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

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

DEFENDANT-APPELLEE'S BRIEF ON REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral argument for September 22, 2021.

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INTRODUCTION

This Court should affirm the district court's judgment dismissing plaintiffs' challenge to the Mississippi Constitution's provision removing the right to vote from certain felons. Mississippi's provision accords with all constitutional requirements.

States may "exclude some or all convicted felons from the franchise," *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974), so long as they do not exercise that authority based on "a desire to discriminate ... on account of race," *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). This case involves a challenge to Section 241 of the Mississippi Constitution, the State's disenfranchising-felonies provision. Section 241 covers ten broad categories of felonies that extend to eighty-nine different violations of the state criminal code. ROA.3765-3767. Plaintiffs contend that the original version of Section 241 was enacted in 1890 with discriminatory intent and that the present-day version of the law is invalid—despite multiple intervening enactments that materially altered the disenfranchising-felonies provision. The district court dismissed based on this Court's decision in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), which rejected a similar claim and, alternatively, because unrebutted evidence shows the State would have passed the present-day disenfranchising-felonies provision without racial motivation.

ROA.4317-4327. A panel of this Court affirmed, agreeing with the district court that prior precedent foreclosed plaintiffs' claims. Panel Op. 4-7.

This Court should affirm. In line with all other courts of appeals to consider the matter, this Court has adopted the rule that when a State materially alters a felon-disenfranchisement provision through a "deliberative" legislative "process," the new enactment presumptively cures the law of any invalidating, discriminatory "taint." *Cotton*, 157 F.3d at 391; *see Hayden v. Paterson*, 594 F.3d 150, 165-67 (2d Cir. 2010); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1223-25 (11th Cir. 2005) (en banc). That intervening-enactment rule is sound, and under that rule the State's disenfranchising-felonies provision satisfies the Equal Protection Clause—on two independent grounds.

First, Section 241's disenfranchising-felonies provision was materially altered through intervening enactments in 1950 and 1968 that cured any discriminatory taint on the original provision. In 1950 and 1968, the State adopted new versions of Section 241 through a multi-stage constitutional amendment process. The first enactment removed burglary (which has been cited as having originally been included based on discriminatory motivation) and the second added murder and rape (which have been cited as having been originally excluded for discriminatory reasons). In each instance, the enactments were accomplished through resolutions approved by two-thirds of each house

of the legislature, advance publication of the resolutions proposing that voters ratify or reject the new versions of Section 241, and a majority vote in favor of the resolutions at a statewide election. These intervening-enactments presumptively cured the original version of Section 241's disenfranchising-felonies provision of its under-inclusive taint, absent proof that discrimination motivated the enactments. In *Cotton*, this Court applied the intervening-enactment rule to reject a challenge to Section 241's felon-disenfranchisement provision based on the theory that its original, now non-existent 1890 version was motivated by discriminatory intent. 157 F.3d at 391-92. In this case, plaintiffs assert the same claims on the same theory that *Cotton* correctly rejected. Yet plaintiffs maintain that they have created a better record showing that *Cotton*'s application of the intervening-enactment rule was infirm or that its holding is inapplicable to their claims. Plaintiffs are wrong on both fronts: the expanded record only strengthens *Cotton*'s holding, and that holding retains full force in this materially indistinguishable case. Affirmance is warranted on this ground alone.

Second, and alternatively, this Court should hold that present-day Section 241's disenfranchising-felonies provision is constitutional because yet another intervening enactment and legislative process, in the 1980s, removed from the law any discriminatory taint. In the mid-1980s state lawmakers ratified and codified Section 241, and further materially

altered the State's disenfranchisement laws, without any discriminatory motivation. The legislative actions followed an extensive re-examination of the State's election laws. A diverse and bipartisan Election Law Reform Task Force recommended to keep the State's felon disenfranchisement laws as is. Then a legislative committee proposed broader changes including an expansion of the disenfranchisement laws and introduced legislation to that effect. Through the legislative process, the 1986 legislature adopted the Task Force's recommendation to effectively ratify and codify the present-day version of Section 241 and proposed to align the provision with its implementing statutes. The legislature ultimately passed that legislation overwhelmingly and it took effect following preclearance under the Voting Rights Act. The unrebutted proof in this case shows that the State would have adopted its present-day disenfranchisement provision in an atmosphere free of discriminatory bias—because that is what lawmakers in the mid-1980s did.

This Court should affirm.

STATEMENT OF JURISIDCTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on August 7, 2019, granting summary judgment to the Secretary of State and denying plaintiffs' cross-motion. Plaintiffs filed a notice of appeal on August 28, 2019. ROA.4339-4341. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Does the present-day version of the Mississippi Constitution's disenfranchising-felonies provision satisfy the Equal Protection Clause?

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. This disenfranchisement authority is broad. It permits a State to "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); *see id.* at 53-56 (rejecting equal-protection challenge to California's permanent-disenfranchisement laws). The disenfranchisement power must, of course, be exercised consistently with other constitutional provisions. Thus, the Supreme Court has held, States may not disenfranchise convicts based on "desire to discriminate ... on account of race." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

Factual Background. Mississippi law has always prohibited certain felons from voting. Mississippi's 1817 and 1832 Constitutions, and laws passed under them, provided for disenfranchisement. Miss. Const. art. VI, § 5 (1817); Miss. Const. art. VII, § 4 (1832). In that period only white male suffrage existed, and the laws prohibited persons convicted of "bribery," "perjury," "forgery," or "other high crimes or misdemeanors" from voting. Miss. Const., art. VI § 5 (1817); Miss. Const., art. VII § 4 (1832). After the Civil War, the States (including Mississippi) ratified the Fourteenth and Fifteenth Amendments, which recognized States' authority to disenfranchise felons and established universal male suffrage. U.S. Const. amend. XIV, § 2; U.S. Const. amend. XV. At that time, "29 [of 36] States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48. In Mississippi, similar to other States, the Reconstruction-era government's 1868 Constitution mandated laws excluding persons convicted of "bribery," "perjury," "forgery," or "other high crimes or misdemeanors" from voting. Miss. Const. art. XII, § 2 (1868). The 1872 Code specified that "[n]o person convicted of bribery, perjury, forgery or other infamous crimes shall be registered" to vote, ROA.544, ROA.719-720., and that "infamous crime" included felonies, ROA.544, ROA.721. The 1880 Code similarly excluded any person "who

has been convicted of bribery, perjury, forgery, grand larceny or any felony" from voting. ROA.545, ROA.724.

In 1890, delegates convened and drafted the State's fourth Constitution. ROA.790-838. The 1890 framers addressed felon disenfranchisement in Article XII, Section 241. Consistent with the law since statehood, the 1890 framers' Section 241 included "bribery," "perjury," and "forgery" as disqualifying offenses. ROA.827. But the 1890 version of Section 241 narrowed the scope of other disenfranchising felonies to also disqualify from voting persons convicted of "burglary," "theft," "arson," "obtaining money or goods under false pretenses," "embezzlement," and "bigamy." ROA.827. The 1892 Code similarly provided that persons convicted of one of those crimes were disqualified from voting. ROA.839-840.

Six years after the 1890 convention, the Mississippi Supreme Court stated that the 1890 disenfranchisement provision of the Constitution reflected racial stereotypes of that era. This included the view that black Mississippians had "certain peculiarities of habit, of temperament, and of character" and that their race's "criminal members" were "given to rather furtive offenses than to the robust crimes of whites." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). The 1890 convention delegates thus, the Mississippi Supreme Court said, adopted an under-inclusive set of disenfranchising crimes in the original version of Section 241:

> Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone …. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while murder and robbery and other crimes in which violence was the principal ingredient were not.

Id. After *Ratliff*, the 1890 framers' version of Section 241's disenfranchising-felonies provision remained unchanged for almost sixty years.

In 1950, the State took the first of multiple fresh legislative actions regarding felon disenfranchisement. Two-thirds of each legislative house adopted, and a 66,077 to 14,862 majority of the State's electorate approved, an enactment eliminating burglary from Section 241's categories of felonies. Miss. Laws, 1950, ch. 569; ROA.842-843.

The State also revisited Section 241 in the 1960s. In 1965, a federal commission condemned Mississippi's voting laws and practices. *See generally Voting in Mississippi, A Report of the United States Commission for Civil Rights* (1965). The Commission's report concluded that the poll tax and literacy tests imposed in the 1890 Constitution were designed to exclude black Americans from voting, and the Commission called for their repeal. *Id* at 3-6, 61-63. The Commission also identified "other disabilities to voting" in Section 241 "which were thought to reflect the racial characteristics" of black Americans. *Id.* at 6. "The requirement

of long residency, two years in the State and one year in the election district," according to the Commission, "was aimed at the supposed" transitory nature of young black Americans. *Id.* The Commission further observed that Section 241's "disenfranchising crimes" included "burglary, theft, arson, and obtaining money or goods under false pretenses" because they were crimes "to which [black Americans] were thought to be particularly prone" while "[t]he more serious felonies of murder, rape, or assault were not included." *Id.*

The 1968 Mississippi Legislature addressed concerns that the Commission raised regarding Section 241. In February 1968, the House introduced House Concurrent Resolution No. 5, which proposed to replace Section 241, and brought the measure up for floor debate. *See* ROA.876-878. Through adopted floor amendments, representatives reduced Section 241's primary residency requirement from two years to six months, eliminated its poll-tax provisions, and deleted an exclusion of "Indians not taxed" from voting. ROA.876-878. A floor amendment also broadened Section 241's disenfranchising crimes by adding "murder" and "rape." ROA.877. Representatives confirmed that a purpose of the resolution was "to delete certain improper parts of" Section 241. ROA.881. The Senate modified the resolution's primary residency requirement to one year. ROA.891-892. The rest of the proposed changes, including the resolution's new disenfranchising crimes provision, were

ultimately approved by two-thirds of each legislative house, and later by a 136,846 to 59,888 majority of the State's electorate. Miss. Laws, 1968, ch. 614; ROA.912, ROA.914-915, ROA.965.

Nearly twenty years passed. Then, for a third time, in the mid-1980s, lawmakers revisited the State's felon disenfranchisement laws again. In 1984, a bipartisan and diverse Election Law Reform Task Force was appointed to review and revise the State's election laws. ROA.975-976, ROA.980-982. The Task Force held public hearings, received written information, and met with the U.S. Department of Justice. ROA.983, ROA.1072; *see also* ROA.984-1064. During the process, the Task Force recognized the State's then-existing code included burglary as a disenfranchising felony category, and thus did not conform to the present-day version of Section 241 enacted in 1968. ROA.1074.; *see* ROA.1072-1078. The Task Force also explicitly considered whether to expand the disenfranchising felonies, amend Section 241, or leave the law "as is." ROA.1074, ROA.1081.; *see* ROA.1072-1078, ROA.1080-1084. The Task Force ultimately determined the law should be left "as is." ROA.1081.

The legislature responded to the Task Force's work by forming a committee that studied the issues, held open meetings, and ultimately proposed legislation. ROA.1085-1123. The committee's report recommended amending Section 241 and further expanding the State's disenfranchisement laws to include all felony convictions, except

manslaughter and felony tax evasion, with restoration of voting rights upon completion of a convicted felon's sentence. ROA.1108-1110. Then, at the 1986 legislative session, committee members proposed a bill to establish a new election code which included provisions that broadened the categories of disenfranchising felonies to all felonies, excepting manslaughter and felony tax evasion. ROA.1124-1126. Lawmakers modified the bill through the legislative process to adopt the Task Force's "as is" recommendation, conform the state statutes' categories of felony disenfranchising crimes to the 1968 enactment's version of Section 241, and thereby eliminate burglary as a disenfranchising crime. ROA.1128-1131. In April 1986, the legislation passed by a vote of 51-1 in the Senate, and 118-3 in the House. ROA.1132. The U.S. Department of Justice subsequently pre-cleared the law. ROA.1137-1139. Then the enactment took effect, and its felon-disenfranchisement provisions are now codified, in pertinent part, at Mississippi Code §§ 23-15-11 and 23-15-19 (excluding as qualified electors any persons "convicted of vote fraud or of any crime listed in Section 241, Mississippi Constitution of 1890").

In 1998, a lawsuit claimed that Section 241 (as it was in effect then and as it remains in effect today) violates the Equal Protection Clause because it is traceable to the 1890 version of the law. *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). Upholding the rejection of that theory, 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," 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 *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 (convicted of forgery) and Kamal Karriem (convicted of embezzling public funds) are disqualified from voting under Mississippi law. ROA.568-569, ROA.579.

In 2017, plaintiffs sued the Mississippi Secretary of State, challenging present-day Section 241. ROA.27. Plaintiffs' operative complaint alleges that Section 241 violates their Fourteenth and Fifteenth Amendment rights because the 1890 version of the law was enacted with racially discriminatory intent. ROA.130-135. Plaintiffs seek a declaration that most of Section 241's disenfranchising-felonies provision is invalid and an injunction prohibiting Section 241's enforcement, except as to felonies classified as murder and rape. ROA.138.

The district court consolidated plaintiffs' lawsuit with a similar case (*Hopkins v. Hosemann*). After discovery, all parties moved for summary judgment. *See* ROA.535, ROA.1200, ROA.1537, ROA.2604. On August 7, 2019, the court granted the Secretary's motion on the merits as to plaintiffs' claims in this suit and denied plaintiffs' cross-motion. *See* ROA.4309-4327, ROA.4336-4337. First, the court ruled that *Cotton* required the rejection of plaintiffs' claims. ROA.4318-4322. 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. ROA.4319-4322. Second, the court alternatively held

that plaintiffs' claims fail because the State's comprehensive review of its disenfranchisement laws and deliberative legislative actions in the mid-1980s established that the State "would have passed section 241 as is without racial motivation." ROA.4327.; *see* ROA.4324-4327. The court also resolved most of the *Hopkins* claims, severed the lawsuits, and entered final judgment dismissing plaintiffs' claims in this case with prejudice. ROA.4338. Plaintiffs appealed. ROA.4339-4341. (The *Hopkins* parties separately appealed from the district court's ruling. *See* Fifth Circuit No. 19-60662, *consolidated with* No. 19-60678. That pending appeal is fully briefed and was argued in December 2019.)

A panel of this Court affirmed. The panel held that *Cotton* foreclosed plaintiffs' argument that Section 241 remained tainted by racially discriminatory intent. Panel Op. 5-6. The panel rejected plaintiffs' three arguments for not following *Cotton*. *Id.* at 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. *Id.* at 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." *Id.* (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. *Id.*; *see also id.* at 6-7. The panel emphasized the absence of "any evidence" that the re-enactments were themselves motivated by racial discrimination. *Id.* at 7. The panel also emphasized *Cotton*'s observation that the 1968 amendments—adding new crimes that were not thought to target black Mississippians—showed that the State had "'cure[d] the discriminatory taint of the entire provision.'" *Id.* (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). *Id. Perez* described the Supreme Court's 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, *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*. *Id.*

Plaintiffs sought rehearing en banc, which this Court granted on June 23, 2021. The Secretary of State submits this brief under the Court's

established schedule as a supplement to the Secretary's panel-stage brief, including his previously asserted jurisdictional arguments.

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment dismissing plaintiffs' complaint.

I. Under settled principles, when a State materially alters its felon-disenfranchisement laws through a deliberative legislative process, a challenger cannot rest on proof that discriminatory intent motivated the enactment of a prior law. Instead, the challenger must prove that discrimination motivated the intervening enactment under which the challenger stands disenfranchised today. That rule applies here to plaintiffs' challenge to Section 241 of the Mississippi Constitution, the State's disenfranchising-felonies provision. The State's intervening enactments in 1950 and 1968 substantively modified and re-enacted the provision through the State's comprehensive constitutional amendment process. The enactments addressed the under-inclusive discriminatory defect of the original provision. And plaintiffs have failed to demonstrate that discriminatory intent infected the process which produced the enactments. Their claims fail.

II. Alternatively, the State's more recent legislative actions establish that the State would have adopted Section 241's present

disenfranchising-felonies provision, as amended in 1968, without discriminatory motivation. In the mid-1980s, a specially appointed Election Law Reform Task Force and a select legislative committee fully considered the issue and recommended different approaches to reforming the State's felon disenfranchisement laws. In the end, the 1986 legislature adopted the Task Force's recommendation to effectively ratify and codify the present-day version of Section 241 and overwhelmingly passed legislation that aligned the provision with its implementing statutes. Discriminatory motives played no part in the legislature's actions, and the plaintiffs have never attempted to prove otherwise.

STANDARD OF REVIEW

The district court granted the Secretary of State's summary-judgment motion and denied plaintiffs' cross-motion. ROA.4338. This Court reviews a grant of summary judgment on cross-motions *de novo*, applying the same Rule 56 "analysis that guides the district court" and reviewing the competing motions "independently, with evidence and inferences taken in the light most favorable to the nonmoving party." *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 370 (5th Cir. 2005).

ARGUMENT

I. This Court Should Affirm Because The State's 1950 And 1968 Amendments To The Mississippi Constitution Produced A Felon-Disenfranchisement Provision That Comports With The Equal Protection Clause.

A. Section 241's disenfranchising-felonies provision is constitutional because intervening enactments in the 1950s and 1960s cured it of any unlawful taint.

1. The Constitution recognizes that a State may disenfranchise felons. A State may deny "the right to vote" "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. States thus have broad authority to "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).

That authority must, of course, be exercised consistently with other constitutional provisions. 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). *Hunter* held that a 1901 Alabama disenfranchisement law rested on such an improper motive and so violated the Equal Protection Clause. *Id.* at 227-32. The Court reasoned that because the law "produce[d] disproportionate effects along racial lines" and the plaintiffs proved that "racial discrimination" was a "'substantial' or 'motivating' factor" behind the law's enactment in 1901, "the burden shift[ed]" to the State to show "that the law would have been enacted without this factor." *Id.* at 227-28. The State failed to

demonstrate that lawmakers in 1901 had legitimate motives. *Id.* at 229-32. So the law was unconstitutional. *Id.* at 233.

When a State at one time acted based on such motives, under *Hunter* a State can remove the discriminatory taint that stained the original enactment. That had not happened in *Hunter*: Alabama had never legislatively altered or readopted its 1901 law. *Id.* at 233. And the Court held that prior *judicial* decisions, which invalidated "[s]ome of the more blatantly discriminatory" provisions of Alabama's law, did not remove the taint on the law. *Id.* But the Court left open the prospect that legislative actions—such as "enact[ing]" the 1901 disenfranchisement law "without any impermissible motivation"—could have led to a different result. *Id.*

Since *Hunter*, every federal court of appeals to consider that open question—including this Court—has adopted and applied an intervening-enactment rule. Under that rule, material alterations to a felon-disenfranchisement provision enacted through a "deliberative" legislative "process" presumptively cures the law of any invalidating "taint." *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998); *see Hayden v. Paterson*, 594 F.3d 150, 165-67 (2d Cir. 2010) ("substantive amendment" and lack of "allegations … of discriminatory intent reasonably contemporaneous to challenged decision" rendered disenfranchisement law constitutional) (internal quotation marks

omitted); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1225 (11th Cir. 2005) (en banc) (disenfranchisement law was "constitutional because it was substantively altered and reenacted … in the absence of any evidence of racial bias"). When faced with an intervening enactment, a challenge to a disenfranchisement law cannot rest solely on evidence that discrimination motivated an earlier enactment (or version) of the law. Rather, the challenger must prove that discriminatory intent motivated the intervening enactment under which the challenger is disenfranchised today. *Cotton*, 157 F.3d at 392 (the State's disenfranchisement law "as it presently exists is unconstitutional only if the amendments were adopted" with discriminatory intent); *see Hayden*, 594 F.3d at 167 (requiring proof "of discriminatory intent reasonably contemporaneous with" the "substantive amendment"); *Johnson*, 405 F.3d at 1223-24 (requiring "evidence of racial bias" in the process that led to the "substantively altered and reenacted" provision).

The intervening-enactment rule is sound and accords with established principles.

To start, the intervening-enactment rule respects the fact that States have wide latitude to set their felon-disenfranchisement policies. Again, the Constitution expressly recognizes that States may disenfranchise felons. U.S. Const. amend XIV, § 2. Felon disenfranchisement advances legitimate state interests in reserving the

franchise to the upright and protecting the integrity of elections. *E.g.*, *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (States may reasonably "decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases"); *Kronlund v. Honstein*, 327 F. Supp. 71, 72 (N.D. Ga. 1971) (three-judge court) (states have "an interest in preserving the integrity of [their] electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims ... [and] may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses"). An overwhelming majority of States have long advanced those interests by proscribing felon voting in some form. *See Green*, 380 F.2d at 450-51 & n. 5, 6 (29 of 36 state constitutions included felon-disenfranchisement provisions when the Fourteenth Amendment was adopted, and 42 state constitutions provided for felon disenfranchisement in the late 1960s); Roger Clegg, et al., *The Case Against Felon Voting*, 2 Univ. of St. Thomas J.L. & Pub. Policy 1 (Spring 2008) (as of 2008, 48 of 50 States "forbid[] felons from voting in varying degrees").

Next, the intervening-enactment rule honors the principle that courts presume that legislators have enacted laws in "good faith." *Miller*

v. Johnson, 515 U.S. 900, 915 (1995); *see Johnson*, 405 F.3d at 1223 n.19 (rejecting approach that would "reverse the presumption that" state laws "are constitutional, and plunge federal courts into far-reaching expeditions regarding the sins of the past in order to question the laws of today"). That principle fully applies when enactments follow past versions on the same subject matter. *See North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (district court's failure to apply "presumption of good faith" to enactment of new voter-ID law "was an unmistakable error"); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 945 F.3d 206, 216 (5th Cir. 2019) ("presumption of legislative good faith" is "not changed by a finding of past discrimination" as to prior regulations on the same subject) (internal quotation marks omitted). Thus, evidence that prior disenfranchisement laws "were motivated by a discriminatory purpose" does not establish that discrimination motivated an intervening enactment "which continues in effect today." *Hayden*, 594 F.3d at 165; *see Johnson*, 405 F.3d at 1223 (challenge to present law failed even assuming lawmakers adopted its predecessor for discriminatory reasons); *Cotton*, 157 F.3d at 392 (challenger's showing that the "original version" of the provision "was adopted for [a discriminatory] purpose" was "now-irrelevant" due to intervening enactments). Proof suggesting discrimination motivated a past enactment is (at most) weak evidence that a later enactment was so

motivated, particularly when decades have passed since the original enactment. *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion); *see Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016) (en banc) ("historical evidence" provides "little probative value when it is not "reasonably contemporaneous" to a challenged enactment) (internal quotation marks omitted); *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) (evidence that discrimination "le[d] to passage of a 1914 statute" was "of no relevance to [an] inquiry into the motives of the Congress that passed" a law on the same subject seventy years later).

Further, the intervening-enactment rule respects the principle that proof that discrimination motivated a past felon-disenfranchisement law does not shift the burden of proof to the State to "affirmatively prove that racial discrimination" did not factor into an intervening enactment or to establish that legislators "acknowledged that racial discrimination tainted" the prior version and "knowingly reenacted the disenfranchisement provision for non-discriminatory reasons." *Johnson*, 405 F.3d at 1225; *see Hayden*, 594 F.3d at 167 (challenge failed due to "the lack of any allegations by plaintiffs of discriminatory intent" relative to the intervening enactment); *Cotton*, 157 F.3d at 392 (state law "as it presently exists is unconstitutional only if the amendments were adopted" due to discriminatory motives). This is consistent with the established rule that proof of discriminatory motivations behind a past

enactment does not carry a challenger's burden to prove that discrimination motivated the enactment of the current law. *See Wal-Mart Stores*, 945 F.3d at 216 ("a finding of past discrimination" does not change "[t]he allocation of the burden of proof" on a discriminatory intent claim) (internal quotation marks omitted); *see also North Carolina State Conference of the NAACP*, 981 F.3d at 303 (failure to "hold [plaintiffs] to their burden of proving the General Assembly's discriminatory intent" based on judicial invalidation of prior iteration of the law "was an unmistakable error").

Last, and relatedly, the intervening-enactment rule recognizes that a past legislature's discriminatory motive cannot simply be imputed to lawmakers who adopt a different law decades later. *See Johnson*, 405 F.3d at 1226 (the "lack of proximity in time" between enactments showed it was "not reasonable to assign any impermissible motives" to lawmakers a century after the original enactment). A legislator's motives cannot be imputed to the entire legislature or even other legislators in the same legislature. *See Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2350 (2021) ("legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents"). That principle applies with even more force when challengers seek to impute past lawmakers' motives to a different lawmaking body that passed an intervening enactment many years later.

2. In *Cotton v. Fordice*, this Court applied the intervening-enactment rule in holding that a challenge to the Mississippi constitution's felon-disenfranchisement provision required the plaintiff to prove that discriminatory intent motivated the most recent enactment of the law. 157 F.3d 388 (5th Cir. 1998). In this case, the panel and the district court correctly viewed plaintiffs' challenge as materially indistinguishable from *Cotton* and rejected their attempts to distinguish the precedent. Panel Op. 4-7; ROA.4318-4324. All three decisions—*Cotton*, the panel opinion, and the district court's ruling—are correct. The en banc Court should reach the same conclusion. *Cotton* properly applied the intervening-enactment rule. Moreover, the record in this case, which includes proof not considered in *Cotton*, confirms that a deliberative legislative process produced the State's intervening enactments that materially altered Section 241. Plaintiffs have failed to prove discriminatory intent infected that process. The district court's judgment should thus be affirmed.

First, the State's 1950 and 1968 alterations to Section 241's felon-disenfranchisement provision were enacted through the deliberative legislative process prescribed by the state constitution. Mississippians have revised Section 241 five times over the past 130 years through the legislative amendment process (which was then, and is now, the only way to change the constitution apart from a new convention). *See* Miss. Laws,

1935, ch. 117; Miss. Laws, 1950, ch. 569; Miss. Laws, 1952, ch. 441; Miss. Laws, 1968, ch. 614; Miss. Laws, 1972, ch. 626. Two of those intervening enactments substantively altered Section 241's disenfranchising-felonies provision. Miss. Laws, 1950, ch. 569; Miss. Laws, 1968, ch. 614. In 1998, this Court determined that the State's multi-stage amendment process that produced those laws satisfied the intervening-enactment rule. *Cotton*, 157 F.3d at 391. That was correct. And the record in this case provides even more force for that conclusion.

In 1950, the State enacted House Concurrent Resolution 10 (HCR 10) which removed burglary from Section 241. Miss. Laws, 1950, ch. 569. Records show that HCR 10 was adopted through the then-required legislative process, published in advance of a statewide election, and enacted by a 66,077 to 14,862 vote. ROA.841-843.

In the 1960s, the State revisited the disenfranchisement provision again and enacted another new version. The historical record details the sequence of events relevant to the enactment. In 1965, after extensive investigation, the United States Commission on Civil Rights found that, as in other states, Mississippi's laws prescribing poll taxes and literacy tests unlawfully impeded black Mississippians from voting. *Voting in Mississippi, A Report of the United States Commission for Civil Rights* 3-6 (1965) (*Voting in Mississippi*). The Commission also criticized the lengthy residency qualifications and disenfranchising-felonies provision

in the original version of Section 241. *Id.* at 6. The Commission faulted the original version of Section 241 for including the "disenfranchising crimes" of "burglary, theft, arson, and obtaining money or goods under false pretenses" which "were those to which [black Mississippians] were thought to be particularly prone" while "[t]he more serious felonies of murder, rape, or assault were not included." *Id.* State lawmakers were undoubtedly aware of these findings. The Governor testified at the Commission hearings. *Id.* at 59. The Commission cited the Governor's testimony and other statements as "evidence of the beginning of a change in attitude towards Federal law" and willingness to accept "the requirements of the Constitution." *Id.* The State thereafter eliminated several constitutional provisions and laws that the Commission had identified as improper. *See Mississippi Freedom Democratic Party v. Democratic Party*, 362 F.2d 60, 62 & n. 1 (5th Cir. 1966).

Later, the 1968 legislature addressed the aspects of Section 241's voter qualifications addressed in the Commission's report. The multi-stage process required the legislature to craft and adopt a new version of Section 241 through its ordinary legislative procedures (which required approval by House and Senate committees, adoption by a two-thirds vote in each house following opportunities for floor debate and amendments, and adoption of a conference report by a joint conference committee and then both houses by a two-thirds vote), *see* ROA.926-957., and pass a

resolution containing the final version of the new provision by a two-thirds vote in each house, ROA.967-968. Then, after advance publication of the entire proposed new version of Section 241, a majority of voters had to ratify the resolution at a statewide election. ROA.967-968.

In February 1968, the House of Representatives introduced a committee-approved resolution to amend Section 241. ROA.875. The House took several steps showing that House Concurrent Resolution No. 5 (HCR 5) was well-debated and well-intentioned. ROA.876-878. On February 6, representatives modified HCR 5 through floor amendments. ROA.876-878. The amendments targeted the voter-qualification issues cited in the federal government's 1965 report. ROA.876-878. Through floor votes, representatives approved provisions that reduced the primary residency requirement for electors from two years to six months, eliminated Section 241's poll-tax provisions, and deleted the voting prohibition on "Indians not taxed." ROA.876-878. Representatives then addressed the federal government's objection to Section 241's disenfranchisement provision by expanding its scope to include "murder" and "rape." ROA.877. The House's floor actions on HCR 5 continued the next day, when representatives further amended HCR 5 to reflect a purpose to delete "certain improper parts" of Section 241 and passed the resolution by a two-thirds majority. ROA.881.

After HCR 5 was transferred and approved by the Senate Constitution Committee, senators adopted most of the House floor amendments, including the resolution's expansion of the disenfranchisement provision. *See* ROA.889-892. The Senate increased the House's proposed six-month residency requirement to one year. ROA.891-892. After a two-thirds majority approved the Senate's modified version of HCR 5, each house agreed to send the resolution to conference committee. ROA.892, ROA.897, ROA.905, ROA.907. The House and Senate later passed the conference report by two-thirds majorities—thus twice approving HCR 5's disenfranchisement provision by two-thirds votes. ROA.912-915.

In May, the Secretary of State published HCR 5's full text in state newspapers. ROA.958-960. The resolution required voters to ratify or reject the proposed new version of Section 241 by a majority vote. ROA.870-871. In June, an overwhelming majority of the electorate ratified HCR 5 by a vote of 136,846 to 55,888. ROA.965. Thirty days later, the newly approved version of Section 241 officially became part of the state constitution. ROA.962-964.

In sum, the State's 1950 and 1968 enactments resulted from the robust multi-stage process as state law required. And the relevant records of those events introduced in this case—which *Cotton* had no opportunity to consider—reaffirms its conclusion in that regard.

Second, the State's intervening enactments materially altered Section 241's disenfranchising felonies provision. *Cotton*, 157 F.3d at 391. The 1950 and 1968 enactments themselves (which *Cotton* relied upon) and the record evidence detailed above further confirms that conclusion.

Only a substantive alteration to a past version of state law is necessary to trigger the intervening-enactment rule. *Cotton*, 157 F.3d at 391; *see also Hayden*, 594 F.3d at 166-67 (change from permissive constitutional provision to a mandatory provision obligating legislature to enact felon-disenfranchisement laws); *Johnson*, 405 F.3d at 1220-21 (change eliminating misdemeanants from coverage of constitutional provision). That occurred here. The State's 1950 and 1968 enactments targeted the original disenfranchising-felonies provision's "discriminatory taint" by "removing 'burglary'" and then "broaden[ing] the provision by adding 'murder' and 'rape.'" *Cotton*, 157 F.3d at 391. That is evident from the text and nature of the enactments. *See Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (observing that the "meaningful alterations" made by the 1950 and 1968 enactments were "dramatic" because they "added categories of crimes originally excluded because they were not considered 'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime") (citing *Cotton*, 157 F.3d at 391).

Moreover, the State's substantive changes to Section 241 addressed the discriminatory defect in the original version of its felon-disenfranchisement provision. The original Section 241's flaw was its under-inclusion of some felonies for discriminatory purposes. The only contemporaneous evidence of the 1890 framers' motivation regarding their selections is the Mississippi Supreme Court's decision in *Ratliff v. Beale*, 20 So. 865 (Miss. 1896). *Ratliff* said that the framers accomplished their discriminatory objective by including "[b]urglary, theft, arson, and obtaining money under false pretenses" in their version of Section 241 while excluding "murder and robbery and other crimes in which violence was the principal ingredient." *Id.* at 868. The 1965 United States Commission on Civil Rights interpreted *Ratliff* as finding the under-inclusion of felony categories as the discriminatory flaw in the original Section 241. Its report faulted the original version of Section 241 for including "burglary, theft, arson, and obtaining money or goods under false pretenses" but not "[t]he more serious felonies of murder, rape, or assault." *Voting in Mississippi* 6. Dr. Dorothy Pratt (an expert for the *Hopkins* plaintiffs in the consolidated cases below) stated that the 1890 version "notably omitted violent crimes, such as murder and rape, and instead focused on property related offenses." ROA.1267. The other retained expert in this case, Dr. Robert Luckett, did not independently opine on specific felonies in the original version. ROA.2611-2613. These

sources confirm that, by eliminating burglary and adding murder and rape, the State's intervening enactments materially altered Section 241 and squarely addressed what the evidence here shows was the original version's under-inclusive defect.

Third, plaintiffs have failed to establish that discriminatory intent motivated the 1950 and 1968 enactments. Plaintiffs must prove that the intervening enactments that established the "current version" of Section 241 were "adopted out of a desire to discriminate" against black Mississippians. *Cotton*, 157 F.3d at 392; *see Hayden*, 594 F.3d at 166 (failure to plead a plausible claim of "intentional discrimination" as to the State's constitutional provision adopted in 1894 "which continues in effect today"); *Johnson*, 405 F.3d at 1223 & n.19 (failure to allege the State's present-day law enacted in 1968 "was adopted with the intent to discriminate based on race"). They have failed to meet that standard based on the record evidence in this case.

The panel in this case recognized that *Cotton* would not foreclose plaintiffs' claims if they proved that racial discrimination motivated the 1950 and 1968 enactments. Panel Op. 6-7. On that point, the panel held that "general Mississippi history" offered by plaintiffs was not up to the task. *Id.* at 7. In the panel's view, plaintiffs' historical references to the "racial composition of the [1950 and 1968] Mississippi legislatures and general resistance to desegregation in Mississippi" in that era—failed to

demonstrate that the 1950 and 1968 enactments "were adopted out of a desire to discriminate against blacks." *Id.* at 6 (internal quotation marks omitted). The district court reached the same conclusion. ROA.4321-4322. Those findings were correct. Faced with a charge of "racially discriminatory intent or purpose," this Court looks to "historical background of the decision," "the specific sequence of events leading up to the decision," "departures from the normal procedural sequence," "substantive departures," and "legislative history, especially where there are contemporary statements by members of the decision-making body," to "determine whether [the] particular decision was made with a discriminatory purpose." *Veasey*, 830 F.3d at 230-31 (internal quotation marks omitted). Following those guideposts, plaintiffs here must prove that "racial discrimination was a substantial or motivating factor behind [the] enactment of" HCR 5 (which established Section 241's current disenfranchisement provision). *Id.* at 231 (quotation marks omitted). They fell far short of that burden.

The historical background of the sequence of events directly related to HCR 5 is significant. The enactment followed shortly after the federal government's finding in 1965 that the original version of Section 241 intentionally failed to include "[t]he more serious felonies of murder, rape, or assault." *Voting in Mississippi* 6. That observation is the only historical material on disenfranchisement contemporaneous with HCR

5's enactment in any materials cited to this Court by either side. HCR 5's legislative record evinces an intent to remedy the problem identified by the federal government. *See* ROA.872-925. Moreover, the historical backdrop of state disenfranchisement policies in the late 1960s is relevant. At the time, forty-two state constitutions provided for felon disenfranchisement, and "the propriety of excluding felons from the franchise ha[d] been ... frequently recognized" by the Supreme Court. *Green*, 380 F.2d at 451. Together, the contemporaneous history and sequence of events specific to HCR 5's enactment do not support the view that discrimination factored in HCR 5's passage or subsequent ratification.

No procedural or substantive departures from any ordinary process led to HCR 5's enactment. Plaintiffs have never contended otherwise. As detailed above, every required step in the multi-stage process that produced HCR 5 was followed. *See* ROA.872-925, ROA.926-957, ROA.967-968.

HCR 5 further dispels any notion that the legislature formulated and passed the resolution with impermissible intent. As noted previously, HCR 5 remedied specific defects the federal government had previously identified in the original version of Section 241. The records of the legislature's actions confirm that that was the objective. After HCR 5 was introduced, the House proposal reduced Section 241's voter-

residency requirement from two years to six months, struck its poll-tax provision, eliminated its "Indians not taxed" exclusion, and added murder and rape to the disenfranchising-felonies provision previously enacted in 1950. ROA.876-878. The House also added that a purpose of the resolution was "to delete certain improper parts" of Section 241. ROA.881. The Senate amended the House's proposal to change the residency requirement to six months but concurred in the other amendments. ROA.891-892. Then, after both houses passed the resolution by supermajorities, the voters approved HCR 5 by an overwhelming majority at a statewide election. ROA.912, ROA.914-915, ROA.965.

All told, the State's post-1890 enactments show legitimate motivations—indeed, counter-discriminatory motivations—to bring Section 241's disenfranchising felonies provision in line with federal law. *See Wal-Mart Stores*, 945 F.3d at 216 (proof that "the drafter sought to create a law that would survive a constitutional challenge is not evidence of a discriminatory legislative purpose"). Nothing in the record proves otherwise. Plaintiffs have failed to establish that Section 241's present-day felonies provision was enacted with discriminatory intent. The district court's judgment should be affirmed.

B. Plaintiffs' arguments against the 1950 and 1968 intervening enactments lack merit.

Plaintiffs maintain that the 1950 and 1968 enactments fail to harmonize Section 241 with the Equal Protection Clause. *See* Pl. Br. 26-48. They are wrong.

1. Plaintiffs' lead argument is that this Court's decision in *Cotton v. Fordice* rests on "factual and legal errors." Pl. Br. 37; *see id.* at 36-47. This Court did not err. But even if plaintiffs' charge were true, full reconsideration of the issues on this factual record re-proves that *Cotton* applied a sound rule and reached the correct outcome.

First, plaintiffs contend that *Cotton*'s reliance "on the deliberative process used to amend § 241 ... is untenable" because the State must prove sufficient "justifications" for the 1950 and 1968 enactments. Pl. Br. 42 (internal quotation marks and citation omitted). They are wrong.

To start, in 1950 and 1968, the State's multi-stage constitutional amendment process was the only legislative way to "remove" the alleged "discriminatory taint associated with" Section 241's "original version." *Cotton*, 157 F.3d at 391. Plaintiffs admit that that process was required to change the constitution. Pl. Br. 43. And there is no dispute that the enactments were properly adopted through that process. Plaintiffs' real quarrel is that "the legislative materials cited by the *Cotton* panel" do not prove the "legislature ever considered, much less agreed upon

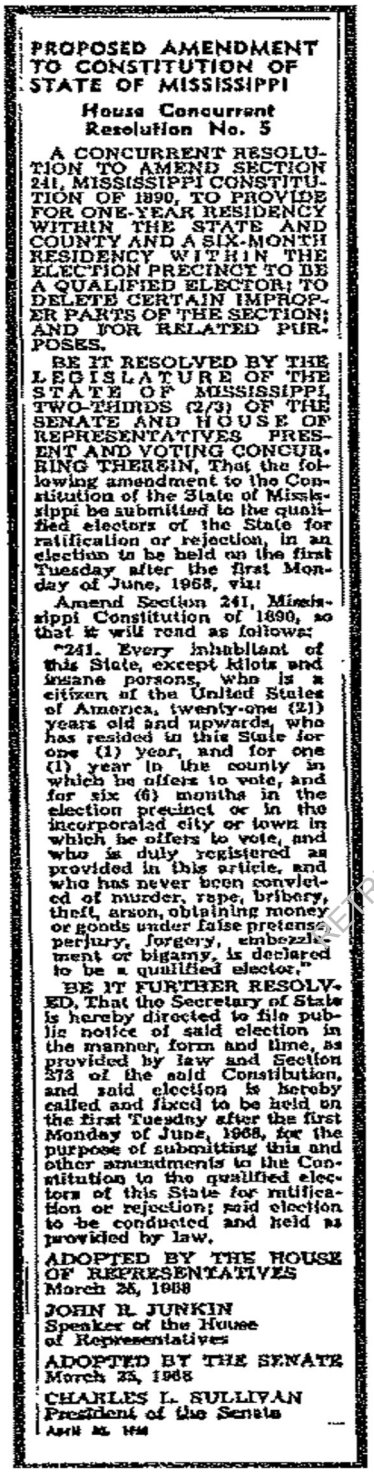
nondiscriminatory justifications" for the disenfranchising felonies in the 1950 and 1968 enactments. Pl. Br. 42. But the State is not required to marshal such proof. The 1950 and 1968 enactments were legislation. When States pass legislation, federal courts presume "legislative good faith" even if suspicions of "past discrimination" are involved. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 945 F.3d 206, 216 (5th Cir. 2019) (internal quotation marks omitted); *see also North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020). And when legislation is challenged as discriminatory, "a finding of past discrimination" does not alter "[t]he allocation of the burden of proof." *Wal-Mart Stores*, 945 F.3d at 216. (internal quotation marks omitted). *Cotton* honored those principles. The legislative process—a robust process—produced the 1950 and 1968 enactments. Lawmakers had to make policy decisions as to which disenfranchising felonies to add, subtract, or keep, and a supermajority agreed on those choices. *E.g.*, ROA.872-925. Then the voters had to ratify the final product. *E.g.*, ROA.958-965. That legislators made those decisions in reconsidering a past alleged constitutionally infirm policy is more reason that "the presumption of legislative good faith" applies to their decisions. *Wal-Mart Stores*, 945 F.3d at 217. Indeed, when the challengers' alleged proof of discrimination is "based only on [then-]recent history," as here, courts cannot "flip[] the evidentiary burden on its head." *Id.* (internal quotation

marks omitted). The State thus has no obligation to prove exactly what legislators "considered" and that they "agreed upon nondiscriminatory justifications" for their decisions. Pl. Br. 42. Nor must the State prove that legislators "conveyed" their thoughts "to the State's voters" who voted overwhelmingly to enact new versions of Section 241 into law. *Id.* The "burden flip" that plaintiffs seek to achieve is not the law. *Wal-Mart Stores*, 945 F.3d at 216; *see Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1224-25 (11th Cir. 2005) (en banc); *Cotton*, 157 F.3d at 391.

Second, plaintiffs argue that *Cotton* "incorrectly assumed" that voters were asked to "re-enact" Section 241's disenfranchising-felonies "provision in its entirety." Pl. Br. 37; *see id.* at 37-42. That was so, they believe, because "the panel did not have access in the record to the ballot language that accompanied the 1950 and 1968 amendments." *Id.* at 39. Plaintiffs' contention is unavailing.

The official "ballot language" was not in *Cotton*'s record but that aids plaintiffs little. This Court did not "mistakenly," as plaintiffs contend, believe that voters were presented with something other than an "up" or "down" vote on the 1950 and 1968 legislative resolutions. This Court had access to the resolutions. *See Cotton*, 157 F.3d at 391 (citing H. Cons. Res. 10 (1950); H. Con. R. 5 (1968)). The resolutions were published before the state-wide votes. ROA.841, ROA.958. The

resolutions were published in full and required voters to ratify or reject the proposed new versions of Section 241 "so that it will read as follows":



PROPOSED AMENDMENT TO CONSTITUTION OF STATE OF MISSISSIPPI

House Concurrent Resolution No. 5

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.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, TWO-THIRDS (2/3) OF THE SENATE AND HOUSE OF REPRESENTATIVES PRESENT AND VOTING CONCURRING THEREIN, That the following amendment to the Constitution of the State of Mississippi be submitted to the qualified electors of the State for ratification or rejection, in an election to be held on the first Tuesday after the first Monday of June, 1968, viz:

Amend Section 241, Mississippi Constitution of 1890, so that it will read as follows:

"241. Every inhabitant of this State, except idiots and insane persons, who is a citizen of the United States of America, twenty-one (21) years old and upwards, who has resided in this State for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct 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 murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector."

BE IT FURTHER RESOLVED, That the Secretary of State is hereby directed to file public notice of said election in the manner, form and time, as provided by law and Section 273 of the said Constitution, and said election is hereby called and fixed to be held on the first Tuesday after the first Monday of June, 1968, for the purpose of submitting this and other amendments to the Constitution to the qualified electors of this State for ratification or rejection; said election to be conducted and held as provided by law.

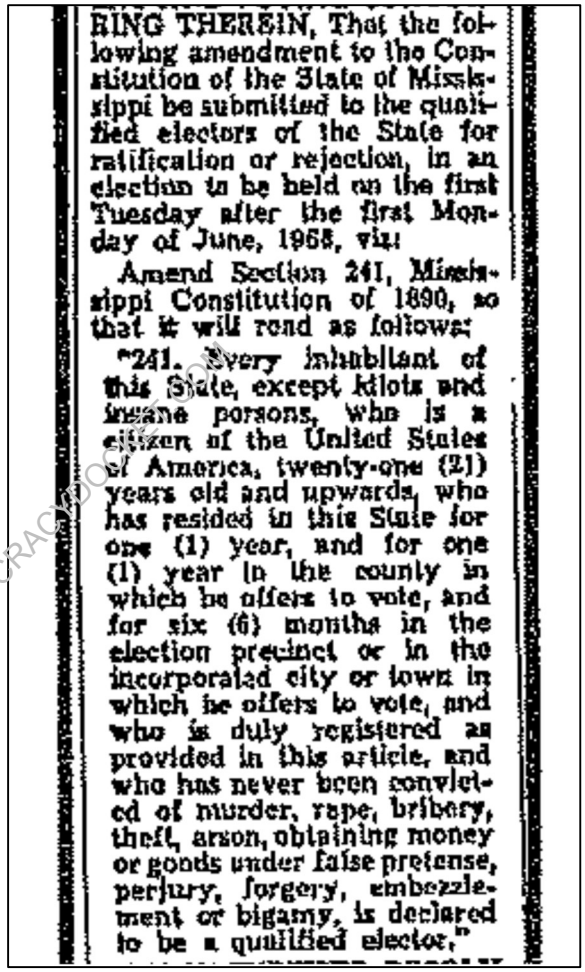
ADOPTED BY THE HOUSE OF REPRESENTATIVES
March 26, 1968

JOHN R. JUNKIN
Speaker of the House of Representatives

ADOPTED BY THE SENATE
March 25, 1968

CHARLES L. SULLIVAN
President of the Senate

April 26, 1968



RING THEREIN, That the following amendment to the Constitution of the State of Mississippi be submitted to the qualified electors of the State for ratification or rejection, in an election to be held on the first Tuesday after the first Monday of June, 1968, viz:

Amend Section 241, Mississippi Constitution of 1890, so that it will read as follows:

"241. Every inhabitant of this State, except idiots and insane persons, who is a citizen of the United States of America, twenty-one (21) years old and upwards, who has resided in this State for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct 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 murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector."

ROA.958; *see also* ROA.841. The "ballot language" that plaintiffs tout likewise reprinted the resolutions and contained the full text of Section 241 that voters were asked to ratify and thereby enact as law. ROA.2641, ROA.2645. Each time, a vote "For Amendment" approved of the new proposed version and a vote "Against Amendment" disapproved. ROA.2641-2642, ROA.2645. Thus, for each election, the full text of the new versions of Section 241 to be approved was published in advance and on the ballots.

Plaintiffs also insist that the 1950 and 1968 enactments did not effectuate a full "re-enactment" (Pl. Br. 39) because voters lacked "the option of reenacting or repealing the original provisions of Section 241 challenged in this case" (*id.* at 40). This too is flawed.

Plaintiffs' argument ignores the required legislative process for amending the state constitution and their burden of proof. The 1950 and 1968 resolutions only gave voters a "choice ... to ratify or reject amendments that added or subtracted" disenfranchising felonies. Pl. Br. 40. But legislators decided what to add, subtract, or keep in Section 241. Then the voters enacted the law by ratifying those choices. In this case, as in *Cotton*, plaintiffs have failed to prove that the choices of anyone involved in that process were motivated by discriminatory intent. *See supra* Part I-A-2.

Plaintiffs' ballot-language argument also overlooks the legal effect of the 1950 and 1968 enactments. The new constitutional provisions became Section 241 when, as required by law, they were "inserted as a part of the Constitution by proclamation of the secretary of state certifying that [they] received the majority vote required by the Constitution." ROA.967-968; *see also* ROA.841-843, ROA.962-964. When that happened each time, under Mississippi law, the previous version then "ceased to exist." *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 639 (Miss. 1991) (a statutory "amendment itself overrules the prior interpretation, which for all practical purposes becomes relegated to history," and that "same principle" applies to constitutional amendments). *Cotton* was thus correct. As a matter of law, "Mississippi's procedure resulted both in 1950 and 1968 in a re-enactment of § 241, [and] *each enactment superseded the previous version*." 157 F.3d at 391 (emphasis added). The current version of Section 241 is legally operative today—not some previous iteration.

Third, plaintiffs fault this Court for allegedly failing to consider the "historical context" of the 1950s and 1960s. Pl. Br. 43-46. They argue that *Cotton* "gave no indication that it ever considered" that "history" and failed to explain how the 1950 and 1968 enactments "cleansed the original Section 241 of its discriminatory origins in light of that history." *Id.* at 43. It is true that this Court's opinion did not discuss the history

that plaintiffs believe is relevant. But that fails to prove *Cotton* wrong, much less that the present-day version of Section 241 is invalid based on their generalized account of Mississippi history.

Cotton explained how the 1950 and 1968 enactments "cleansed" Section 241 of "its discriminatory origins" (Pl. Br. 43): substantive constitutional amendments enacted through legislative means. 157 F.3d at 391. The State willingly "remov[ed]" a crime which, according to *Ratliff v. Beale*, was originally included for discriminatory purposes, then "broadened" the provision to include violent crimes that *Ratliff* said were excluded for that purpose. *Id.* Those legislative alterations were material and substantial—and they cured the original Section 241's under-inclusiveness. *See Veasey v. Abbott*, 888 F.3d 792, 821 (5th Cir. 2018) ("The passage of time and the actions of intervening parties cut the thread of [discriminatory] intent in *Cotton*: two legislatures, acting eighteen years apart (with the first acting sixty years after the offending constitutional provision was enacted) approved the amendments by two-thirds majorities, and then the entire sections—not just the amendments—were subject to statewide votes in favor of full reenactment.") (Graves, J., concurring in part and dissenting in part); *Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (recognizing the 1950 and 1968 enactments effectuated "meaningful alterations" by adding crimes originally excluded because "they were not considered

'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime") (citing *Cotton*, 157 F.3d at 391); *see also supra* Part I-A-2. Indeed, the only judge who dissented from the Eleventh Circuit's application of the intervening-enactment rule in *Johnson* acknowledged that Mississippi's intervening enactments removed the discriminatory defect in Section 241's original version: "the legislative amendment process in *Cotton* proceeded as the converse of the enactment process: the amendment removed those aspects of the law shown to be rooted in racial animus." *Johnson*, 405 F.3d at 1246 (Barkett, J., dissenting). The general Mississippi history that plaintiffs offer does not undermine that conclusion, much less carry their burden to prove that discrimination motivated the enactment of present-day Section 241's disenfranchising crimes provision. *See supra* Part I-A-2.

2. Next, plaintiffs turn to *Abbott v. Perez*, 138 S. Ct. 2305 (2018) for support. Pl. Br. 46-47. *Perez* includes a paragraph about *Hunter v. Underwood*, 471 U.S. 222 (1985), and, in plaintiffs' view, that "description of *Hunter* is precisely the situation before the panel in *Cotton*, and which this case presents again." *Id.* at 46. Plaintiffs' view of *Perez* is unsound.

In *Perez*, Texas adopted redistricting plans in 2013 that included some districts carried over from 2011 plans that, the challengers contended, were enacted with discriminatory intent. 138 S. Ct. at 2315-17. The district court flipped the burden of proof to require Texas to prove

that the 2013 legislature's adoption of certain carried-over districts was not motivated by discriminatory intent. *Id.* at 2317-18. In rejecting that burden flipping, the Supreme Court distinguished *Hunter*. The Court observed that the "situation" was not "like the one in *Hunter*" where Alabama's law "was never repealed, but over the years, the list of disqualifying offenses had been pruned." *Id.* at 2325 (citing *Hunter*, 471 U.S. at 232-33). *Hunter* had rejected the argument that "what remained was facially constitutional," the Court observed, "because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. But [*Hunter*] specifically declined to address the question whether the then-existing version would have been valid if [re]enacted today." *Id.* (citing *Hunter*, 471 U.S. at 233) (second alteration in original).

Plaintiffs emphasize *Perez*'s statement that the "'amendments'" in *Hunter* "'did not alter the intent with which the article, including the parts that remained, had been adopted,'" Pl. Br. 46 (quoting *Perez*, 138 S. Ct. at 2325), to contend that here "neither the 1950 nor 1968 amendments could have altered the intent with which the original list of crimes in Section 241 was adopted." *Id. Perez*'s description of *Hunter* does not aid plaintiffs. Although *Perez* referred to the judicial decisions at issue in *Hunter* as "amendments," *Hunter* did not reject the proposition that legislatively amending an originally defective law can rehabilitate

it: indeed, it left that issue open. *See* 471 U.S. at 233 (declining to opine on whether the remaining enforceable provisions in Alabama's law "would be valid if enacted today without any impermissible motivation"); *see also Johnson*, 405 F.3d at 1223 n.20 (*Hunter* "concluded that revision to [Alabama's] provision by *state courts* ... did not purge the provision of its *legislative* intent," but "did not hold that intervening *legislative* changes to the policy would have been legally insufficient to remove an earlier discriminatory intent") (emphasis in original); *Cotton*, 157 F.3d at 391 n. 7 (*Hunter* "left open" the question whether legislatively enacted "constitutional alterations could cure an originally defective constitutional provision").

This case is not *Hunter*. And it is not *Perez*'s description of *Hunter*—no matter how many times plaintiffs quote that description throughout their brief.

3. Next, plaintiffs contend that their "case is indistinguishable" from *Hunter*. Pl. Br. 29; *see id.* at 29-30, 33-36. That is incorrect. Mississippi's post-1890 legislative actions separate Section 241 from the legislatively unaltered 1901 misdemeanant-disenfranchisement law at issue in *Hunter*. *See supra* Part I-A-2 and *infra* Part II-A. This case also differs materially from *Hunter* because plaintiffs have failed to carry their burden to prove disparate impact. *See* Pl. Br. 33-36.

Plaintiffs contend that they "need not prove discriminatory impact to prevail." Pl. Br. 33. But that is wrong. *Hunter*'s analysis applies only in the first instance to "a neutral state law that produces disproportionate effects along racial lines." 471 U.S. at 227. There, the plaintiffs proved that Alabama's law caused both a contemporaneous disparate impact in 1901 and at present. *Id.* Plaintiffs here have never made a sufficient showing on either front.

As to impact proof contemporaneous to the enactment of Section 241's original disenfranchising-felonies provision, plaintiffs argue that "no one has been able to uncover comparable turn-of-the-century evidence in Mississippi" that compares to *Hunter*. Pl. Br. 35. Then they contend that proof of disparate impact caused by all the State's 1890-era voting laws carries their burden. *Id.* Whether that could satisfy their burden or not, plaintiffs offer no impact proof relative to the intervening 1950 and 1968 enactments that produced present-day Section 241. Nor have they proven any impact proximate to the State's legislative actions in the 1980s. That lack of that impact proof shows their claim is not on "all fours" with *Hunter*. *Id.* at 26.

Plaintiffs' proof of alleged present-day impact is also deficient. Even if past impact proof were unnecessary, *Hunter*'s rule requires proof of discriminatory intent *and* proof that "the section continues to this day to have that effect." *Hunter*, 471 U.S. at 233; *see also Cotton*, 157 F.3d at

392 n. 9 (noting proof of discriminatory intent and effects are required). They argue that statistics show that black Mississippi adults "are 2.7 times more likely than white adults" to be convicted of a disenfranchising felony under present state law. Pl. Br. 34. The record does not explain how plaintiffs' methodology comports with their legal theories. Moreover, plaintiffs' argument ignores key data. The breakdown of convictions by race and crime category in plaintiffs' data set is:

Mississippi Criminal Convictions 1994-2017
by Crime Category and Race (*see* ROA.563-564, ROA.1143-1149.)

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

As the data shows, black and white Mississippians accounted for 112,356 and 77,216 criminal convictions in plaintiffs' data set. Among persons convicted of crimes, the convictions for disenfranchising felonies, by race, included 25,353 and 16,400. That means that, among total convictions of black Mississippians, approximately 29% (25,353/112,356) were

convicted of a disenfranchising felony. The same comparison for white Mississippians shows that approximately 27% (16,400/77,216) were disenfranchised. In other words, black and white Mississippians convicted of crimes are disenfranchised at nearly the same rate. That is not proof of disparate impact—it is a slight difference that refutes plaintiffs' argument that their case is "indistinguishable from *Hunter*." Pl. Br. 29. Indeed, they have not even proven the present-day impact required to prevail under *Hunter*.

4. Last, as they have throughout this case, plaintiffs assert that they are challenging only the "original list" of crimes in Section 241's "original version" rather than the law "as it presently exists." Pl. Br. 47 (quotation marks omitted). That self-declared constraint, plaintiffs insist, makes *Cotton* "distinguish[able] if the full Court is not prepared to overrule it" because it presented a different "challenge ... to the entire provision as it has existed since 1968." *Id.* at 48.

This argument is absurd. Plaintiffs are disenfranchised under current state law. Saying that they are only challenging a law as it no longer exists does not make it so. Nor does that distinguish *Cotton*—a challenge also premised on a past law and brought by a felon disenfranchised under current state law. 157 F.3d at 389-90. The intervening-enactment rule does not evaporate because plaintiffs focus

their argument on a prior, now non-existent version of Section 241. *See id.* at 391-92; *Hayden*, 594 F.3d at 162-67; *Johnson*, 405 F.3d at 1223-27.

II. Alternatively, This Court Should Affirm Because The State's Post-1968 Legislative Actions Confirm That Section 241's Disenfranchising-Felonies Provision Is Constitutional.

A. Section 241's disenfranchising-felonies provision is constitutional because the State has ratified and codified the provision over the past thirty-five years.

As *Cotton v. Fordice* recognized, Section 241's original enactment in 1890 was not "the end of the story." 157 F.3d 388, 391 (5th Cir. 1998). But the State's 1950 and 1968 enactments that *Cotton* relied on are likewise not the end of the story. Because the plaintiff in *Cotton* failed to prove that discrimination motivated the 1950 and 1968 enactments, there was no reason for *Cotton* to consider the State's later adoption and codification of Section 241's present-day disenfranchising felonies. Yet—as the district court here correctly held—even if *Cotton*'s conclusions about 1950 and 1968 were unsound, Mississippi's post-1968 legislative actions independently defeat plaintiffs' claims.

1. In the mid-1980s, Mississippi lawmakers resolved to revise and streamline the State's election laws. Andrew Taggart & John C. Henegan, *The Mississippi Election Code of 1986: An Overview*, 56 Miss. L.J. 535, 536 (1986) (*Election Code of 1986*). To accomplish that goal, in Spring 1984, Democratic Secretary of State Dick Molpus assembled an

Election Law Reform Task Force. ROA.975-979. The 25-member Task Force included a diverse group of legislators, executive branch officials, local election officials, party officials, and members of the public-at-large. ROA.980-982; *see Election Code of 1986* at 538. Over seven months, the Task Force conducted public meetings, accepted public comments, and deliberated over the State's election laws. *See* ROA.983-1084. During the process, U.S. Department of Justice officials met with the Task Force to discuss the "functioning of the Voting Rights Act" and the "Department's approval procedures." *Election Code of 1986* at 540. The exchange "also allowed the Justice Department an opportunity to observe firsthand the racial composition of the Task Force and the genuineness of the interaction between its members." *Id.*; *see also* ROA.1072-1078. The Task Force's work included an examination of the State's felon disenfranchisement laws. A range of different options were considered: expanding disenfranchisement to all felonies; amending Section 241; and leaving the disenfranchisement laws "as is." ROA.1066, ROA.1074, ROA.1081. The Task Force also recognized that then-existing code section 23-5-35 governing voter qualifications had never been amended to exclude burglary. ROA.1074.

In late 1984, the Task Force completed its work and proposed legislation styled "The Election Reform Act of 1985." *Election Code of 1986* at 541. The legislation failed to gain traction in the 1985 legislature.

Id. But the legislature appointed a Joint Interim Study Committee on Elections to investigate further. *See* ROA.1085-1123. The Study Committee considered the Task Force's proposals, held public meetings, and devised its own proposals, including a recommendation to change the State's felon-disenfranchisement laws. ROA.1086-1087, ROA.1089, ROA.1093, ROA.1108-1110. Before the 1986 regular session, the Study Committee released a report that recognized the State's disenfranchising felonies included those in Section 241, as amended in 1968, and burglary, which had remained codified as a disenfranchising crime over the years; proposed to expand the list to all felonies, except manslaughter and tax evasion, with restoration of voting rights following completion of sentence; and resolved to propose amendments to effectuate its recommendations. ROA.1108-1110.

At the 1986 legislative session, based on the work of the Task Force and Study Committee, lawmakers introduced 1986 Senate Bill 2234 (SB 2234). *Election Code of 1986* at 543. On felon disenfranchisement, as originally proposed, SB 2234 would have expanded the then-current code's primary disenfranchisement provision found at section 23-5-35 from "murder, rape, bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, [and] bigamy" to encompass convictions "in any court of this state or any other state or in any federal court of any felony other than manslaughter or

any violation of the United States Internal Revenue Code." *Compare* ROA.1135-1136. *with* ROA.1124-1126. As SB 2234 moved through the legislative process, lawmakers modified it. The conference report on SB 2234 eliminated burglary from section 23-5-35 (as the Task Force and Study Committee had identified) and codified Section 241's present-day felonies provision by replacing the then-present code's list of disenfranchising felonies with convictions for "any crime listed in Section 241" of the constitution. ROA.1128-1131.; *see also* ROA.1135-1136. The legislature passed SB 2234 by an overwhelming bipartisan House vote of 118 to 3 and Senate vote of 51 to 1. ROA.1132. SB 2234 thereby officially eliminated burglary and adopted Section 241—as enacted in 1968—as the State's disenfranchising felonies. And the Department of Justice later precleared the legislation by letters issued in late-December 1986 and early-January 1987. ROA.1133-1136, ROA.1137-1139. SB 2234 then took effect, and its disenfranchising-felonies provision was codified at current code sections 23-15-11 ("voter qualifications, generally") and 23-15-19 ("persons convicted of certain crimes not to be registered"). (The legislature has also further modified those code sections several times since 1986, including a substantive change in 2012 that added vote fraud as a disenfranchising felony. Miss. Code Ann. § 23-15-11 (qualified electors include "[e]very inhabitant" meeting all other requirements and

who "has never been convicted of vote fraud or of any crime listed in Section 241, Mississippi Constitution of 1890"); *id.* § 23-15-19 (similar).)

2. For two primary reasons, these legislative actions over the past thirty-five years defeat plaintiffs' claims even if the 1950 and 1968 enactments did not.

First, the State's post-1968 legislative actions ratified and codified present-day Section 241, and further materially altered the State's felon disenfranchisement laws. *Cotton*, 157 F.3d at 391-92; *see Hayden v. Paterson*, 594 F.3d 150, 166-67 (2d Cir. 2010); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1220-21 (11th Cir. 2005) (en banc). After extensively re-examining the State's election laws, including its disenfranchisement provisions, the 1986 legislature ratified and codified Section 241's disenfranchising-felonies provision as enacted in 1968—not the now non-existent version of 1890. ROA.1128-1131. The legislation materially altered state law by removing burglary from the disenfranchising felonies provision in the former code. *See* ROA.1124-1126, ROA.1135-1136. (Not only did that legislation align the code with present-day Section 241's felonies provision, but it also had a significant practical impact. The legislature's action, in effect, enfranchised at least 24,385 persons convicted of burglary (which is more than half of the total number of currently disenfranchised felons convicted of other crimes identified in plaintiffs' data set). *See* ROA.1150, ROA.2740.) The

legislature's actions also added vote fraud in 2012 (with the federal government's approval) to expand the State's disenfranchising felonies. Under the intervening-enactment rule, plaintiffs must show that discriminatory intent motivated the legislature's actions. *Cotton*, 157 F.3d at 391-92; *see Hayden*, 594 F.3d at 165-67 (2d Cir. 2010); *Johnson*, 405 F.3d at 1224. But they have never argued, much less proven, that any such intent motivated any of these legislative actions.

Second, the legislative actions in the mid-1980s carry any burden of proof that could be required of the State here. If the State must prove anything, its burden is to demonstrate that the current version of Section 241 "would have been enacted" absent impermissible motivation. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *see Johnson*, 405 F.3d at 1224-25 (the State must prove that the "state would enact" its present-day law "even without an impermissible motive"). The unrebutted evidence here satisfies that standard. After multiple stages of review, the 1986 legislature ratified and codified the *current* version of Section 241. Racial motivations played no part in the process. And plaintiffs have never alleged otherwise.

B. Plaintiffs' attempts to marginalize the State's legislative actions are meritless.

Plaintiffs have no proof to counter the State's post-1968 legislative actions. Instead of offering proof, they contend that the district court's

alternative holding "fails at every level" because those actions were alleged "legislative inaction." Pl. Br. 49. That is wrong.

States may "exclude some or all convicted felons from the franchise." *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974). The Task Force and the legislature may not have "weigh[ed] and balance[d]" the felon disenfranchisement issue and reached what, in plaintiffs' view, would have been a "more enlightened and sensible" conclusion. *Id.* at 55. But that is not "inaction." The Task Force, a joint committee, and the entire legislature fully considered different courses of action. Then the legislature (which, by the mid-1980s, was diverse both in terms of race and party affiliation) voted to keep state law as is, by an overwhelming margin, and aligned the Election Code with Section 241's present-day version. *See* ROA.1132, ROA.1135-1136. That decision was not "legislative inaction." Pl. Br. 49. It was an affirmative choice that plaintiffs just do not like—and it supplies no reason for a federal court to intervene "to choose" plaintiffs' "set of values over the other." *Richardson*, 418 U.S. at 55.

To bolster their mischaracterization of the State's legislative actions, plaintiffs invoke the principle that "[i]nferences drawn from legislative inaction are notoriously unreliable in general." Pl. Br. 49 (citing *Rapanos v. United States*, 547 U.S. 715, 749-50 (2006) and *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*,

531 U.S. 159, 160 (2001)). But this case involves extensive legislative action, not mere inaction. And this is not a statutory interpretation dispute like *Rapanos* or *Solid Waste Agency*. In those disputes, the issue was whether Congress's failure to pass a law had a bearing on how courts should interpret what statutes mean. *See Rapanos*, 547 U.S. at 729-39 (interpreting Clean Water Act provisions); *Solid Waste Agency*, 531 U.S. at 167-74 (same). In this dispute, the issue is motive, not statutory meaning. Did a discriminatory purpose motivate the 1986 legislature's actions? No. Race discrimination played no part in the Task Force's work or the 1986 legislature's overwhelming decision to reaffirm Section 241's disenfranchising-felonies provision, as it currently exists, across party and racial lines. And plaintiffs have not proven otherwise.

Next, plaintiffs mistake the issue here for "whether the law currently on the books was *actually* enacted based on race-neutral reasons." Pl. Br. 49 (emphasis in original). The question is: did the 1986 legislature ratify and codify the disenfranchising felonies listed in Section 241 (as enacted in 1968) because of a discriminatory motive? *Cotton*, 157 F.3d at 391-92; *see Hayden*, 594 F.3d at 165-67; *Johnson*, 405 F.3d at 1224. The answer is no. No proof in this record even suggests that discriminatory motivations prompted any of the Task Force's recommendations or the legislature's decision-making.

Plaintiffs next contend that *Hunter v. Underwood* (Pl. Br. 50) and employment-retaliation cases (*id.* at 49-50) impose a burden on the State to "prove the existence of a race-neutral motive capable of severing the connection between the legislators' discriminatory intent and the enacted law." Pl. Br. 50; *see id.* at 49-50. But there is no "connection between" the 1986 legislature's "discriminatory intent and the enacted law," as plaintiffs apparently contend. *Id.* at 50. Plaintiffs have offered no proof suggesting that any of the 169 legislators who passed SB 2234 acted with discriminatory intent. To the extent that plaintiffs mean to contend that the State must prove the legislature's 1986 enactment was supported by a race-neutral motive, that is not required. *Cotton*, 157 F.3d at 391-92; *see Hayden*, 594 F.3d at 165-67; *Johnson*, 405 F.3d at 1224-25. But even if so, at minimum, the record shows that the Task Force that recommended aligning the State's implementing statutes with present-day Section 241, and the lawmakers who made that choice, had race-neutral motives. They were attempting to remedy deficiencies in the State's prior election laws and enact a new election code that comported with federal law. *See* ROA.977-979, ROA.1087-1090, ROA.1133-1136.; *see also Election Code of 1986* at 536-37. They succeeded. ROA.1137-1139.

Next, plaintiffs argue there is "no cogent explanation" why lawmakers would adopt the "eight originally-identified crimes" in the

1890 version of Section 241 but not "equally or even more serious offenses." Pl. Br. 51. That argument ignores that this case challenges plaintiffs' disenfranchisement under the State's present-day law, which added "equally or more serious offenses" that were excluded from the now non-existent 1890 version of Section 241. But in any event, it was not irrational for the 1968 lawmakers who enacted Section 241's present-day version, or the 1986 lawmakers who ratified and codified it, to choose their list of serious offenses. Three of the serious crimes (bribery, perjury, forgery) have been included in the constitution since Mississippi became a state—including the 1868 constitution approved by Congress. *See* Miss. Const. art. VI, § 5 (1817); Miss. Const. art. VII, § 4 (1832); Miss. Const. art. XII, § 2 (1868). The other serious crimes included (murder, rape, embezzlement, arson, theft, obtaining money or goods under false pretense, and bigamy) closely align with the historically recognized common-law felonies. *See Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (noting felonies at common law included: "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny") (citing Wharton, Criminal Law (12th ed.) § 26). Some legislators (such as those on the joint committee in 1985) may have thought a broader list would be "more rational." Pl. Br. 51 (internal quotation marks omitted). But that does not make present-day Section 241's disenfranchising felonies irrational—and plaintiffs have not grounded their equal-protection claim

on that basis. *Richardson*, 418 U.S. at 53 ("State[s] may exclude some or all convicted felons from the franchise"); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) ("the realm of state discretion in disenfranchising persons convicted of felonies" is not "limited to the disenfranchisement of all felons or none").

Moreover, plaintiffs' argument pitting "equally or more serious offenses" against each other hardly proves Mississippi lawmakers "at any time" made illegitimate choices, much less when present-day Section 241 was enacted. Pl. Br. 51 ("Why, for example, false pretenses but not kidnapping, forgery but not aggravated assault, and bigamy but not child molestation?"). Lawmakers are permitted to make those value judgments even though they may not be the choices plaintiffs would make. *See Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1040 & n. 3 (D. Md. 1974) (three-judge court) (approving disenfranchisement law encompassing "kidnapping" but not "false pretenses," "larceny" but not "theft," "child abuse" but not "child molestation"); *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (three-judge court) (rejecting equal-protection challenge to disenfranchising-felonies provision limited to "treason," "embezzlement of public funds," "malfeasance in office," "bribery," "larceny," and "any crime involving moral turpitude").

Finally, plaintiffs contend that, by not further expanding Section 241, the 1986 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." Pl. Br. 51. That decision, in plaintiffs' view, "perpetuate[d] the discriminatory taint" of the original version of Section 241. *Id.* (emphasis removed). Plaintiffs are wrong, again.

As already explained, this is not a case where the State never did anything to remedy a constitutionally infirm felon-disenfranchisement provision. The State materially altered the provision to remedy the defect through legislative means. Then, after studying and fully reconsidering the issue, lawmakers overwhelmingly voted to keep the amended version as is and amended the implementing statutes to conform with it—in an atmosphere free of racial bias. The original provision's "taint" was eliminated, not "perpetuate[d]." *Id.*

Additionally, at least two admissions in plaintiffs' closing argument are noteworthy. First, finally after fifty pages, plaintiffs admit that expanding Section 241 would cure the under-inclusive "discriminatory taint" of Section 241's original version. *Id.* at 51. As *Cotton* correctly held, and the record here proves again, the 1950 and 1968 enactments did that by removing one of the less serious offenses and then adding crimes originally excluded for discriminatory reasons. Second, the record here proves something lawmakers in 1986 could not then know yet that shows they made a reasonable and race-neutral choice. Among a wide range of

permissible options lawmakers elected not to further expand the State's disenfranchisement laws. As explained already above, plaintiffs' own data shows that black and white Mississippians convicted of felonies are disenfranchised at roughly the same rate. *See supra* Part I-B-3. That is race neutral. Further, albeit with the benefit of hindsight, the data shows the 1986 legislature in fact did not "perpetuate" any discrimination into the future as plaintiffs erroneously contend.

CONCLUSION

This Court should affirm the district court's judgment of dismissal.

Dated: August 23, 2021

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: August 23, 2021

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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. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32, it contains 12,857 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because its text has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which have been prepared the same way except in 12-point font.

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