

**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

**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 as arms of the state as asserted herein) in the above styled case and file this Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, stating as follows:

BACKGROUND

The present suit has its origins in state court. On or about October 6, 2006, Leola Strickland and Michael Johnson filed their Complaint in the First Judicial District of the Chancery Court of Hinds County, Mississippi, alleging that the State had unconstitutionally disenfranchised voters from state and federal elections through their interpretation and

application of Section 241 of the Mississippi Constitution. (Ex. A, Strickland, et al. v. Clark, et al., Civil Action No. G2006-1753, Complaint at ¶¶ 1-7). As here, the plaintiffs in Strickland assert, *inter alia*, that the State Defendants' interpretation 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.* (Ex. A; instant Compl.)

In the summer of 2007¹, the Strickland Plaintiffs propounded discovery to the State Defendants, to which the State responded. In turn, the State served discovery requests, but the plaintiffs never responded. In February 2008, undersigned counsel and plaintiffs' counsel, John Williams with the ACLU, 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 Complaint on February 11, 2008, but he did not circulate an Amended Complaint until on or about April 24, 2008. After circulating the Amended Complaint, 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 along with a proposed Order to the new chancellor, where they remain pending. The ACLU has never attempted to set a hearing for its motions.

¹Plaintiff Leola Strickland sought a temporary restraining order and preliminary injunction which were denied by Order dated October 24, 2006, and entered on November 2, 2006. The State then filed a motion to dismiss on November 3, 2006, which was denied on June 12, 2007. In denying the motion, the chancellor did not contest the legal arguments of the State: "This Court carefully considered Defendants' Motion . . . and considers it likely that the Complaint should be dismissed under Rule 12(b)(6). . . . Given the magnitude of the rights allegedly infringed, this Court will err on the side of caution." (Strickland, No. G2006-1753, Order entered June 12, 2007).

Recently, on September 12, 2008, ACLU counsel filed a motion to withdraw plaintiffs' claims related to the State's alleged refusal to allow plaintiffs to register to vote for President and Vice President of the United States. (Ex. B). That same day, Plaintiffs Young and Colley filed the present Complaint and a Motion for Preliminary Injunction asserting the very claims they moved to withdraw from the state Chancery Court. "Specifically, Plaintiffs allege that Article 12, Section 241 of the Mississippi Constitution explicitly allows for individuals who have been convicted of a crime to vote for President and Vice President of the United States" and that the State's "disfranchisement violates . . . Section 241 . . . the equal protection clause . . . and the National Voter Registration Act." (Compl. at ¶ 1). Plaintiffs' Motion for Preliminary Injunction asks this Court to enjoin the State Defendants from preventing Plaintiffs from registering to vote, to extend the voter registration deadline, to require the county registrars to extend office hours, to amend the State's registration applications and to disseminate public service announcements to inform citizens of the changes. The State opposes Plaintiffs' attempt to obtain any injunctive relief.

LEGAL ARGUMENT

I. All of Plaintiffs' Claims Rely Upon a Misinterpretation of State Law.

Plaintiffs' rely solely upon their interpretation of state law to prove a violation of Section 241 itself, the Equal Protection Clause and the NVRA. Although couched in terms of violations of the United States Constitution and the NVRA, Plaintiffs' claims are, in essence and in fact, merely claims for an alleged violation of state election law. Plaintiffs' claims begin and end with Section 241 and **their** interpretation of that provision.

At this point, it is important to note what Plaintiffs are not arguing. 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 criminals 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.

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 criminals, who would otherwise be disenfranchised, to vote for President and Vice President.² The State disagrees.

Section 241 does not preserve the right of a disenfranchised criminal to vote for President or Vice President. Section 241 prescribes five requirements for a Mississippi inhabitant to

²Both Plaintiffs are disenfranchised criminals. According to the Complaint, Colley was convicted of embezzlement in 1999, and Young was convicted of armed robbery, considered "theft" under Section 241, in 1980. Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998).

qualify as an elector: the inhabitant must (1) be a citizen of the United States of America; (2) be at least 18 years old; (3) be a resident of the state and county in which he offers to vote for one year and of the voting precinct or municipality for six months;³ (4) be registered to vote; and (5) not be convicted of a disenfranchising crime. MISS. CONST., art. XII, § 241. 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 for President” language as an exception or 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 meaning.

The flaw in Plaintiffs’ reading is readily apparent when one observes the provision’s simple structure:

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

MISS. CONST., art. XII, § 241 (emphasis added). Plaintiffs’ interpretation applies the alleged exception to only one requirement, but no structural or logical basis exists for such an application. The alleged exception is separated from all the listed requirements by a comma and

³The durational residency requirements of Section 241 were found to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972), which imposed only a thirty day residency requirement in the state, county and precinct or municipality. To that extent, Section 241 was abrogated upon the enactment of Mississippi Code Section 23-15-11, providing for a thirty day residency requirement and incorporating the provisions of Section 241.

the phrase “is declared to be a qualified elector.” Under Plaintiffs’ interpretation, the exception could apply to any, all or none of the requirements to be a qualified elector because there is no reason why the alleged exception should modify only the last listed requirement. Additionally, Plaintiffs would have this Court 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 meaning. It recognizes Congress’ authority to regulate the voting qualifications of electors for President and Vice President, as well as the authority of the states to do the same, so long as federal and state laws are not in conflict.⁴ Plaintiffs interpretation would read out of Section 241 the states’ traditional and inherent authority to establish requirements to be a qualified elector in federal elections. The states’ traditional role in establishing requirements for qualified electors for President and Vice President is specifically recognized in Section 2 of the Fourteenth Amendment to the United States Constitution:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding 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 of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added). Equally, Section 2 of the Fourteenth

⁴In fact, the amendment in 1972 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.

Amendment plainly sanctions the disenfranchisement of felons by the states as qualified voters for the election of President and Vice President.⁵ See *id.*; Richardson v. Ramirez, 418 U.S. 24, 54-56, 94 S. Ct. 2655 (1974); Hayden v. Pataki, 449 F.3d 305, 316 (2nd Cir. 2006); Cotton, 157 F.3d at 391.

Of Section 241's requirements to become a qualified elector, only the durational residency requirement is impacted by federal law. Particularly, 42 U.S.C. § 1973aa-1 provides in pertinent part:

No citizen of the United States **who is otherwise qualified to vote** in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision[.]

42 U.S.C. § 1973aa-1(c) (emphasis added). Therefore, to qualify to vote for President and Vice President in Mississippi, an inhabitant must meet the requirements of Section 241, except the durational residency requirement.⁶

Both the structure and meaning of Section 241 reject Plaintiffs' interpretation. Additionally, other state statutes, read *in pari materia* with Section 241, prove that no federal election exception exists. Section 23-15-11, which tracks the qualified elector language of Section 241, provides, in pertinent part:

⁵Thus, it is apparent that Plaintiffs' Equal Protection claim rises and falls with their state law claim. The same is true for Plaintiffs' claims 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); see infra at 15-16.

⁶Given the enactment of Mississippi Code Section 23-15-11, the only instance in which the state residency requirement would not be applicable is if a qualified elector of Mississippi moved to another state within thirty days of a Presidential and Vice Presidential election and was not a qualified voter under the laws of his new state. In that instance, such otherwise qualified voter could return to Mississippi to vote or vote by Mississippi absentee ballot. See 42 U.S.C. § 1973aa-1(e).

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. Additionally, § 23-15-19 stipulates that:

Any person who has been convicted of any crime listed in Section 241, Mississippi Constitution of 1890, shall not be registered, or if registered the name of such person shall be erased from the registration book on which it may be found by the registrar or by the election commissioners.

Miss. Code Ann. § 23-15-19. Again, this provision contains no exception to disenfranchisement for those convicted of any crime listed in Section 241. Section 23-15-151 provides for the tracking of disenfranchised criminals:

The circuit clerk of each county is authorized and directed to prepare and keep in his office a full and complete list, in alphabetical order, of persons convicted of any crime listed in Section 241, Mississippi Constitution of 1890. Said clerk shall enter the names of all persons who have been or shall be hereafter convicted of any crime listed in Section 241, Mississippi Constitution of 1890, in a book prepared and kept for that purpose.

Miss. Code Ann. § 23-15-151. As with the other statutes, there is no recognized exception for voting in federal elections.

The State Defendants have shown that Plaintiffs' interpretation is incorrect.⁷ Having clearly failed to establish that Section 241 protects a felon's right to vote for President and Vice President, all of Plaintiffs' claims become unsupportable. As discussed below, the Court has several grounds to choose from in denying Plaintiffs' request for injunctive relief. The State Defendants will show (1) that they are entitled to the immunity from suit recognized by the Eleventh Amendment to the Constitution of the United States regarding Plaintiffs' official capacity claims brought under both state and federal law; (2) that the Court should abstain from hearing this matter under the Pullman abstention doctrine; (3) that laches bars Plaintiffs' requested relief; and (4) that Plaintiffs cannot satisfy the requirements for injunctive relief.⁸ The State Defendants will address each of these arguments in turn.

II. Plaintiffs' Claims are Barred by the Eleventh Amendment.

Plaintiffs sued the State Defendants in their official capacities, seeking declaratory and injunctive relief. As discussed below, these Defendants, however, are entitled to the immunity from suit recognized in the Eleventh Amendment to the United States Constitution. See Alden v. Maine, 527 U.S. 706, 712-13 (1999). The Eleventh Amendment provides as follows:

The Judicial power of the United States shall not be construed to extend to any

⁷A second interpretation exists concerning the phrase "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[.]" Because voters actually cast their votes for Presidential electors rather than voting for President directly, Miss. Code Ann. § 23-15-785, one argument is that the disputed language addresses the qualifications of those who would be Presidential electors, i.e. those who actually "vote for President and Vice President." Regardless, this argument does not aid Plaintiffs but further illustrates the absurdity of Plaintiffs' position.

⁸The State Defendants have given some thought to whether this Court has subject matter jurisdiction given the necessity, here, of having to find a violation of state law before the submitted federal causes of action can come into existence. Given the time constraints, the State Defendants have not been able to fully formulate its position on subject matter jurisdiction.

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.

U.S. CONST. amend. XI.⁹ Absent waiver or a valid abrogation of the State's immunity by Congress, the State may not be sued in federal court regardless of the relief requested. Green v. Mansour, 474 U.S. 64, 68 (1986); Martinez v. Texas Dep't of Criminal Justice, 300 F.3d 567, 573 (5th Cir. 2002).

This immunity extends to state agencies, departments and other arms of the state. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Richardson v. Southern University, 118 F.3d 450, 452 (5th Cir. 1997). Equally, Eleventh Amendment immunity extends to state officials acting within their official capacities. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 66-71 (1989); Carter v. Mississippi Dep't of Human Servs., No. 3:05cv190 HTW-JCS, 2006 WL 2827691, at *2 (S.D. Miss. Sept. 29, 2006) (Wingate, J.). Congress has not abrogated and Mississippi has not waived its Eleventh Amendment or sovereign immunity in the present context.

Secretary Hosemann is clearly a state official and enjoys the benefits of the Eleventh Amendment. 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) (Starrett, J.). Equally, 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) (Wingate, J.) (finding that municipal election commission was an arm of the state where it

⁹The Supreme Court “[h]as consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.” Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Lakshman v. Mason, No. 3:05cv151 HTW-JCS, 2006 WL 2827683, at *3 (S.D. Miss. Sept. 30, 2006). (Wingate, J.).

is was merely enforcing a state statutory scheme [Section 241 in fact] which it believed to be unambiguous on its face and which reflected state, rather than county, policy). Given the foregoing, the State Defendants will address Plaintiffs' state and federal claims.

A. State Claim

Plaintiffs seek declaratory and injunctive relief against the State Defendants premised on a misinterpretation of Section 241 of the Mississippi Constitution, as well as the protections of that very law. See discussion supra at Part I. Plaintiffs' claim is barred by the Eleventh Amendment. As declared by the Supreme Court in Pennhurst State Sch. & Hosp. v. Halderman:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

465 U.S. 89, 106 (1984). The Fifth Circuit has held that a plaintiff's state law claims "are not cognizable in a proceeding under *Ex parte Young* because state officials continue to be immunized from suit in federal court on alleged violations of state law brought under the federal courts' supplemental jurisdiction." Earles v. State Bd. of Certified Public Accountants of La., 139 F.3d 1033, 1039 (5th Cir. 1998) (citing Pennhurst at 103-21); see Mississippi Surplus Lines Ass'n v. Mississippi, 384 F. Supp. 2d 982, 985-86 (S.D. Miss. 2005) (Lee, J.). Clearly, the Eleventh Amendment bars Plaintiffs' state law claim against the State Defendants.

B. Federal Claims

Plaintiffs assert that the State's misapplication of Section 241 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the

NVRA. The immunity analysis begins with the assumption that Plaintiffs' official capacity claims, which act as claims against the State,¹⁰ are barred by the Eleventh Amendment. To overcome this bar, Plaintiff must show that his suit fits within the narrow exception carved out in Ex parte Young, 209 U.S. 123 (1908). In Young, the Supreme Court examined, *inter alia*, whether the Attorney General of Minnesota could be sued in federal court, consistent with the Eleventh Amendment, where the plaintiffs sought to enjoin the Attorney General from enforcing a state enactment alleged to be unconstitutional. 209 U.S. at 126-33.

In holding that the Eleventh Amendment did not impede such suit, the Court reasoned as follows:

If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60. Addressing the Young holding in a later case, the Supreme Court explained that “[t]his holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.” Papasan v. Allain, 478 U.S. 265, 276 (1986)

The exception in Young has been described as a narrowly construed, legal fiction that

¹⁰By suing the specified Defendants in their official capacities for declaratory and injunctive relief relating to voting registration, Plaintiffs are quite plainly seeking to restrain the State from acting or to compel it to act; thus, Plaintiffs' official capacity claims are claims against the sovereign. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02, n. 11 (1984).

exists “as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” Pennhurst, 465 U.S. at 105, n. 25 (quoting Young, 209 U.S. at 160). However, the Supreme Court has recognized “that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.” Id. at 105.

The Supreme Court maintains that the Young fiction is a “narrow exception.” Seminole Tribe of Florida v. Florida, 517 U.S. 44, 76 (1996). As emphasized by the Court in Idaho v. Coeur d’Alene Tribe of Idaho:

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

521 U.S. 261, 269 (1997).

Given these considerations, the Supreme Court has specifically limited the application of Young, stating that “[i]n accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.” Papasan, 478 U.S. at 277. Additionally, even where certain cases meet the formal Young requirements, the Supreme Court limits the Young fiction to “cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official

directly ends the violation of federal law[.]” Id. at 277-78.

Plaintiff may only invoke the Young fiction if he seeks (1) to prospectively enjoin (2) a state official (3) from acting pursuant to the authority granted by an unconstitutional state enactment (4) where the violation of federal law is ongoing and (5) where such injunction will directly end the violation of federal law. When viewed in its entirety, the Young exception is quite narrow. Should a claim fail to satisfy each requirement of the exception, the Eleventh Amendment will bar such claim.

Plaintiffs do not challenge Section 241; rather, Plaintiffs petition this Court to enjoin the State Defendants 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 constitutional and statutory 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 claims 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 State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105-06 (1984).

As to the treatment of state law, this case bears striking 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. The teachers argued that the pay-raise statute created a property right vesting in the teachers and that they had been denied their property right in violation of federal law. Id. The

Fifth Circuit began its analysis by chiding plaintiffs, “[r]egarding appellants’ claim for their purported pay raises, a minimal perusal of the case law would have informed appellants’ attorney that this entire action is barred by the Eleventh Amendment.” Id. at 1292-93.

Continuing, the Court cut straight to the heart of the matter: “The instant action is both in form and in substance a suit against the state. It seeks equitable relief requiring the state to pay money from its treasury to its teachers.” Id. at 1293. The Court further found that the pay-raise statute could not be interpreted as creating a constitutionally protected property interest vesting in the teachers. Id.

Addressing the teachers request for prospective relief, the Fifth Circuit found as follows:

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. (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.

See also Chayer v. Barbour, 560 F. Supp. 2d 490 (S.D. Miss. 2008) (Lee, J.).

Additionally, Plaintiffs do not allege an ongoing violation of federal law that can be reviewed by this Court. Given that Section 241 clearly disenfranchises certain convicted

criminals and that the Eleventh Amendment prohibits this 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. See supra at 7 n. 5; infra at 16.

The State Defendants' construction and execution of Section 241 do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs contend that they are qualified electors who are being denied the right to register and vote in violation of the Equal Protection Clause. Plaintiffs' argument hinges on their being found to be qualified voters, which position the State Defendants have previously addressed, supra Part I. Plaintiffs must rely on such an argument because the United States Supreme Court has explicitly found that a state may exclude felons from the franchise without violating the Equal Protection Clause of the Fourteenth Amendment. See Richardson, 418 U.S. at 54-56; Cotton, 157 F.3d at 391. Because Plaintiffs are not qualified voters, their disenfranchisement does not violate the Equal Protection Clause.

Equally decisive, the NVRA 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). As set forth previously, supra Part I, Mississippi constitutional and statutory law clearly prohibit those individuals who have been convicted of certain crimes from registering to vote. Accordingly, the NVRA does not prohibit Mississippi from enforcing its voter qualification laws and/or removing such convicted felons from the voter rolls.

Finally, Plaintiffs cannot avail themselves of the Young exception because the present State Defendants do not have the authority to enforce Section 241, thus any injunction against

these State Defendants would not end the alleged violation of federal law, making them nominal defendants. See Young at 156-58. In Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001), the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, confronted the issue whether the Governor and Attorney General of Louisiana were shielded from suit by the Eleventh Amendment in a private action in federal court challenging the constitutionality of a state statute creating a private cause of action against medical doctors performing abortions. Recognizing that the suit would be barred absent application of the Young fiction, the Court set about recounting and analyzing Young's predecessors and progeny, including decisions rendered by other federal courts. Okpalobi, 244 F.3d at 411-416.

Before beginning its detailed analysis, the Fifth Circuit noted that “[i]t is against this background of the overriding importance of the Eleventh Amendment in limiting the power of the federal courts over the sovereignty of the several states, that we now consider whether the facts of this appeal can fit into the exception carved from the Eleventh Amendment in *Ex parte Young*, so as to allow the federal courts to enjoin [the state statute].” Okpalobi, 244 F.3d at 411. At the end of its analysis, the *en banc* Court found that “[the Young] exception only applies when the named defendant state officials have *some connection with the enforcement of the act* and ‘threaten and are about to commence proceedings’ to enforce the unconstitutional act.” Id. at 416. Because the governor and attorney general did not meet this two-pronged test (the statute provided a private right of action), the Young fiction did not apply, even though the plaintiff was seeking prospective injunctive relief regarding an allegedly unconstitutional statute. Id. at 416-21.

In the present suit, the State Defendants have little connection with the enforcement of the

challenged provision. Plaintiffs seek an injunction preventing these State Defendants from interfering with their alleged right *to register to vote* for federal elections. (Pl.s' Mot. for Prelim. Injunc. at 1). Registrars are the entities tasked with registering voters. Miss. Code Ann. § 23-15-33, -41. Plaintiffs have not sued any registrars. This district court has previously ruled that concerning the enforcement of Section 241, the Secretary of State is not a proper party. McLaughlin, 947 F. Supp. 965. Additionally, while election commissioners have some authority to purge convicted criminal from the registration book, Miss. Code Ann. § 23-15-19, and some oversight of the registrar to “register the names of all persons who have duly applied to be registered and have been illegally denied registration,” Miss. Code Ann. § 23-15-153(1), election commissioners have no right to register voters. Section 23-15-41(1) explicitly states that “[n]o person other than the registrar, or a deputy registrar, shall register any applicant.” Miss. Code Ann. § 23-15-41(1). These State Defendants are not sufficiently connected with the enforcement of Section 241 for Plaintiffs to maintain an action against them. That being true, any injunction issued against these State Defendants would not end the alleged violation of federal law.

A challenge to a state enactment pursuant to which the state official acts and against whom an injunction would be effective is necessary to invoke the Young fiction. These State Defendants being only nominal defendants, no need exists to tip the balance away from the constitutional immunity of the states toward the need to vindicate federal rights and hold these State Defendants responsible to the supreme authority of the United States *in a federal forum*. See Pennhurst, 465 U.S. at 105-06.

Plaintiffs' claims are based on state law and the State's alleged failure to follow the requirements of state law. Plaintiffs' “federal” claims are only viable if this Court agrees that the

State Defendants have misconstrued Section 241. As shown herein, the State Defendants have properly construed and executed Section 241. As such, this action is prohibited by the Eleventh Amendment and not excepted by Young. Accordingly, the State Defendants are immune from suit, and Plaintiffs' entire suit should be dismissed.

III. This Court Should Abstain from Hearing this Case Under the Pullman Doctrine.

Plaintiffs' arguments, even if true, would establish nothing more than that state law on this point is unclear or unsettled and, therefore, 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 Committee, the Fifth Circuit explained Pullman abstention:

The Supreme Court explained in *Hawaii Housing Authority v. Midkiff* that under the Pullman doctrine, a federal court should abstain from exercising its jurisdiction "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." "By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies....'" In other words, 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) (internal citations omitted).

As to the first Pullman prong, Plaintiffs have at least attempted to state a constitutional claim under the Equal Protection Clause of the Fourteenth Amendments and a federal statutory claim under the NVRA. (Compl. at 6-8). 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 (quoting Baran v. Port of Beaumont

Navigation Dist., 57 F.3d 436, 442 (5th Cir. 1995)). In this case, if the law were settled by a state court in favor of these State Defendants, Plaintiffs' arguments and claims would falter. This is so 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 Defendants respectfully request 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 Hospital District, 688 F.2d 334, 338 (5th Cir. 1982) ("It is well settled that Pullman abstention may be appropriate . . . where the federal claims may be thoroughly mooted through a narrowing construction of state law."); see also Thrasher v. Board of Sup'rs of Alcorn County, Miss., 765 F.Supp. 896, 904 (N.D. Miss.1991) (noting possible application of Pullman in an election case but refusing to apply because even if the state court resolved the law against the defendants "plaintiffs would still have failed to show, as a matter of law, the type of federal or constitutional violation warranting this court's jurisdiction under Section 1983").

IV. Laches Bars Plaintiffs' Request for Injunctive Relief.

The doctrine of laches bars Plaintiffs requested relief. 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 existence of laches bars equitable relief, such as injunctions, even when plaintiffs assert violations of statutory or constitutional rights. Environmental Defense Fund, 614 F.2d at 480. Particularly, the United States Supreme Court

has made it clear that equitable considerations can and do factor into voting rights cases. See Reynolds v. Sims, 377 U.S. 533, 585 (1964); Robinson v. Comm’rs Court, Anderson County, 505 F.2d 674, 681 (5th Cir. 1974); Watkins v. Mabus, 771 F. Supp. 789, 802-03 (S.D. Miss. 1991) (three-judge court); Simkins v. Gressette, 495 F. Supp. 1075, 1081 (D.C.S.C.1980); Boddie v. City of Cleveland, No. 4:01CV88-D-B, 2001 WL 1523854, at *2 (N.D. Miss. April 24, 2001) (Davidson, J.); Maxwell v. Foster, No Civ.A.98-1378, 1999 WL 33507675, at *1-2 (W.D. La. Nov. 24, 1999).

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. See discussion supra at 1-3. Additionally, 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, as well as Plaintiffs’ dilatory pursuit of the underlying state case, constitutes a clear delay in asserting the present claim that cannot be explained by excusable neglect. See Miller v. Board of Comm’rs of Miller County, 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998) (finding that laches bars preliminary injunction when plaintiffs waited five years to bring constitutional challenge weeks before primary election).

Faced with a similar situation, the district court in Miller v. Board of Comm’rs of Miller County found that laches barred the remedy of enjoining an election where the plaintiffs had waited five years to bring suit regarding county apportionment and had filed suit approximately three months prior to the primary elections. 45 F. Supp. 2d at 1373. The Court found that plaintiffs failure to press for a prompt resolution of the matter once suit had been filed was an

equally compelling reason for applying laches. Id. The same may be said of the present case.

Given the delay and timing of the present motion, the State has been unduly prejudiced by the delay by continuing to advise interested parties, such as registrars, circuit clerks and election commissioners, regarding voter disenfranchisement. Relying on past opinions, these interested parties have expended funds, resources and material in preparing for the elections this November. Courts have found that the expenditure of resources and the imminence of elections constitute undue prejudice. See Simkins, 495 F. Supp. at 1082-83; Boddie, 2001 WL 1523854, at *2; Maxwell, 1999 WL 33507675, at *3-4. 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 at 1082-83.

Additionally, given the timing of the present motion, the relief sought would maximize voter confusion and present significant issues of potential voter fraud. Even if enjoined to do so, the State Defendants 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 Defendants, this Court should apply the doctrine of laches and deny the motion for injunctive relief.

V. Plaintiffs' Cannot Prove that They Are Entitled to Injunctive Relief.

Plaintiffs cannot satisfy the elements necessary for injunctive relief. Those seeking the extraordinary remedy of a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure bear the burden of showing that each of the well known prerequisites warrant issuing the injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that threatened injury outweighs the threatened harm to the non-movant;

and (4) that the injunction will not disserve the public interest. DSC Communications Corp. v. DGI Technologies, Inc., 81 F.3d 597, 600 (5th Cir. 1996).

The decision to grant a preliminary injunction is the “exception rather than the rule.” Mississippi Power & Light v. United Gas Pipe Line Co., 760 F.2d 618, 620 (5th Cir. 1985). Courts have “cautioned repeatedly” that a preliminary injunction is an “extraordinary remedy” to be granted only if the party seeking it has “clearly carried the burden of persuasion” on all four elements.” PCI Transportation, Inc. v. Forth Worth & Western Railroad Co., 418 F.3d 535, 545 (5th Cir. 2005). To carry their burden, movants must establish the four elements by a “clear” and “unequivocal[]” showing. Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908, 917(5th Cir. 2000); Valley v. Rapides Parish School Bd., 118 F.3d 1047, 1050 (5th Cir. 1997).

The reasons for dismissal have been adequately presented herein, supra Part I and II, and need not be restated in full. Section 241 has been properly interpreted and applied by the State to lawfully disenfranchise criminals convicted of certain crimes. Section 241 recognizes Congress’ authority to regulate the voting qualifications of electors for President and Vice President, as well as the authority of the State to do the same, so long as federal and state laws are not in conflict. Plaintiffs interpretation would read out of Section 241 the State’s traditional and inherent authority to establish requirements to be a qualified elector in federal elections. Plaintiffs’ interpretation fails in light of the structure and plain language of Section 241, as well as the clear intent of related statutes read *in pari materia* with Section 241.

Additionally, the balance of harms and the public interest weighs heavily against

fundamentally changing the registration requirements on the eve of the election.¹¹ The threatened injury to Plaintiffs does not outweigh the harm to the State and the voting public. Similarly, the injunction would certainly disserve the public interest. In reviewing a request for injunctive 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) (quoting Reynolds v. Sims, 377 U.S. 533, 585, 84 S.Ct. 1362 (1964)).

Fundamentally changing the mechanics and voter registration requirements regarding elections at this late date would create voter chaos and confusion. There is insufficient time to devise, print and meaningful disseminate new voter registration forms. Additionally, there is insufficient time 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: candidates have qualified and campaigned, absentee ballots will be mailed within days, and poll workers have been trained on the current voter registration requirements. There is “a strong

¹¹Although not addressed by Plaintiffs, even if the Court favored granting the requested relief an unresolved issue would remain whether such change in voter qualifications would implicate Section 5 of the Voting Rights Act and require preclearance by the Department of Justice. Mississippi is a covered jurisdiction under the Voting Rights Act. 42 U.S.C. § 1973b(b). Any proposed change in “**qualification**, prerequisite, standard, practice, or procedure” must be precleared prior to implementation by either the Attorney General of the United States or by the United States District Court for the District of Columbia. Lopez v. Monterey County, 525 U.S. 266, 270-271, 119 S.Ct. 693 (1999) (“Lopez II”) (emphasis added); 28 C.F.R. § 51.13. When submitted to the Attorney General, the Department of Justice has 60 days to approve or reject the change. Lopez, 525 U.S. at 270; 28 C.F.R. § 51.9. There is a provision to request expedited consideration of the proposed change. See 28 C.F.R. § 51.34. However, the request does not guarantee a decision in less than 60 days. Id. Preclearance is not a procedural technicality – it serves to protect minority voters from both subtle and overt discrimination. Beer v. United States, 425 U.S. 130, 140, 96 S.Ct. 1357 (1976). The Supreme Court has reversed even federal courts who allow elections to proceed under non-precleared plans. Lopez v. Monterey County, 519 U.S. 9, 20-25, 117 S.Ct. 340 (1996) (“Lopez I”).

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 Central and Executive Committee v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004) (staying injunction pending appeal). 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.

CONCLUSION

Based on the preceding arguments, the State Defendants respectfully request that this Court deny Plaintiffs’ request for injunctive relief and dismiss Plaintiffs’ claims in their entirety.

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

Respectfully submitted, this the 19th day of September, 2008.

By: JIM HOOD, ATTORNEY GENERAL

s/ Shawn S. Shurden
SHAWN S. SHURDEN, MSBN 99678
SPECIAL ASSISTANT ATTORNEYS GENERAL
CIVIL LITIGATION DIVISION

Counsel for the Defendant

Civil Litigation Division
Office of Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

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
AMERICAN CIVIL LIBERTIES UNION
OF MISSISSIPPI
Post Office Box 2242
Jackson, Mississippi 39225-2242

Laughlin McDonald
Neil Bradley
Nancy G. Abudu
AMERICAN CIVIL LIBERTIES UNION
VOTING RIGHTS PROJECT
2600 Marquis One Tower
245 Peachtree Center Ave., N.E.
Atlanta, GA 30303-1227

This 19th day of September, 2008.

s/ Shawn S. Shurden _____
SHAWN S. SHURDEN