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**

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW the Defendant, Secretary of State Delbert Hosemann, in his official capacity (referred to collectively as "the State" or the "State Defendants," as the arguments herein are applicable to the election commissioners as arms of the state as asserted herein) in the above styled case and file this Memorandum of Authorities in Support of Defendant's Motion to Dismiss, stating as follows:

BACKGROUND

On September 12, 2008, Plaintiffs filed the present Complaint and a Motion for Preliminary Injunction. "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). After briefing and a hearing, this Court denied Plaintiffs' request for injunctive relief, finding that the "Defendants' interpretation of Section 241 of the Mississippi Constitution is correct[.]" (Doc. no. 11, Order entered September 25, 2008). In lieu of filing an Answer, the State now moves to dismiss Plaintiffs' Complaint.

LEGAL ARGUMENT

The State presents the instant motion pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, respectively. The State submits that it is entitled to dismissal on all counts because Plaintiffs cannot obtain any relief against it, even if all well-pleaded factual allegations in Plaintiffs' Complaint are assumed to be true. Jones v. Greninger, 188 F.3d 322, 324 (5th Cir.1999).

As discussed below, the Court has several grounds upon which to dismiss Plaintiffs' claims. The State Defendants will show (1) that Plaintiffs fail to state a claim upon which relief can be granted because their interpretation of Section 241 is legally incorrect; (2) that this Court lacks subject matter jurisdiction; (3) that the State Defendants 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; and (4) that the Court should abstain from hearing this matter under the Pullman abstention doctrine in the event this Court finds state law unsettled. The State Defendants will address each of these arguments in turn.

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.

Plaintiffs are not asserting that Section 241 of the Mississippi Constitution, standing alone, is unlawful or unconstitutional. Indeed, Plaintiffs seek the protection and alleged benefit of Section 241, arguing that Section 241 actually protects the right of convicted felons to vote for President and Vice President (although the State has never applied Section 241 in this fashion). Rather, Plaintiffs argue that the State's interpretation and application of Section 241 violates both state and federal law. Thus, Plaintiffs' suit turns upon the accuracy of Plaintiffs' interpretation of state law, so much so that Plaintiffs' federal claims are dependant on this Court finding a violation of state law.

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.[1] 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 a Mississippi inhabitant to 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;[2] (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.

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[1]Both Plaintiffs are disenfranchised felons. 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. See Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998).

[2]The 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 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 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 Congressional authority to regulate the voting qualifications of electors for President and Vice President, as well as the traditional and inherent authority of the states to set voter qualifications, so long as federal and state laws are not in conflict.[3] Plaintiffs' interpretation would read out of Section 241 the states' primary authority to establish requirements to be a qualified elector in federal elections.

The power to establish requirements for qualified electors for President and Vice

[3]In 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. In addition to the Twenty-Sixth Amendment, the Fourteenth, Fifteenth (race), Nineteenth (sex) and Twenty-Fourth (poll tax) Amendments all impact the qualifications of electors and recognize Congressional authority to pass appropriate legislation to enforce those Amendments.

President is vested in the states by the federal Constitution, providing that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors[.]" U.S. CONST. art. II, § 1, cl. 2; see, e.g., McPherson v. Blacker, 146 U.S. 1, 35 (1892). Likewise, states are vested with the power to set the qualifications of electors for Congressional elections. U.S. CONST. art. I, § 2, cl. 2 (Representatives) and amend. XVII, cl. 1 (Senators); see, e.g., Katzenbach v. Morgan, 384 U.S. 641, 647 (1966). Indeed, the constitutionally mandated balance between state and federal authority has been readily identified by the Supreme Court:

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

Katzenbach, 384 U.S. at 647. The Constitution establishes the State's authority to set voter qualifications, and while Congress may regulate voting issues, Congress does not establish voter qualifications *per se*.

Additionally, Section 2 of the Fourteenth Amendment to the United States Constitution explicitly recognizes the authority of the states regarding voter qualifications and disenfranchisement:

> 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). Section 2 of the Fourteenth Amendment plainly sanctions the disenfranchisement of felons by the states as qualified voters for the election of President and Vice President.[4] 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.[5]

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

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[4]Thus, 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 20-21.

[5]Given 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).

election exception exists. Section 23-15-11, which tracks the qualified elector language of Section 241, provides, in pertinent part:

> Every inhabitant of this state, except persons adjudicated to be non compos mentis, who is a citizen of the United States of America, eighteen (18) years old and upwards, who has resided in this state for thirty (30) days and for thirty (30) days in the county in which he seeks to vote, and for thirty (30) days in the incorporated municipality in which he seeks to vote, and who has been duly registered as an elector under Section 23-15-33, and who has never been convicted of any crime listed in Section 241, Mississippi Constitution of 1890, shall be a qualified elector in and for the county, municipality and voting precinct of his residence, and **shall be entitled to vote at any election**. . . . **No others than those specified in this section shall be entitled, or shall be allowed, to vote at any election**.

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

> 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.[6] Having clearly failed to establish that Section 241 protects a convicted felon's right to vote for President and Vice President, all of Plaintiffs' claims become unsupportable as a matter of law, and the Court should grant the State's motion to dismiss.

II. This Court Lacks Subject Matter Jurisdiction to Hear Plaintiffs' Claims.

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 Idus. Dev. Corp., 637 F.2d 337, 339 (5th Cir. 1981). While federal courts should exercise jurisdiction where the Complaint "seek[s] recovery directly under the Constitution or laws of the United States," Bell, 327 U.S. at 681, jurisdiction does not exist "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id. at 682-83; Suthoff, 637 F.2d at 339. A claim is considered frivolous or insubstantial where such claim "has no plausible foundation or which is clearly foreclosed by a prior Supreme Court decision." Bell v. Health-Mor, Inc., 549 F.2d 342, 344 (5th Cir. 1977). As discussed below, Plaintiffs have failed to establish subject matter

[6]A 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.

jurisdiction.

Plaintiffs are not asserting that Section 241 of the Mississippi Constitution, standing alone, is unlawful or unconstitutional. Indeed, Plaintiffs seek the protection and alleged benefit of Section 241, arguing that Section 241 actually protects the right of convicted felons to vote for President and Vice President (although the State has never applied Section 241 in this fashion). Rather, Plaintiffs argue that the State's interpretation and application of Section 241 violates both state and federal law. Thus, Plaintiffs' suit turns upon the accuracy of Plaintiffs' interpretation of state law, so much so that Plaintiffs' federal claims are dependant on this Court finding a violation of state law.

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

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

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

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

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

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

In Snowden v. Hughes, the Supreme Court considered a state candidate's claim that state election officials had "willfully, maliciously, and arbitrarily" violated state election statutes in refusing to place him on the ballot and, thus, violated the Fourteenth Amendment. 321 U.S. 1, 4 (1944). Specifically, state law provided that two Republican nominees were to appear on the ballot for the election of representatives to the General Assembly. Id. at 3. The State Primary Canvassing Board, however, certified only one Republican nominee to appear on the ballot. Id. at 4. Petitioner, having received the second highest votes, sued in federal court under the Equal Protection Clause, arguing that the actions of the canvassing board "constituted an 'unequal, unjust and oppressive administration' of the laws of Illinois." Id. The Supreme Court recognized plaintiff's argument to be that the canvassing board, "merely by failing to certify

petitioner as a duly elected nominee, has denied to him a right conferred by state law." Id. at 8.

The Supreme Court rejected plaintiff's attempt to equate a violation of state election law with a violation of the Fourteenth Amendment:

> 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 denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely from the 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.
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> But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. 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 in and of itself.

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

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.

The Fifth Circuit, in Stern v. Tarant County Hosp. Dist., considered *en banc* the equal protection claims of five osteopathic physicians who had been denied staff privileges at a county hospital. 778 F.2d 1052 (5th Cir. 1985). Specifically, state law prohibited state-agency hospitals from denying medical staff appointments based solely upon the academic medical degree held by the licensed physician, that is a hospital could not discriminate between an allopathic physician (M.D.) and an osteopathic physician (D.O.). Id. at 1054-55. The offending hospital admittedly denied staff privileges to the five osteopaths because they had not completed an allopathic training program. Id. at 1054.

Nevertheless, the Fifth Circuit ultimately rejected plaintiffs' equal protection challenge:

> We reject a per se equal protection analysis. The guarantees of the fourteenth amendment, its requirement that state laws be applied in the same way to those entitled to equal treatment and its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards. **Converting alleged violations of state law into federal equal protection and due process claims improperly bootstraps state law into the Constitution**. In doing so, this novel approach would expand the scope of the fourteenth amendment, would render its meaning less certain, and would serve no legitimate policy.

Id. at 1056 (emphasis added). Following Snowden, the Fifth Circuit noted that "[o]ur lodestar is not what the state legislature has done or purported to do, but what *any* rational decision maker might have chosen to do." Id. at 1059-60.

As directed by the holdings in Snowden and Stern, 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 the State's interpretation and application of Section 241. Plaintiffs' challenge is dependent upon an alleged violation of state law. Supra at 9-10. 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. Indeed, as noted in the second point 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 v. Ramirez, 418 U.S. 24, 53-56 (1974). Discussing Richardson, the Fifth Circuit held:

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

Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978). Finally, in Cotton v. Fordice, the Fifth Circuit specifically found that "§ 241 [of the Mississippi Constitution] as it presently exists is unconstitutional **only if** the amendments were adopted out of a desire to discriminate against blacks." 157 F.3d 388, 392 (5th Cir. 1998) (emphasis added). The Court subsequently found no discriminatory motive. Id. Thus, Section 241 as interpreted and applied by the State cannot be, and is not, 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

state law. Such pleading is not only impermissible bootstrapping, it is insufficient to support federal jurisdiction because any such claim lacks a federal legal basis and therefore, should be dismissed. See Bell v. Hood, 327 U.S. at 682-83 (finding that jurisdiction does not exist "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous"); Bell v. Health-Mor, Inc., 549 F.2d at 344 (finding that 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").

III. 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 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.[7] 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).

[7]The 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.).

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 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,[8] are barred by the Eleventh Amendment. To overcome this bar, Plaintiffs must show that their 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

[8]By 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).

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)

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.

Plaintiffs may only invoke the Young fiction if they seek (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, 465 U.S. at 105-06.

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 felons 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. 4 and Part II.

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. See supra Parts I, II. 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. (Compl. at 8; 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 felons 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. 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.

IV. As an Alternative, This Court Should Abstain from Hearing this Case Under the Pullman Doctrine.

Plaintiffs' arguments, even if believed by this Court, 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 Amendment 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 of the law.

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").

CONCLUSION

Based on the preceding arguments, the State Defendants respectfully request that this Court grant the State Defendants' motion and dismiss Plaintiffs' claims in their entirety.

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

Respectfully submitted, this the 2nd day of October, 2008.

By: JIM HOOD, ATTORNEY GENERAL

s/ Shawn S. Shurden
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CERTIFICATE OF SERVICE

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

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This the 2nd day of October, 2008.

s/ Shawn S. Shurden
SHAWN S. SHURDEN