

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

JERRY YOUNG and CHRISTY COLLEY

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:08cv567 TSL-JCS

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

DEFENDANTS

**SUPPLEMENT TO RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW the Defendant, Secretary of State Delbert Hosemann, in his official capacity (referred to collectively as “the State” or the “State Defendants,” as the arguments herein are applicable to the election commissioners) in the above styled case and file this Supplement to Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, stating as follows:

In its Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, the State highlighted that Plaintiffs’ Complaint rests on the notion that the State’s interpretation and application of Section 241 is incorrect, leading to a violation of Section 241 itself and, in turn, a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the National Voter Registration Act (“NVRA”), 42 U.S.C. § 1973gg, *et seq.* In

footnote eight of its Response, the State noted that it questioned whether this Court possessed subject matter jurisdiction but that the State had not had time to formulate its position regarding the jurisdictional issue. Having considered the matter further, the State submits that this Court lacks subject matter jurisdiction.

As the party asserting jurisdiction, Plaintiffs bear the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Liberty Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). To support federal jurisdiction, the Complaint must be drawn in such a way “so as to claim a right to recover under the Constitution and laws of the United States.” Bell v. Hood, 327 U.S. 678, 681 (1946); Suthoff v. Yazoo County Indus. Dev. Corp., 637 F.2d 337, 339 (5th Cir. 1981). While federal courts should exercise jurisdiction where the Complaint “seek[s] recovery directly under the Constitution or laws of the United States,” Bell, 327 U.S. at 681, jurisdiction does not exist “where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” Id. at 682-83; Suthoff, 637 F.2d at 339. A claim is considered frivolous or insubstantial where such claim “has no plausible foundation or which is clearly foreclosed by a prior Supreme Court decision.” Bell v. Health-Mor, Inc., 549 F.2d 342, 344 (5th Cir. 1977). As discussed below, Plaintiffs have failed to establish subject matter jurisdiction.

Plaintiffs are not asserting that Section 241 of the Mississippi Constitution, standing alone, is unlawful or unconstitutional. Indeed, Plaintiffs seek the protection and alleged benefit of Section 241, arguing that Section 241 actually protects the right of convicted felons to vote for President and Vice President (although the State has never applied Section 241 in this fashion).

Rather, Plaintiffs argue that the State's interpretation and application of Section 241 violates both state and federal law. Thus, Plaintiffs' suit turns upon the accuracy of Plaintiffs' interpretation of state law, so much so that Plaintiffs' federal claims are dependant on this Court finding a violation of state law.

A cursory review of the Complaint reveals that Plaintiffs do not premise their recovery directly on the Equal Protection Clause or the NVRA. Plaintiffs' entire factual allegations address state law, (Compl. at 3-5), and their first cause of action is devoted to an alleged violation of Section 241 of the Mississippi Constitution, asserting that "Section 241 . . . secures the rights of individuals convicted of crimes to vote for President and Vice President of the Untied States." (Compl. at 5-6). Plaintiffs' second and third causes of action for violation of the Equal Protection Clause and the NVRA, respectively, are premised necessarily on the retention by convicted felons of the right to vote under state law. The Complaint recognizes such reliance noting under each count that "[a]lthough Plaintiffs Young and Colley have felony convictions, they remain eligible to vote for President and Vice President of the United States." (Compl. at ¶¶ 28, 37).

Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Injunction leaves no doubt as to Plaintiffs' **sole reliance** on state law:

Pursuant to . . . Section 241 . . . Plaintiffs retain the right to vote in the November 4, 2008 election for president and vice president on an equal basis with citizens who have never been convicted of a crime.

(Pl.s' Memo. in Supp. of Mot. for Prelim. Injunction at 7-8). Regarding Plaintiffs' claims under the NVRA, Plaintiffs' Memo again states that:

Mississippi law allows anyone with a criminal conviction to vote for president and

vice president of the United State. However, neither Mississippi's voter registration application form nor Mississippi's driver's license application form allows a person to register to vote only in presidential and vice presidential elections.

(Pl.s' Memo. in Supp. of Mot. for Prelim. Injunction at 10). Thus, it is only by operation of state law as interpreted by Plaintiffs that Plaintiffs can even invoke the alleged protections of the Fourteenth Amendment and the NVRA. Their claims are clearly predicated on state law, not federal law.

Plaintiffs' invocation of federal law is "immaterial and made solely for the purpose of obtaining jurisdiction" and is "wholly insubstantial and frivolous." See supra at 2. Supreme Court precedent establishes that "the exclusion of felons from the vote has an affirmative sanction in s 2 of the Fourteenth Amendment" and said disenfranchisement does not violate the Equal Protection Clause. Richardson v. Ramirez, 418 U.S. 24, 53-56 (1974). Discussing Richardson, the Fifth Circuit held:

Thus, the Court clearly envisioned that a state could grant the right to vote to some persons convicted of a felony while denying it to others. Section 2's express approval of the disenfranchisement of felons thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens.

Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978). Finally, in Cotton v. Fordice, the Fifth Circuit specifically found that "§ 241 [of the Mississippi Constitution] as it presently exists is unconstitutional **only if** the amendments were adopted out of a desire to discriminate against blacks." 157 F.3d 388, 392 (5th Cir. 1998) (emphasis added). The Court subsequently found no discriminatory motive. Id.

Plaintiffs' federal claims are foreclosed by Richardson and Fifth Circuit precedent.

Knowing this, Plaintiffs craft an argument that relies solely upon **their** interpretation of state law, of which, of course, the State runs afoul. Such pleading is not only impermissible bootstrapping, it is insufficient to support federal jurisdiction because any such claim lacks a federal legal basis.

In Snowden v. Hughes, the Supreme Court considered a state candidate’s claim that state election officials had “willfully, maliciously, and arbitrarily” violated state election statutes in refusing to place him on the ballot and, thus, violated the Fourteenth Amendment. 321 U.S. 1, 4 (1944). The Supreme Court recognized plaintiff’s argument to be that the election board, “merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law.” Id. at 8. The Supreme Court rejected plaintiff’s attempt to equate a violation of state election law with a violation of the Fourteenth Amendment. The Court noted that the proper inquiry was whether the state action – independent of its legality under state law – violated the Fourteenth Amendment in and of itself.

If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

321 U.S. at 11 (internal citations omitted).

As set forth herein, and as directed by the holding in Snowden, the proper inquiry is whether the State’s interpretation and application of Section 241, i.e. the actual disenfranchisement of certain convicted felons, itself violates the Fourteenth Amendment – regardless of its alleged illegality under state law. As we know, the Fourteenth Amendment expressly sanctions the disenfranchisement of convicted felons. See, e.g., Richardson. Knowing

this, the Plaintiffs do not challenge the State's interpretation and application of Section 241 under federal law. Rather, Plaintiffs rely upon the State's position being unlawful under state law. As set forth herein, this Court lacks jurisdiction over Plaintiffs' claims.

Wherefore, premises considered, the State Defendants respectfully request that this Court DENY the present Motion for Preliminary Injunction.

Respectfully submitted, this the 23rd day of September, 2008.

By: JIM HOOD, ATTORNEY GENERAL

s/ Shawn S. Shurden
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CERTIFICATE OF SERVICE

This is to certify that I, Shawn S. Shurden, a Special Assistant Attorney General for the State of Mississippi, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This 23rd day of September, 2008.

s/ Shawn S. Shurden

SHAWN S. SHURDEN