

**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

REBUTTAL IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

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 as arms of the state as asserted herein) in the above styled case and files this Rebuttal in Support of Defendant’s Motion to Dismiss, stating as follows:

Plaintiffs’ response to the State’s motion to dismiss boils down to a single assertion: “§ 241 actually affirms that people convicted of the ten crimes enumerated in that section retain the right to vote for president and vice president of the United States.” (Doc. no. 20, Pl.s’ Resp. in Opp. to Def.s’ Mot. to Dis. at 4). To the contrary, Section 241 plainly and unambiguously prohibits certain convicted felons from being qualified electors and voting in any elections.

MISS. CONST., art. XII, § 241; Miss. Code Ann. § 23-15-11.¹ Notably, neither the State nor its courts have ever interpreted or applied Section 241 in the manner suggested by Plaintiffs.

Indeed, this Court has clearly rejected Plaintiffs’ frivolous interpretation of Section 241, (doc. no. 11; Ex. A at 3), as did the Fifth Circuit by implication in its recent *per curiam* denial of Plaintiffs’ motion for injunction pending appeal.² (Ex. B). In its Bench Opinion, this Court clearly found as follows:

[F]rankly, I reviewed and considered the party’s arguments and don’t find plaintiff’s interpretation of the provision to be a fair or reasonable construction. Rather, I think that the defendants have - - the defendant has correctly construed this provision[.]

(Ex. A at 3). The Order affirmed the Bench Opinion, providing that “the Defendants’ interpretation of Section 241 of the Mississippi Constitution is correct[.]” (Doc. no. 11).

This Court’s finding reflects the plain language and simple structure of Section 241:

Every inhabitant of this state . . . who [meets the five listed requirement], **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

¹Section 23-15-11, which tracks the qualified elector language of Section 241, provides, in pertinent part:

Every 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. . . . No others than those specified in this section shall be entitled, or shall be allowed, to vote at any election.**

Miss. Code Ann. § 23-15-11 (emphasis added). The highlighted language is clear and unambiguous, containing no exception for federal elections.

²In its Response to Plaintiffs’ Motion for Injunction Pending Appeal, the State argued that Plaintiffs’ interpretation of Section 241 is “patently insubstantial.” (Ex. C).

established by Congress therefor and **is otherwise a qualified elector.**

MISS. CONST., art. XII, § 241 (emphasis added). Plaintiffs' interpretation applies the alleged exemption to one requirement, but no structural or logical basis exists for such an application. Plaintiffs' specious reading could just as easily apply to any or all of the listed qualifications, rendering the provision meaningless.

The disputed language is separated from all the listed requirements by a comma and the phrase "is declared to be a qualified elector." Further, Plaintiffs ignore the "and is otherwise a qualified elector" language of Section 241, completely reading out any meaning for the phrase. The language of Section 241, however, has a clear meaning. It recognizes Congress' authority to regulate the voting qualifications of electors for President and Vice President, as well as the traditional and inherent authority of the states to set voter qualifications, so long as federal and state laws are not in conflict.³ Plaintiffs' interpretation reads out of Section 241 the states' primary authority to establish requirements to be a qualified elector in federal elections.

The power to establish requirements for qualified electors for President and Vice President is vested in the states by the federal Constitution, providing that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors[.]" U.S. CONST. art. II, § 1, cl. 2; see, e.g., McPherson v. Blacker, 146 U.S. 1, 35 (1892). Likewise, states are vested with the power to set the qualifications of electors for Congressional elections. U.S. CONST. art. I, § 2, cl. 2 (Representatives) and amend. XVII, cl. 1 (Senators); see, e.g., Katzenbach

³The 1972 amendment of Section 241, lowering the voting age and adding the disputed language, coincides with the ratification of the Twenty-Sixth Amendment, lowering the nation's voting age to 18. Additionally, the Fourteenth, Fifteenth (race), Nineteenth (sex) and Twenty-Fourth (poll tax) Amendments all impact the qualifications of electors and recognize Congress' authority to pass appropriate legislation to enforce those Amendments.

v. Morgan, 384 U.S. 641, 647 (1966). Indeed, the constitutionally mandated balance between state and federal authority has been readily identified by the Supreme Court:

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, s 2; Seventeenth Amendment; Ex parte Yarbrough, 110 U.S. 651, 663, 4 S.Ct. 152, 28 L.Ed. 274. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution.

Katzenbach, 384 U.S. at 647. The Constitution establishes the State's authority to set voter qualifications, and while Congress may regulate voting issues, Congress does not establish voter qualifications *per se*. Section 241 plainly asserts the authority of the State, while recognizing Congress' role in our federal system.

Wherefore, premises considered, the State respectfully requests that this Court GRANT the present Motion to Dismiss.

Respectfully submitted, this the 17th day of October, 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:

Kristy L. Bennett
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This the 17th day of October, 2008.

s/ Shawn S. Shurden

SHAWN S. SHURDEN