UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JERRY YOUNG and
CHRISTY COLLEY **PLAINITFFS**

V. **CIVIL ACTION NO.: 3:08-CV-567-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**

PLAINTIFFS' REBUTTAL TO DEFENDANTS' RESPONSE IN OPPOSITION TO THEIR MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, Jerry Young and Christy Colley, by and through counsel, file this their Rebuttal to Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Defendants concede that if Plaintiffs' interpretation of Article XII, § 241 of the Mississippi Constitution as it pertains to their right to vote in presidential and vice presidential elections is correct, Plaintiffs' claims are properly before this Court and redress can be given. However, Defendants nevertheless argue that (a) Plaintiffs' have misread Section 241; (b) sovereign immunity bars this suit against them; (c) this Court should abstain for rendering a judgment in this case because only a state court should address the claims Plaintiffs raise; (d) the doctrine of laches applies because

Plaintiffs' claims are not timely; and (e) that the Court does not have subject matter jurisdiction over this matter because Plaintiffs' claims are predicated on state law, not federal law[1].

A. SECTION 241 EXPRESSLY ALLOWS PLAINTIFFS TO VOTE IN THE PRESIDENTIAL ELECTIONS.

Defendants contend that any person convicted of a disfranchising crime may not vote for President or Vice President. Def. Resp. p. 4. Specifically, Defendants argue that disfranchised individuals are not "otherwise qualified electors," and therefore cannot vote for President and Vice President. *See Id.* at 4-5. Defendants' analysis of § 241 is contradictory to the explicit language of the constitutional provision.

For all of the reasons set forth in Plaintiffs' memorandum of law in support of their motion for preliminary injunction, Plaintiffs maintain the explicit language in § 241 affirms that people convicted of the ten crimes enumerated in that section, and any subsequent expansion of the crimes enumerated in that section, retain the right to vote for president and vice president of the United States.

When interpreting a statute or constitutional provision, courts are bound by the plain meaning of the law. *Abrams v. U.S. Dept. of Treasury*, 2007 WL 1721506 *6 (5th Cir. June 11, 2007). A law's plain meaning "may be ascertained by both the 'particular statutory language at issue, as well as the language and design of the statute as a whole.'" *United States v. Collins*, 2006 WL 2921225 *1 (5th Cir. Oct. 12, 2006), *quoting United States v. Elrawy*, 448 F.3d 309, 315 (5th Cir.2006). The Mississippi Supreme Court has repeatedly held that the Constitution should be read and enforced "in

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[1]Subject matter jurisdiction was raised by Defendants in their supplement to their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction which was filed on eve of this rebuttal being submitted to the Court.

a manner which best fits its language, is most consistent in principle with the best justification which may be given for that language, and which best serves our state today." *See Alexander v. State ex rel. Allain*, 441 So. 2d 1329,1334 (Miss. 1983). *See also Stepp v. State*, 33 So. 2d 307, 309 (1948); *Albritton v. City of Winona*, 178 So. 799, 806 (1938). More specifically, language added to a constitutional provision, such as the language here, must have meaning for it shows the intent to change or modify the law. "'Where words or provisions of a statute differ from those of a previous statute on the same subject, they are presumably intended to have a different construction or meaning, and to denote an intention to change the law.'" *Stidham v. State*, 750 So. 2d 1238, 1245 (Miss. 1999) (internal citations omitted) (finding that legislature's amendment of a constitutional provision signified an intention to change the law). Thus, courts should interpret a modification to a constitutional provision in a manner that recognizes the change in the law and makes the new provision meaningful. *Id.*

Article XII, § 241 of the Mississippi Constitution of 1890, as amended in 1972 following the passage of Concurrent Senate Resolution No. 502, is well known for having extended the elective franchise to 18 year old citizens and enacting language "to provide qualifications for voting for President." Miss. Const. art. 12, § 241. The introduction to the Amendment provided as follows:

> A CONCURRENT RESOLUTION to amend Section 241 of the Mississippi Constitution of 1890 to extend the elective franchise to 18 year-old citizens, to provide qualifications for voting for President; and for related purposes. Miss. Con. S. Res. 502

Therefore, the amendment to § 241 disqualified from voting anyone convicted of one of the ten enumerated crimes **"except that [the person] 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).

Because the right to vote is a fundamental right, courts must focus on "whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds v Sims*, 377 U.S. 533, 554, 561 (1964). *See also, Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("Our Constitution leaves no room for classification of people in a way that unnecessarily abriges this right.").

The constitutional amendment of 1972 clearly and unambiguously creates an exception for people convicted of one of the enumerated crimes to vote for President and Vice President. Defendants' interpretation of § 241 does not give any weight to the phrases "otherwise qualified elector" and "except" which appear in § 241 and which, read in harmorny with the rest of the section, carve out an exception for voting in presidential and vice presidential elections. If the phrase "otherwise a qualified elector" only directly referred back to the earlier definition of "qualified elector" there would have been no reason for the legislature to even insert the additional phrase. The fact that it is stated twice within the amendment - once before and once after the exception - indicates that there are two classes of "qualified electors": one class qualified to vote in all elections and the other qualified to vote only in U.S. presidential elections. The exemption language secures the right of people convicted of one of the ten enumerated crimes or subsequent additional disenfranchising crimes to vote in presidential elections. The part of the 1972 amendments relating to presidential elections would be completely superfluous and without meaning if the court interprets § 241 as the Defendants propose. As stated earlier, additional language added by the Legislature is presumed to have meaning and effect a change in the law. *Stidham*, 750 So. 2d at 1245.

Plaintiffs do not challenge the constitutionality of Mississippi's felon disfranchisement law. Instead, Plaintiffs specifically argue that the Legislature and Mississippi citizens determined that persons convicted of any crime listed in § 241 retain the right to vote for President and Vice President. Defendants' actions of denying disfranchised persons of their right to vote in presidential elections violate the clear language of the constitutional provision which creates such an exception. If the State is allowed to continue to interpret § 241 as it has in the past, it is consciously choosing to disregard the clear language in that section. This Court cannot in good conscious allow the State to violate Plaintiffs constitutionally protected right to vote in the election for President and Vice President. "The State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision'." *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 976 (S.D. Miss. 1995). Such precision can be found in § 241 which addressES the constitutionally protected activity of voting, whereby a clear exception is delineated allowing those who would be otherwise disenfranchised as a result of their conviction of one of the enumerated crimes to nonetheless vote in elections for President and Vice President so long as they would be a qualified elector absent their conviction and disenfranchisement as a result thereof. To read § 241 in some other fashion fails to credit the 1972 amendment providing for the exception allowing otherwise qualified electors to vote in presidential elections.

B. THE STATE DEFENDANTS ARE NOT ENTITLED TO IMMUNITY UNDER THE ELEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

Defendants argue that they are immune from suit under the doctrine of sovereign immunity. Def. Resp. p. 9, 11. The present case is clearly one seeking injunctive relief "against the state defendants in their official capacities for alleged violations of [Plaintiffs'] rights under the federal

constitution and statutes." *McLaughlin*, 947 F. Supp. at 965. Further, the State Defendants all have some connection with the enforcement of § 241. The Secretary of State is the Chief Elections Officer and is vested with the authority to execute and enforce the state laws related to the elective franchise to preserve public confidence in the democratic process and to facilitate voter participation in elections. Miss. Code Ann. § 23-15-211-211.1. County Commissioners are charged with the responsibility for registering and disenfranchising voters. *See McLaughlin*, at 965.

The bulk of the State's argument that the State Defendants are entitled to immunity under the Eleventh Amendment rests on its disavowal of Plaintiffs' interpretation of § 241. "Plaintiffs' claims are only viable if this Court agrees that the State Defendants have misconstrued Section 241." Def. Resp. P. 18-19. Thus, the issue of whether the State Defendants have immunity can only be determined by interpreting § 241. As previously argued, Plaintiffs contend that the language of Article XII, § 241 of the Mississippi Constitution is unambiguous and open to only one interpretation, that being that those disenfranchised under § 241 based on their conviction of one of the enumerated crimes are permitted to vote in presidential and vice presidential elections. Without a doubt, the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, at 555. Thus, to deny Plaintiffs the right to vote in the presidential election clearly circumvents Plaintiffs' federally protected right. "[A] denial of constitutionally protected rights demands judicial protection..." *Id.*, at 566. If indeed the State were exercising its power "wholly within the domain of state interest, it [would be] insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). In the instant matter, the State's failure to

recognize the right of the Plaintiffs to register and cast their vote in the presidential election clearly infringes upon the constitutionally protected right to vote freely for the candidate of their choice and thus the State cannot lay claim to some protection or immunity under the Eleventh Amendment.

C. THERE IS NO CAUSE FOR ABSTENTION UNDER THE PULLMAN DOCTRINE.

The State's position that there is some unclear or unsettled state law at issue in this matter is clearly without merit. See Def. Resp. p. 19. The issues before this Court do not turn on some unsettled question of law that bears consideration by the state courts. This case is about the State's failure to give its citizens the right to vote when so allowed by the State Constitution. The only uncertainty at issue herein is whether Plaintiffs interpretation or the Defendants' interpretation is the correct one, which Plaintiffs maintain is not an uncertainty, in the least. Once the Court has satisfied itself that Plaintiffs' interpretation is one based on the plain meaning of the language set forth in § 241, as it must, this Court is well within its authority to ascertain whether Plaintiffs are being denied equal protection under law and to suggest a means for remedying such a violation.

D. PLAINTIFFS HAVE NOT BEEN DILATORY IN BRINGING THIS MATTER BEFORE THE COURT FOR CONSIDERATION.

Despite the defendants' misrepresentation of the procedural history in this case, the claims of Plaintiffs Young and Colley are <u>not</u> before any court. Plaintiffs did seek to join an ongoing lawsuit in which identical claims were raised, but seven months have passed since Plaintiffs sought to join that lawsuit and the state court has never ruled on their motion. *See* Exhibit E, Docket Sheet for Strickland et al v. Hon. Eric Clark et al. Now, there is a presidential election scheduled for November 4, 2008, and the voter registration deadline in Mississippi is October 4, 2008. Thus,

despite Plaintiffs attempts to have their claims heard as early as February of this year, the state's inaction has left them with no recourse but to file the instant lawsuit.

As the State sets forth, this claim was brought in federal court on September 12, 2008. A complaint and request for injunctive relief was filed in Chancery Court on behalf of different Plaintiffs seeking redress in relation to § 241 in October 2006. *See* Ex. A to Defendants' Response, hereinafter referred to as the "State Complaint". One of the claims asserted in the State Complaint did challenge the State's interpretation of § 241, specifically in relation to the right of those disenfranchised as a result of conviction of one of the disqualifying crimes to vote in presidential elections. The Defendants named in the State Complaint filed a Motion to Dismiss said suit and a ruling was not issued on said motion until June 12, 2007. See Exhibit F, Order [denying Motion to Dismiss]. Subsequently, a motion to amend the complaint for the purpose of substituting plaintiffs was filed on February 11, 2008, and has been pending before the Chancery court since that time. Ex. E, State Complaint Docket Sheet. In fact, there has also been a motion filed by counsel for plaintiffs named in the State Complaint to substitute said counsel, but there has been no ruling on that motion either. The only Order to have issued from the Court in the state matter is an Order of Recusal entered by Chancellor William H. Singletary on April 30, 2008. *See* Exhibit G, Order of Recusal. All attempts to discern why there has been no movement on the state matter have been unsuccessful. As there has not been an order allowing the Plaintiffs in the instant matter to be named parties in the state matter, the Plaintiffs herein were left with little choice but to seek redress from this Court for the violation of their rights under the Equal Protection Clause as well as under the National Voter Registration Act. Any delay in the instant case being brought before this Court is in direct relation

to the hope that the State Court would take some action permitting consideration of these very important issues.

Further, simply because the language at issue in this matter has been in existence for decades and the State has been allowed to continue to disenfranchise voters without real consideration for the dictates of § 241, Def. Resp. p. 21, does not mean that the issues are no less important and vital at this time. It is simply without merit to argue that the State's interpretation of § 241 does not amount to a violation of the Equal Protection Clause. A violation of the United States constitution can be "based on state constitutional provisions which have been consistently been complied with [or] when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and State Constitution, the Supremacy Clause of course controls." *Reynolds*, at 584.

While the deadline for registration for the Presidential election is fast approaching, the violation of the Plaintiffs constitutional right to vote in said election can still be remedied by allowing them to register and to vote in the presidential election. Once there has been a determination that a State has acted unconstitutionally, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid [interpretation]." *Id.*, at 587. The Court "should consider the proximity of the forthcoming election and the mechanics and complexities of the state election laws, and should act and rely upon general equitable principles," in determining whether the injunctive relief sought herein is realistic, which Plaintiffs certainly believe. *Id.*

E. JURISDICTION IS PROPER IN THIS COURT.

Defendants Supplemental Response raises the issue that subject matter jurisdiction is not

proper with this court. Plaintiffs allege violations of federal law over which this Court has original jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3) and (4). Furthermore, the Defendants admittedly state that, "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." Def. Supp. Resp. P. 4. Defendants do not deny the existence of subject matter jurisdiction if, in fact, Plaintiffs' interpretation is correct. Obviously, it stands to reason that if the State is denying Plaintiffs the right to vote in presidential elections as provided for by § 241, then such a denial amounts to a violation of the Equal Protection Clause and gives rise to jurisdiction in this Court.

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, at 554. "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted. *Id.* at 555. While a state is certainly within its purview to "grant the right to vote some persons convicted of a felony while denying it to others... thus grant[ing] to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons...", Def. Supp. Resp. p. 4, a state is not granted the discretion to ignore its own laws with respect to disenfranchisement or reenfranchisement. "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 bollot box the disenfranchised, the disinherited must sit idly by while other 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." *McLaughlin*, at 971. If § 241 clearly directs that all those disenfranchised

under its provisions due to conviction of one of the enumerated crimes are *excepted* from the section's disenfranchising language in the case of presidential elections, then a denial of that right is not directed by law and must be remedied by this Court. "[S]ince the enactment of the Fourteenth Amendment," it has "been open to the courts" to determine whether a particular set of facts demonstrates a violation of the Equal Protection Clause where there is a determination that the discrimination is not as a result of policy, but rather simply arbitrary and capricious action. *Id.* at 557, *quoting Baker v. Carr*, 369 U.S. 186, 226 (1962).

Plaintiffs have raised a very compelling issue of constitutional proportions, that they are being denied their right to vote in the presidential election. Not only has the State failed to adhere to policy, but it has acted arbitrarily and capriciously in refusing to give credence to a plain interpretation of § 241. The present matter is squarely within the subject matter jurisdiction of the Court and is ripe for redress.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Court grant its motion for injunctive relief and allow Plaintiffs the opportunity to register to vote in the upcoming presidential election and to cast their votes accordingly, as well as any other relief the Court may deem proper.

This the 24th day of September, 2008.

Respectfully Submitted,

American Civil Liberties Union of Mississippi

BY: /s/ *Kristy L. Bennett*
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CERTIFICATE OF SERVICE

I, Kristy L. Bennett, attorney for the Plaintiff, do hereby certify that I have this day served via ECF filing or by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following counsel of record:

Shawn S. Shurden, Esq.
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THIS the 24th day of September, 2008.

/s/ *Kristy L. Bennett*
KRISTY L. BENNETT