

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

JERRY YOUNG and
CHRISTY COLLEY

Plaintiffs,

v.

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.

CIVIL ACTION

NO. _____

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR A PRELIMINARY INJUNCTION**

COME NOW Plaintiffs Jerry Young and Christy Colley, by and through counsel,
to file this Memorandum of Law in support of their Motion for a Preliminary Injunction.

In support of their Motion, Plaintiffs show this Court as follows:

I. SUMMARY OF THE ARGUMENT

Plaintiffs filed the instant lawsuit on September 12, 2008 challenging Defendants' denial of their right to register to vote in presidential and vice-presidential federal elections because of their criminal convictions. Article 12, § 241 of the Mississippi Constitution explicitly states that a person convicted of one of the ten crimes enumerated in the provision is "qualified to vote for President and Vice President of the United States

if he meets the requirements established by Congress therefore and is otherwise a qualified elector.” However, Mississippi’s voter registration application form does not allow Plaintiffs to register to vote only in presidential and vice-presidential elections.

Plaintiffs attempted to join a similar lawsuit filed on October 6, 2006, in the Chancery Court of Hinds County, Mississippi, in which the plaintiffs in that case argued that the defendants were violating their right to register and vote only in the elections for president and vice president. Although Plaintiffs filed their motion to join that suit on February 11, 2008, the state court has not ruled on their motion. On September 12, 2008, Plaintiffs moved to withdraw their claims related to voting in the presidential and vice presidential elections from the state case. See Ex. A.

Plaintiffs, who have felony convictions, are citizens of the United States, residents of Mississippi, and meet the age and other residency requirements set forth in Miss. Const. art. 12, § 241 and Miss. Code Ann. § 23-15-11. Plaintiffs Young and Colley attempted to register to vote in Lee County and Panola County, respectively, for presidential and vice presidential elections, but were told that they were not eligible to register and vote and would first have to get their voting rights restored. See Exs. B and C. Plaintiffs maintain that Defendants’ denial of their right to register and vote in presidential elections violates their rights under Miss. Const. art. 12, § 241, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the National Voter Registration Act (42 U.S.C. § 1973gg).

For these reasons, Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction so that they may register for and vote in the November 4, 2008, general presidential and vice-presidential election.

II. LEGAL STANDARD

A court may grant a motion for a preliminary injunction if the plaintiff shows all of the following four factors: (1) a substantial likelihood of success on the merits of the case; (2) a substantial threat of irreparable injury if the preliminary injunction is denied; (3) the benefit to the plaintiff in obtaining the injunction outweighs the harm the defendants will experience; and (4) granting the preliminary injunction will not disserve the public interest. Rundus v. Chertoff, 2007 WL 1748075 *3 (5th Cir. June 18, 2007); Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001). The moving party bears the burden of proof in a motion for injunctive relief. Okpalobi v. Foster, 190 F.3d 337, 342 (5th Cir. 1999); Lichterman v. Pickwick Pines Marina, Inc., 2007 WL 4287586 *3 (N.D. Miss. Dec. 6, 2007). Injunctive relief is preventive in nature and it is not necessary to wait for the actual occurrence of the injury. See Lichterman, 2007 WL 4287586 at *7-8 (granting plaintiffs' motion for preliminary injunction in part and ordering state agency to investigate environmental consequences of proposed development).

III. ARGUMENT

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Complaint.

Article 12, § 241 of the Mississippi Constitution expressly states that a person convicted of one of the ten enumerated crimes loses the right to vote, "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 therefore and is otherwise a qualified elector." Despite their felony convictions, Plaintiffs retain the right to vote under Mississippi law because Congress has not passed any laws denying the right of people with felony convictions to vote in federal elections and Plaintiffs are otherwise qualified to vote in

Mississippi. Given that Mississippi's voter registration application form does not allow Plaintiffs to register and vote only for president and vice-president, Defendants are violating Article 12, § 241, Plaintiffs' right to equal protection under the law, and the NVRA.

1. Article 12, § 241 of the Mississippi Constitution Grants Plaintiffs the Right to Vote for President and Vice President of the United States.

Mississippi's felon disfranchisement provision dates back to the state's first constitution of 1817. At that time, the legislature denied voting rights to people convicted of bribery, perjury, forgery, or other high crimes or misdemeanors, and that clause remained in effect until 1890. Miss. Const. art. VI, § 5 (1817); Miss. Const. art. VII, § 4 (1832); Miss. Const. art. XII, § 2 (1868). In 1890, the legislature amended the felon disfranchisement provision and listed ten crimes which were disqualifying offenses for purposes of voting and inserted a new clause which allowed an individual convicted of any crime to vote for president and vice president of the United States. Miss. Const. art. 12, § 241. The exact language of Article 12, § 241 is as follows:

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 therefore and is otherwise a qualified elector." Id. (emphasis added).

The first determination in construing a statute is whether it is ambiguous. Nostrad v. Little, 362 U.S. 474, 477 (1960). "Where the language of a statute is plain,

unambiguous, and well understood according to its natural and ordinary sense and meaning, the statute itself furnishes a rule of construction beyond which the court cannot go.” Id. A court may not apply the rules of statutory construction in a manner which will create ambiguity. Jones v. City of Palestine, 2008 WL 152569 (5th Cir. Jan. 16, 2008). See also In re Rippstein, 2006 WL 1888956 *2-3 (5th Cir. July 10, 2006) (rulings that Texas law regarding liens was unambiguous and, therefore, did not require issue to be certified to state supreme court).

Neither Mississippi’s voter registration application form nor the driver’s license application form allows a citizen to register to vote only for president and vice president. See Ex. D. Instead, a person completing either form is considered to be registering to vote for state and all federal elections. The forms also list twenty-one (21) crimes that are disfranchising and warns potential applicants that “[t]he penalty for conviction of false registration is a felony punishable by a fine of not more than Five (5) Thousand Dollars (5,000) or imprisonment for not more than five (5) years, or both.” See id. Article 12, § 241 of the Mississippi Constitution clearly provides that a person with a criminal conviction can vote in presidential and vice presidential elections. The language in the constitution is unambiguous and Defendants must comply with the law by allowing Plaintiffs to register to vote in the November 4, 2008 presidential election.

2. Defendants’ refusal to allow Plaintiffs to register and vote in the November 4, 2008 election for president and vice president violates Plaintiffs’ right to equal protection under the law.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1. In order to prove a violation under the Equal Protection Clause,

the moving party must show that similarly situated persons were treated differently. Bryan v. City of Madison, Miss., 213 F.3d 267, 276 (5th Cir. 2000); Wheeler v. Miller, 168 F.3d 241, 252 (5th Cir. 1999). The right to vote has long been held to be a foundational element of the United States Constitution. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,” the Supreme Court has characterized the right to vote as a “fundamental political right.” Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). Its fundamental role in the functioning of America’s democratic institutions means that “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.” Kramer v. Union Free Sch. No. 15, 395 U.S. 621, 626 (1969).

The Supreme Court has established that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the state has adopted an electoral process for determining who will represent any segment of the state’s population. Lubin v. Panish, 415 U.S. 709, 713 (1974) (citing Reynolds v. Sims). See also Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (“this court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”).

When determining whether or not a state election law or policy violates the Equal

Protection Clause, a court must first consider the character and magnitude of the asserted injury to the rights protected by the Fourteenth Amendment. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (applying strict scrutiny standard in ruling that an Ohio statute which required independent candidates running for President to file their nomination papers earlier than political party candidates violated equal protection clause). The court then should identify and evaluate the precise interests the state puts forward to justify the burden that its law or policy imposes on a plaintiff. See id. “In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” Id.

Once a state election law subjects equal protection rights to “severe” restrictions, the state law must be “narrowly drawn to advance a state interest of compelling importance.” Burdick v. Takushi, 504 U.S. 428, 434 (1992). For election and voting issues, Burdick raised the level of the traditional Fourteenth Amendment analysis. Unlike other areas where some state actions may survive based on a rational basis test, under Burdick, restrictions on voters must at a minimum be both “reasonable” and “nondiscriminatory.” Id. The fundamental role of elections in the functioning of America’s democratic institutions means that “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.” Kramer v. Union Free Sch. No. 15, 395 U.S. at 626.

Pursuant to Article 12, § 241 of the Mississippi Constitution, 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. In denying Plaintiffs' voting rights, Defendants treat Plaintiffs differently than similarly situated individuals and impose a severe restriction on a fundamental right. Because Defendants' actions are not narrowly tailored and do not serve a compelling governmental interest, this Court should enjoin them from unconstitutionally denying Plaintiffs the right to vote.

3. Defendants' refusal to allow Plaintiffs to register and vote in the November 4, 2008 election for president and vice president violates the NVRA.

Congress enacted the NVRA in 1993 to: (1) establish procedures to increase the number of eligible citizens who register to vote in federal elections; (2) make it possible for federal, state, and local governments to implement national voter registration in a manner that enhances the participation of eligible citizens as voters in federal elections; (3) protect the integrity of the electoral process; and (4) ensure that states maintain accurate and current voter registration rolls. 42 U.S.C. § 1973gg(b). In particular, states must: (1) include a voter registration application form for federal elections as part of a state driver's license application; (2) accept voter registration application forms by mail; and (3) designate voter registration agencies, at which voter registration applications, assistance, and acceptance of applications, must be made available. Id. at 1973gg-3 to 1973gg-5. The Act further mandates that states maintain accurate and current voter registration rolls through the use of uniform and non-discriminatory programs and activities. See id. at § 1973gg-6(b)(1). The NVRA allows states to remove from the official list of eligible voters the names of individuals who have a criminal conviction, but only as provided under state law. See id. § 1973gg-6(a)(3)(B).

The NVRA provides a private right of action for citizens affected by a state's violation of the NVRA and states that such a person "may provide written notice of the violation to the chief election official of the State involved." See id. § 1973gg-9(b)(1). If the offending party does not correct the violation within ninety (90) days of receiving notice of the breach or within twenty (20) days after receiving notice if the breach occurred within one hundred and twenty (120) days before a federal election, the aggrieved party may file a civil action against the offending party. See id. § 1973gg-9(b)(2).

In Association of Community Organizations for Reform Now v. Miller, 129 F.3d 833, 838 (6th Cir. 1997), the court held that the plaintiffs' failure to provide notice prior to filing their lawsuit to enforce the NVRA did not warrant dismissal of the action. Miller involved a challenge to the Michigan governor's executive order which prohibited state agencies from complying with the NVRA until federal funds became available. Id. at 835. The defendants argued that the suit should be dismissed because the plaintiffs had failed to give notice of the violation prior to filing their lawsuit. Id. at 837-38. The court of appeals rejected that argument and found that, although the individual plaintiffs had not given notice, the organizational plaintiff previously had complained about the violations and the state had made it clear that it would not comply with the NVRA. Id. at 838. The court determined, therefore, that it would have been futile for the individual plaintiffs to provide such notice when the state had already ignored earlier requests for compliance. See also National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Scales, 150 F. Supp. 2d 845, 852 (D. Md. 2001) (holding that students'

initial application for registration services thirty days prior to an election provided the university with sufficient notice of its NVRA violations).

In the instant case, Defendants were put on notice that they were violating the NVRA when they were sued in October 2006 for the same violation. Since then, Defendants have not amended the voter registration application form or the drivers license application form so that people can register to vote only in federal elections for president and vice president. To the extent that Plaintiffs were required to provide Defendants with notice prior to filing the instant lawsuit, the NVRA's notice provisions have been satisfied.

As already asserted in this memorandum, Mississippi law allows anyone with a criminal conviction to vote for president and vice president of the United States. 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. The state also has failed to create and implement any procedures to increase the number of eligible citizens who have a felony conviction to register to vote for president and vice president. Finally, the state is not maintaining accurate and current voter registration rolls with respect to federal elections because many eligible citizens like Plaintiffs are being denied the right to register and vote for the presidential and vice presidential elections. Thus, Defendants are violating mandatory provisions under the NVRA. Mississippi is responsible for bearing the costs of complying with the NVRA and an injunction requiring Mississippi's compliance is proper in this case. See ACORN v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995) (enjoining state officials from failing or refusing to comply with NVRA, particularly NVRA

provision which required application for driver's license to also serve as application to register to vote in federal elections); Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) (same).

B. Plaintiffs Will Suffer Irreparable Harm If This Court Does Not Issue An Injunction Because They Will Completely Lose The Opportunity To Register And Vote In The November 2008 Election For President And Vice President Of The United States.

The right to vote is one of the most fundamental rights in our system of government. Reynolds v. Sims, 377 U.S. at 554. For that reason, the loss of the constitutionally protected right to vote “for even minimal periods of time, constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). The Mississippi voter registration deadline for the November 4, 2008 presidential and vice presidential election is October 6, 2008. Mississippi law requires that Plaintiffs register before they are allowed to vote. See Miss. Code Ann. § 23-15-11. Unless this Court grants Plaintiffs’ motion, they will not be able to register to vote and will have no adequate recourse or remedy available to them for purposes of the upcoming November election.

C. The Benefit To Plaintiffs In Obtaining The Injunction Outweighs Any Alleged Harm Defendants Might Experience.

Courts have ruled that the deprivation of a fundamental right outweighs any threatened harm that an injunction might cause a defendant. Murphree v. Winter, 589 F. Supp. 374, 381-382 (S.D. Miss. 1984) (“the deprivation of a fundamental right constitutes irreparable harm requiring the issuance of a preliminary injunction”) (internal citations omitted). As the Supreme Court has held, the right to vote is a fundamental right because it is “preservative of all rights.” Yick Wo, 118 U.S. at 370.

The instant case involves Plaintiffs' fundamental right to vote in the November 4, 2008 election for president and vice president. The injury that Plaintiffs will suffer if they are not allowed to vote surpasses any possible inconvenience that Defendants might experience as a result of a preliminary injunction. No amount of monetary damages or other type of relief this Court may grant after the November 4, 2008 elections will remedy the fact that Plaintiffs will not be allowed to vote in the general election this fall. In order to vote, Plaintiffs must be registered by October 6, 2008 and, if not allowed to register, they will have no recourse or adequate remedy at law because the registration deadline will have passed. Thus, absent the granting of Plaintiffs' motion for a preliminary injunction, any relief that this Court grants prospectively will be insufficient to address the harm of not being allowed to vote this fall.

D. An Injunction Will Serve The Public's Interest Because A Vast Number of Mississippi Citizens Will Be Able To Vote In The November 4, 2008 Election For President And Vice President Of The United States.

Federal courts have found that “[t]he public does indeed have a strong interest in assuring that constitutional rights of citizens are respected.” Cohen v. Coahoma County, Miss., 805 F. Supp. 398, 408 (N.D. Miss. 1992). Although Plaintiffs filed the instant lawsuit on their own behalf, a favorable ruling will impact thousands of Mississippi citizens who have a criminal conviction, but who remain eligible to vote in presidential and vice presidential elections. Consequently, an injunction will serve the public interest in a significant way, improve the integrity of elections, and help ensure that Defendants do not apply election laws in a discriminatory manner.

III. CONCLUSION

For all the reasons stated above, Plaintiffs respectfully ask this Court to grant their motion for a preliminary injunction.

Respectfully Submitted,

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*Pro Hac Vice Motions to Follow