law Reform Task Force to assess whether and how the state's election laws should be reformed. ROA.977-978. Among many other things, the task force considered the issue of criminal disfranchisement but did not recommend any changes to Section 241. No reason was given for the failure to do so. In response to the Task Force efforts on a wide array of election laws, the legislature formed committees prior to the 1986 legislative session to consider election law changes. The House Election Law Reform Study Committee and a subcommittee of the Senate Elections Committee recommended that the list of crimes be changed to include all felonies except manslaughter and federal tax violations, and to provide for re-enfranchisement upon completion of sentence. The Senate Elections Committee and the House Apportionment and Elections Committee issued a separate joint report commending this approach and stating that it "would certainly provide a more rational basis" for disqualifying and

re-enfranchising persons convicted of crimes. ROA.1123. But even though the legislature passed a comprehensive election law reform bill in 1986, this proposal to change the law regarding criminal disfranchisement made absolutely no progress in the legislature and was not adopted. The only portion of the bill pertaining to felon disfranchisement simply insured that the state's election code conformed to Section 241, which remained unchanged from 1968 and continued to include all but one of the crimes first set forth in the 1890 constitution. ROA.1081, ROA.1092-1094, ROA.1107-1109, ROA.1123, ROA.1128-1131. No reason was ever given for retaining these original crimes from 1890.

Plaintiffs' Suit

Plaintiffs are two African Americans in Mississippi who have been disfranchised under Section 241's original list of disfranchising crimes. One is Roy Harness, who was convicted of forgery in 1986 and has completed his sentence. In 2018, at the age of 62, Mr. Harness completed his baccalaureate degree in Social Work from Jackson State University and was awarded a scholarship to pursue his Master's degree. The other is Kamal Karriem, a former city council member in Columbus, who was convicted of embezzlement in 2005 and has completed his sentence. Mr. Karriem is a pastor and is one of the owners and operators of his family's restaurant. ROA.2754-2755, ROA.2763-2764, ROA.2765-2766.[3]

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

Plaintiffs filed this suit on September 28, 2017, against Mississippi Secretary of State Delbert Hosemann challenging, under the Fourteenth Amendment, portions of Section 241 of the Mississippi Constitution of 1890 that list certain crimes that would forever prevent a citizen from voting. ROA.29, ROA.30, ROA.46. They subsequently amended their complaint to include a Fifteenth Amendment challenge as well. ROA.137. Plaintiffs contend that the adoption of the 1890 list was motivated by racial discrimination. They do not challenge the existence of the disfranchising crimes of murder and rape which were not part of the 1890 list, but instead were added to Section 241 in 1968. Plaintiffs requested both declaratory and injunctive relief. ROA.137-138.

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

On October 4, 2018, the parties filed cross-motions for summary judgment in this case, ROA.535-537, ROA.2604-2607. The district court granted the defendant's motion for summary judgment in this case on August 7, 2019, and denied plaintiffs' motion. ROA.4309-4337. The district court concluded that it was bound by the holding in *Cotton*, that the 1950 and 1968 amendments to Section 241

removed the provision's original discriminatory taint. ROA.4322. The district court concluded in the alternative that even if the 1950 and 1968 amendments did not work a cleansing effect, the legislature's failure in 1986 to change Section 241 demonstrated that "the state would have passed section 241 as is without racial motivation." ROA.4327.

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

In that order, the district court also severed the two cases. It entered final judgment in favor of the defendant in the present case. ROA.4336, ROA.4338. The district court also certified the open claims in *Hopkins* for interlocutory appeal. ROA.4336. Plaintiffs in the current case filed their notice of appeal on August 28, 2019. The *Hopkins* plaintiffs also filed a notice of appeal and their appeal is proceeding on a separate track. *Hopkins v. Hosemann,* No. 19-60662 (5th Cir.).

On February 23, 2021, a panel of this Circuit affirmed the district court decision in this case. The panel first concluded that plaintiffs Harness and Karriem had standing to bring their constitutional challenge and that sovereign immunity did not bar the challenge. The panel noted that Mississippi's Secretary of State was a

proper defendant in this action because 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" and is the means by which disfranchisement under Section 241 is implemented. Slip Op. at 4; Miss. Code Ann. § 23-15-165(2), (1).

Having established jurisdiction, the panel then proceeded to the merits and affirmed the district court's decision. Invoking the rule of orderliness, the panel concluded that it was bound by the prior panel decision in *Cotton*. The panel rejected plaintiffs' argument that *Cotton* should not be deemed controlling because the evidentiary record in this case established that the fundamental premise of the panel's decision in *Cotton*—that the 1950 and 1968 amendments to Section 241 provided occasions for the State's voters to re-enact Section 241 in its entirety for nondiscriminatory reasons, thereby cleansing its discriminatory taint—was wrong as a matter of historical fact. The panel also rejected plaintiffs' argument that evidence of the relevant historical context, which was not before the panel in *Cotton* and which the panel opinion did not discuss, reinforced the conclusion that the 1950 and 1968 amendments could not have cleansed the original provisions of Section 241 of their discriminatory intent. And the panel rejected plaintiffs' argument that *Cotton* could be distinguished because it addressed the entirety of Section 241 in its current (*i.e.*, amended) form, whereas the plaintiffs in this case challenged only the

original parts of Section 241 that were enacted in 1890 and have never been subject to reconsideration by the people of Mississippi to this day.

Appellants filed a motion for rehearing en banc on March 9, 2021. This Court granted en banc review on June 23, 2021.

SUMMARY OF ARGUMENT

I. As in *Hunter*, where the Supreme Court held that a 1901 Alabama disfranchisement provision violated the Fourteenth Amendment because the "crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks," and the "evidence . . . demonstrate[d] conclusively that [the provision] was enacted with the intent of disenfranchising blacks," 471 U.S. at 227, 229, the original list of disfranchising crimes in Mississippi's 1890 constitution was chosen for the specific purpose of disfranchising African Americans. Mississippi's 1890 convention was the first of the southern constitutional conventions that the Supreme Court in *Hunter* described as "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. Indeed it was the blueprint for Alabama's 1901 convention. The offenses listed in Section 241 were those the Mississippi delegates believed were disproportionally committed by African Americans. As confirmed by the Mississippi Supreme Court just six years later, the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting for disfranchisement "the offenses to

which its weaker members were prone." *Ratliff*, 20 So. at 868. Because this case is indistinguishable from *Hunter*, the eight originally-listed crimes in Section 241 must be invalidated as unconstitutional.

II. The conclusion of a panel of this Court in *Cotton* that the 1950 amendment to Section 241 eliminating burglary and the 1968 amendment adding murder and rape "removed the discriminatory taint associated with the original version" of Section 241, 157 F.3d at 391, does not provide a sound basis for rejecting plaintiffs' challenge because *Cotton* was premised on fundamental errors of fact and law.

The panel decision in *Cotton* depended on the Court's assumption that the 1950 and 1968 amendments constituted a "re-enactment" of the original list in Section 241 by which "a majority of the voters had to approve the *entire provision*." *Id.* (emphasis added). But evidence presented in this case (that was not presented by the *pro se* prisoner plaintiffs in *Cotton*) establishes the opposite. The voters in 1950 and 1968 did not—because they were given no opportunity to—vote to re-enact the original list of crimes in the provision. The only choice before them was whether to vote "For Amendment" or "Against Amendment." Whichever way they voted, at least eight of the nine crimes on the original 1890 list would remain.

Moreover, the plaintiffs submitted evidence—which again was not included in the *Cotton* record—establishing the extensive hostility of the legislature and much of the white populace to equal rights in 1950 and 1968, rendering implausible the

conclusion that the 1950 and 1968 amendments were steps taken to "remove[] the discriminatory taint associated with the original [1890] version," 157 F.3d at 391. In reality, those amendments did nothing to "alter the intent with which the [original] article, including the parts that remained, had been adopted," which is the standard described in the Supreme Court's recent decision in *Perez* for cases like *Hunter* and this one. *Perez*, 138 S. Ct. at 2325.

Further, in the present case, and unlike *Cotton,* the plaintiffs do not challenge the entirety of Section 241 as amended, and specifically do not challenge the addition of murder and rape in 1968, but instead challenge only what the Court in *Perez* called "the parts that remained" in the original list. *Id.* Because *Cotton* was so clearly wrong, it should be overruled insofar as it holds that the originally enacted list of crimes in Section 241 is constitutional. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (en banc) ("[T]he court sitting en banc may overrule or abrogate a panel's decision if the en banc court concludes that panel opinion's holding was indeed flawed."); *cf. Ramos*, 140 S. Ct. at 1405 (explaining that "the quality of the decision's reasoning" must be considered when determining whether past precedent should be overruled).

III. The district court also erred in concluding that the proceedings of the Election Law Reform Task Force in the mid-1980s and the 1986 Mississippi

legislature "shows the state would have passed section 241 as is without racial motivation." ROA.4327. Nothing was done in the 1980s to change the law and nothing was done to justify retaining the eight of nine crimes that remained from the original list. As a general matter, inferences drawn from legislative inaction are notoriously unreliable. *See Rapanos v. United States*, 547 U.S. 715, 749-50 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). Any such inference here would be particularly unwarranted. Because neither the legislature nor the voters took any action to change Section 241 during this period, nothing occurred that eliminated its discriminatory taint.

In addition, the state's evidence does not reveal any alternative, race-neutral motivations that show the legislature would have enacted Section 241 in its current form regardless of any discriminatory intent. To the contrary, it is clear that this otherwise bizarre list would not have been enacted in 1986 "as is" without any impermissible motivation because the impermissible motivation of race is the only possible explanation for it. And while the relevant legislative committees recommended amending Section 241 in 1986 to reflect what they called a "more rational" approach of including almost all felonies and re-enfranchising people upon completion of their sentences, that proposal made no progress in the legislature. The bare fact that a more rational approach was considered, but not adopted, cannot be enough to "alter the intent with which the [original] article, including the parts that

remained, had been adopted," *Perez*, 138 S. Ct. at 2325, particularly where no non-racial reason was given for retaining the crimes that remained from the original list.

The district court's grant of summary judgment in favor of the defendant should therefore be reversed.

STANDARD OF REVIEW

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

ARGUMENT

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

This case is on all fours with *Hunter v. Underwood*. The reasoning that led the unanimous Supreme Court to invalidate the disfranchisement provisions of the 1901 Alabama Constitution applies with equal force to the nine original disfranchising crimes listed in Mississippi's 1890 Constitution, eight of which remain unchanged to this day. Binding Supreme Court precedent therefore requires

that those provisions be struck down because they deny African Americans the equal protection of the laws.

1. ***Section 241 of the Mississippi Constitution was adopted in 1890 for the express purpose of disfranchising African Americans.*** The Mississippi constitutional convention of 1890 focused on a singular goal: to entrench white supremacy and, in particular, to prevent African Americans from voting. As one delegate put it to his fellow attendees, "What are you here for, if not to maintain white supremacy, especially when a majority of whites stand for a great principle of public morals and public safety?" E.L. Martin, *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi* 94 (1890). The president of the convention called upon delegates to "arrange[]" the "ballot system . . . to effect one object[:]" the continued rule of a white race "whose rule has always meant prosperity and happiness." *Id.* at 10.

It is no coincidence that this historical record closely parallels the one that prompted the Supreme Court to invalidate Alabama's 1901 disfranchisement provision in *Hunter*. Mississippi's 1890 constitutional convention was both inspiration and blueprint for Alabama's convention eleven years later. *See Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984) (explaining that the Alabama 1901 convention "[b]orrow[ed] from the successful methods of the Second

Mississippi Plan," which formed the basis for the 1890 Mississippi Constitution), *aff'd*, 471 U.S. 222 (1985).

A decade before white supremacy "ran rampant," *Hunter*, 471 U.S. at 229, at the 1901 Alabama convention, it roamed freely at the 1890 Mississippi convention, where it dictated the contours of the new state constitution. *See* Martin at 275 ("It is the manifest intention of this Convention to secure to the State of Mississippi, 'white supremacy.'"), 701 ("[W]e are willing . . . to do all things except to yield up the common civilization of our common country, which civilization was constructed, has been maintained and can be continued only by the white race."); *Female Suffrage Day*, Jackson Daily Clarion-Ledger (Sept. 10, 1890), at 1 (recounting one delegate's satisfaction that the constitution "places the commonwealth of Mississippi for all time in the control of the white race—the only race fit to govern in this country" and another delegate's concern that Mississippi "may never again have the opportunity of . . . insur[ing] and perpetuat[ing] the supremacy of the white race in Mississippi").

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

> Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had

> acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites.

Ratliff, 20 So. at 868. The Court added: "Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone." *Id.* These allegedly "furtive offenses" were "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, [and] bigamy." *Id*. at 867-68.

The historical record thus unambiguously establishes the crimes included in Section 241 in 1890 were selected for discriminatory reasons. *See Cotton*, 157 F.3d at 391 ("Although § 241 was facially neutral and technically in compliance with the Fourteenth Amendment, the state was motivated by a desire to discriminate against blacks."). Except for burglary, all of these offenses remain in Section 241 today.[4]

2. *This case is indistinguishable from Hunter.* In *Hunter*, the Supreme Court held that a 1901 Alabama disfranchisement provision violated the Fourteenth Amendment because the "crimes selected for inclusion . . . were believed by the

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

delegates to be more frequently committed by blacks," and the "evidence . . . demonstrate[d] conclusively that [the provision] was enacted with the intent of disenfranchising blacks." 471 U.S. at 227, 229. The exact same thing is true here. The original list of disfranchising crimes in Mississippi's 1890 Constitution was chosen for the specific purpose of disfranchising African Americans. As confirmed by the Mississippi Supreme Court just six years later, the 1890 convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race" by targeting for disfranchisement "the offenses to which its weaker members were prone." *Ratliff*, 20 So. at 868. This case is thus indistinguishable from *Hunter*. Just as the Alabama disfranchisement provisions violated the Equal Protection Clause because of their discriminatory origins, the originally-enacted provisions of Section 241 of the Mississippi Constitution—which served as the template for the Alabama provisions invalidated in *Hunter*—must be struck down as well.

3. ***All of the disfranchising offenses included in the original Section 241 are tainted by unconstitutional animus.*** In the district 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. On appeal, however, the State reversed course and sought to distinguish *Hunter* by advancing the remarkable claim that only some of the disfranchising crimes were included for discriminatory reasons. Appellee Br. at 47-49. In

particular, the State argued that Mr. Harness's crime of conviction—forgery—was untainted by discriminatory intent because "[u]nder every constitution and law ever enacted in Mississippi, forgery has always been a disenfranchising crime." *Id*. at 48. Likewise, the State argued that Mr. Karriem's crime of conviction—embezzlement—"is a textbook crime of dishonesty closely associated with the State's other pre-1890 disenfranchising crimes of bribery, perjury and forgery." *Id.* at 48-49.

This argument is irreconcilable with the historical record. As the Mississippi Supreme Court explained in *Ratliff*:

> 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. 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 facially implausible.

The State's argument is also disproved by the expert testimony of every historian who rendered an expert opinion in this case. 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 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* 79 (2018)). Dr. Pratt, the plaintiffs' expert in the consolidated *Hopkins* case, stated in her expert report 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. The State, for its part, 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.[5] Accordingly, there is no sound basis for concluding that any of the eight originally listed crimes in Section 241 is free of discriminatory taint.

4. ***The discriminatory impact of the original provisions of Section 241—though not necessary to prove unconstitutionality—is indisputable.*** The State also contended before the panel that the plaintiffs failed to prove that Section 241 had a discriminatory impact on African Americans. Appellee Br. at 43. That contention is meritless.

To begin with, plaintiffs need not prove discriminatory impact to prevail. The Supreme Court in *Hunter* did note that the Eleventh Circuit in that case had "implicitly found the evidence of discriminatory impact indisputable." 471 U.S. at 227. But the Supreme Court did not hold, or even suggest, that proof of discriminatory impact was essential to establish an Equal Protection violation. Nor would such a requirement make sense, given that the very point of the Equal Protection principle articulated and applied in *Hunter* is that even facially neutral measures violate the Fourteenth Amendment when enacted for discriminatory reasons. Proof of discriminatory impact could well provide a basis for inferring

[5] The State (Appellee Br. at 5) cited a passage from *Ratliff* stating that: "Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while murder and robbery, and other crimes in which violence was the principal ingredient were not." 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 included for reasons other than the framers' beliefs that these were crimes to which the "weaker members [of the black race] were prone." *Id.*

discriminatory intent in the absence of direct proof. But in a case like this one—where the direct proof of discriminatory intent is overwhelming and largely undisputed—there is no need to resort to evidence of discriminatory impact to establish a law's unconstitutionality.

Even if a showing of discriminatory impact is necessary, the record amply establishes it. The disqualification 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 far 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.[6] *Cf. Hunter*, 471 U.S. at 227 ("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." (citation omitted)).

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

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

(emphases added). The State faults the plaintiffs for having no impact proof prior to 1994, *id.*, and points to passage from *Hunter* that 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 (citation omitted).

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. There is nevertheless every reason to conclude that Section 241 had a discriminatory impact in the years following its enactment. That was, after all, the point of enacting it. 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 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)). Furthermore, the State conceded in the District Court that the collection of discriminatory devices "caused a disparate racial impact in the

1890s." ROA.1185. Section 241 was surely responsible for some portion of that massive disenfranchisement, even if the exact percentage cannot be quantified. And nothing in *Hunter* suggests that such specific proof is required in any event. 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. That is just as true in this case as it was in *Hunter*.[7]

II. 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.

Despite overwhelming proof that the original Section 241 of the Mississippi Constitution is indistinguishable from the Alabama provision struck down in *Hunter*, the district court concluded that this Court's prior decision in *Cotton* foreclosed plaintiffs' challenge to the provision. Invoking the rule of orderliness, the now-vacated panel decision in this case reached the same conclusion. *Cotton* did uphold Section 241 against an Equal Protection challenge, concluding that amendments to the provision in 1950 and 1968 cleansed the original 1890 enactment of its

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

discriminatory taint. But *Cotton* was premised on fundamental factual and legal errors—errors that were doubtless the result of the unusual posture in which these issues were considered. *Cotton* thus does not provide a sound basis for rejecting plaintiffs' claims and distinguishing *Hunter*, and should be overruled. *Cf. Ramos*, 140 S. Ct. at 1394 ("[W]hen it revisits a precedent this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.").

Most fundamentally, the panel in *Cotton* incorrectly assumed that in 1950 and 1968 Mississippi voters were asked not merely to approve the amendments to Section 241 that the legislature had proposed in each of those years, but instead to re-enact the provision in its entirety. The historical record refutes that assumption and knocks the underpinnings out from under the *Cotton* panel's decision. Mississippi's voters have *never* been afforded the opportunity to re-enact the original provisions of Section 241. They have thus never had occasion to repudiate Section 241's invidious origins or "alter the intent with which the [original] article, *including the parts that remained*, had been adopted." *Perez*, 138 S. Ct. at 2325 (emphasis added). Because the conclusion of the panel in *Cotton* rested entirely on this erroneous premise, the case should be overruled and the original disfranchising offenses in Section 241 should be invalidated—as *Hunter* requires.

1. ***Cotton erred in concluding that the 1950 and 1968 amendments to Section 241 extinguished the discriminatory taint of the originally-enacted provisions by re-enacting those provisions as part of the amendment process.*** 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*, 20 So. at 868. 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.*

The *Cotton* panel 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 panel then addressed, *sua*

sponte,[8] 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 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). 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. To begin, 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.*

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

The record evidence in the present case unequivocally establishes that this linchpin of the panel's analysis in *Cotton* was wrong as a matter of historical fact. Critically, the 1950 and 1968 ballot language conclusively establishes that voters did *not* have the option of reenacting or repealing the original portions of Section 241 challenged 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.2641-2642, ROA.2645. Voters could cast their ballots *only* "For Amendment" or "Against Amendment." ROA.2641-2642, ROA.2645. They could not have "re-enact[ed] § 241" with each amendment, as the *Cotton* court found. 157 F.3d at 391. Thus, voters confronted with the 1950 amendment to eliminate burglary could not eliminate the full 1890 list, or any other crimes in it, by voting against the amendment, and similarly could not vote to approve the remainder of the list by choosing to keep it. The only question before them was whether to remove burglary from the list of disfranchising crimes (a vote "For Amendment") or to keep it on the list (a vote "Against Amendment"). Apart from burglary, therefore, every one of the original disfranchising crimes chosen in 1890 would remain in place in its original form no matter how many votes were cast for or against the amendment. The same was true of the 1968 amendment, which asked voters to decide whether to add murder and rape to the list.

If the *Cotton* panel had before it the factual record before the district court in this case it could not possibly have concluded 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*. Plaintiffs 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, which were never the subject of an amendment. Because they do not challenge murder and rape, they have no obligation to prove the 1950 and 1968 amendments were motivated by discrimination. Accordingly, the amendment votes 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.

The *Cotton* court's decision to prioritize what it wrongly perceived to be a full, non-discriminatory reenactment gave short shrift to the racist history that produced Section 241. That, too, was error. As the Supreme Court recently

cautioned in *Ramos*, a "shared respect for rational and civil discourse" does not "supply an excuse for leaving an uncomfortable past unexamined." 140 S. Ct. at 1401 n.44 (internal quotation marks and citation omitted). The unambiguously racist origins of Section 241 were never addressed—much less redressed—by the amendments in 1950 and 1968, and the *Cotton* court acted too hastily in concluding otherwise.

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 prior panel in this case suggested, Slip Op. at 6 (quoting *Cotton*, 157 F.3d at 391), that contention, too, is untenable. None of the legislative materials cited by the *Cotton* panel suggest that the Mississippi legislature ever 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)). Certainly no such justifications were ever conveyed to the State's voters or mentioned in contemporaneous accounts of the deliberative process—which focused exclusively on wholly unrelated subjects. *See* page 11 *supra*. 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. Even more to the point, the key step in the "deliberative

process" on which the *Cotton* panel relied was what the panel, erroneously, described as a "re-enactment" by which "a majority of the voters had to approve the entire provision." 157 F.3d at 391. That step was critical to the panel's "deliberative process" analysis because in Mississippi the Constitution can only be amended by a vote of the people. Thus the determinative step in the "deliberative process" is necessarily the vote of the people of the State. But the panel was wrong about this key step, and its "deliberative process" analysis therefore cannot—and does not—provide a sound basis for upholding the remaining original provisions of Section 241.

2. ***The Cotton panel gave no consideration to the historical context, which renders implausible the inferences the panel drew.*** While the prior panel opinion in this case was surely correct that the "general Mississippi history" of segregation and racial discrimination was "fully available to the *Cotton* court," Slip Op. at 7, the panel in *Cotton* gave no indication that it ever considered the history, much less explained how the amendments could have cleansed the original Section 241 of its discriminatory origins in light of that history. 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 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 determinative issue in this case is not whether the amendments resulted from discrimination (there is little reason to think that they did). It is whether the amendments "removed the discriminatory taint associated with the original [1890] version," *id.* at 391, by "alter[ing] the intent with which the article, including the parts that remained, had been adopted." *Perez*, 138 S. Ct. at 2325.

Mississippi's history during the 1950s and 1960s is indisputably relevant to that question. Indeed, it renders implausible *Cotton*'s conclusion that the amendments "removed the discriminatory taint associated with the original [1890] version." 157 F.3d at 391.

Far from repealing existing structures of discrimination, the Mississippi legislature in 1950 and 1968 extended and entrenched segregation and discrimination. As noted (see pages 13-14 *supra*), the 1950 legislature is the same one that sat in 1948 (having been elected in 1947 to a four-year term) and adopted a resolution expressing "vigorous opposition … to the recommendations of President Truman's committee on civil rights," which had proposed a federal anti-lynching law, anti-poll tax measures, and a permanent Fair Employment Practices Commission, claiming that those recommendations would lead to the "subjugation of the majority to the demands of various minority groups, and not least among those

recommendations, certain ones *whose effect would be to deprive the states of their rights with regard to suffrage and election laws*." Miss. Laws 1948 Ch. 541, H. Con. R. 22 (emphasis added). The 1950 legislature also 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, amended yet maintained many of the discriminatory voting laws passed in 1966; passed legislation encouraging white students to attend private schools, thereby advancing segregation; and funded the notorious Mississippi State Sovereignty Commission. Indeed, the tenor of these times was reflected in this Court's statement 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) (footnotes omitted). *Cotton* mentioned none of this history before concluding that the two amendments—passed by legislatures that each aggressively pursued segregationist goals reflecting racial animus—cleansed Section 241 of its original discriminatory intent. 157 F.3d at 391-92. Given the historical context, it is difficult to imagine that these same legislative bodies from 1950 and 1968 would have advocated that the original list of disfranchising crimes in Section 241 be re-enacted for neutral and rational reasons in order to extirpate the

discriminatory taint that infected Section 241 in its original form. Moreover, there is absolutely nothing in the historical record proving that this happened or proving that the electorate voted for the amendments in order to do so.

3. *The Supreme Court's decision in Perez confirms that Cotton should be overruled insofar as it upheld the originally enacted provisions of Section 241.*

In *Perez*, the Supreme Court considered the circumstances under which past discrimination carries into the future, and the Court's analysis bears directly on the question now before this Court. 138 S. Ct. at 2324-25. The Supreme 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 those eight crimes. *Cotton*'s conclusion to the contrary cannot be squared with *Hunter* and *Perez*.

4. *To the extent that Cotton focused on the entirety of Section 241, and not just the list of disfranchising crimes originally enacted in 1890, it is distinguishable from the present case.* In the present case, the plaintiffs do not challenge the entirety of Section 241 as amended, and specifically do not challenge the addition of murder and rape in 1968, but challenge only what the Court in *Perez* called "the parts that remain[]" in the original list. This is different than *Cotton,* where the panel said:

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

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

remain[]" even if they were held to be irrelevant to the challenge in *Cotton* to the entire provision as it has existed since 1968.

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

III. BECAUSE THE OTHERWISE BIZARRE COLLECTION OF CRIMES IN THE 1890 LIST WAS ENACTED SOLELY BECAUSE OF DISCRIMINATION, THERE WOULD BE NO REASON FOR ANYONE TO ENACT IT ANEW—IN THE 1980S OR AT ANY OTHER TIME—ABSENT AN IMPERMISSIBLE MOTIVATION

The district court held that the original disfranchising crimes listed in Section 241 were insulated from constitutional challenge for the additional reason that the proceedings of the Election Law Reform Task Force and the 1986 Mississippi legislature "shows the state would have passed section 241 as is without racial

motivation." ROA.4327. That alternative rationale—which neither *Cotton* nor the prior panel of this Court endorsed—fails at every level.

Most fundamentally, neither the Mississippi legislature nor the State's voters took any action in 1986 that even addressed, much less extinguished, the discriminatory taint that renders the originally enacted Section 241 unconstitutional. Inferences drawn from legislative inaction are notoriously unreliable in general. *See Rapanos*, 547 U.S. at 749-50 (2006) (Scalia, J.) (explaining the Supreme Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction"); *Solid Waste Agency*, 531 U.S. at 160 (Rehnquist, C.J.) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute."). Here, legislative inaction is dispositive. The question is not whether the same list of disfranchising crimes *could*, in some hypothetical universe, be enacted today for race-neutral reasons. The question is whether the law currently on the books 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 "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" (citation and internal quotation marks omitted)). Because neither the legislature nor the voters took any action in 1986 that could be interpreted as a race-neutral re-enactment of the original provisions of Section 241, nothing occurred in 1986 that could have "alter[ed] the

intent with which the [original] article, including the parts that remained, had been adopted." *Perez*, 138 S. Ct. at 2325.

Moreover, even if *Hunter* allowed for ex post facto explanations unaccompanied by any re-enactment of a tainted law—which it does not—the State's argument is untenable. *Hunter* requires that the State prove the existence of a race-neutral motive capable of severing the connection between the legislators' discriminatory intent and the enacted law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977); *Prof'l Ass'n of Coll. Educators v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 265 (5th Cir. 1984) ("In short, the question is not whether the employer justifiably could have made the same decision but whether it actually would have done so."); *Bueno v. City of Donna*, 714 F.2d 484, 490-91 (5th Cir. 1983).[9] But here, 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—only an unexplained decision not to change it. Tellingly, the State offers no cogent

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

explanation for why the Mississippi legislature in 1986—or at any time—would choose the eight originally-identified crimes in Section 241 as disqualifying, but not other equally or even more serious offenses. Why, 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 explanation for picking that particular collection of disfranchising crimes, and Mississippi has never offered one.

Indeed, if anything, the legislature's refusal to enact any changes in 1986 reinforces the discriminatory character of the originally-enacted provision. The relevant legislative committees concluded in 1986 that expanding Section 241 to include all felonies except manslaughter and federal tax violations, and to re-enfranchise people when they completed their sentences, would have been a "more rational" approach to disfranchisement. But that proposal made no progress in the legislature. ROA.1092-1094, ROA.1108-1110, ROA.1123. By its inaction, the legislature *rejected* the proposal to replace the discriminatory provisions of Section 241 with a rational and race-neutral approach that would have eliminated the discriminatory taint of the original provisions. The effect of that legislative inaction

was to *perpetuate* the discriminatory taint that infected the original Section 241, not to extinguish it.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment for the defendant should be reversed and the case remanded with instructions to grant summary judgment for the plaintiffs, or in the alternative, remanded for further proceedings.

Dated: July 23, 2021

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: July 23, 2021

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

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Dated: July 23, 2021

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