

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

OCT 30 2002

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 GRANTING TEMPORARY RESTRAINING 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. Pending before the Court is plaintiffs' motion for a Temporary Restraining Order (TRO).

Facts

The parties have filed a joint stipulation of facts which provides as follows:

1. The plaintiff class is comprised of all persons (other than university staff) who registered to vote in Clark County, Arkansas using a university address. The plaintiff class numbers approximately 1,000 people.
2. The claims of the named plaintiffs are typical of the claims of the class.

3. The prosecution of separate actions by individual members of the class would create a risk of adjudications that would, as a practical matter, be dispositive of the interest of the other members of the class not parties to the adjudications.

4. Defendant Rhonda Williams has been ordered to act on grounds generally applicable to the class.

5. All of the named plaintiffs are adequate representatives of the class in that they successfully registered to vote in Clark County using a university address prior to Judge Thomas' order and are represented by counsel experienced in the field of voting rights.¹

6. Plaintiff Adam R. Copeland is an adult citizen and resident of Clark County, Arkansas, and a student at Ouachita Baptist University. He registered to vote in Clark County using a university address, and his registration was accepted by the voter registration officials in Clark County.

7. Plaintiff Rebecca Fuller is an adult citizen and resident of Clark County, Arkansas and is a student at Ouachita Baptist University. She registered to vote in Clark County using a university address, and her registration was accepted by the voter registration officials in Clark County.

8. Plaintiff John Daniel Hays, Jr. is an adult citizen and resident of Clark County, Arkansas, and a student at Ouachita Baptist University. He registered to vote in Clark County using a university address, and his registration was accepted by the voter registration officials in Clark County.

9. Plaintiff Sarah Huckabee is an adult citizen and resident of Clark County, Arkansas and is a student at Ouachita Baptist University. She registered to vote in Clark County using a university address, and her registration was accepted by the voter registration officials in Clark County.

10. Plaintiff Jennifer Diane Thompson is an adult citizen and resident of Clark County,

¹Although the parties have stipulated to facts which would indicate that a class should be certified, class certification is not necessary for the issuance of the TRO.

Arkansas. She is married to a student at Ouachita Baptist University but is not a student herself. She registered to vote in Clark County using a university address, and her registration was accepted by the voter registration officials in Clark County.

11. Defendant Mike Huckabee (defendant Huckabee) is the Governor of the State of Arkansas. He is the chief executive of the State of Arkansas.

12. Defendant Sharon Priest is the Secretary of State of the State of Arkansas. She is the chief election official of the State of Arkansas and serves as the chairperson and secretary of the State Board of Election Commissioners.

13. Defendant Williams is the County Clerk of Clark County, Arkansas. She is the chief voter registrar in Clark County and is charged by statute with processing voter registration applications and maintaining the list of registered voters in Clark County.

14. 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." (A copy of Judge Thomas' order is attached as Exhibit A).

15. On or about the same day, defendant Williams began to comply with Judge Thomas' order.

16. Some of the plaintiffs have received notification from defendant Williams that they have been purged from the list of registered voters as a result of Judge Thomas' order.

17. The next election in Arkansas is scheduled for November 5, 2002.

18. Early voting in the November 5th election has already begun.

19. The deadline for registering to vote in the November 5th election has already passed.

Motion of Floyd Thomas Curry to Intervene

Before dealing the merits of the request for a TRO, the Court must first address the request to intervene of Floyd Thomas Curry (Curry).

Motion to Intervene

Curry filed the action in the Clark County circuit court alleging harm to his right to vote resulting from the county clerk allowing unqualified persons to register to vote. Curry has filed a motion for leave to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

Under Rule 24(a)(2), a person is entitled to intervene as of right if: (1) he or she has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation. The burden is on the person seeking intervention to show that all three parts of the test are met. Chiglo v. City of Preston, 104 F. 3d 185, 187 (8th Cir. 1997).

Curry states that he has an interest in protecting his right to vote against dilution by the voting of unqualified persons. He contends that he is not adequately represented by the persons named as defendants.²

It is true that defendants Huckabee and Priest do not take the position that the Clark County order should be upheld. They are of the opinion that the blanket ruling of Judge Thomas is contrary

²The motion for leave to amend was filed on the same day plaintiffs filed an amended complaint adding Governor Huckabee as a defendant. The Court assumes that Curry makes the same argument with respect to defendant Huckabee that he does with respect to defendants Priest and Williams.

to Arkansas law. Defendant Williams takes no position with regard to the request for the TRO, and merely asks for guidance. In fact, Williams does not object to Curry intervening in this action.

Plaintiffs, however, do object to Curry's request to intervene. They state that the disposition of this case will not impair or impede Curry's asserted interest in the right to cast his ballot undiluted by unqualified voters. Curry can protect his interest in ensuring that only qualified voters cast their ballots by invoking the procedure of Ark. Code Ann. § 7-5-312.³

³Ark. Code Ann. § 7-5-312 provides:

7-5-312 Challenge of voter's ballot by poll watchers, candidates, or designees.

(a) During the progress of any election in this state, any candidate in person or by representative designated in writing shall have the right to be present within the polling site or room so as to observe and ascertain the identity of those persons presenting themselves to vote for the purpose of challenging any voter who appears for the purpose of casting a ballot. The document designating a representative shall be sufficient if it contains the signature of the candidate and states that the candidate designates the person as a representative and is notarized by a notary attesting that the signature is that of the candidate. No additional requirement shall be imposed for the sufficiency of the document.

(b)(1) When the ballot of any voter is thus challenged, it shall be the duty of the election officials in the election precinct to make and retain a list of the names of all persons so challenged, and the following procedure shall be followed:

(A) The voter shall separate his marked ballot and ballot stub;

(B) The voter shall place the challenged ballot in a single challenged ballot envelope and seal the envelope; and

(C) The voter shall place the ballot stub and the sealed challenged ballot envelope and challenge form in a challenged voter envelope.

(2) The ballots of all challenged persons shall be preserved, secured, and separated from the remaining ballots to the end that the right of any person to vote may be determined later by the county board of election commissioners or the court in which an election contest may thereafter be filed.

(c) The county board shall, prior to certification of the results of the election, determine whether the challenged ballots are valid. If, upon examination of any challenged ballots, the county board suspects that a violation of the election laws has occurred, the county board may refer the matter to the prosecuting attorney.

(d)(1) Any group seeking the passage or defeat of a measure on the ballot may

The Court notes that Curry has failed to comply with Fed. R. Civ. P. 24(c), requiring that he submit a complaint in intervention” setting forth the claim or defense for which intervention is sought.” The absence of such a pleading makes it difficult for the Court to determine whether Curry can meet the requirements of Rule 24(a)(2).

The Court, therefore, directs that Curry file a pleading in compliance with Fed. R. Civ. P. 24(c). The Court will then rule on Curry’s request to intervene prior to resolution of the case on the merits.

Because Curry is not a party at this time, the motions to dismiss or to abstain that Curry has filed will be denied without prejudice to renew should the Court allow Curry to intervene in this action.

Temporary Restraining Order

In determining whether to grant a preliminary injunction or a temporary restraining order the

designate a person or persons to be present within the polling site or room to observe and ascertain the identity of those persons presenting themselves to vote for the purpose of challenging any voter who appears for the purpose of casting a ballot.

(2) Only one (1) representative of a candidate or issue shall be allowed to be present at any one (1) time.

(3) Any group wishing to designate a representative shall file a statement with the county clerk stating whether the group is for or against a measure and naming the persons authorized to represent the group.

(4) A representative of the group seeking to be present within the polling site or room shall present a copy of the document with a certificate from the county clerk stating that the document has been filed.

Court must consider (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981).

Likelihood of Success

Judge Thomas concluded that “persons temporarily living in Clark County for the purpose of attending a university as a student do not [establish] residence in Clark County, but remain residents where they established residence prior to temporarily living in this County as students.” Thus, “persons present in Clark County for the purpose of being students at a university located in the County are not qualified to vote in the County.”

Arkansas has the power to impose reasonable residence restrictions on the right to vote. See Carrington v. Rash, 380 U.S. 89, 91 (1965). However, the right to vote is of such importance that a state “may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the States.” 380 U.S. at 96. See Dunn v. Blumstein, 405 U.S. 330, 336 (“In decision after decision, 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.”) As the Court in Dunn stated, “This ‘equal right to vote . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . But, as a general matter, ‘before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.’” 405 U.S. at 336 (citations omitted).

Thus, in order to restrict or otherwise deprive plaintiffs of their right to vote, defendants must set forth a compelling state interest.

They have not done so. Defendants Priest and Huckabee state that they believe that the

blanket ruling by Judge Thomas is contrary to Arkansas law. Defendant Williams provides no justification for the restriction on the right of plaintiffs to vote. She states that prior to the Judge Thomas' order, the Clark County Clerk allowed all persons to vote in elections who had completed the "Arkansas Voter Registration Application." ⁴

In Carrington a sergeant in the United States Army challenged a provision of the Texas Constitution prohibiting any persons in the military who moves his or her home to Texas during the course of military duty from voting in any election in Texas so long as he or she is a member of the Armed Forces. The Court found that by creating a irrebuttable presumption of non-residence, the Texas Constitution imposed "an invidious discrimination in violation of the Fourteenth Amendment." Id. at 96.

A number of courts have addressed whether the state residency requirements for students violates a voter's rights under the Equal Protection Clause. In Whatley v. Clark, 482 F. 2d 1230 (5th Cir. 1973), the plaintiff challenged a Texas statute which provided that a student would not acquire a voting residence where he or she lived while attending school unless the student intended to remain there and make the place his or her home indefinitely after ceasing to be a student. The court noted that the same definition of domicile was applied to both students and other prospective voters. However, the statute offended the Equal Protection Clause because it created a presumption that students were not domiciliaries of the places they lived while attending school. The court further noted that the burden of rebutting the presumption could be quite great and the result of not meeting

⁴Only Curry attempts to set forth any rationale, contending that his vote would be diluted by allowing students to vote. Even if Curry had standing to raise the issue, such a rationale cannot withstand scrutiny. The Supreme Court has held that "[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." Carrington, 380 U.S. at 94.

the burden resulted in a student being denied the opportunity to participate in elections. The court held that the state had not demonstrated “that treating persons as presumptive nonresidents simply because they are students is necessary to promote any compelling state interest.” 482 F. 2d at 1234.

This case is similar to Williams v. Salerno, 792 F. 2d 323 (2d Cir. 1986), where the Westchester County Board of Elections (Board) denied about 450 applications to register to vote from students at the State University of New York at Purchase on the ground that a college dorm cannot be considered a fixed, permanent or principal home. The district court granted a preliminary injunction enjoining the Board from denying to any student at the university the right to register to vote and providing that students living on the campus who had filed a timely application containing the material information required on the registration form with the Board be allowed to register and vote as a resident of the college community in which the student resided and was attending school.

On appeal, the Second Circuit noted the right of the State of New York to require that a person be a resident of the place in order to vote there and to take steps to determine a person’s proper residence for voting purposes. 792 F. 2d at 327. However, “[t]he equal protection clause of the fourteenth amendment does not, of course, permit a state to discriminate against students by denying them the right to vote or by subjecting them to more vigorous registration requirements than are generally applied.” Id. at 327-28.

As in this case, the Board’s interpretation of the residency requirement in Williams created a per se rule against residence at a student dormitory. “Such a rule would stretch the definition of ‘residence’ beyond the constitutional breaking point.” Id. Furthermore, the presumption against student residency was irrebuttable. While the court found that the Board could take “reasonable, good faith steps to determine the true residence of a student applicant” it could not “subject student applicants to a different substantive standard than is applied to other categories of applicants

generally.” Id.

Here, Judge Thomas’ order being implemented by defendant Williams creates an irrebuttable presumption that would-be voters who live at a university address and are not members of the staff at a university are not residents of Clark County and are therefore ineligible to vote in Clark County. In light of Carrington, Williams and Whatley it is clear that plaintiffs are likely to succeed on the merits in establishing that the action of Clark County violates their right to Equal Protection.

Irreparable Harm

Plaintiffs contend that if the TRO is not issued, they will be denied the opportunity to vote and to have their vote counted in the upcoming November 5, 2002 election. It is clear that the denial of the right to vote constitutes irreparable harm. “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. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.” Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

Time is of the essence. Judge Thomas’ order was entered after the time allowed for persons to registered to vote. Thus, if plaintiffs are not allowed to vote on November 5th, they will be denied the opportunity to vote at all in the election. It is clear that plaintiffs will suffer irreparable harm if they are denied the opportunity to exercise their fundamental right to vote.

Balance of Harms

Defendants have not claimed that they will be harmed by entry of the TRO. They do not oppose the issuance of a TRO that allows all registered voters, including students attending either university in Clark County, to vote in the November 5th election. If necessary, ballots cast can be challenged under the provisions of Ark. Code Ann. §7-5-312.

Public Interest

As plaintiffs state, "[i]n a democracy there can hardly be a matter of greater importance to the public interest than the right to vote, for the franchise is the foundation upon which all other freedoms are built." The public has a strong interest in the lawful application of state election laws and in ensuring that citizens of this great nation are not impeded or deterred in exercising their right to vote.

In sum, the Court finds that a TRO should issue. The Defendants are enjoined 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. Defendants are directed to immediately notify all persons rejected or purged that their voting rights have been restored. Plaintiffs shall post a \$500.00 bond. The TRO shall remain in effect for ten days, pursuant to Fed. R. Civ. P. 65(b). A hearing on the merits is scheduled for November 13, 2002 at 9:30 a.m.

IT IS SO ORDERED this 30 day of ~~October~~, 2002, at 1:15 p.m..


UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 10-30-02 BY MKZ

IN THE CIRCUIT COURT OF CLARK COUNTY
EQUITY DIVISION

FLOYD THOMAS CURRY

PETITIONER

Vs.

CV 2002-191

RHONDA L. WILLIAMS, County Clerk
of Clark County, Arkansas

RESPONDENT

WRIT OF MANDAMUS

COMES ON to be heard, the Petition of Floyd Thomas Curry praying the Court to issue a Writ of Mandamus directed to the Clark County Circuit Court. The matter comes before the Court on the Motion for Judgment on the Pleadings. From the pleadings, it is clear there are no facts in dispute and that this matter must be determined as a matter of law. From the pleadings, the following FACTS are not in dispute:

- (1) The Petitioner, Floyd Thomas Curry, is a resident of Clark County, Arkansas.
- (2) That persons temporarily living in Clark County for the purpose of attending one of the two universities in Arkadelphia have registered in the past, and continue to register to vote in this County.
- (3) That to the extent persons not properly qualified to vote in this County vote in elections held in this County, the votes of lawful residents of the County, including those of the Petitioner, are diluted.

The Court concludes as a matter of LAW that persons temporarily living in Clark County for the purpose of attending a university as a student do not establish residence in Clark County but remain residents where they established residence prior to temporarily living in this County



Oct 29 02 12:51p

Ralph Ohm Atty at Law

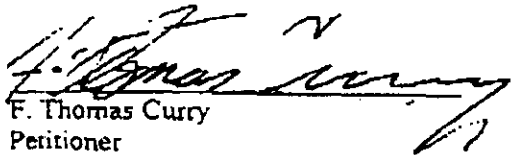
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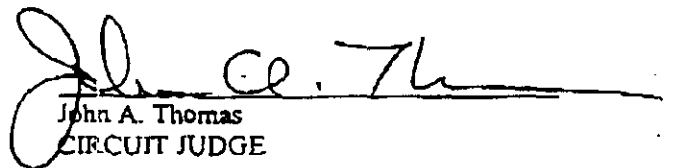
P. 3

as students. Such persons remain residents and electors of the County and State from which they traveled to this County for the purpose of attending a university. (Arkansas Code Annotated § 7-5-201(b)(6).) Accordingly, persons present in Clark County for the purpose of being students at a university located in the County are not qualified to vote in the County.

Premises considered, it is therefore by the Court ORDERED that the County Clerk of Clark County, Arkansas shall immediately cease to accept voter registrations from persons present in the County for the purpose of attending a university as a student. To that end, the County Clerk shall refuse to accept voter registrations from persons listing as their address a university post office box, university dormitory, or other university owned student housing. This order does not include university staff members who reside in such housing in connection with their employment. It is FURTHER ORDERED that the County Clerk shall; before the upcoming general election, examine the voter registration rolls and purge from those rolls all persons (excepting university staff as described above) listing as their address a university post office box, university dormitory, or other university owned student housing.

Approved as to form:


F. Thomas Curry
Petitioner


John A. Thomas
CIRCUIT JUDGE

Date: 10/22/02

Ralph C. Ohm
Attorney for Respondent

Filed for Record 22 day of Oct 2002 at 11:30 O'Clock
ATTY L. CLOWER, Circuit Clerk
by Lenny Ross

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
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October 30, 2002

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:02-cv-00675.

True and correct copies of the attached were mailed by the clerk to the following:

(NOTE: Copies also faxed to attorneys by Patricia Murray in Jonesboro)

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James W. McCormack, Clerk

Date: 10-30-02

BY: Martha Sigal