

MAY - 2 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES W. McCORMACK, CLERK
By: *[Signature]*
DEP. CLERK

ADAM R. COPELAND, ET AL.

PLAINTIFFS

Case Number: 4:02CV00675 GH

MIKE HUCKABEE, in his official
capacity as Governor of the
State of Arkansas, et al.

DEFENDANTS

ORDER

Plaintiffs have filed this action under 42 U.S.C. § 1983 seeking to enforce their rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. They seek declaratory and injunctive relief requiring defendants to restore to the voting rolls all persons rejected or purged as a result of the alleged unconstitutional application of Ark. Code Ann. §7-5-201(b)(6), which they contend has been interpreted to disenfranchise students and other persons living in university housing.¹

¹Ark. Code Ann. § 7-5-201(b)(6) provides:

"Voting residence" shall be a voter's domicile and shall be governed by the following provisions: . . .

(6) Persons who are temporarily living in a particular place because of a temporary work-related assignment or duty post or as a result of their performing duties in connection with their status as military personnel, students, or office holders shall be deemed residents of that place where they established their home prior to beginning such assignments or duties.

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On October 22, 2002, Circuit Judge John A. Thomas of the Circuit Court of Clark County, Arkansas issued a writ of mandamus ordering defendant Williams, the County Clerk of Clark County, to stop accepting voter registration applications from "persons present in the County for the purpose of attending a university as a student." Judge Thomas further ordered Williams to immediately purge from the voter rolls all persons, other than university staff, "listing as their address a university post office box, university dormitory, or other university owned student housing. Defendant Williams began to comply with Judge Thomas' Order.

Plaintiffs are individuals, other than university staff, who registered to vote in Clark County, Arkansas using a university address. They filed a motion for a Temporary Restraining Order (TRO) prohibiting the disenfranchisement of students and other persons living in university housing on the ground that Ark. Code Ann. § 7-5-201(b)(6) as applied by defendant Williams violated their rights guaranteed by the Equal Protection Clause of the 14th Amendment to the United States Constitution. Plaintiffs contended that without the entry of a TRO, they would be precluded from voting in the upcoming November 5, 2002, election.

The Court granted the TRO on October 30, 2002, enjoining defendants from failing to restore to the voting rolls all persons rejected or purged as a result of implementation of Judge Thomas' Order of October 22, 2002. Pursuant to the parties' agreement, the Court converted the TRO to a preliminary injunction to remain in effect until further Order of the Court. Pending before the Court are defendants' motions to dismiss

Motion to Dismiss of Sharon Priest and Mike Huckabee²

Defendant Sharon Priest argues she had nothing to do with the Clerk's action and therefore should be dismissed.³ She states that plaintiffs' claims against her are barred by sovereign immunity, that plaintiffs fail to state a claim against her under 42 U.S.C. § 1983, and that plaintiffs' amended complaint does not allege a justiciable "case or controversy" between plaintiffs and defendant Priest.

The doctrine of sovereign immunity, or Eleventh Amendment immunity, establishes that a State is immune from suits in federal courts brought by private citizens unless the state has waived its immunity or Congress has abrogated the immunity pursuant to a valid exercise of Congressional power. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-101 (1984). Additionally, under the doctrine of Ex parte Young, 209 U.S. 123 (1908), a federal court may enjoin a state official from violating federal law. "In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland, 122 S. Ct. 1753, 1760 (2002) (citation and internal quotation marks omitted). The inquiry "does not include an analysis of the merits of the claim." Id. at

²Plaintiffs agree that defendant Mike Huckabee, sued in his official capacity as Governor of the State of Arkansas, can be dismissed as a defendant.

³Priest is no longer Secretary of State. Charlie Daniels was elected Secretary of State in the November 2002 election. He is substituted as defendant pursuant to Fed. R. Civ. P. 25(d).

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Plaintiffs allege in their complaint that Priest is Secretary of State and chief election official of the state of Arkansas. They contend that Priest serves as chairperson and secretary of the State Board of Election Commissioners. "She is charged by statute with assuring the uniform application of voter registration laws throughout the State of Arkansas." (Amended Complaint, para. 13). Plaintiffs seek prospective injunctive relief against Priest, that is, they request, inter alia, that the Court enjoin the defendants from failing to enforce Ark. Code Ann. § 7-5-201(b)(6) in a manner consistent with the Equal Protection Clause of the 14th Amendment.

The Court is persuaded that based on plaintiffs' claim of an ongoing violation of federal law and the request for prospective injunctive relief, as well as Priest's involvement with the enforcement of the voter registration laws, see discussion infra, Priest is not entitled to sovereign immunity. See Lawson v. Shelby County, Tennessee, 211 F. 3d 331, 335 (6th Cir. 2000) (where plaintiffs denied right to vote because they refused to disclose their social security numbers as condition to exercise right to vote, claim for prospective injunctive and declaratory relief against individual state officials, including Governor, fell under Young exception)

Defendants' assertion that the Secretary of State has no involvement at all with the enforcement of voter registration laws and no "special relation" to the statute alleged to be unconstitutionally applied is without merit. The Arkansas Constitution designates the Secretary of State as the chief election official with various duties set

out below. Ark. Const. Amend. 51 § 5 (b).⁴ Furthermore, under Ark. Code Ann. § 7-4-101, the Secretary of State is chairperson and secretary of the State Board of Election Commissioners. Arkansas law gives the Secretary of State and the State Board of Election Commissioners several responsibilities regarding the interpretation, application and enforcement of the State's voter registration laws as set forth below.⁵

⁴ The Secretary of State is designated as the chief election official. The Secretary shall prepare and distribute the preaddressed postcard mail voter registration application forms described in section 6 of this amendment. Mail registration application forms shall serve for purposes of initial applications to register and shall also serve for changes of name, address, or party affiliation. Bilingual (Spanish/English) forms, braille forms, and large print forms shall be available upon request. The Secretary of State shall make the state mail voter registration application form available for distribution through governmental and private entities with particular emphasis on making them available for organized voter registration programs. Any person may distribute state registration cards. All registration cards shall be distributed to the public without charge.

⁵Ark. Code Ann. §7-4-101 (as amended by the 2003 Arkansas legislature) provides:

- (a) The State Board of Election Commissioners shall be composed of the following seven (7) persons, with at least one (1) from each district:
- (1) The Secretary of State;
 - (2) One (1) person designated by the chairman of the state Democratic Party;
 - (3) One (1) person designated by the chairman of the state Republican Party;
 - (4) One (1) person to be chosen by the President Pro Tempore of the Senate;
 - (5) One (1) person to be chosen by the Speaker of the House of Representatives; and
 - (6) Two (2) persons to be chosen by the Governor, one (1) of whom shall be a county clerk and one (1) of whom shall have served for at least three (3) years as a county election commissioner.
- (b) The Secretary of State shall serve as chairman and secretary of the board and keep the records of the state board.

(c) Except for the Secretary of State and the county clerk, no member of the state board shall be an elected public official.

(d)(1) The term on the state board of the elected state official shall be concurrent with the term as public elected officer.

(2) The county clerk shall hold the office of county clerk when appointed to the state board and shall be removed as a member of the state board if not in office.

(3)(A) The term of office of the board members appointed by the President Pro Tempore and the Speaker of the House shall be two (2) years or until their successors are appointed and qualified in the manner provided in this section for the initial appointment.

(B) The term on the state board of all other appointive members shall be four (4) years or until their successors are appointed and qualified in the manner provided in this section for the initial appointment.

(4) No appointive member shall be appointed to serve more than two (2) consecutive full terms.

(e)(1) The state board shall meet as needed at a time and place which shall be designated by the chair or upon written request to the chair of four (4) or more members.

(2) A majority of the membership of the state board shall constitute a quorum for conducting business.

(3) Meetings of the state board may be chaired and conducted by either the chair, if present, or a state board member designated acting chair for the meeting by the chair.

(f) The state board shall perform the following duties:

(1) Publish a candidate's election handbook, in conjunction with the office of the Secretary of State and the Arkansas Ethics Commission, which outlines in a readable and understandable format the legal obligations of a candidate and any other suggestions that might be helpful to a candidate in complying with state election law;

(2) Conduct statewide training for election officials and county election commissioners;

(3) Adopt all necessary rules and regulations regarding training referred to in subdivision (f)(2) of this section and develop procedures for monitoring attendance;

(4) Monitor all election law-related legislation;

(5) Review citizen complaints regarding violations of election and voter registration laws and forward them to the proper authorities, except as to § 7-1-103(a)(1)-(4), (6), and (7) or except for any matter relating to campaign finance and disclosure laws, which the Arkansas Ethics Commission shall have the same power and authority to enforce as is provided the commission under §§ 7-6-217 and 7-6-218 for the enforcement of campaign finance laws;

(6) Develop procedures for reviewing and forwarding citizen complaints referred to in subdivision (f)(5) of this section;

(7) Formulate, adopt, and promulgate all necessary rules and regulations to assure even and consistent application of voter registration laws and fair and orderly election procedures;

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- (8)(A) Appoint certified election monitors to any county upon a signed, written request under oath filed with the state board and a determination by the state board that appointing a monitor is necessary.
- (B) Certified election monitors shall serve as observers for the purpose of reporting to the state board on the conduct of the election.
- (C) The state board may allow for reasonable compensation for election monitors;
- (9) Assist the county board of election commissioners in the performance of the administrative duties of the election process if the state board determines that assistance is necessary and appropriate;
- (10)(A) Formulate, adopt, and promulgate all necessary rules and regulations to establish uniform and nondiscriminatory administrative complaint procedures consistent with the requirements of Title IV of the federal Help America Vote Act.
- (B) The cost of compliance with Title IV of the federal Help America Vote Act shall be paid from the fund established to comply with the federal Help America Vote Act.
- (11) If the state board finds a violation of election and voter registration laws, except as to § 7-1-103(a)(1)-(4), (6), and (7), or except for any matters relating to campaign finance and disclosure laws which the commission shall have the same power and authority to enforce under §§ 7-6-217 and 7-6-218 for the enforcement of campaign finance laws, the state board may do one (1) or more of the following:
- (A) Issue a public letter of caution or warning or reprimand;
- (B)(i) Impose a fine of not less than twenty-five dollars (\$25.00) nor more than one thousand dollars (\$1,000) for negligent or intentional violation of this subchapter.
- (ii) The state board shall adopt rules governing the imposition of such fines in accordance with the provisions of the Arkansas Administrative Procedure Act, § 25-15-201 et seq.
- (iii) All moneys received by the state board in payment of fines shall be deposited in the State Treasury as general revenues; or
- (C) Report its finding, along with such information and documents as it deems appropriate, and make recommendations to the proper law enforcement authorities;
- (12) The state board shall complete its investigation of a complaint filed pursuant to this section within no later than ninety (90) days of the filing of the complaint; and
- (13) Any final action of the state board under this section shall constitute an adjudication for purposes of judicial review under § 25-15-212.
- (g) All election-related questions are to be answered by the Secretary of State's office pursuant to § 7-1-106 and shall be consistent and in conformity with any policies, guidelines, or regulations established by the state board.
- (h) The Attorney General shall provide legal assistance to the state board in answering questions regarding election laws.
- (i)(1) The Director of the State Board of Election Commissioners and the staff shall serve at the pleasure of the state board.
- (2) The Secretary of State shall exercise daily supervision of the director and the

The power, authority and responsibility of the Secretary of State to help administer the voter registration laws is sufficient to establish that Priest, as Secretary of State, is a proper defendant in this action. See United States v. Mississippi, 380 U.S. 128, 141 (1965). Priest, as a state official, “may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that officials plays some role in the enforcement of the act.” Schulz v. Williams, 44 F. 3d 48, 61 n. 13 (2d Cir. 1994) (quoting Donohue v. Bd. of Elections of New York, 435 F. Supp. 957, 963 (E.D. N.Y. 1976). Therefore, the Court finds that plaintiffs have stated a claim against Priest.⁶

Priest further argues that the amended complaint fails to allege a justiciable “case or controversy” within the meaning of Article III of the United States Constitution. Priest stated that she agreed with plaintiffs that the Clerk’s action was improper and that it constituted a misapplication and misinterpretation of state law. Priest states that she took affirmative steps to advise the public and the parties in the state action that in her opinion the plaintiffs should be allowed to vote.

staff, consistent with personnel policy.

(3) The state board shall set the personnel policies in accordance with the Regular Salary Procedures and Restrictions Act, § 21-5-101 et seq., and the Uniform Classification and Compensation Act, § 21-5-201 et seq.

Furthermore, under Act 994 of the 84th General Assembly, 2003 (which implements the Federal Help America Vote Act and revised various voting procedures), the Secretary of State is given additional duties. See Ark. Code Ann. § 7-5-202(d) (as amended).

⁶To the extent defendants rely on cases discussing individual capacity lawsuits or monetary relief in an official-capacity lawsuit, it is misplaced. Plaintiffs do not seek prospective monetary relief and do not sue defendants in their individual capacity.

As plaintiffs note, a concession of wrongdoing does not end the controversy. There is a dispute as to the scope of the proper remedy as Priest contends that an injunction should not issue against her in her official capacity. However, finding that plaintiffs have stated a claim against Priest and are entitled to prospective injunctive relief, the Court finds that they have alleged a justiciable "case or controversy."

The motion of Priest to dismiss the complaint is denied.

Arguments of Defendant Rhonda L. Williams⁷

Defendant Williams, sued in her official capacity as County Clerk for Clark County, Arkansas, filed a post-trial brief in which she contends that plaintiffs' claim against her should be dismissed. She also states that plaintiffs' assertion in their post-trial brief that Williams has violated the TRO and plaintiffs' constitutional rights is incorrect.

After the entry of the TRO, Williams mailed out letters informing all persons registered to vote in Clark County who had previously listed a university address or university post office box as their primary residence that they would be permitted to vote during the November, 2002 General Election. Either one or more candidates challenged the ballots of about 150 persons listing a university address. The challenge was made pursuant to Ark. Code Ann. § 7-5-312. Following receipt of the challenges, the votes of persons who had listed a university address or university post office box

⁷The Court notes that Williams did not file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or a motion for summary judgment. The matters have not, in the Court's view, been fully briefed, thereby making resolution of the issue of liability more difficult. See infra.

as their primary address were counted, with a few exception involving persons who admitted at the polls that they no longer lived in Clark County.⁸

The Court is not persuaded that Williams violated the TRO. The challenge to the ballots was made pursuant to Arkansas statute, and was recognized in the TRO as an appropriate way to challenge the ballots.⁹

Williams also requests that the claim against her be dismissed. Relying on Monell v. Dep't of Soc. Services, 436 U.S. 658 (1978), Williams states that plaintiffs must demonstrate that a policy, practice, or custom of Clark County, Arkansas resulted in their constitutional rights being violated. Williams states that prior to October 2002, the policy of Clark County was to allow all persons to register to vote and to vote in all elections held in Clark County who completed the Arkansas Voter Registration Application regardless of whether they listed a university address as their primary address. She states that Judge Thomas' order was not consistent with the policy of Clark County.

There appears to be a disagreement among the courts as to whether Monell applies to claims against a municipality for prospective injunctive relief. Compare Chaloux v. Killeen, 886 F. 2d 247, 250 (9th Cir. 1989) (Court did not intend to apply any "official policy or custom" requirement to foreclose a suit for prospective relief against a county or its officials for enforcing allegedly unconstitutional state laws) with

⁸Williams states that only about 15 of the challenges were deemed to be valid.

⁹In the TRO, the Court noted that Curry, who had attempted to intervene in the action, could protect his interest in ensuring that only qualified voters cast their ballots by invoking the procedure of Ark. Code Ann. § 7-5-312.

Dirrane v. Brookline Police Dep't., 315 F.3d 65, 71 (1st Cir. 2002) ("However, the Supreme Court, in imposing the precondition of an unconstitutional 'official municipal policy,' was directly addressing 'monetary, declaratory, or *injunctive* relief.' Thus, the Ninth Circuit's contrary position in *Chaloux v. Killeen*, is on its face at odds with *Monell* itself.") The court in Dirrane noted that several circuits have found the Chaloux interpretation to be incorrect. Id. at 71, n. 4 See Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 468 (7th Cir.2001) ("The predominant though not unanimous view is that *Monell*'s holding applies regardless of the nature of the relief sought."), cert. denied, 535 U.S. 1017(2002); Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989 (11th Cir.1990)(applying *Monell* even though the plaintiff only sought declaratory and injunctive relief). See also Reynolds v. Giuliani, 118 F. Supp. 2d 352, 362-63 (S.D. N.Y. 2000) (discussing cases). Additionally, Judge Fletcher in Los Angeles Protective League v. Gates, 995 F. 1469, 1477-78 (9th Cir.1993) (Fletcher, J., concurring) suggested that Chaloux was wrongly decided as it conflicted with Monell.

The Court is unable at this time to determine whether Williams should be dismissed. The Court notes that the courts' questioning Chaloux calls into doubt plaintiffs' assertion that Monell does not apply. Assuming that Monell does not, the record is unclear as to the basis for municipal liability.

The Court is of the opinion that the issue of municipal liability, including the issue of whether Williams is the final policymaker, should be further addressed by the parties. See e.g. Pembaur v. City of Cincinnati, 475 U.S. 469 (1985). Plaintiffs shall

file a supplemental brief within twenty days which addresses the issue of Williams' and the County's liability; Williams shall have fifteen days to file a supplemental response. Furthermore, plaintiffs shall address the issue of what further relief is requested with regard to the Secretary of State and the County, should the Court find it liable.

Accordingly, the motion of Priest to dismiss is denied; however defendant Huckabee is hereby dismissed as a defendant. The Clerk is directed to substitute Charlie Daniels as defendant for Sharon Priest pursuant to Fed. R. Civ. P. 25(d).

IT IS SO ORDERED this 2 day of May, 2003.


UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 5/5/03 BY JP

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

May 5, 2003

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:02-cv-00675.

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Date: 5/5/03

BY: Lorna Jones