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)

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:

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- Ken Paxton, Attorney General of Texas
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INTEREST OF AMICI CURIAE

Louisiana and Texas supported Mississippi as *Amici Curiae* before the original panel of this Court. They write again to urge the *en banc* panel to reaffirm this Circuit's longstanding rule that a legislature can cleanse a race-neutral law of any unlawful taint through a "deliberative" legislative process. *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). *Amici* are alarmed by Plaintiffs' invitation to this Court to adopt a more demanding standard—requiring a state legislature to expressly "repudiate" the taint when reenacting a race-neutral law. Pls.' Rehearing Br. at 5, 37. Accepting Plaintiffs' invitation to require more than a deliberative legislative process would (1) create a lopsided circuit split, (2) possibly expose numerous race-neutral state laws to revision by the federal judiciary, and (3) place state legislatures in a quandary about how to satisfy such demanding standards.

There is no question that the "blight of racial discrimination in voting" was "an insidious and pervasive evil." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 309 (1966). But "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 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 or reenacted without racial animus. The Court should reject that approach—allowing state legislatures to continue bettering society with the robust deliberative process that this Court endorsed for decades. *Amici* ask the Court to affirm the district court's judgment.

SUMMARY OF THE ARGUMENT

The Supreme Court has 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."). In *Cotton v. Fordice*, this Court held that the "deliberative" legislative process that Mississippi's legislature and voters employed when amending Mississippi Constitution article XII, § 241 "removed the discriminatory taint associated with the original version." 157 F.3d at 391. This is what Mississippi calls the "intervening-enactment rule." *See* Miss. Rehearing Br. at 2. *Amici* agree with Mississippi that the Court should retain *Cotton*'s intervening-enactment rule.

Each circuit court to address the question left open in *Hunter* has agreed with *Cotton* and 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.

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.").

Despite the growing consensus among the circuit courts, Plaintiffs again ask the Court to revisit § 241—which is facially race-neutral. Plaintiffs ask the Court to either distinguish[1] or rethink *Cotton* in light of allegedly new evidence and the Supreme Court's recent opinion in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). According to Plaintiffs, putting § 241 through Mississippi's robust constitutional amendment process twice was insufficient to cleanse the taint associated with the provision's original enactment. Plaintiffs demand that Mississippi's legislature actively "repudiate" or "expurgate[]" the taint above and beyond what *Cotton* requires. Pls.' Rehearing Br. at 5, 37.

[1] Plaintiffs contend that *Cotton* is distinguishable in light of the following evidence: (1) voters approving amendments to § 241 did not have the option to approve or repeal the remainder of the law; (2) the 1950 and 1968 legislatures were nearly all white and allegedly resistant to desegregation; and (3) only the allegedly tainted portions of § 241 are on the chopping block in this action.

The original panel of this Court properly and unanimously rejected Plaintiffs' argument that the allegedly new evidence distinguishes this case from *Cotton*. And so, under the rule of orderliness, the panel concluded it was bound to follow *Cotton*'s intervening-enactment rule and affirm the district court's judgment. When discussing the rule, however, the panel said in a footnote that the Supreme Court has required "states to eradicate policies and practices traceable to their prior racially-motivated actions." Panel Op. at 5 n.3 (cleaned up) (quoting *United States v. Fordice*, 505 U.S. 717, 728 (1992)). The panel also cited a concurrence from Justice Sotomayor in *Ramos v. Louisiana*—where she opined that unlawful taint may persist if the "States' legislatures never truly grappled with the laws' sordid history in re-enacting them." *Id.* (citing 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring)). The Court granted Plaintiffs' petition to rehear the case *en banc*.

Amici doubt that the Court granted rehearing to consider whether *Cotton* is distinguishable from this case.[2] To the extent that the Court wants to reevaluate *Cotton*'s intervening-enactment rule, *Amici* urge the

[2] To the extent the Court does reconsider whether *Cotton* is distinguishable from this case, *Amici* strongly agree with Mississippi's brief on rehearing, which expertly dismantles Plaintiffs' argument.

en banc panel to stick with *Cotton*'s analysis. The Court should not adopt Plaintiffs' proposed "repudiation" standard. Nor should the Court adopt a standard requiring state legislatures to "truly grapple[]" with a law's history, as Justice Sotomayor suggested in *Ramos*.

The intervening-enactment rule is workable, has been adopted by each circuit court to consider the issue, and demonstrates respect for the democratic process and States' sovereignty. The Court would split with at least two circuits if it required more. Allowing the democratic process to play out in state legislatures has yielded tremendous progress over time. There is no need for this Court's intervention.

Moreover, nothing in the Supreme Court's precedent requires rethinking *Cotton*. The Court did not disturb the holding or analysis of *Cotton* in *Perez* or *Ramos*. *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.' Rehearing Br. at 5, 37.

Nor did the Supreme Court disturb the intervening-enactment rule in *Ramos*. That case presented a claim for a unanimous jury under the Sixth Amendment. It did not implicate the Equal Protection clause of the

Fourteenth Amendment. The Court considered whether to overrule one of its precedents—*Apodaca v. Oregon*, 406 U.S. 404 (1972)—which allowed States to accept non-unanimous jury verdicts. As part of its analysis, the Court considered the racially tainted origins of the non-unanimous jury rules in Louisiana and Oregon. But the Court did not invalidate the non-unanimous jury laws on that basis. *Ramos*, 140 S. Ct. at 1401, n.44 ("[A] jurisdiction adopting a non-unanimous jury rule even for benign reasons would still violate the Sixth Amendment."). Nor did it discuss *Hunter* or purport to answer the question left open in that case. *Ramos* is inapposite here.

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

ARGUMENT

I. *COTTON* WAS RIGHTLY DECIDED.

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*, 594 F.3d at 166–67; *Johnson*, 405 F.3d at 122. 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).

By adopting a new standard, the Court would create a lopsided circuit split. "Although sometimes there is virtue in being a lonely voice in the wilderness," here the Court should "conclude that one really is the loneliest number" because the intervening-enactment rule is worth retaining for other reasons beyond maintaining uniformity among the circuit courts. *Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246, 255–56 (5th Cir. 2018) (*en banc*) (quoting Three Dog Night, *One*, on THREE DOG NIGHT (Dunhill 1969)).

The intervening-enactment rule is robust and demanding. For example, Mississippi has put § 241 through the constitutional amendment process twice. Mississippi's 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. It is rarely easy to amend a constitution. *See State ex rel. Moore v. Molpus*, 578 So. 2d 624, 635 (Miss. 1991) ("We know of no serious devotee of democratic governments who has ever thought amending a constitution ought to be

made impossible or easy."). The cleansing process Mississippi employed is sufficient to satisfy the Fourteenth Amendment.

Moreover, the rule is easy for state legislatures to apply: As long as they do not amend or reenact facially neutral laws for odious purposes, they can rest assured that the revamped laws will not run afoul of the Fourteenth Amendment. Requiring more—including express repudiation—raises the specter of a state legislature *unwittingly* violating the Fourteenth Amendment by amending a facially neutral law without racial animus—merely because the legislature was unaware of the provision's history. This makes little sense and would flip the burden the Supreme Court has placed on Plaintiffs to show "[p]roof of racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *see Hunter*, 471 U.S. at 227.

As a judicial matter, the rule is easy to administer—as more than two decades of this Court's precedent have demonstrated. *See Veasey*, 888 F.3d at 802 (decided in 2018); *Chen*, 206 F.3d at 521 (decided in 2000). Other circuits' adoption of the rule is further evidence favoring this point.

Importantly, the intervening-enactment rule strikes the right balance between respecting the sovereignty of States and upholding the

guarantees of the Fourteenth Amendment. All parties agree that 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*, in recent history "things have changed dramatically." 570 U.S. at 547.

The progress recognized in *Shelby County* stems in part from the fact that the States have wielded their sovereign powers to preserve and ensure 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.").

Cotton's intervening-enactment rule does not satisfy Plaintiffs—who want States to disavow any racial taint *expressly* through legislation.

Or perhaps Plaintiffs want a legislature to "truly grapple[] with the laws' sordid history" before it could expurgate any unlawful taint. *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring). Under Plaintiffs' proposed repudiation standard, if a federal court decided that a legislature had not sufficiently grappled with a law's history, the court would have power to revise facially race-neutral state provisions even if amended or reenacted without any racial animus.

Adopting Plaintiffs' view would expose *Amici* to uncertainty about the constitutionality of their laws. As discussed, Louisiana passed sweeping guarantees of racial equality in its 1974 constitutional convention. La. Const. art. I, § 12; *see id.* § 3. It is unclear whether these legislative acts would satisfy Plaintiffs' repudiation standard. If not, then *Amici* are unsure how a standard more rigorous than the intervening-enactment rule would operate in practice. A rule that exposes amended, racially neutral laws to revision by the federal judiciary is deeply troubling and fails to respect the sovereignty of States and the progress recognized in *Shelby County*.

This Court got it right in *Cotton*. The *en banc* panel should reaffirm *Cotton*'s intervening-enactment rule.

II. THE INTERVENING-ENACTMENT RULE IS CONSISTENT WITH THE SUPREME COURT'S JURISPRUDENCE.

The Supreme Court has not subverted *Cotton*'s intervening-enactment rule, either explicitly or implicitly. On the contrary, *Cotton*'s analysis is more consistent with that Court's jurisprudence than any other standard.

Plaintiffs argue that *Cotton*'s "deliberative" legislative standard is inconsistent with *Perez*. 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 (emphasis added) (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. 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.

Nor did the Court's recent opinion in *Ramos* undermine *Cotton*. Louisiana and Oregon[3] had a long history of accepting non-unanimous jury verdicts. *See* 140 S. Ct. at 1394. The Supreme Court approved that practice for state courts in 1972 in *Apodaca v. Oregon*. Whether to overrule *Apodaca* was a central question before the Court in *Ramos*.

While considering the question of whether to overrule *Apodaca*, the Court discussed what it viewed as the race-tainted origins of the non-unanimous jury rule in Louisiana.[4] But when pressed by Justice Alito's dissent about why such discussions were necessary considering "that

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[3] Puerto Rico also accepted non-unanimous jury verdicts.

[4] Louisiana respectfully disagrees with the Court's conclusion about the origins of Louisiana's non-unanimous jury laws. As Louisiana explained at length in its *Ramos* merits brief, there was no contemporaneous evidence that the non-unanimity rule was the product of racial animus. La. *Ramos* Br. 36–37. Many provisions of the 1898 constitution (especially those involving voting) were unfortunately expressly motivated by racial animus. The non-unanimity rule, however, was included in a section regarding judicial administration that had no apparent racial motivation. *See id.* (collecting sources).

Louisiana and Oregon eventually recodified their non-unanimous jury laws in new proceedings untainted by racism," the Court observed that "*the States' proceedings took place only after the Court's decision*" in *Apodaca*. 140 S. Ct. at 1401 n.44 (emphasis added).

This demarcation in time is important. *Ramos* observed that Louisiana adopted its non-unanimous jury laws during its 1898 constitutional convention. *Id.* at 1394. But in 1974, as discussed, the State held another constitutional convention and passed sweeping reforms guaranteeing "every person shall be free from discrimination based on race." La. Const. art. I, § 12; *see id.* § 3. At that time, the Louisiana Legislature "adopted a new, narrower [non-unanimity] rule, and its stated purpose [for doing so] was 'judicial efficiency.'" *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (quoting *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1038, *writ denied*, 2013-2109 (La. 3/14/14), 134 So. 3d 1193)); *accord* 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184–89 (La. Constitutional Convention Records Comm'n 1977). Indeed, Louisiana expressly relied on *Apodaca* in 1974 when it readopted its rule and revised the minimum vote to 10-2. *See* Records of the Louisiana

Constitutional Convention of 1973: Convention Transcripts, Vol. 7, pp. 1184–89 (La. Constitutional Convention Records Commission 1977).

The Louisiana Legislature cleansed its non-unanimous jury law of any purported racial animus in 1974 when it re-adopted a narrower form of that policy through a constitutional convention that no one suggested was tainted by racial animus. In *Ramos*, the Court did not suggest otherwise. On the contrary, it pointed out that *Apodaca* warranted overruling in part because it had been decided *before* any taint had been cleansed. And the Court noted that "a jurisdiction adopting a non-unanimous jury rule even for benign reasons would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1401, n.44. Thus, at the end of the day, the Court's discussion of the non-unanimous jury laws' history was not essential to the legal analysis other than, perhaps, as a reason to discard *Apodaca*.

Justice Sotomayor saw things differently from her colleagues in *Ramos*. In her view, states legislatures must "truly grapple[]" with a law's "sordid history [when] reenacting them." *Id.* at 1410 (Sotomayor, J., concurring). Not satisfied with the sweeping changes adopted in Louisiana's 1974 constitutional convention or the other "legitimate"

reasons that Louisiana readopted the narrower version of the non-unanimity rule, she opined "Louisiana's perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether."[5] *Id.* This sets an incredibly high standard for cleansing unlawful taint. No other justice of the Court joined her opinion. This Court should not adopt her position here.

It bears emphasis that nothing in Justice Alito's solo concurrence in *Espinoza v. Montana Department of Revenue* undercuts these points. 140 S. Ct. 2246, 2267 (2020). In *Espinoza*, the Court addressed a First Amendment challenge to the application of a provision of Montana's constitution that prohibited any aid to a school controlled by a church, sect, or denomination. 140 S. Ct. at 2251. The Court held that States are not free to "disqualify some private schools" from subsidies "solely because they are religious." *Id.* at 2261.

Justice Alito wrote a concurring opinion discussing the bigoted origins of the Montana provision. He began by observing that, "[r]egardless of the motivation for this provision or its predecessor, its

[5] In 2018, before the Court decided to grant certiorari in *Ramos*, Louisiana amended its constitution and ended the practice of accepting non-unanimous jury verdicts.

application here violates the Free Exercise Clause." 140 S. Ct. at 2267. Despite this observation, he believed that "the provision's origin is relevant under . . . *Ramos*." *Id.*

Justice Alito explained that he dissented in *Ramos* in part because the Court's opinion had discussed the allegedly racist origins of the non-unanimous jury laws even though the origins "had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and [Louisiana and Oregon] readopted their rules under different circumstances in later years." *Id.* at 2268 (internal quotation marks omitted). In his concurrence in *Espinoza*, he lamented: "But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here." *Id.* at 2268.

Justice Alito then opined that, "under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's uncomfortable past must still be examined." *Id.* at 2273 (cleaned up). He cited Justice Sotomayor's concurrence from *Ramos* for the proposition that the Montana provision's "*terms keep it tethered to its original bias*, and it is not clear at all that the State actually confronted the provision's tawdry past in reenacting it." *Id.* at 2274

(cleaned up) (emphasis added) (quoting *Ramo*s, 140 S. Ct. at 1410 (Sotomayor, J., concurring)). On its face, Justice Alito's discussion of Justice Sotomayor's *Ramos* concurrence appears cabined to a scenario that is not present here.

In any event, no other member of the Court joined Justice Alito's concurrence in *Espinoza*. And it is worth remembering that Justice Alito authored *Perez* in 2018, where the Court rejected as "fundamentally flawed" the notion that a legislature has "a duty to expiate" or "purge its predecessor's allegedly discriminatory intent." *Perez*, 138 S. Ct. at 2325–26. It is improbable that Justice Alito—in the span of a couple of years—shifted so far from his view in *Perez* that he now agrees with Justice Sotomayor's solo concurrence in *Ramos*.

Either way, *Ramos* has nothing to do with *Cotton*'s intervening-enactment rule. *Ramos* addressed a Sixth Amendment claim that does not implicate the Equal Protection clause of the Fourteenth Amendment. As discussed, the Court's decision in *Ramos* did not depend on its analysis of the racial history of the non-unanimous jury laws. And the Court went out of its way to note that *Apodaca* was decided *before* the States cleansed their laws. *Ramos*, 140 S. Ct. at 1401, n.44.

This Court should not jettison *Cotton* based on nothing more than two solo-justice concurrences from cases that did not address Fourteenth Amendment claims. If the Court rejects *Cotton*'s intervening-enactment rule and adopts a more-demanding standard, it will break with *Perez*, create a circuit split, and undermine States' sovereignty.

CONCLUSION

The Court should stick with *Cotton*'s intervening-enactment rule. *Amici* ask the Court to affirm the district court's judgment.

Respectfully submitted,

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I hereby certify that on August 29, 2021, 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 3,755 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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Dated: August 29, 2021