

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

JERRY YOUNG, ET AL.

PLAINTIFFS

VS.

CIVIL NO. 3:08cv00567TSL-JCS

DELBERT HOSEMANN, ET AL

DEFENDANTS

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE TOM S. LEE,  
UNITED STATES DISTRICT JUDGE  
SEPTEMBER 25, 2008  
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFF: MS. KRISTY BENNETT

FOR THE DEFENDANT: MR. SHAWN STEPHEN SHURDEN

REPORTED BY: CHERIE GALLASPY BOND  
Registered Merit Reporter  
Mississippi CSR #1012

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245 E. Capitol Street, Room 120  
Jackson, Mississippi 39201  
(601) 965-4410

EXHIBIT

"A"

tabbles

1 THE COURT: There is before the court today for  
2 consideration the motion of plaintiffs Jerry Young and Christy  
3 Colley for preliminary injunction against the Secretary of  
4 State with regard to case number 3:08-567. Are you ready to  
5 proceed for the plaintiffs?

6 MS. BENNETT: Yes, Your Honor.

7 THE COURT: Are you ready for the secretary?

8 MR. SHURDEN: Yes, Your Honor.

9 THE COURT: Ms. Bennett, what do you propose to  
10 present to the court in support of your motion?

11 MS. BENNETT: I'm sorry, Your Honor?

12 THE COURT: I have your briefs. Is there anything  
13 that you want to present to the court this afternoon in the  
14 form of either testimony and/or argument in addition to what  
15 you've already presented?

16 MS. BENNETT: I think that our position has been  
17 fairly well laid out in the briefing. Unless Your Honor has  
18 some specific questions, I don't believe that we have to add  
19 anything. Obviously if you want some oral arguments, I'll be  
20 happy --

21 THE COURT: So you are in anticipation of hearing the  
22 court's ruling on the motion now?

23 MS. BENNETT: Yes, Your Honor.

24 THE COURT: What do you say for the secretary of  
25 state?

1           MR. SHURDEN: Your Honor, I would -- if Your Honor is  
2 prepared to rule as to the subject matter of this court, we  
3 will simply defer and have no argument. If the court is still  
4 in consideration of that matter, I would like to present  
5 argument on this court's subject matter jurisdiction.

6           THE COURT: All right. Thank you. The court will now  
7 rule on the motion.

8           The plaintiffs, Jerry Young and Christy Colley, are before  
9 this court arguing that defendant's interpretation of  
10 Section 241 of the Mississippi Constitution violates the equal  
11 protection clause of the United States Constitution and  
12 deprives them of the federal constitutional right to vote. Of  
13 course, the claims are based entirely on the premise that the  
14 defendants have incorrectly interpreted state law, Section 241,  
15 and that this has resulted in the violation of their federal  
16 constitutional rights.

17           I recognize the challenge by the defendant to this court's  
18 jurisdiction over the plaintiff's claims, but I don't agree  
19 that the court lacks jurisdiction. It could be that Pullman  
20 abstention might be appropriate here; but, frankly, I reviewed  
21 and considered the party's arguments and don't find plaintiff's  
22 interpretation of the provision to be a fair or reasonable  
23 construction. Rather, I think that the defendants have -- the  
24 defendant has correctly construed this provision, and it  
25 follows that the plaintiffs are not entitled to relief so the

1 motion for preliminary injunction is denied.

2 Can you provide the court with an order?

3 MR. SHURDEN: Yes, Your Honor, I can do that.

4 THE COURT: Very well then. Is there anything from  
5 either party then before I adjourn? Court is adjourned.

6 (Recess)

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CERTIFICATE OF REPORTER

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I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 11th day of October, 2008.

s/Cherie G. Bond  
Court Reporter

No. 08-60941

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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JERRY YOUNG AND CHRISTY COLLEY,

Plaintiffs-Appellants

v.

DELBERT HOSEMANN, in his official capacity as the  
Secretary of State of Mississippi; KRISTIN BUSE, DEBBY  
McCAFFERTY, JOHN M. WAGES, HARRY GRASON, 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 ROLAND McMINN, in  
their official capacities as Elections Commissioners  
of Panola County,

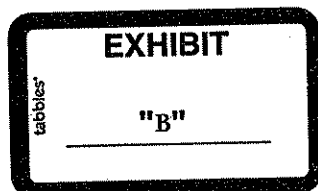
Defendants-Appellees

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**DEFENDANT/APPELLEE'S RESPONSE TO EMERGENCY  
AND URGENT MOTION FOR INJUNCTION PENDING APPEAL**

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*Attorney for Defendant-Appellee,  
Delbert Hosemann, Secretary of State*

## CERTIFICATE OF INTERESTED PERSONS

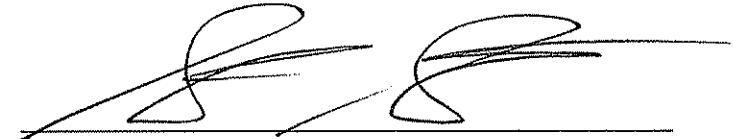
The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Jerry Young, Appellant
2. Christy Colley, Appellant
3. Delbert Hosemann, Appellee
4. Kristin Buse, Appellee
5. Debbie McCafferty, Appellee
6. John M. Wages, Appellee
7. Harry Grayson, Jr., Appellee
8. John H. Edwards, Appellee
9. Vivian Burkley, Appellee
10. Julius Harris, Appellee
11. Jimmy Herron, Appellee
12. Bonnie G. Land, Appellee
13. Ronald McMinn, Appellee
14. Nancy G. ABudu, Counsel for Appellants
15. Kristy Bennett, Counsel for Appellants

16. Laughlin McDonald, Counsel for Appellants

12. Shawn S. Shurden, Special Assistant Attorney General

Dated: October 14, 2008.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Shawn S. Shurden  
Attorney of Record for Appellees

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## **BACKGROUND AND PROCEDURAL HISTORY**

The present matter has its origins in state court. On or about October 6, 2006, Leola Strickland and Michael Johnson filed their complaint in state chancery court, alleging, *inter alia*, that the State's interpretation of Section 241 is incorrect, leading to a violation of Section 241 itself and, in turn, a violation of the Equal Protection Clause and the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg, *et seq.* (Ex. 4, attached Ex. A).

In February 2008, undersigned counsel and ACLU counsel John Williams exchanged communications in which Mr. Williams sought and received agreement that plaintiffs Leola Strickland and Michael Johnson would be replaced, via an amended complaint, with Jerry Young and Christy Colley (Plaintiffs in the instant suit). Mr. Williams filed for leave to amend the state court complaint on February 11, 2008, but he did not circulate an amended complaint until on or about April 24, 2008. Subsequently, the original chancellor recused himself, and the matter was assigned to a new chancellor. On May 9, 2008, Mr. Williams forwarded the proposed amended complaint and a proposed order to the new chancellor, where the matter remains pending. The ACLU has not attempted to set a hearing for its pending motions in state court.

On September 12, 2008, ACLU counsel filed a motion in chancery court to withdraw those claims related to the State's refusal to allow plaintiffs to register to

vote for President and Vice President. (Ex. 4, attached Ex. B). That same day, Plaintiffs Young and Colley filed their Complaint and a Motion for Preliminary Injunction in federal district court asserting the very claims they moved to withdraw from the chancery court. (Exs. 1, 2). Despite knowing the particulars of their claim since at least February 2008, Plaintiffs, nevertheless, moved the district court to enjoin the State from preventing Plaintiffs from registering to vote. (Id.).

The issues were briefed and argued before the district court on September 25, 2008. As stated in the Order and in the district court's bench opinion, the Plaintiffs' request for injunction was denied because the court found "that the Defendants' interpretation of Section 241 of the Mississippi Constitution is correct, thus Plaintiffs are not likely to succeed on the merits of their claims." (Ex. 7; see Ex. 8 at 3). Plaintiffs then filed the present motion for emergency injunctive relief, which the State opposes for the reasons stated herein and in the memoranda presented by the State to the district court. (Exs. 4, 5, 10).

### **ARGUMENT**

To obtain the requested relief, Plaintiffs must satisfy the following four factors: (1) a showing of likelihood of success on the merits, (2) a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. Ruiz v. Estelle ("Ruiz I"), 650 F.2d 555, 565 (5th

Cir. 1981). Plaintiffs bear a heavy burden:

[O]n motions for stay pending appeal the movant need not always show a “probability” of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities **weighs heavily in favor** of granting the stay. . . . Of course, if the balance of equities (i. e. consideration of the other three factors) is not **heavily tilted** in the movant's favor, the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal.

Id. at 565-66 (emphasis added) (internal citations omitted). “Likelihood of success remains a prerequisite,” such that even where the equities heavily favor the movant “the issue must be one with patent substantial merit.” Ruiz v. Estelle (“Ruiz II”), 666 F.2d 854, 857 (5th Cir. 1982). Plaintiffs’ burden is all the heavier because the district court expressly held that the State’s interpretation of Section 241 is correct and that Plaintiffs’ construction is neither fair nor reasonable. (Exs. 7, 8).

This Court has emphasized “that the grant of a stay pending appeal is preventive or protective in that it seeks to maintain the status quo pending a final determination on the merits of the suit.” Ruiz I at 565. Plaintiffs’ requested relief would obliterate the status quo. The request is premised entirely upon a patently insubstantial interpretation of state law that has never been accepted or applied by the State or its courts. To grant Plaintiffs’ motion, the Court must rewrite state law and re-calibrate the election machinery only days before the November elections.

**I. Plaintiffs Cannot Show Any Likelihood of Success on the Merits.**

**A. Plaintiffs' Interpretation of State Law is Patently Insubstantial.**

Plaintiffs present no likelihood of success on the merits because they base their claims solely on a patently insubstantial interpretation of state law. Plaintiffs seek the protection and alleged benefit of Section 241, arguing that Section 241 actually protects the right of felons to vote for President and Vice President.

Section 241 of the Mississippi Constitution provides:

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 therefor and **is otherwise a qualified elector**.

MISS. CONST., art. XII, § 241 (emphasis added). Somehow, Plaintiffs read Section 241 to allow convicted felons, who would otherwise be disenfranchised, to vote for President and Vice President. The State disagrees.

Section 241 does not preserve the right of a disenfranchised felon to vote for President or Vice President. Section 241 prescribes five requirements for an inhabitant to qualify as an elector. After setting forth these requirements, Section

241 provides that “[such a person] **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 therefor **and is otherwise a qualified elector.**” *Id.* (emphasis added). Plaintiffs interpret the “except that he shall be qualified to vote” language as an exemption to the last requirement - to not be convicted of a disenfranchising crime - for elections for President and Vice President. Such an interpretation ignores the structure of Section 241, as well as its plain meaning.

The simple structure of Section 241 reveals Plaintiffs’ flaw:

Every inhabitant of this state . . . who [meets the five listed requirements], **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 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.<sup>1</sup> Plaintiffs' interpretation reads out of Section 241 the states' primary authority to establish requirements to be a qualified elector in federal elections.

The power of the states to establish requirements for qualified electors for President and Vice President is provided by the federal Constitution: "Each 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 v. Morgan, 384 U.S. 641, 647 (1966). Indeed, the Supreme Court has asserted the Constitutionally mandated balance between state and federal authority:

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

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<sup>1</sup>The 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.

may vote for United States Representatives and Senators . . . 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 (internal citations omitted). The Constitution establishes the states' authority over voter qualifications, and while Congress may regulate voting issues, Congress does not establish voter qualifications *per se*.<sup>2</sup>

Section 2 of the Fourteenth Amendment explicitly recognizes the authority of the states over voter qualifications and disenfranchisement:

Representatives shall be apportioned among the several States according to their respective numbers . . . . **But when the right to vote at any election for the choice of electors for President and Vice President of the United States . . . 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[.]

U.S. CONST. amend. XIV, § 2 (emphasis added). Section 2 plainly sanctions the disenfranchisement of felons as qualified voters for the election of President and Vice President.<sup>3</sup> See *id.*; Richardson v. Ramirez, 418 U.S. 24, 54-56 (1974); Cotton, 157 F.3d at 391.

Additionally, state statutes, read *in pari materia* with Section 241, prove

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<sup>2</sup>Of Section 241's requirements to become a qualified elector, only the durational residency requirement is impacted by federal law. 42 U.S.C. § 1973aa-1(c), (e).

<sup>3</sup>Thus, Plaintiffs' Equal Protection claim rises and falls with their state law claim. As does Plaintiffs' claim under the NVRA, which explicitly recognizes that states may remove any registered voter "as permitted by State law, by reason of criminal conviction or mental incapacity." 42 U.S.C. § 1973gg-6(a)(3)(B).

that no federal election exception exists. Section 23-15-11, which tracks the qualified elector language of Section 241, is compelling. Section 23-15-11 provides, in pertinent part:

Every inhabitant of this state . . . 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 . . . 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.<sup>4</sup>

Plaintiffs' interpretation contradicts the plain and unambiguous language of Section 241. Plaintiffs ask this Court to abrogate the Constitutional authority of the State to set voter qualifications for federal elections by interpreting the State's Constitution in a manner that has never been interpreted or applied by the State or its courts. Plaintiffs' reading is not simply wrong; it is utterly insubstantial.<sup>5</sup>

#### **B. Plaintiffs Cannot Establish Subject Matter Jurisdiction.**

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<sup>4</sup>Two other statutes that address Section 241's voter qualifications and do not contain a federal election exception are §§ 23-15-19 and 23-15-151.

<sup>5</sup>As held by the district court, "frankly, I reviewed and considered the party's argument and don't find plaintiff's interpretation of the provision to be a fair or reasonable construction." (Ex. 8 at 3).

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). Jurisdiction, however, 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.” Bell, 327 U.S. 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).

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, (Ex. 1 at 3-5), and their legal allegations are premised entirely on their novel interpretation that “Section 241 . . . secures the rights of individuals convicted of crimes to vote for President and Vice President of the United States.” (Ex. 1 at ¶¶ 23, 28, 37). Indeed, the district court found that “[o]f course, the claims are based entirely on the premise that the

defendants have incorrectly interpreted state law[.]”<sup>6</sup> (Ex. 8 at 3).

Thus, only by operation of state law as interpreted by Plaintiffs can they assert a violation of Equal Protection and the NVRA. Such bootstrapping is impermissible under Supreme Court and Fifth Circuit precedent. See Stern v. Tarant County Hosp. Dist., 778 F.2d 1052, 1056 (5th Cir. 1985) (“Converting alleged violations of state law into federal equal protection and due process claims improperly bootstraps state law into the Constitution.”).

In Snowden v. Hughes, the Supreme Court considered a state candidate’s claim that state election officials had violated state election statutes in refusing to place him on the ballot, thus violating the Fourteenth Amendment. 321 U.S. 1, 4 (1944). State law provided that two Republican nominees should appear on the ballot for election to the General Assembly. Id. at 3. The State Primary Canvassing Board, however, certified only one Republican nominee. Id. at 4. Petitioner, having received the second highest votes, sued in federal court. Id.

The Supreme Court rejected plaintiff’s attempt to equate a violation of state election law with a violation of Equal Protection:

Nor can we conclude that the action of the State Primary Canvassing Board, even though it be regarded as state action within the prohibitions of the Fourteenth Amendment, was a denial of the equal protection of the laws. . . . The right is one secured to him by state statute and the deprivation of right is alleged to result solely from the

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<sup>6</sup>The district court summarily rejected the State’s subject matter jurisdiction challenge, stating simply that “I don’t agree that the court lacks jurisdiction.” (Ex. 8 at 3).

Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment.

\* \* \*

But not every denial of a right conferred by state law involves a denial of the equal protection of the laws . . . . Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

Id. at 7-8. The Court noted that the proper inquiry was whether the state action – independent of its legality under state law – violated the Fourteenth Amendment:

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.

Id. at 11 (internal citations omitted). Based on the preceding, the Court found that it lacked jurisdiction, concluding that “the right asserted by the petitioner is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon[.]” Id. 13; see Stern, 778 F.2d at 1056, 1059-60.

As directed by the holding in Snowden, the proper inquiry is whether the

State's interpretation and application of Section 241, regardless of its alleged illegality under state law, actually violates the Fourteenth Amendment. This inquiry is decisive regarding this Court's jurisdiction for two reasons: First, Plaintiffs do not directly and independently challenge Section 241. Plaintiffs' challenge is dependent upon an alleged violation of state law according to their interpretation of Section 241. Here, as in Snowden, "[t]here is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment." Supra at 11. As discussed below, Plaintiffs cannot mount a broad attack upon the State's disenfranchisement of convicted felons.

Second, Supreme Court precedent unequivocally 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, 418 U.S. at 53-56. 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. Thus, Section 241 as interpreted and applied by the State cannot be challenged on equal protection grounds.

Plaintiffs do not plead a direct and independent federal cause of action, and any broad attack on felony disenfranchisement is foreclosed by the Fourteenth Amendment, Richardson and Fifth Circuit precedent. Rather, Plaintiffs rely upon the State’s position being unlawful under Plaintiffs’ interpretation of state law. Such pleading is not only impermissible bootstrapping, it is insufficient to support federal jurisdiction.

**C. The Eleventh Amendment Bars Plaintiffs’ Claims.**

Plaintiffs sued the State<sup>7</sup> seeking declaratory and injunctive relief premised on a misinterpretation of Section 241, as well as seeking the protections of that very law. The Eleventh Amendment unequivocally bars Plaintiffs’ state claim. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984); Earles v. State Bd. of Certified Public Accountants of La., 139 F.3d 1033, 1039 (5th Cir. 1998) (citing Pennhurst at 103-21).

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<sup>7</sup>Plaintiffs did not contest before the district court the State’s assertion that the Secretary of State, E.g. O’Hara v. Mississippi Office of Secretary of State, No. 2:06cv180, 2007 WL 2071796 at \*3-4 (S.D. Miss. July 17, 2007), and the county election commissioners, in the context of executing the essential state functions of voting, are considered arms of the state. See McLaughlin v. City of Canton, Miss., 947 F. Supp. 954, 966 (S.D. Miss. 1995).

Seeking both entry into federal court and a way around the Eleventh Amendment, Plaintiffs assert that the State's interpretation and application of its own law violates Equal Protection and the NVRA. To overcome the Eleventh Amendment bar, Plaintiffs must show that their suit fits within the narrow exception carved out in Ex parte Young, 209 U.S. 123 (1908).

Plaintiffs do not challenge Section 241; rather, Plaintiffs petition this Court to enjoin the State to apply the law, and its perceived benefits, to them. Plaintiffs seek to drag the State into federal court by transmogrifying a claim premised solely on state law (of which Plaintiffs seek the benefit) into federal claims for declaratory and injunctive relief. As such, Plaintiffs cannot invoke the Young exception because this matter does not involve an unconstitutional state enactment or the kind of claim that would require a tipping of the balance away from the constitutionally recognized immunity of the State toward the need to vindicate federal rights as the supreme law of the land. See Pennhurst, 465 U.S. at 105-06.

This case bears similarity to Mohler v. State of Mississippi, 782 F.2d 1291 (5th Cir. 1986). In Mohler, Mississippi school teachers brought a class action civil rights suit against the State asking the federal court to require the State to increase teachers' pay scale in accordance with Mississippi's "pay-raise" statute. 782 F.2d at 1292. Addressing the request for prospective relief, the Fifth Circuit found that:

The appellants also appear to demand prospective relief (pay raise for

both 1985 and 1986). But no constitutional claims have been stated. The complaint instead is obviously based upon state law, and the alleged failure of Mississippi officials to carry out the dictates of state law. When only state law is involved, “the eleventh amendment immunity jurisdictional bar applies to state agencies and officials acting in their official capacity regardless of the relief the plaintiff[s] seek[ ].”

Id. at 1293 (citations omitted).

Finally, the Court concluded that the Young exception did not apply, reasoning that:

[*Young*] is not applicable here, because appellants do not seek to enjoin a state official from enforcing an unconstitutional statute. Rather, they seek to compel state officials to enforce state law, which appellants obviously otherwise interpret as constitutional and under which they claim expected benefits-not even recognizable property rights.

Id. at 1294. Mohler precludes Plaintiffs’ attempt to gain access to federal court via state law.

Additionally, Plaintiffs do not allege an ongoing violation of federal law that can be reviewed by a federal court. Given that Section 241 clearly disenfranchises certain convicted felons and that the Eleventh Amendment prohibits a federal court from reviewing legal challenges premised on state law, this Court cannot review Plaintiffs’ alleged Equal Protection and NVRA violations because the existence of such violations or actionable claims must be based, necessarily, on an actual violation of Section 241. Supra Part I(A) at 7 n. 3; Part

I(B) at 12-13. Because Section 2 of the Fourteenth Amendment affirmatively sanctions the disenfranchisement of convicted felons, the State's act in so disenfranchising cannot violate Equal Protection or the NVRA. Id.

Plaintiffs' claims are based on state law and the State's alleged failure to follow the requirements of state law. As shown herein, the State has properly construed and executed Section 241. As such, this action is prohibited by the Eleventh Amendment and not excepted by Young. Accordingly, the State is immune from suit.

## **II. The Balance of Equities Favors the State.**

The balance of harms and the public interest weigh heavily against altering the registration requirements and balloting on the eve of the election.<sup>8</sup> The threatened injury to Plaintiffs does not outweigh the harm to the State and the voting public. Similarly, the injunction would disserve the public interest. In reviewing a request for relief on the eve of elections, "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election law, and should act and rely upon general equitable principles." Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988).

Fundamentally changing the mechanics and voter registration requirements

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<sup>8</sup> Notably, any change in voter qualifications would likely implicate Section 5 of the Voting Rights Act and require preclearance by the Department of Justice.

at this late date would create voter and institutional confusion and present an unnecessary opportunity for fraud. There is insufficient time to devise, print and meaningfully disseminate new voter registration forms and ballots dedicated to the elections for President and Vice President or to properly educate registrars who maintain the voter registration roles on any new voter qualifications. The machinery of the election is already calibrated and proceeding: absentee and military voting began on September 22, 2008, the registration deadline ran on October 4, 2008, and poll workers and election commissioners have been trained on the current voter registration requirements and election procedure.

There is “a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election.” Summit County Democratic Cent. and Executive Comm. v. Blackwell, 388 F.3d 547, 551 (6<sup>th</sup> Cir. 2004). Public and institutional confusion over voter qualifications, the potential for voter fraud and the waste of State resources would not be in the public interest and weigh heavily against the requested injunction. Neither the likelihood of success on the merits or the balance of equities favors granting Plaintiffs’ requested relief. Consequently, this Court should deny Plaintiffs’ motion for emergency relief.

### **III. Laches Bars Plaintiffs' Emergency Request for Injunctive Relief.**

The doctrine of laches bars Plaintiffs requested relief.<sup>9</sup> These very issues have been pending in state chancery court since October 2006, yet Plaintiffs have failed to advance this case, now seeking to withdraw certain claims pending in state court and have them adjudicated in this forum. Supra at 1-2. Plaintiffs have been aware of their claim since at least as early as February 2008. Id.

Since its inception, Section 241 has never been interpreted or applied as Plaintiffs suggest, and the language relied upon by Plaintiffs has been in existence since Section 241 was amended in 1972. The passage of decades and Plaintiffs' dilatory pursuit of the underlying state case constitute a clear delay in asserting the present claim that cannot be explained by excusable neglect. See Miller v. Board of Comm'rs, 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998).

Given the delay and timing of the present motion, the State has been unduly prejudiced as discussed in Part II, supra. Additionally, interested parties have expended funds, resources and material in preparing for the elections this November. Because Plaintiffs seek to enjoin actions directly affecting imminent elections for which the State has expended significant resources, equitable relief should be denied in this case pursuant to the doctrine of laches. See Simkins v. Gressette, 495 F. Supp. 1075, 1081-83 (D.C.S.C. 1980).

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<sup>9</sup>Laches exists when plaintiffs: (1) delay in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim is asserted. See Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.1980).

The timing of the present motion and the relief sought would maximize voter and institutional confusion and present significant opportunity for voter fraud. Even if enjoined to do so, the State could not remedy any alleged disenfranchisement by the election date given Plaintiffs' long delay in seeking the requested relief. Given Plaintiffs' inexcusable delay and the undue prejudice that would be suffered by the State, this Court should apply the doctrine of laches and deny the motion for emergency injunctive relief.

#### **IV. The Pullman Doctrine Requires Abstention.**

Plaintiffs' arguments, even if true, would establish nothing more than that state law on this point is unclear or unsettled, thus this Court should abstain from resolving an unsettled issue of state law under the doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). In Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., the Fifth Circuit explained that "for Pullman abstention to be appropriate in [a] case, it must involve (1) a federal constitutional challenge to state action and (2) an unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question." 283 F.3d 650, 652-53 (5th Cir. 2002).

As to the first Pullman prong, Plaintiffs have at least attempted to state a Constitutional claim under the Equal Protection Clause and a federal statutory claim under the NVRA. (Ex. 1). As to the second Pullman prong, the Nationwide

Mutual court described the test as follows: “[T]here must be an uncertain issue of state law that is ‘fairly susceptible’ to an interpretation that would render it unnecessary for us to decide the federal constitutional questions in a case.” Id. at 653 (citation omitted).

In this case, if the law were settled by a state court in favor of the State, Plaintiffs’ arguments and claims would falter because Plaintiffs are not questioning the underlying law (indeed, they are seeking its protection) but only the State’s interpretation. Thus, even if the Court were to find the authority to be unclear, the State respectfully requests that this Court abstain from hearing the federal claims so that the state courts will have the opportunity to determine this matter that, if resolved, would alter this Court’s interpretation of the federal issues. See Brooks v. Walker County Hosp. Dist., 688 F.2d 334, 338 (5th Cir. 1982).

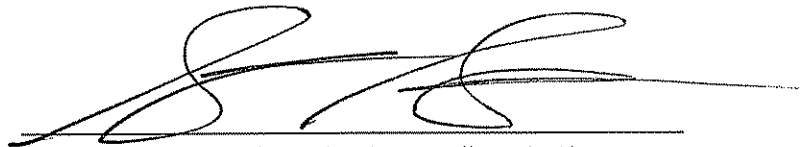
#### CONCLUSION

For the reasons discussed herein and in the State’s memoranda to the district court, the State requests that this Court DENY Plaintiffs’ Emergency and Urgent Motion for Injunction Pending Appeal.

Respectfully submitted, this the 14<sup>th</sup> day of October, 2008.

FOR THE DEFENDANT-APPELLEE  
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**CERTIFICATE OF SERVICE**

I, the undersigned counsel for Appellees, hereby certify that I have this day caused to be mailed, a true and correct printed copy of this Brief of Appellees to:

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This, the 14<sup>th</sup> day of October, 2008.



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 08-60941

U.S. COURT OF APPEALS

**FILED**

OCT 15 2008

JERRY YOUNG; CHRISTY COLLEY

**CHARLES R. FULBRUGE III**  
CLERK

Plaintiffs - Appellants

v.

DELBERT ROSEMAN, 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

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Appeal from the United States District Court for the  
Southern District of Mississippi, Jackson  
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Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' motion for injunction pending appeal is *Denied*.

