NO. 19-60632

In the United States Court of Appeals for the Fifth Circuit

ROY HARNESS; KAMAL KARRIEM,
Plaintiffs-Appellants,

v.

DELBERT HOSEMAN, 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)

LOUISIANA AND TEXAS' *AMICI CURIAE* BRIEF IN SUPPORT OF MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

- Jeff Landry, Attorney General of Louisiana
- Ken Paxton, Attorney General of Texas
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. "Deliberative" legislative intervention cleanses a race-neutral provision of any taint associated with its original enactment. . 5

II. Plaintiffs' attempts to distinguish *Cotton* are unpersuasive. 6

A. Mississippi amended § 241 through *Cotton*'s "deliberative" legislative process. 7

B. Mississippi's 1950 and 1968 legislatures acted on a clean slate. 8

C. Mississippi's legislative process cleansed all of § 241. ... 12

III. Adopting Plaintiffs' view of *Cotton* would expose amended, race-neutral state laws to judicial revision. 12

CONCLUSION 14

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

Cases

Chen v. City of Hous.,
206 F.3d 502 (5th Cir. 2000) 2, 6

Cotton v. Fordice,
157 F.3d 388 (5th Cir. 1998) ..... passim

Hayden v. Paterson,
594 F.3d 150 (2d Cir. 2010) 2, 5

Hunter v. Underwood,
471 U.S. 222 (1985) ..... passim

Johnson v. Governor of State of Fla.,
405 F.3d 1214 (11th Cir. 2005) 2, 5

Louisiana v. United States,
380 U.S. 145 (1965) 13

Shelby Cty. v. Holder,
570 U.S. 529 (2013) 1, 13

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 1, 13

Teague v. City of Flower Mound,
179 F.3d 377 (5th Cir. 1999) 7

United States v. Guerrero,
768 F.3d 351 (5th Cir. 2014) 4, 10

United States v. Johnson,
40 F.3d 436 (D.C. Cir. 1994) 2, 6

Veasey v. Abbott,
888 F.3d 792 (5th Cir. 2018) 6

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 4, 10, 11, 12, 14

Rules

Federal Rule of Appellate Procedure 29 1

Constitutional Provisions

Louisiana Constitution article I, § 12 13

Mississippi Constitution article IV, § 33 7

Mississippi Constitution article XII, § 241 2

Texas Constitution article I, § 3a 14

INTEREST OF *AMICI CURIAE*[1]

Louisiana and Texas write as *Amici Curiae* to support Mississippi. The "blight of racial discrimination in voting" was "an insidious and pervasive evil." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 309 (1966). Fortunately, "history did not end" with the racist policies of a past century. *See Shelby Cty. v. Holder*, 570 U.S. 529, 552 (2013). As the Supreme Court has recently recognized, "things have changed dramatically" for the better. *Id.* at 547. That change stems in part from the actions States have taken to amend their laws and ensure equality.

Despite the States' progress, Plaintiffs seek to endow federal courts with super-legislative powers to reshape facially race-neutral laws that state governments have amended without racial animus. That position is undemocratic, unconstitutional, and contrary to the precedent of this Court and its sister circuits. For this reason, *Amici* ask the Court to affirm the district court's judgment.

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[1] Under Federal Rule of Appellate Procedure 29(b)(2), Louisiana and Texas, as States, are not required to obtain the consent of the parties or leave of the Court before filing this brief.

In accordance with Rule 29(4)(E), Louisiana and Texas state the following: No party's counsel authored this brief in whole or in part; and no party, party's counsel, or any person—other than Louisiana and Texas—contributed money to fund the creation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Supreme Court has expressly reserved the question of whether a facially race-neutral provision, through legislative amendment or reenactment, can overcome any taint of racial animus associated with its original enactment. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *see Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (The Supreme Court "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin."). Every circuit court to address that question—including the Fifth Circuit—has held that impermissible motives associated with the enactment of a race-neutral provision are cleansed when a legislature, acting without racial animus, reenacts or amends the law.[2]

Despite the growing consensus between the circuit courts, Plaintiffs ask the Court to rewrite a facially race-neutral provision—Mississippi Constitution article XII, § 241—that this Court has already held to be constitutional because two Mississippi legislatures have amended it since

[2] *See, e.g.*, *Hayden v. Paterson*, 594 F.3d 150, 166–67 (2d Cir. 2010); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) ("Florida's 1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision."); *Chen v. City of Hous.*, 206 F.3d 502, 521 (5th Cir. 2000); *Cotton*, 157 F.3d at 392; *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994).

the time of its enactment. 157 F.3d at 392. Specifically, in *Cotton v. Fordice* the Court held that the "deliberative" legislative process Mississippi's legislature and voters employed when amending § 241 "removed the discriminatory taint associated with the original version." *Id.* at 391.

Plaintiffs ask the Court to rethink *Cotton* in light of allegedly new evidence and the Supreme Court's recent opinion in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). But none of Plaintiffs' arguments to distinguish *Cotton* is persuasive. Plaintiffs contend: (1) voters approving amendments to § 241 did not have the option to approve or repeal the remainder of the law; (2) Mississippi failed to "repudiate" § 241's taint because the 1950 and 1968 legislatures were nearly all white and resistant to desegregation; and (3) only the allegedly tainted portions of § 241 are on the chopping block in this action. Pls.' Br. at 29–31.

Adopting any of Plaintiffs' rationales would create a lop-sided circuit split and expose numerous race-neutral provisions of state law to revision by the federal judiciary. None of Plaintiffs' evidence changes the fact that Mississippi amended § 241 through the "deliberative" legislative process that *Cotton* endorsed. So, under *Cotton*, it does not matter

whether the voters approving the amendments had the option to approve or repeal the remainder of the law. And it does not matter that Plaintiffs attack only limited portions of § 241.

Moreover, the Supreme Court did not disturb the holding or analysis of *Cotton* in *Abbott v. Perez*. *Perez* did nothing more than summarize and distinguish the holding of *Hunter*. 138 S. Ct. at 2325. *Perez* did not require a legislature to "repudiate" any taint associated with a provision's original passage, as Plaintiffs suggest. Pls.' Br. at 30. That proposition flies in the face of the Supreme Court's teaching that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *see Hunter*, 471 U.S. at 227. In any event, the panel cannot overrule *Cotton* absent "unequivocal" displacement by the Supreme Court. *United States v. Guerrero*, 768 F.3d 351, 361 (5th Cir. 2014). And *Perez* did not unequivocally displace *Cotton*.

Because the amendment process cured § 241 of any taint under *Cotton*, *Amici* ask the Court to affirm the district court's judgment.

ARGUMENT

I. "DELIBERATIVE" LEGISLATIVE INTERVENTION CLEANSES A RACE-NEUTRAL PROVISION OF ANY TAINT ASSOCIATED WITH ITS ORIGINAL ENACTMENT.

In *Cotton*, this Court explained that the very same Mississippi provision at issue in this appeal—§ 241—had been amended in a manner that "removed the discriminatory taint associated with the original version." 157 F.3d at 391. The Court approved the "deliberative" process that the legislature employed to amend the provision in 1950 and 1968: (1) "Both houses of the state legislature had to approve the amendment by a two-thirds vote"; (2) the full-text version of § 241 was published two weeks before the popular election; and (3) "a majority of the voters had to approve the entire provision, including the revision." *Id.* The Court noted that these *legislative* changes were "fundamentally different" from the "involuntary" *judicial* changes made to the Alabama provision invalidated by *Hunter*. *Id.* at 391 n.8.

The Second and Eleventh circuits have expressly agreed with *Cotton*'s analysis. *Hayden v. Paterson*, 594 F.3d 150, 166–67 (2d Cir. 2010); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) ("Florida's 1968 re-enactment eliminated any taint from the allegedly discriminatory 1868 provision."). In a case predating *Cotton*,

the D.C. Circuit offered similar analysis in a relevant context. *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) ("In light of the changes in American society since 1914, changes in no small way effected by successive Congresses—including the impact of the Voting Rights Act on the nature of Congress itself—it would be anomalous to attempt to tar the present Congress with the racist brush of a pre-World War I debate."). And this Court has approvingly cited *Cotton*'s analysis. *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018); *Chen v. City of Hous.*, 206 F.3d 502, 521 (5th Cir. 2000).

To be sure, under the Supreme Court's analysis in *Hunter*, even facially neutral laws enacted with a desire to discriminate against minorities can violate the Fourteenth Amendment. *Hunter*, 471 U.S. at 233; *Cotton*, 157 F.3d at 391. But where a legislature has intervened with a deliberative process, all circuit courts addressing the question agree that a facially neutral law passes constitutional muster. The Court got it right in *Cotton*.

II. PLAINTIFFS' ATTEMPTS TO DISTINGUISH *COTTON* ARE UNPERSUASIVE.

Dissatisfied with the Court's analysis of § 241 in *Cotton*, Plaintiffs offer three ways for the Court to distinguish that opinion. All three

distinctions are illusory.[3] So, under the Rule of Orderliness, *Cotton* binds this panel's analysis. *Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999) ("[T]he rule of orderliness forbids one of our panels from overruling a prior panel."). *Amici* address each of Plaintiffs' points in turn.

A. Mississippi amended § 241 through *Cotton*'s "deliberative" legislative process.

First, Plaintiffs contend that it matters that "the ballot[s] [of the 1950 and 1968 amendments] did not give *voters* the option of re-enacting or repealing the remainder of the original list of disqualifying crimes." Pls.' Br. at 29 (emphasis added). Plaintiffs forget that Mississippi maintains a republican form of government. *See* Miss. Const. art. IV, § 33. *State representatives* had the full text of the provision before them when they voted by a two-thirds majority to adjust its language. Plaintiffs do not and cannot explain why the voters themselves, as

[3] If the Court agrees that *Cotton* controls here, there is no need to consider whether the later history of § 241 also militates in favor of affirming the district court's judgment. *Amici* submit that *Cotton* controls and so that should end the Court's analysis. But, if the Court disagrees, *Amici* agree with Mississippi and the district court that Mississippi's close scrutiny of the provision in the 1980s cleansed any taint. *See* Defs.' Br. at 6–8, 17, 33–42.

opposed to their representatives, would need power to edit or disapprove portions of the provision to cleanse it of any taint.

Under *Cotton*'s "deliberative" legislative process analysis, the point is that the 1950 and 1968 legislatures—acting without racial animus—chose overwhelmingly to amend and reaffirm race-neutral language. The people of Mississippi—by popular vote—then "approve[d] the entire provision, including the revision[s]" made by their representatives. *Cotton*, 157 F.3d at 391. Plaintiffs' revelations about the 1950 and 1968 ballots do not cast any doubt on *Cotton* or its application to the present action.

B. Mississippi's 1950 and 1968 legislatures acted on a clean slate.

Second, Plaintiffs submitted evidence that the 1950 legislature was composed of only white members and the 1968 legislature "had only one black member." Pls.' Br. at 30. And Plaintiffs allege that, during the period when the legislature amended § 241, Mississippi's government engaged in "massive resistance" to desegregation. *Id.* at 30. From these facts, Plaintiffs conclude that the actions of those legislatures could not have "repudiate[d]" any taint from Mississippi's 1890 constitutional convention. *Id.* at 31. This argument fails for several reasons.

Importantly, Plaintiffs' argument relies on an assumption that the Supreme Court's recent decision in *Abbott v. Perez* abrogated *Cotton*'s "deliberative" process standard and replaced it with a more demanding "repudiat[ion]" standard. According to Plaintiffs, after *Perez*, a legislature must actually "repudiate" an earlier legislature's action by "alter[ing] the intent with which the article, including the parts that remained, had been adopted." *Perez*, 138 S. Ct. at 2325 (discussing *Hunter*).

Plaintiffs misread *Perez*. There, the Court rejected as "fundamentally flawed" the notion that a legislature has "a duty to expiate" or "purge its predecessor's allegedly discriminatory intent." *Id.* at 2325–26. It explained that by imposing such a duty, the district court "disregarded the presumption of legislative good faith and improperly reversed the burden of proof." *Id.* at 2326–27. The language Plaintiffs quote from *Perez* is nothing more than a summary of *Hunter*'s holding and analysis. *See id.* The Court's discussion of *Hunter* in *Perez* did not repudiate *Cotton* or set a standard for cleansing taint. Instead, the Court in *Perez* made the unremarkable observation that the *judicial* intervention in *Hunter* was not enough to cleanse the taint of intentional

discrimination associated with a provision's enactment. *Id.* That observation did nothing to disturb *Cotton*'s holding that deliberative *legislative* intervention is sufficient.

Even if the panel assumes that *Perez*'s discussion forecasted the Supreme Court's intention to adopt Plaintiffs' views when it eventually decides the question that it left open in *Hunter*, the panel remains without authority to overrule *Cotton*. This Court has said that, "[i]n determining the effect of Supreme Court developments on our precedents, we do not read tea leaves to predict possible future Supreme Court rulings, but only decide whether an issued Supreme Court decision has 'unequivocally' overruled our precedent." *Guerrero*, 768 F.3d at 361. *Perez* did not unequivocally displace *Cotton*.

Accordingly, Plaintiffs retain the burden to show that Mississippi's 1950 and 1968 legislatures acted with "racially discriminatory intent or purpose" when they amended § 241. *Arlington Heights*, 429 U.S. at 265; *see Hunter*, 471 U.S. at 227 ("[T]he Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment."). Mississippi does not bear any burden to show that the 1950 and 1968

legislatures intended to "repudiate" the taint. So, for example, a legislature could remove any taint of discrimination from a facially race-neutral law through *Cotton*'s "deliberative" process without even being aware of a provision's racially charged history.

It bears emphasis that "[p]roving the motivation behind official action is often a problematic undertaking." *Hunter*, 471 U.S. at 228. Before concluding that racial animus tainted the Alabama provision at issue in *Hunter*, the Court carefully detailed evidence supporting that assertion. *Id.* at 228–31. And, at oral argument before the Court in *Hunter*, counsel for Alabama "essentially conceded" the point: "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182 . . . ." *Id.* at 471 U.S. at 230.

By contrast, Mississippi has not conceded that racial animus animated the 1950 and 1968 legislatures' actions regarding § 241. Generalized evidence that the Mississippi legislature amended § 241 during "periods of massive resistance" to segregation is insufficient to meet Plaintiffs' burden. *Id.* at 228–31; *Arlington Heights*, 429 U.S. at 265–68. And it is not enough to simply point to the racial makeup of a

legislature. Mississippi's 1950 and 1968 legislatures acted on a clean slate when amending § 241, and Plaintiffs have failed to meet their burden to demonstrate that the legislatures were motivated by "racially discriminatory intent or purpose." *Arlington Heights*, 429 U.S. at 265.

C. Mississippi's legislative process cleansed all of § 241.

Finally, Plaintiffs attempt to distinguish *Cotton* by pointing out that they are attacking only limited portions of § 241—not the whole provision. But this argument again misunderstands *Cotton*'s "deliberative" legislative process analysis. When amending § 241, Mississippi's legislature considered the entire facially race-neutral provision. By removing burglary and adding rape and murder to the list, the legislature implicitly and overwhelmingly approved the remainder of § 241. And then the People voted to affirm the changes to the law by a majority vote. That is the "deliberative" legislative process *Cotton* approved. Plaintiffs' third proposed distinction of *Cotton* is no distinction at all.

III. Adopting Plaintiffs' view of *Cotton* would expose amended, race-neutral state laws to judicial revision.

Under Plaintiffs' view of *Cotton*, *Hunter*, and *Perez*, a federal court has power to revise facially race-neutral state provisions even if amended

through *Cotton*'s deliberative legislative process. Plaintiffs' view requires States to disavow any racial taint *expressly* through legislation. Adopting Plaintiffs' view would expose States to significant uncertainty about the constitutionality of their laws.

The "blight of racial discrimination in voting" was a terrible evil. *Shelby Cty.*, 570 U.S. at 545 (quoting *Katzenbach*, 383 U.S. at 308). Sadly, many States engaged in that destructive practice. *See, e.g.*, *Hunter*, 471 U.S. at 232–33; *Louisiana v. United States*, 380 U.S. 145, 151–52 (1965); *Cotton*, 157 F.3d at 391. Fortunately, as the Supreme Court recognized in *Shelby County v. Holder*, in recent history "things have changed dramatically." 570 U.S. at 547. The Voting Rights Act "proved immensely successful at redressing racial discrimination and integrating the voting process." *Id.* at 548.

And the States themselves have taken dramatic steps towards preserving and ensuring democracy for all. Today, for example, Louisiana's operative 1974 Constitution proclaims "every person shall be free from discrimination based on race." La. Const. art. I, § 12; *see id.* § 3 ("No law shall discriminate against a person because of race . . . ."). The Texas Constitution provides similar guarantees. *See* Tex. Const. art. I, §

3a (adopted in 1972) ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.").

But the States' progress is not enough for Plaintiffs, who want federal courts to intervene even when state laws are facially race-neutral and when the States have amended those laws through *Cotton*'s deliberative legislative process. Putting state laws through the rigors of that process is sufficient to cleanse taint from race-neutral provisions. Requiring more—including express repudiation—would flip the burden the Supreme Court has placed on Plaintiffs to show "[p]roof of racially discriminatory intent or purpose." *Arlington Heights*, 429 U.S. at 265; *see Hunter*, 471 U.S. at 227.

It is difficult to imagine how States would accomplish Plaintiffs' demand for repudiation. But it is clear that the Supreme Court has never required any such thing. Every circuit court has adopted *Cotton*'s reasoning. The Court should reaffirm *Cotton*'s holding and deny Plaintiffs' attempt to circumvent its analysis.

CONCLUSION

Amici ask the Court to affirm the district court's judgment.

Respectfully submitted,

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I hereby certify that on February 19, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 2,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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