

Case No. 08-60941

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY YOUNG; CHRISTY COLLEY,

Plaintiffs - Appellants

versus

DELBERT HOSEMANN, in his official capacity as the Secretary of State of Mississippi; KRISTIN BUSE, in official capacity as Election Commissioner of Lee County; DEBBY MCCAFFERTY, in official capacity as Election Commissioner of Lee County; HARRY GRAYSON, JR., in official capacity as Election Commissioner of Lee County; VIVIAN BURKLEY, in official capacity as Election Commissioner in Panola County; JULIUS HARRIS, in official capacity as Election Commissioner in Panola County; JIMMY HERRON, in official capacity as Election Commissioner in Panola County; BONNIE G. LAND, in official capacity as Election Commissioner in Panola County; RONALD MCMINN, in official capacity as Election Commissioner in Panola County; JOHN H. EDWARDS, in official capacity as Election Commissioner of Lee County; JOHN M. WAGES, in official capacity as Election Commissioner of Lee County,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi

Reply Brief of Appellants

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TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT	1
ARGUMENT.....	3
I. EVEN UNDER A DE NOVO STANDARD OF REVIEW, THE DISTRICT COURT SHOULD HAVE PROVIDED A CLEAR EXPLANATION FOR ITS LEGAL CONCLUSIONS.....	3
II. DEFENDANTS’ INTERPRETATION OF MISS. CONST. ART. 12, § 241 IS PATENTLY FLAWED.	4
A. The Term “Except” in Miss. Const. art. 12, § 241 Clearly Limits The Scope Of The State’s Felon Disfranchisement Law.	5
B.....The Phrase “Otherwise Qualified” In Section 241 Requires Plaintiffs To Meet All Of The Other Qualifications To Vote That Have Nothing To Do With Having A Criminal Conviction.....	11
III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS’ CLAIMS.....	15
A. The Fourteenth Amendment’s Equal Protection Clause Protects Plaintiffs’ Right To Vote In Presidential Elections And There Is No State Law Which Abridges That Right.....	15
B. Defendants Are Not Entitled to Sovereign Immunity Under The Eleventh Amendment.	22
IV. CERTIFICATION OF THE ISSUES RAISED ON APPEAL TO THE MISSISSIPPI SUPREME COURT IS UNWARRANTED AND, INSTEAD, THIS COURT SHOULD ABSTAIN FROM RULING ON THE MERITS OF PLAINTIFFS’ CLAIMS TO THE EXTENT THERE IS ANY AMBIGUITY REGARDING PLAINTIFFS’ RIGHT TO VOTE UNDER STATE LAW.	25
CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<u>Ali v. Johnson</u> , 259 F.3d 317, 318 (5 th Cir.2001)	11
<u>Anderson v. Celebrezze</u> , 460 U.S. 780 (1983)	19
<u>Attorney General of New York v. Soto-Lopez</u> , 476 U.S. 898 (1986).....	15
<u>Bowen v. American Hospital Ass’n</u> , 476 U.S. 610 (1986)	15
<u>Burdick v. Takushi</u> , 504 U.S. 428 (1992).....	20
<u>Bush v. Gore</u> , 531 U.S. 98, 104-105 (2000).....	19
<u>City of Cleburne v. Cleburne Living Ctr., Inc.</u> , 473 U.S. 432 (1985).....	19
<u>Dunn v. Blumstein</u> , 405 U.S. 330 (1972)	16
<u>Dunn v. Blumstein</u> , 405 U.S. at 336.....	19
<u>Edelman v. Jordan</u> , 415 U.S. 651 (1974).....	26
<u>Ex Parte Young</u> , 209 U.S. 123 (1908)	25
<u>Frew ex rel Frew v. Hawkins</u> , 540 U.S. 431 (2004).....	26
<u>Griffin v. County School Board of Prince Edward County</u> , 377 U.S. 218 (1964)	26
<u>Harper v. Virginia Bd. of Elections</u> , 383 U.S. 663 (1966)	16
<u>Kramer v. Union Free Sch. Dist. No. 15</u> , 395 U.S. 621 (1969)	16
<u>Lubin v. Parish</u> , 415 U.S. 709 (1974).....	19
<u>McLaughlin v. City of Canton, Miss.</u> , 947 F. Supp. 954 (S.D. Miss. 1995) 20	

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982)..... 14

Mohler v. State of Mississippi, 782 F.2d 1291 (5th Cir. 1986)..... 27

Nationwide Mut. Ins. v. Unauthorized Prac. of Law, 283 F.3d 650 (5th Cir. 2002)..... 30

Nelson v. Univ. of Texas at Dallas, 535 F.3d 318 (2008)..... 26

Northwest Austin Municipal Util. Dist. No. One v. Holder, 2009 WL 1738645 * 10 (June 22, 2009)..... 12

Northwest Austin Municipal Util. Dist. No. One v. Holder, 2009 WL 1738645 at *10-13..... 12

Reynolds v Sims, 377 U.S. 533 (1964) 18

Richardson v. Ramirez, 418 U.S. 24 (1974)..... 10

Salve Regina College v. Russell, 499 U.S. 225, 233 (1991)..... 6

Shepard v. Trevino, 575 F.2d 1110 (5th Cir. 1978) 10

Snowden v. Hughes, 321 U.S. 1 (1944) 21

Staley v. Harris County, Texas, 332 F. Supp. 2d 1041 (S.D. Tex. 2004) 17

State of Florida Ex Rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 30

State v. Bd. of Levee Comm’rs for Yazoo-Mississippi Delta, 932 So. 2d 12, 26 (Miss. 2006)..... 14

Stern v. Tarant County Hospital District, 778 F.2d 1052 (5th Cir. 1985)..... 21

Swearington v. Owens-Corning Fiberglass Corp., 968 F.2d 559 (5th Cir. 1992)..... 30

United States v. Mississippi, 380 U.S. 128 (1965)..... 19

Vaught v. Showa Denko K.K., 107 F.3d 1137 (5th Cir. 1997)..... 30

Wesberry v. Sanders, 376 U.S. 1 (1964) 22

Statutes

U.S. Const. amend. XIII, § 1 11

U.S. Const. amend. XIV, § 2 10

42 U.S.C. § 1973gg..... 23

42 U.S.C. § 1973l (c)(2) 12

Miss. Code Ann. § 23-15-11..... 13

Miss. Const. art. 12, § 241 5

Miss. R. App. P. 20(a) 28

Other Authorities

American Heritage Dictionary (3d ed. 1994) 10

Black’s Law Dictionary (6th ed. 1991; 8th ed. 2004) 9

SUMMARY OF THE ARGUMENT

In their response to Appellants-Plaintiffs' (Plaintiffs) appeal, Appellees-Defendants (Defendants) present an unreasonable and untenable interpretation of Miss. Const. art. 12, § 241, by completely ignoring the significance of the term "except" in Section 241. When given its full meaning, the clause in Section 241 which begins with "except" clearly allows people with criminal convictions in Mississippi to vote in presidential elections. Plaintiffs' claims are based on long standing principles of statutory construction which weigh in favor of protecting the fundamental right to vote absent any clear and valid abrogation of that right. Based on the plain meaning of the term "except," the absence of any clear denial of Plaintiffs' right to vote in presidential elections, and the importance of presidential elections in this country, there was no legitimate reason for the district court to disregard that controlling principle.

In addition, Defendants characterize Plaintiffs' claims as only involving an interpretation of state law, while ignoring the fact that Plaintiffs allege violations of federal law, namely the Fourteenth Amendment's Equal Protection Clause and the National Voter Registration Act, and that those federal claims serve as the basis for the district court's subject matter jurisdiction over this case. Defendants' argument that they are entitled to

sovereign immunity also fails because Plaintiffs seek declaratory and injunctive relief, not monetary damages and, thus, both the state and county defendants are proper parties to this suit and cannot shield themselves from liability under the Eleventh Amendment. Finally, Plaintiffs maintain that, if there is any ambiguity regarding the meaning of Section 241, the district court should have abstained from deciding the issue. Abstention is preferable to certifying the question to the Mississippi Supreme Court because there is a lower state court action involving other plaintiffs who have raised the exact same issue in their case. Thus, this issue may be resolved in accordance with the normal course of litigation which starts in a lower state court.

For the reasons stated in Plaintiffs' opening brief and this reply, this Court should reverse the district court's dismissal of Plaintiffs' complaint and remand the case for further proceedings. In the alternative, Plaintiffs ask this Court to remand the case with instructions that the district court either provide a supplemental order clarifying the factual and legal basis for its judgment; or, if the district court determines that the language in Miss. Const. art. 12, § 241 is ambiguous, it should abstain from hearing the case so that a state court may interpret the meaning of the presidential elector qualification clause.

ARGUMENT

I. **EVEN UNDER A DE NOVO STANDARD OF REVIEW, THE DISTRICT COURT SHOULD HAVE PROVIDED A CLEAR EXPLANATION FOR ITS LEGAL CONCLUSIONS.**

Defendants argue that the district court's order was sufficient for purposes of this Court conducting a de novo review of the issues Plaintiffs raise on appeal. Appellees' Br. at 8-9. They make this contention without citing any case law or offering any reason why this Court should disregard the cases upon which Plaintiffs rely in their opening brief.

The fact that this Court must review the district court's legal conclusions de novo does not render the absence of any reasoning in the district court's order acceptable. In Salve Regina College v. Russell, 499 U.S. 225, 233 (1991), in which the Court ruled that a lower court's interpretation of state law should be reviewed de novo, the Court reasoned that "[i]ndependent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions." Even though the parties are "diametrically opposed" (as the Defendants describe it) regarding the meaning of Section 241, this does not necessarily mean the district court adopted Defendants' arguments wholesale. Notably, the district court

rejected the defenses of sovereign immunity and lack of subject matter jurisdiction Defendants raised during the preliminary injunction phase. Although Defendants reasserted these arguments at the motion to dismiss phase, the district court's order is completely silent on those points. Thus, the exact basis for the district court's legal conclusions remains unknown and, as Plaintiffs stated in their opening brief, they are at a substantial disadvantage in challenging the district court's ruling.

The primary issue Plaintiffs raise in this case – whether Mississippi's practice of denying people convicted of certain crimes the right to vote in presidential elections violates state and federal law – impacts thousands of people in the state and in the country as well given the national importance of presidential elections. Given the significance of this case, it is worthy of serious and thoughtful consideration, and the district court should have followed the mandate set forth in Salve by “explicat[ing] with care the basis for its legal conclusions.”

II. DEFENDANTS' INTERPRETATION OF MISS. CONST. ART. 12, § 241 IS PATENTLY FLAWED.

Defendants maintain that Miss. Const. art. 12, § 241 denies persons convicted of one of the ten crimes enumerated in that provision from voting

in presidential and vice presidential elections. Appellees' Br. at 10.¹ In support of their position, Defendants ignore the plain meaning of the terms "except" and "otherwise qualified" which appear in Section 241 and seek to justify their actions by admitting they have been unlawfully disfranchising people in the same situation as Plaintiffs for years. *Id.* at 13-16. They also incorrectly assert that the language in Miss. Code Ann. § 23-15-11 further limits Plaintiffs' right to vote in presidential elections. For the reasons set forth in Plaintiffs' opening brief and below, all of Defendants' arguments are without merit.

A. The Term "Except" in Miss. Const. art. 12, § 241 Clearly Limits The Scope Of The State's Felon Disfranchisement Law.

Defendants argue that giving any weight to the term "except" in Section 241 would not only allow people with criminal convictions to vote in presidential elections, but would render nugatory the other voter qualifications (age, residency, and citizenship) set forth in the provision. Appellees' Br. at 13-17. In reality, the structure and meaning of Section 241 requires the exact opposite conclusion, and Defendants' arguments that infants, people who are not state or county residents, and those who have

¹ The ten crimes listed in Miss. Const. art. 12, § 241 are murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement and bigamy.

never even registered to vote would be able to vote are plainly without merit.

Appellees' Br. at 13.

Section 241 states:

Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of 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, **except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefore and is otherwise a qualified elector.**

Miss. Const. art. 12, § 241 (emphasis added). Black's Law Dictionary provides the following definition for the word "except": "other than; but; if it were not for the fact that; only; to leave out; exclude; a provision in a statute exempting certain persons or conduct from the statute's operation; the retention of an existing right or interest, by and for the grantor, in real property being granted to another; something that is excluded from a rule's operation." Black's Law Dictionary (6th ed. 1991; 8th ed. 2004). These definitions are consistent with the ones found in the American Heritage Dictionary which defines "except" as follows: "but for; only for; not

including; other than; otherwise than; to leave out of account or consideration.” American Heritage Dictionary (3d ed. 1994).

It is significant that the word “except” in Section 2 of the Fourteenth Amendment provides an affirmative sanction for Mississippi to disfranchise felons in the first place. Section 2 of the Fourteenth Amendment provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, **except for participation in rebellion, or other crime**, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number the male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added). In Richardson v. Ramirez, 418 U.S. 24 (1974), the Court held that the phrase “except for participation in rebellion, or other crime” provided an affirmative sanction for felon disfranchisement by the states. See also Shepard v. Trevino, 575 F.2d 1110 (5th Cir. 1978) (upholding Texas’ felon disfranchisement law based on Supreme Court’s ruling in Richardson). This phrase in Section 2 of the Fourteenth Amendment is a clear limitation on the amendment’s prohibition against otherwise denying qualified individuals the right to vote. Defendants

do not hesitate to read this limitation into Section 2 for purposes of justifying the existence of their felon disfranchisement law. Given this interpretation of Section 2, Defendants' failure to acknowledge the meaning of the term "except" in Section 241 of the Mississippi Constitution and the significance of where the word appears in Section 241 is contradictory and illogical.

The Thirteenth Amendment is another constitutional provision in which the plain meaning of the word "except" has been recognized. The amendment states that "[n]either slavery nor involuntary servitude, **except as a punishment for crime whereof the party shall have been duly convicted**, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1 (emphasis added). In Ali v. Johnson, 259 F.3d 317, 318 (5th Cir.2001), this Court ruled that the term "except" in the Thirteenth Amendment created an exception to the prohibition against slavery, and that prison inmates required to work during their period of incarceration cannot state a claim under the Thirteenth Amendment. If Defendants' interpretation of Section 241, which completely ignores the plain meaning of the term "except", were to prevail, it would be impossible to reconcile their position with the universally accepted interpretations of the word "except" in Section 2 of the Fourteenth Amendment and the Thirteenth Amendment.

Courts have recognized the full significance of the term “except” when reviewing the legality of government actions. For example, the plaintiff in Northwest Austin Municipal Util. Dist. No. One v. Holder, 2009 WL 1738645 * 10 (June 22, 2009), challenged not only the constitutionality of Section 5 of the Voting Rights Act, but also argued, in the alternative, that it was a political subdivision and should be allowed to seek an exemption from, or “bail out” of, Section 5’s preclearance requirements. The Act defines “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U.S.C. § 1973l (c)(2) (emphasis added). Although the Supreme Court ruled that, based on other statutory definitions of the term “political subdivision,” the plaintiff utility district could bail out of coverage, there was no dispute that if the definition of that term in the Act was the only controlling definition, the plaintiff could not have bailed out of Section 5 coverage given the exception clause. Northwest Austin Municipal Util. Dist. No. One v. Holder, 2009 WL 1738645 at *10-13.

Also, whereas in Northwest Austin Municipal Util. Dist. No. One v. Holder the definition of “political subdivision” under statutory law could be expanded by other statutory laws, Mississippi’s felon disfranchisement law

appears in its constitution, and the legislature does not have any authority to modify the constitution through statutory law. Such a modification may only be done through a constitutional amendment (See Miss. Const. art. 15, § 273), and no such amendment pertaining to Section 241's presidential exception exists. Thus, Defendants' argument that Miss. Code Ann. § 23-15-11² somehow nullifies the express exception for presidential elections set forth in Section 241 is totally without merit. Although Plaintiffs maintain that the language in Section 23-15-11 does not conflict with Section 241 in the constitution for the reasons set forth in their opening brief, Defendants' heavy reliance on Section 23-15-11 also ignores the long standing principle that when there is a conflict between constitutional law and statutory law,

² Miss. Code Ann. § 23-15-11 states that “[e]very inhabitant of this state, except persons adjudicated to be non compos mentis, who is a citizen of the United States of America, eighteen (18) years old and upwards, who has resided in this state for thirty (30) days and for thirty (30) days in the county in which he seeks to vote, and for thirty (30) days in the incorporated municipality in which he seeks to vote, and who has been duly registered as an elector under Section 23-15-33, and who has never been convicted of any crime listed in Section 241, Mississippi Constitution of 1890, shall be a qualified elector in and for the county, municipality and voting precinct of his residence, and shall be entitled to vote at any election. Any person who will be eighteen (18) years of age or older on or before the date of the general election and who is duly registered to vote not less than thirty (30) days before the primary election associated with the general election, may vote in the primary election even though the person has not reached his or her eighteenth birthday at the time that the person seeks to vote at the primary election. No others than those specified in this section shall be entitled, or shall be allowed, to vote at any election.”

the constitution always prevails. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982). See also State v. Bd. of Levee Comm'rs for Yazoo-Mississippi Delta, 932 So. 2d 12, 26 (Miss. 2006) (“[N]o citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.” (quoting Newell v. State, 308 So.2d 71, 77 (Miss.1975))).

B. The Phrase “Otherwise Qualified” In Section 241 Requires Plaintiffs To Meet All Of The Other Qualifications To Vote That Have Nothing To Do With Having A Criminal Conviction.

Defendants also argue that, if this Court were to give any meaning to the term “except” in Section 241, infants, people who are not state or county residents, and those who have never even registered to vote would be able to vote because the exception would nullify all of the other voter qualifications set forth. Appellees’ Br. at 13-14. Defendants again improperly attempt to read out of the provision another important phrase – “otherwise qualified” – which clarifies that anyone convicted of one of the ten crimes enumerated in the constitution is eligible to vote in presidential elections provided they satisfy the other requirements set forth such as age, residency, and citizenship.

Black’s Law Dictionary defines “otherwise” to mean: “in a different manner; in another way; or in other ways.” Black’s Law Dictionary (6th ed.

1991). By reading the term “otherwise qualified” out of Section 241, Defendants again ignore the provision’s plain meaning and structure. In Bowen v. American Hospital Ass’n, 476 U.S. 610 (1986), the Supreme Court addressed the issue of whether the defendant hospital violated federal law by not performing surgery on an infant who suffered from multiple congenital defects even though the hospital was willing to perform the surgery and the infant met all of the other qualifications for obtaining the surgery, but the infant’s parents would not give their consent. The law at issue provided that: “No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 476 U.S. at 613. The court ruled that the hospital could not have violated the law when the only reason it did not perform the surgery was because the parents refused to consent to the operation. Id. at 635-36. In arriving at this conclusion, the Court noted that the infant could only benefit from the law if she met the other qualifications for obtaining the health care benefits. Id. at 624.

In Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), the Court addressed the issue of whether a New York statute which allowed employers to give preferences in the form of bonus points to those

who entered the armed services while they were New York residents violated the equal protection rights and the right to travel of those who served in the military while residents of other states. In striking down the provision, the Court described the state's actions as unlawfully denying bonus points to "otherwise qualified" veterans who happened not to be New York residents at the time they entered the military. 476 U.S. at 911. Thus, after eliminating the preference for New York residents, the applicants still had to show they met the other qualifications required for getting the job.

In the context of voting, the Supreme Court has struck down laws which abridged the voting rights of people who were "otherwise qualified" to vote. See Dunn v. Blumstein, 405 U.S. 330 (1972) (ruling that Tennessee's requirement that otherwise qualified voters meet a durational residency requirement was unconstitutional); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (striking down a New York statute which mandated that residents who were otherwise qualified to vote either satisfy a property ownership requirement or have children in a school located in the voting district); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating Virginia statute conditioning the right to vote of otherwise qualified residents on payment of a poll tax). In the instant case, Section 241 affirms the right of people with criminal convictions to vote in

presidential elections and the term “otherwise qualified” means that Plaintiffs must still satisfy the age, residency, and citizenship requirements for voting which they do. Thus, the other voter qualifications set forth in Section 241 remain intact, and there is no other logical way to interpret “otherwise qualified” in Section 241. Defendants’ argument that anyone, regardless of the person’s age, residence, or citizenship, would be able to vote if this Court rules against them lacks any legal or factual basis and only creates unnecessary concern that, by allowing Plaintiffs’ to vote in presidential elections, the other voter qualifications the state has set would become meaningless which is simply not true.

Defendants also contend that their actions must be lawful because they have been denying individuals in Plaintiffs’ position the right to vote in presidential elections for decades. Appellees’ Br. at 20. However, just because the state has been violating the law for years does not mean Plaintiffs’ claims are less important or unripe for review and, in any event, that is not a valid basis upon which to affirm the district court’s decision. See Staley v. Harris County, Texas, 332 F. Supp. 2d 1041, 1043 (S.D. Tex. 2004) (“The fact that the County has violated the plaintiff’s rights for years does not mean that the violation should be allowed to continue.”), aff’d 461 F.3d 504 (5th Cir. 2006).

III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

Defendants contend that Plaintiffs' lawsuit is premised entirely on a misinterpretation of state law and, therefore, the district court lacked subject matter jurisdiction because Defendants are entitled to sovereign immunity. Plaintiffs maintain that the Fourteenth Amendment and the National Voter Registration Act (NVRA) secure their fundamental right to vote in certain federal elections absent a clear and valid abridgment of that right by the State, and it is those federal laws which serve as the foundation for Plaintiffs' lawsuit. Reynolds v Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."). Because this Court has original jurisdiction over Plaintiffs' Fourteenth Amendment and NVRA claims, subject matter jurisdiction exists and Defendants are not entitled to sovereign immunity. 28 U.S.C. §§ 1331, 1343(a)(3) and (4).

A. The Fourteenth Amendment's Equal Protection Clause Protects Plaintiffs' Right To Vote In Presidential Elections And There Is No State Law Which Abridges That Right.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and requires that all similarly-situated persons be treated alike. U.S. Const. amend. XIV, § 1; City of Cleburne v. Cleburne

Living Ctr., Inc., 473 U.S. 432, 439 (1985). Plaintiffs do not challenge the State's power to erect laws that disqualify a person from voting because of a felony conviction. However, whenever Mississippi adopts a process for determining who is qualified to vote, individuals have a substantive right under the Equal Protection Clause to participate in elections on an equal basis as other qualified voters. Lubin v. Parish, 415 U.S. 709, 713 (1974). See also Dunn v. Blumstein, 405 U.S. at 336 (it is well established that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Bush v. Gore, 531 U.S. 98, 104-105 (2000). See also United States v. Mississippi, 380 U.S. 128, 144 (1965) (recognizing that "the right to vote in this country is too precious").

When determining whether or not a state election law or policy violates the Equal Protection Clause, a court must first consider the character and magnitude of the asserted injury to the rights that the Fourteenth Amendment protects. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). It should then identify and evaluate the precise interests that the state puts forward to justify the burden that its law or policy imposes on a plaintiff. Id.

“In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” Id. The Supreme Court has held that when a state election law subjects equal protection rights to “severe” restrictions, the state law must be “narrowly drawn to advance a state interest of compelling importance.” Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted). However, when the challenged law imposes only “reasonable, nondiscriminatory restrictions” upon a voter’s equal protection rights, “the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” Id. (citing Anderson v. Celebrezze, 460 U.S. at 788).

In Richardson v. Ramirez, the Supreme Court held that a state could, consistent with the Equal Protection clause, exclude from the franchise convicted felons who have completed their sentences and paroles. 418 U.S. at 56. However, in McLaughlin v. City of Canton, Miss., the court determined:

Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose

the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly; rather only when the circumstances and the law clearly direct. (emphasis added).

947 F. Supp. 954, 971 (S.D. Miss. 1995). Mississippi law does not disfranchise Plaintiffs when it comes to voting in presidential elections, and the language in Section 241 clearly affirms that right.

Defendants' reliance upon the decision in Snowden v. Hughes, 321 U.S. 1 (1944) is misplaced because Snowden involved the denial of a state-created right, not a federal-created right of the sort at issue in the instant case, i.e. the right to vote. In Snowden, a Republican candidate who garnered the second highest number of votes in a primary election for a state office challenged the elections officials' refusal to place his name on the ballot even though a state law required the officials to do so. 321 U.S. at 2. The Court dismissed the case reasoning that "[t]he right to become a candidate for state office, like the right to vote for the election of state officers . . . is a right or privilege of state citizenship, not of national citizenship". Id. at 7.

Stern v. Tarant County Hospital District, 778 F.2d 1052 (5th Cir. 1985), another case upon which Defendants heavily rely, is also inapposite. Stern involved a challenge under the Fourteenth Amendment's Equal Protection clause by five osteopathic physicians who argued that a hospital's

refusal to grant them staff privileges based on where they received their medical training violated state law. 778 F.2d at 1054. This Court ultimately dismissed the suit not for lack of subject matter jurisdiction, but on the ground that there was a rational basis for the hospital's decision. Id. at 1060-61. In reaching its conclusion, however, this Court explained that “[t]he guarantees of the fourteenth amendment, its requirement that state laws be applied in the same way to those entitled to equal treatment and its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards.” Id. at 1056.

The right to vote is fundamental in nature. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”). Unlike the plaintiffs in Snowden and Stern, Plaintiffs’ right to vote in presidential elections turns ultimately on federal law. For the reasons set forth in Plaintiffs’ opening brief and Section II above, Plaintiffs’ right to vote in presidential elections is not abridged under state law. Therefore, Defendants’ refusal to allow Plaintiffs and other similarly situated individuals to register, remain registered, and vote violates the Equal Protection Clause because Plaintiffs cannot exercise their

fundamental right to vote in the same manner as other qualified electors. Moreover, Defendants have not presented a single compelling governmental interest as to why Plaintiffs' right to vote in presidential elections should not be protected. In order for this Court to properly evaluate the merits of Plaintiffs' equal protection claim, Defendants must meet their burden under the strict scrutiny standard set forth in Anderson and Burdick. Therefore, it was improper for the district court to dismiss Plaintiffs' equal protection claim.

Similarly, the court's dismissal of Plaintiffs' NVRA claim also was improper. Congress enacted the NVRA in 1993, in part, to increase the number of eligible citizens who are registered to vote in federal elections. 42 U.S.C. § 1973gg(b). The NVRA requires states to include a voter registration application form for federal elections as part of a state driver's license application. See id. at § 1973gg-3. The Act further mandates that states maintain accurate and current voter registration rolls through the use of uniform and non-discriminatory programs and activities. See id. at § 1973gg-6(b)(1). The NVRA allows states to remove from the official list of eligible voters the names of individuals who have a criminal conviction, but only as provided under state law. See id. § 1973gg-6(a)(3)(B).

The Mississippi voter registration form does not allow an applicant to register only for federal elections, let alone presidential elections. A person who fills out the voter registration form automatically registers to vote in both state and federal elections. Section 5 of the registration form specifically requires a person to swear that they have not been convicted of one of twenty-one crimes before signing the form. The form also warns applicants that false registration is a felony punishable by fine or imprisonment. Therefore, Plaintiffs are effectively barred from registering to vote in federal elections. Because of this policy and its enforcement, the state's voter registration rolls with respect to federal elections are not current or accurate, and the number of registered voters has greatly decreased. Consequently, Defendants are violating the NVRA and the district court should not have dismissed Plaintiffs' NVRA claim.

Plaintiffs seek to vindicate a right secured by federal, not state law – the right to vote in presidential elections absent a state law prohibition. Because the basis for Plaintiffs' lawsuit emanates from a right created under federal law, their Equal Protection and NVRA claims are neither immaterial nor insubstantial and frivolous as the Fed. R. Civ. P. 12(b)(1) standard for dismissal requires. Plaintiffs are not “bootstrapping” their federal claims into this lawsuit as Defendants wrongfully assert given that it is federal law,

not state law, which guarantees Plaintiffs' equal right to vote in the first place. Appellees' Br. at 22. Because Section 241 directs that all those convicted of an enumerated offense are exempted from the provision's disfranchising language in the case of presidential elections, Plaintiffs retain the fundamental right to vote and are entitled to equal protection as guaranteed under the Fourteenth Amendment and, once allowed to register, should appear on the state's voter registration rolls as the NVRA requires.

B. Defendants Are Not Entitled to Sovereign Immunity Under The Eleventh Amendment.

Defendants argue the Eleventh Amendment prohibits Plaintiffs from alleging violations of state law against Defendants in federal court. Appellees' Br. at 31-32. Defendants also assert Plaintiffs' federal claims are barred on the grounds that (1) none of the exceptions articulated in Ex Parte Young, 209 U.S. 123 (1908) and its progeny apply in this case; and (2) Defendants are not engaged in an ongoing violation of federal law. Id. at 32-35. As discussed in Sections II and III.A. above, Plaintiffs maintain they have a federally-created right to vote in presidential elections and the language in Section 241 further cements that right. Defendants, therefore, do not enjoy immunity as to Plaintiffs' claims under the Equal Protection Clause and the NVRA.

The Eleventh Amendment of the U.S. Constitution provides: “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Plaintiffs name the Secretary of State and election commissioners in Lee County and Panola County as defendants in this suit and allege they are violating Plaintiffs’ rights under federal law. Compl. at ¶¶ 6-8, 27-38. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964), the Supreme Court held “it has been settled law since Ex Parte Young . . . that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment.” See also Frew ex rel Frew v. Hawkins, 540 U.S. 431, 437 (2004) (“[T]he Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.”); Accord Nelson v. Univ. of Texas at Dallas, 535 F.3d 318, 322 (5th Cir. 2008). The Court reaffirmed this position in Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974), when it held that the Eleventh Amendment “does not prevent suit against counties” because “a county does not occupy the same position as a state for purposes of the Eleventh Amendment.” Thus, even assuming,

arguendo, the state defendants are entitled to sovereign immunity, which they are not, the county defendants do not enjoy such a privilege.

In Mohler v. State of Mississippi, 782 F.2d 1291 (5th Cir. 1986), upon which Defendants rely, school teachers challenged the state's alleged failure to increase their salaries pursuant to a state statute. In addressing the defendants' Eleventh Amendment immunity defense, the court noted that "Eleventh Amendment immunity applies where . . . state officers are nominal defendants and the state is the real substantial party in interest" and "when the relief sought would operate against the sovereign by expending itself on state coffers." Id. at 1293 (internal citations omitted). However, the court recognized an exception to the immunity doctrine "where a federally created right is at issue." Id.

The Fourteenth Amendment protects Plaintiffs' right to vote in federal elections absent an affirmative sanction under state law. Unlike the plaintiffs in Mohler who had no federal law right to salary increases, the federal voting rights of Plaintiffs in the instant case are derived from the U.S. Constitution. Thus, the "federally created right" exception to Eleventh Amendment immunity applies in this case. Furthermore, as the Mohler court stated, the Eleventh Amendment primarily is aimed at protecting the state's coffers. 782 F.2d at 1293. The state's treasury is not in jeopardy in

this case because Plaintiffs only seek declaratory and injunctive relief, not monetary damages. Therefore, Defendants do not enjoy sovereign immunity from Plaintiffs' lawsuit which seeks to vindicate their rights under federal law.

IV. CERTIFICATION OF THE ISSUES RAISED ON APPEAL TO THE MISSISSIPPI SUPREME COURT IS UNWARRANTED AND, INSTEAD, THIS COURT SHOULD ABSTAIN FROM RULING ON THE MERITS OF PLAINTIFFS' CLAIMS TO THE EXTENT THERE IS ANY AMBIGUITY REGARDING PLAINTIFFS' RIGHT TO VOTE UNDER STATE LAW.

Defendants request that, if there is any question regarding Plaintiffs' right to vote under state law, this Court certify that question to the Mississippi Supreme Court. Appellees' Br. at 40-41. Mississippi Rule of Appellate Procedure 20(a) provides, in part, that:

When it shall appear to the . . . United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court

This Court has discretion when deciding whether to certify a question to a state supreme court. Nationwide Mut. Ins. v. Unauthorized Prac. of Law, 283 F.3d 650, 656 (5th Cir. 2002). Several factors should be considered when making this determination, including: (1) "the closeness of

the question and the existence of sufficient sources of state law – statutes, judicial decisions, attorney general opinions – to allow a principled rather than conjectural conclusion”; (2) “the degree to which considerations of comity are relevant in light of the particular issue and case to be decided”; and the (3) likelihood of significant delay, especially given that it can often take years before the state supreme court issues a response. State of Florida Ex Rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-75 (5th Cir. 1976). However, certification “is not ‘a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state.’” Vaught v. Showa Denko K.K., 107 F.3d 1137, 1143 (5th Cir. 1997) (declining to certify question regarding application of a Texas discovery rule) (quoting Transcontinental Gas Pipeline Corp. v. Transp. Ins. Co., 958 F.2d 622, 623 (5th Cir.1992). See also Swearington v. Owens-Corning Fiberglass Corp., 968 F.2d 559, 564 (5th Cir. 1992) (denying request to certify question of state law even in absence of state supreme court decision on issue).

Another consideration is whether the question at issue already is being litigated in state court. Nationwide Mut. Ins. v. Unauthorized Prac. of Law, 283 F.3d at 651. In Nationwide Mutual Insurance, the appellant sought a declaratory judgment that a Texas law which prohibited insurance

companies from hiring their own staff attorneys to represent their insured clients was unconstitutional under state and federal law. Id. The district court abstained from ruling on the constitutionality of the state law and Nationwide appealed that decision, arguing that the question should have been certified to the Texas Supreme Court instead. Id. In denying the certification request, this Court noted that the issue already was being litigated in two Texas district courts and that “the Supreme Court of Texas would be better suited to answer this question with the benefit of records generated in state court by several insurance companies than it would be by receiving a certified question from one insurer with a relatively limited record on appeal.” Id. at 656-57.

Likewise, in this case, Defendants are litigating the identical issue of whether felons are entitled to vote in presidential elections in Mississippi state court, albeit with different plaintiffs. Strickland v. Clark, Civil Action No. G2006-1753 (Miss. Ch. Ct., filed Oct. 6, 2006). Although Plaintiffs moved to join the Strickland lawsuit, the state court has not granted that motion. Even if the state court denies that motion, Plaintiffs still have an opportunity to seek a declaratory judgment affirming their right to vote in presidential elections in a separate state court action. Thus, this issue remains pending before a state court and there is no reason why the parties

should not be allowed to proceed through the natural course of litigation by starting in a lower state court.³ Therefore, if this Court determines that there is any ambiguity regarding the proper interpretation of Section 241, abstention is more appropriate than certifying the issue to the Mississippi Supreme Court.

CONCLUSION

For the reasons stated in Plaintiffs' opening brief and this reply, Plaintiffs respectfully request that this Court reverse the district court's dismissal of Plaintiffs' complaint and remand the case for further proceedings. In the alternative, Plaintiffs ask this Court to remand the case with instructions that the district court either provide a supplemental order clarifying the factual and legal basis for its judgment; or, if the district court determines that the language in Miss. Const. art. 12, § 241 is ambiguous, it should abstain from hearing the case so that a state court may interpret the meaning of the presidential elector qualification clause.

³ Plaintiffs again note that, after filing their motion to join the Strickland lawsuit, they moved to withdraw all claims in the state court specifically related to their right to vote in presidential elections and opted to pursue those claims in federal court. The state court has not ruled on that motion either.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been mailed to counsel of record on this 10th day of July, 2009.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,208 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.
