United States Court of Appeals, Fifth Circuit.

Billie Faye KEYES; Joshua Allen; Courtney Rena Fortune; Karli Ford Matthews; Shelton S. Matthews, Plaintiffs–Appellees

v.

Philip GUNN; Mark Baker; Richard Bennett; Charles Jim Beckett; Bill Denny; The Mississippi House of Representatives, Defendants–Appellants

No. 17-60097
May 11, 2018

Appeal from the United States District Court for the Southern District of Mississippi, Carlton W. Reeves, U.S. District Judge

## Attorneys and Law Firms

John G. Corlew, Corlew, Munford & Smith, P.L.L.C., Jackson, MS, for Plaintiffs–Appellees.
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Before STEWART, Chief Judge, and JOLLY and OWEN, Circuit Judges.

## Opinion

E. GRADY JOLLY, Circuit Judge:

This appeal arises from an election contest in Smith County, Mississippi, which challenges the vote for a state legislative seat for District 79 in the

Mississippi House of Representatives. The election resulted in a tie vote: 4,589 votes for each of the two candidates. Under established state procedures, the tie vote was resolved by drawing straws, and the winner took his seat. But not so fast. The loser of the straw-drawing contest had filed an election contest before the Mississippi House of Representatives. In accordance with the established rules, House Speaker Philip Gunn appointed a special committee to hear evidence on the election challenge. After the election-contest hearing, the special committee and the House dispossessed the winner of the seat he had won in the straw-drawing contest and seated the loser, but only after disqualifying five affidavit ballots that had previously been accepted by the Smith County election commissioners. This turn of events meant that the election had not resulted in a tie vote after all.

Five voters, who alleged they had been disqualified, then sued the Mississippi House of Representatives, House Speaker Gunn, and four of the five members of the special committee, for violating their rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by rejecting their affidavit ballots and thus depriving them of their constitutional right to vote.

Because we conclude that this lawsuit presents a state election contest for a legislative seat, we hold that the district court lacked subject matter jurisdiction. We therefore reverse and remand to the district court with instructions to dismiss for lack of subject matter jurisdiction.

I.

On November 3, 2015, Mississippi held a general election, which included District 79's legislative seat in the Mississippi House of Representatives. District 79 includes all of Smith County, Mississippi.[1]

In Smith County, thirty people had voted by affidavit ballot. Smith County's election commissioners "duly investigated" all thirty and found that only nine of the thirty were qualified to vote. The official vote count by Smith County officials declared the election a tie between the incumbent Democrat candidate, Blaine "Bo" Eaton, and the Republican candidate, Mark K. Tullos. The result was "duly certified" to the Secretary of State of the State of Mississippi, who tabulated the result and submitted it to the legislative branch.

One week later, in accordance with Mississippi law, and in the presence of the Governor and the Secretary of State of Mississippi, Mr. Eaton drew the longer of two straws and was thus declared the winner. *See* Miss. Code § 23-15-605. Mr. Eaton was later sworn in and took his seat in the House when the Mississippi Legislature convened in January 2016.

The day before drawing straws, however, Mr. Tullos had filed an election contest in the Mississippi House of Representatives. In accordance with Section 38 of the Mississippi Constitution, House Speaker Philip Gunn appointed a five-member special committee to consider the election contest. *See* Miss. Const. art. 4, § 38 ("Each house shall elect its own officers, and shall judge of the qualifications, return and election of its own members."). That special committee included Representatives Mark Baker, Richard Bennett, Charles Jim Beckett, and Bill Denny, who are defendants in this case.

Following hearings and a 4-1 vote, the special committee adopted a resolution recommending that Mr.

Tullos be seated. The resolution stated that the special committee had disqualified five of the nine affidavit ballots that previously had been approved and accepted by the Smith County election commissioners and the Secretary of State. The special committee did not say which five of the nine were disqualified, but its resolution stated that at least one reason for discarding them had been that the five voters were incorrectly counted by Smith County and the Secretary of State, because these voters had failed to make a timely written request to transfer their voter registration upon moving to a different voting precinct.[2] The House agreed with the special committee, voting 67-49 to unseat Mr. Eaton and declare Mr. Tullos the winner of the election.

Thus, five Smith County voters sued Speaker Gunn, four of the five members of the special committee,[3] and the Mississippi House of Representatives itself, under 42 U.S.C. § 1983, alleging that the defendants had deprived them of their right to vote and had violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The five voters—Billie Faye Keyes, Joshua Allen, Courtney Rena Fortune, Karli Ford Matthews, and Shelton S. Matthews—allege that they are among the nine affidavit-ballot voters whose ballots were approved by the Smith County election commissioners and the Secretary of State, and that they "believe" their affidavit-ballots were among the five later rejected by the special committee and the House. Three of the five "suspect" that they were among those whose ballots were excluded for failure to move their registration to their new precincts. All five plaintiffs state that they voted for Mr. Eaton.

In their complaint, the plaintiffs stated that they do not seek money damages, but "only such equitable and prospective remedy, including declaratory or injunctive relief, as the Court deems appropriate to redress the violation of the federal constitutional rights of the Plaintiffs to equal protection of the law." Specifically, the plaintiffs requested "that the Court find that the actions of the Defendants in casting out affidavit ballots which these Plaintiffs and others lawfully cast ... be found in violation of the Equal Protection Clause[;] that [their] votes be counted[;] that the [result of the straw-drawing] be recognized and validated by this Court and that [Mr. Eaton's] position in the Mississippi House of Representatives be restored unto him; that the Court declare the action of the Special Committee to be in violation of the Equal Protection Clause; and that the Court award reasonable attorney fees."

In the proceedings before the district court, the defendants moved to dismiss on various grounds, including legislative immunity, qualified immunity, Eleventh Amendment immunity, lack of subject matter jurisdiction under 28 U.S.C. § 1344, lack of Article III standing, and failure to state a claim. The district court rejected each of the defenses. Finding that it had jurisdiction to consider the plaintiffs' equal-protection claims under 42 U.S.C. § 1983, the district court denied the defendants' motions to dismiss. *See* *Keyes v. Gunn*, 230 F.Supp.3d 588, 593–94, 598 (S.D. Miss. 2017). The defendants have appealed under the collateral order doctrine.

II.

"The requirement that jurisdiction be established as a threshold matter ... is inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quotation omitted). Thus, we must satisfy ourselves of the jurisdiction both of this court and of the district court.[4] The issue having been properly raised by the defendants,[5] we thus proceed to examine whether federal courts have subject matter jurisdiction over this case before we consider anything further.

We review questions of subject matter jurisdiction de novo. *Jones v. United States*, 625 F.3d 827, 829 (5th Cir. 2010).

III.

Congress determines the jurisdiction of the lower federal courts. U.S. Const. art. I, § 8; *id.* art. III, § 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49, 12 L.Ed. 1147 (1850). And Congress has restricted the subject matter jurisdiction of federal courts as it relates to election disputes. *See* 28 U.S.C. § 1344. If a civil action, such as this one, is determined to contest the results of an election, then it must fall within the exceptions allowing federal jurisdiction under 28 U.S.C. § 1344.

Section 1344 provides:

> **§ 1344. Election disputes**
>
> The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it

> appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.
>
> The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

*Id.* Although the arrangement of the wording is somewhat awkward, § 1344 is clear as it relates to this case: federal courts may not hear an election contest involving the office of a "member of a state legislature."[6] *Id.*; *see* *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948) ("Sec. 1344 of Title 28 entitled 'Election Disputes' ... expressly excludes disputes concerning the office of ... [a] member of a State legislature. ... The aim of the section is to enable the district court to interfere in elections only to the limited extent it prescribes and to exclude it altogether from interfering with the election of [the enumerated offices]." (citations omitted) ). We have long held that an election contest within the meaning of § 1344 is any suit in which we are asked "to hear and decide the issue of who has received a majority of the votes legally cast." *Hubbard v. Ammerman*, 465 F.2d 1169, 1180 (5th Cir. 1972), *cert. denied*, 410 U.S. 910, 93 S.Ct. 967, 35 L.Ed.2d 272 (1973).

Accordingly, if a civil action, contesting the results of an election, cannot be maintained under the provisions of § 1344, then it cannot be maintained in a lower federal court. "It is elementary, of course, that

United States District Courts have only such jurisdiction as conferred by an Act of Congress. Except for the narrow exception set forth in 28 U.S.C. § 1344 ... there is no Act of Congress which has conferred upon federal district courts jurisdiction to hear and decide, solely as an election contest, what candidate received a majority of the votes legally cast in an election for state or local office." *Id.* at 1176.

A.

Thus, the issue is not whether § 1344 bars the district court's jurisdiction to decide a state legislative election dispute. It plainly does. The sole issue is whether this lawsuit presents an election contest. On its face, it would certainly appear that there is little question but that this case constitutes an election contest between Mr. Eaton and Mr. Tullos as to who got the most votes legally cast and who of the two won the election in Smith County.

The plaintiffs, however, argue that their lawsuit should not be characterized as an election contest; instead, it must be conceptualized as a constitutional claim vindicating the disqualified plaintiffs' right to vote based on their right to equal protection under the law. Although the rudiments of their claims are not pellucid, they seem to argue that of the nine affidavit ballots considered by the defendants, the five plaintiffs here, whose votes were disqualified, were not treated equally when compared to the four other affidavit ballots that were ultimately counted, thus unconstitutionally denying the plaintiffs their right to vote. The plaintiffs, assuming that they have an equal-protection claim, further argue, and the district court held, that "[a]n election contest is fundamentally

different from an equal protection challenge." *See* Keyes v. Gunn, 230 F.Supp.3d 588, 593 (S.D. Miss. 2017). They argue that, whereas an election contest "seeks to determine which candidate 'received a majority of the votes legally cast,' " *id.* (quoting *Hubbard*, 465 F.2d at 1176), an equal-protection claim "examines whether the votes cast by the plaintiffs were subjected to treatment different from others similarly situated," *id.* (citing *Wilson v. Birnberg*, 667 F.3d 591, 599 (5th Cir. 2012) ). The plaintiffs argue that because their complaint does not allege jurisdiction under 28 U.S.C. § 1344, but instead alleges jurisdiction over their constitutional claims under 28 U.S.C. § 1343[7] and 42 U.S.C. § 1983,[8] the federal courts have jurisdiction over this case.

Our precedent, however, counsels us not to be lulled into accepting these arguments as an avoidance of the jurisdictional restrictions of § 1344. The voter plaintiffs in *Hubbard v. Ammerman*, as here, did not frame their suit under § 1344. 465 F.2d at 1180. Instead, like the plaintiffs in the case before us, they claimed federal jurisdiction over their claims under § 1983. *Id.* at 1172. They alleged that the defendants had stuffed the ballot boxes with forged absentee ballots of at least sixteen black voters, which deprived the black voters of their right to vote for the candidate of their choice, all "on account of their race and color, in contravention of the Voting Rights Acts and the Fifteenth Amendment to the Constitution." *Id.* at 1172–73, 1177–78. Notwithstanding the fact that the plaintiffs asserted their claims under § 1983 to enforce federal statutory and constitutional rights, we were not persuaded to call an election contest by a different name. Instead, we concluded that "28 U.S.C. § 1344 is the only Act of Congress conferring jurisdiction on a [federal court] in a state or local election contest (primary or general) to

hear and decide the issue of who has received a majority of the votes legally cast." *Id.* at 1180. Thus, because the plaintiffs in *Hubbard* did not satisfy the statutory requirements for jurisdiction under § 1344, we held that federal courts were "clearly without jurisdiction to entertain this election contest under 28 U.S.C. § 1344." *Id.* Similarly, here, the perfunctory assertion of federal jurisdiction under § 1983 does not suffice to establish federal jurisdiction over this case.[9] *See id.*; *cf.* *Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986) ("Plaintiffs have attempted to recharacterize their [election contest] claims in constitutional terms. ... Plaintiffs' claims are, in truth, the ordinary dispute over the counting and marking of ballots." (quotations omitted) ); *Hutchinson v. Miller*, 797 F.2d 1279, 1285 (4th Cir. 1986) ("Plaintiffs' theories [under § 1983] in this case illustrate the ways in which a lawsuit such as this could intrude on the role of states and Congress to conduct elections and adjudge results."); *Gamza v. Aguirre*, 619 F.2d 449, 453–54 (5th Cir. 1980) ("If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures ... would be superseded by a section 1983 gloss. ... Section 1983 ... did not authorize federal courts to be state election monitors.").

B.

As we have earlier said, the issue is whether this § 1983 suit presents an election contest, that is, a question of who won the most legal votes. If it does, the district court is bereft of jurisdiction and our analysis must stop here. In our view, there can be no doubt that

this suit constitutes an election contest—pure and simple—in which § 1344 tells us that the federal district courts have no business.

To demonstrate the certainty of our conclusion, we recap the facts that embody the whole of this lawsuit. An election was held. It was determined by the local election commissioners to be a tie vote. A tie-breaking ceremony was lawfully conducted. The winner of the contested election was declared. But the tie-breaking ceremony did not end the contest. A contest was filed in the Mississippi House of Representatives. The election-contest provision of the Mississippi Constitution was employed. The purpose of the appointed committee was to determine who got the most qualified votes in the contested election. Thus, the special committee heard evidence concerning the disputed election and reported its conclusion to the House. The committee—and, ultimately, the House—determined who could or could not vote in the election. In making those decisions, they necessarily were asked to decide the proper and accurate number of votes for each candidate, that is, who won and who lost the disputed election. The facts speak for themselves.

Furthermore, from these facts, it is clear that we cannot resolve the plaintiffs' alleged equal-protection claim because the merits of such a claim can be resolved only by examining the eligibility of each of the disputed voters, in order to determine who was denied equal treatment. This scenario necessarily would determine the winner and loser in the election contest. *See Hubbard*, 465 F.2d at 1176. This conclusion is buttressed by the relief the plaintiffs sought in their complaint: that the plaintiffs' votes be counted and that, consequently, Mr. Eaton be restored to the seat in the Mississippi House of Representatives.

IV.

In sum, whatever name is attached to the plaintiffs' claim, the unavoidable outcome of litigating the claim determines who won and who lost a disputed election for a state legislative seat. And, as even the plaintiffs concede, the district court lacks subject matter jurisdiction to determine that question. Accordingly, the judgment of the district court is REVERSED, and this case is REMANDED to the district court with instructions to DISMISS the complaint for lack of subject matter jurisdiction.
REVERSED and REMANDED.

**Footnotes**

1District 79 also includes part of Jasper County, Mississippi.

2The special committee's resolution stated that the affidavit votes were thrown out because they involved voters who "moved their residence to a different voting precinct within the county, and yet, did not, more than thirty days prior to the election, make a written request of the Circuit Clerk to have their registration transferred to their new voting precinct." *See* Miss. Code § 23-15-13; *Rush v. Ivy*, 853 So.2d 1226, 1234 (Miss. 2003) (noting "the clear requirements of Section 23-15-13 of the Mississippi Election Code that an elector who moves from one ward or voting precinct to another ward within the same municipality or voting precinct within the same county must make a written request to the appropriate registrar to transfer his or her registration to their new ward or voting precinct" (emphasis omitted) ).

3The fifth member of the special committee, Representative Linda Coleman, is no longer a member of the House. She is not a named defendant in this case.

4We have appellate jurisdiction. As we have earlier noted, the defendants have raised defenses of Eleventh Amendment immunity, absolute immunity, and qualified immunity. The district court rejected each of these defenses. A district court's denial of these defenses is immediately appealable under the collateral order doctrine. *Will v. Hallock*, 546 U.S. 345, 350, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006); *In re Deepwater Horizon*, 793 F.3d 479, 484–85 (5th Cir. 2015). We thus have appellate jurisdiction to entertain this appeal.

Ordinarily, a district court's rejection of a defense of lack of subject matter jurisdiction is not immediately appealable. *See Catlin v. United States*, 324 U.S. 229, 236, 65 S.Ct. 631, 89 L.Ed. 911 (1945); *Matter of Greene Cty. Hosp.*, 835 F.2d 589, 595–96 (5th Cir. 1988). Nevertheless, here, as we have noted above, we have established our appellate jurisdiction under the collateral order doctrine, and both parties have raised and addressed the issue of federal subject matter jurisdiction. Not only may the parties raise the issue of subject matter jurisdiction for the first time on appeal, *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), but we also have an independent obligation to assure ourselves of our own federal subject matter jurisdiction before we may consider even any non-jurisdictional immunity defenses asserted in the election dispute, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is

bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." (quotation omitted) ).
5The defendants raise three challenges to federal subject matter jurisdiction. First, they argue that there is no "case" or "controversy" under Article III of the Constitution because the named defendants have no power to grant any of the relief sought. *See* Okpalobi v. Foster, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). Second, they argue that the Eleventh Amendment bars this suit and that the legal fiction recognized in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), does not apply. Third, they argue that the only statute authorizing federal courts to hear election disputes prohibits this suit. *See* 28 U.S.C. § 1344. In an effort to avoid unnecessarily expounding the Constitution, we choose to address statutory jurisdiction under § 1344. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

The legislative history of § 1344 supports our reading of the statute. The enacting Congress intended to provide a limited federal forum to effectuate the Fifteenth Amendment but nonetheless to bar federal courts from hearing election disputes involving legislators. Senator Matthew Carpenter of Wisconsin, a critical supporter of what is now § 1344 and without whom the provision would not have passed, stated that § 1344's exception for legislative seats "is because the Congress and the Legislature are the exclusive judges

of the qualifications and elections of their members." Cong. Globe, 41st Cong., 2d Sess. 3563 (May 18, 1870).

728 U.S.C. § 1343 provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ...
> (3) To redress the deprivation ... of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

The plaintiffs attempt to discredit *Hubbard* by relying on a quote from *Powell v. McCormack*, 395 U.S. 486, 516, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). But their point is misconceived. *Powell* did not involve an election contest, but instead whether to seat a congressman for

misconduct. *See id.* at 489–93, 89 S.Ct. 1944. Further, in *Powell*, the Supreme Court stated that "there is absolutely no indication that the passage of [§ 1344] evidences an intention to impose *other* restrictions on the broad grant of jurisdiction in [28 U.S.C.] § 1331." *Id.* at 516, 89 S.Ct. 1944 (emphasis added). Thus, the *Powell* Court recognized that § 1344 does impose *some* restrictions on the grant of federal jurisdiction under § 1331.

Nor have we extended § 1344's bar to all cases involving elections. For example, we have adjudicated cases involving racial discrimination during an election. *See, e.g.*, *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215, 222 (5th Cir. 1966). Those cases, unlike this case, fall cleanly within the narrow grant of jurisdiction in § 1344, which was enacted to effectuate the Fifteenth Amendment, because those cases involved egregious racial discrimination, and neither concerned an office specifically excluded by § 1344. *See Hubbard*, 465 F.2d at 1176–66 (discussing *Bell v. Southwell* and *Hamer v. Campbell*). Nor did the suits brought in *Bell* and *Hamer* require this Court to decide who won the state elections. *Id.*

United States District Court,
S.D. Mississippi,
**Northern Division.**

Billie Faye KEYES; Joshua Allen; Courtney Rena Fortune; Karli Ford Matthews; Shelton S. Matthews, Plaintiffs,

v.

Philip GUNN; Mark Baker; Richard Bennett; Charles Jim Beckett; Bill Denny; The Mississippi House of Representatives, Defendants.

CAUSE NO. 3:16–CV–00228–CWR–LRA

Signed 01/27/2017

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## MEMORANDUM OPINION AND ORDER

Carlton W. Reeves, UNITED STATES DISTRICT JUDGE

*"The deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as possible, an equal voice in the selections."*

*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

Mississippians select members of the State House of Representatives ("the House") through popular election. The people consented to this form of governance in the Constitution of 1890, trusting that their ballots would be treated fairly.

In this case, five voters claim the House breached that trust by intentionally discarding their ballots to change the outcome of an election. They allege a violation of rights secured by the Equal Protection Clause of the Fourteenth Amendment. Defendants deny all allegations of impropriety. They insist their actions are justified by state law, and that this Court has no jurisdiction to adjudicate plaintiffs' claims.

This case presents the question: if state legislators intentionally discard ballots to swing an election, may the disenfranchised voters bring suit in federal court to enforce the guarantee of equal protection? Yes, they can.

## I. Factual and Procedural History

On November 3, 2015, Mississippians voted in state-wide general elections. Among the positions on the ballot was the legislative seat held by incumbent Blaine Eaton. Eaton was the State Representative for District 79, which is comprised of Smith County as well as a portion of Jasper County.

The race for District 79 could not have been closer. As required by state law, the Smith County election commissioners certified the total number of votes cast county-wide, as well as the number of votes cast in each precinct. *See* Miss. Code Ann. § 23–15–603. Those certifications were transmitted to the Secretary

of State, who tabulated the results and submitted them to each branch of the Legislature. *See id.* § 23–15–603(3) ("Certified county vote totals shall represent the final results of the election."). The District 79 race resulted in a tie between Eaton and challenger Mark Tullos; each received 4,589 votes. Associated Press, *GOP–Majority Panel to Hear Challenge Over Mississippi House Seat*, Jackson Free Press, Dec. 1, 2015.

Approximately one week after the votes were certified, Eaton and Tullos drew lots to break the tie, in accordance with state law. *See* Miss. Code Ann. § 23–15–605. Under the watchful eyes of the Secretary of State, the Governor, legislators, party officials, members of the media, and general onlookers, Eaton won the election by drawing the long straw. Richard Fausset, *Democrat Wins Mississippi House Race After Drawing Straw*, N.Y. Times, Nov. 20, 2015. When Mississippi's 2016 legislative session convened, Eaton was sworn in and seated by the House as the Representative of District 79. His service would not last long.

The tie-breaking ceremony garnered a great deal of attention because much more than a single legislative seat was at stake. As one reporter explained:

> With his victory, Eaton blocks the GOP from having a supermajority in the House, a three-fifths margin that would have allowed Republicans, in theory, to make multimillion-dollar decisions about taxes without seeking help from Democrats.... A Tullos victory would have given Republicans 74 seats in the 122–member House. They already have a supermajority in the 52–member state Senate, and Gov. Phil Bryant is

> Republican. Democrats in the current term have blocked Republicans' efforts to pass hundreds of millions of dollars' worth of tax cuts.

Emily Wagster Pettus, *Mississippi Republicans Literally Drew Straws to Break an Election Tie*, Business Insider, Nov. 21, 2015.

Tullos filed a petition with the House contesting the election.[1] Arielle Dreher, *Election Disputes: No Bibles, and Lots of Swearing*, Jackson Free Press, Jan. 20, 2016. Republican Speaker of the House Philip Gunn appointed Republican Mark Baker, Republican Richard Bennett, Republican Charles Jim Beckett, Republican Bill Denny, and Democrat Linda Coleman to a special committee, charging them to investigate and consider the election challenge. Associated Press, *GOP–Majority Panel to Hear Challenge Over Mississippi House Seat*, Jackson Free Press, Dec. 1, 2015.

The committee voted along party lines to discard five of the nine affidavit ballots counted by Smith County election commissioners and the Secretary of State.[2] Coleman criticized the committee's recommendation as a "trumped up report based upon a trumped-up law." Jimmie Gates, *House Votes for Republican Tullos, Unseats Eaton*, Clarion–Ledger, Jan. 21, 2016. The House then adopted the special committee's resolution, nullified the results of the tie-breaker, declared Tullos the winner of the election, and manufactured a Republican supermajority. *Id.*

On March 30, 2016, Billie Faye Keyes, Joshua Allen, Courtney Rena Fortune, Karli Ford Matthews, and Shelton S. Matthews ("plaintiffs"), residents of Smith County, filed their complaint with this Court. They allege that their affidavit ballots—all cast for Eaton—were counted by the Smith County election

commissioners and the Secretary of State, then jettisoned by the special committee of the House in violation of the Equal Protection Clause.

Plaintiffs' claims are predicated on well-established principles. The Supreme Court has underscored repeatedly the importance of open, honest elections and equal opportunity for civic participation. More than 100 years ago, while considering an election to Congress, the Court regarded it as "unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). The Court later extended that right to elections for state officials. "[W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." *Hadley v. Junior College Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); *see also Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (collecting cases). The protective penumbra cast over state elections by the Equal Protection Clause has not diminished in the passing decades. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (citation omitted).

Nevertheless, defendants argue that the doors to the federal courthouse are closed. First, they claim this Court lacks authority to hear this case. Then they invoke Eleventh Amendment immunity and legislative

immunity. Finally, they argue that the special committee of the House was entitled to make individualized factual determinations about the sufficiency of plaintiffs' ballots.

## II. Threshold Questions

"[F]ederal courts are courts of limited jurisdiction, having only the authority endowed by the Constitution and that conferred by Congress." *Halmekangas v. State Farm Fire and Cas. Co.*, 603 F.3d 290, 292 (5th Cir. 2010) (quotation marks and citation omitted). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citation omitted). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.* (citation omitted).

### A. Election Contests and Equal Protection

An election contest is fundamentally different from an equal protection challenge, and the distinction between them is pertinent to this action. An election contest seeks to determine which candidate "received a majority of the votes legally cast." *Hubbard v. Ammerman*, 465 F.2d 1169, 1176 (5th Cir. 1972). An equal protection claim, by contrast, examines whether the votes cast by plaintiffs were subjected to treatment

different from others similarly situated. *See, e.g.*, *Wilson v. Birnberg*, 667 F.3d 591, 599 (5th Cir. 2012). The former audits the election outcome, while the latter examines the election process.

Defendants argue that this Court lacks subject matter jurisdiction because "Congress did not vest the District Courts with jurisdiction to resolve election contests for State Legislatures." Docket No. 5 at 1. They focus on *Hubbard v. Ammerman*, which states in relevant part: "there is no Act of Congress which has conferred upon federal district courts jurisdiction to hear and decide, *solely as an election contest*, what candidate received a majority of the votes legally cast in an election for state or local office." 465 F.2d at 1176 (emphasis added). Defendants point to the section of the complaint asking that "[Eaton's] position in the Mississippi House of Representatives be restored unto him," Docket No. 1 at 11, and argue that *Hubbard* renders that remedy unavailable.

The Court agrees. To the extent plaintiffs seek an order determining who received a majority of votes or declaring Eaton the lawful Representative of District 79, that portion of the complaint must be dismissed. This Court lacks jurisdiction to grant those remedies.

That does not, however, limit this Court's ability to consider plaintiffs' equal protection claims.[3] The Supreme 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." *Dunn*, 405 U.S. at 336, 92 S.Ct. 995 (citations omitted). Plaintiffs may pursue redress for an alleged malfunction in the electoral process which rendered their votes unequal. They seek the same

treatment received by other affidavit ballots cast in the election. That is a claim this Court can adjudicate.

The analysis here is intuitive. States have the power to conduct their own elections, but they do not possess the power to deprive their citizens of rights protected by the U.S. Constitution. *See Gomillion v. Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

> In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust.... Obviously our elected representatives are the last persons we should trust with identification of ... these situations.

John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 103 (1980) (emphasis in original). The allegations here present one of those distortions of process over which federal courts have jurisdiction.

Other courts agree. "[J]urisdiction is not defeated by ... the bare fact that states have primary authority over the administration of elections." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 232 (6th Cir. 2011) (citation omitted). "That federal courts are constrained in an area does not mean that they must stand mute in the face of allegations of a non-frivolous impairment of federal rights." *Id.*; *accord Johnson v. Hood*, 430 F.2d 610, 613 (5th Cir. 1970) (determining that in the context of a state election "a claimed denial of equal protection by state action would

arise under the Constitution"). Federal question jurisdiction is present here.

## B. Eleventh Amendment: *Ex Parte Young*

Defendants raise Eleventh Amendment immunity as a shield to this suit. The Amendment "bars suits by private citizens against a state in federal court.... Yet, few rules are without exceptions." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc) (citation omitted). One of these exceptions is found in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

*Ex Parte Young* held that the Eleventh Amendment does not preclude suits seeking injunctive relief against state officials who commit unconstitutional acts. "[B]ecause a sovereign state cannot commit an unconstitutional act," the Court reasoned, "a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment." *Barber v. Bryant*, 193 F.Supp.3d 677, 704 (S.D. Miss. 2016) (quoting *Okpalobi*, 244 F.3d at 411).

*Ex Parte Young* requires a demonstration "that the state officer has 'some connection' with the enforcement of the disputed act." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (quoting *Young*, 209 U.S. at 157, 28 S.Ct. 441). If such a connection is found, then the 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 Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quotation marks, brackets, and citation omitted).

These requirements are satisfied here. By treating plaintiffs' ballots unequally, the individual defendants have some connection with the constitutional violation alleged. Plaintiffs also claim an ongoing deprivation: through intentional elimination of their votes, defendants deprived each individual plaintiff of his or her civic voice not just for the 2016 legislative session, but also the 2017, 2018, and 2019 sessions, and any special session called during those years. The relief requested is properly characterized as prospective. Plaintiffs seek an order from this Court mandating equal treatment of their ballots for the remainder of the legislative term. The legal fiction of *Ex Parte Young* removes the cloak of the State and makes the individual defendants amenable to this suit.

What remains is whether the House itself is entitled to Eleventh Amendment immunity. Defendants urge the Court to embrace the reasoning in *Hall v. Louisiana*, 974 F.Supp.2d 944 (M.D. La. 2013). In *Hall*, the Louisiana Legislature argued that it could not be sued for passing a Judicial Election Plan. The court agreed, holding that plaintiff had failed to sufficiently allege an enforcement connection between the Legislature and the Plan, as required by *Ex Parte Young*. *Id.* at 954.

The disputed act in *Hall*, however, delegated enforcement to officials outside the legislative body. The Louisiana Legislature, while it crafted the Plan, did not enforce the unconstitutional act. *Id.* By contrast, defendants here entered the realm of enforcement. They undertook and completed the alleged unconstitutional act themselves, never delegating authority to anyone outside the Legislature. They canceled the ballots.

Plaintiffs maintain that *Bond v. Floyd* authorizes federal courts to hear suits against a legislative

chamber, notwithstanding the Eleventh Amendment. 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). In *Bond*, the Supreme Court held that the Georgia House of Representatives' refusal to seat Julian Bond violated his First Amendment rights.[4] Bond brought suit against the Speaker of the Georgia House and several representative members of the chamber, but did not name the Georgia House itself as a defendant. *Bond v. Floyd*, 251 F.Supp. 333, 335 (N.D. Ga. 1966). In a unanimous decision, the Supreme Court implicitly held that the presence of the individual defendants, named in their official capacities, was sufficient for the Court to enjoin the action taken by the chamber. 385 U.S. at 131, 87 S.Ct. 339 ("We conclude as did the entire court below that this Court has jurisdiction to review the question of whether the action of the Georgia House of Representatives deprived Bond of federal constitutional rights."); *see also Verizon Md.*, 535 U.S. at 645, 122 S.Ct. 1753 ("Whether the Commission waived its immunity is another question we need not decide, because ... [plaintiff] may proceed against the individual commissioners in their official capacities pursuant to the doctrine of *Ex Parte Young*."). This Court need not determine whether the House is subject to *Ex Parte Young*, as the individual defendants provide sufficient basis for plaintiffs to proceed.

### C. Legislative Immunity

Defendants next argue they are entitled to legislative immunity. They rely upon *Tenney v. Brandhove*, in which the Supreme Court found that legislative immunity was "carefully preserved in the formation of State and National Governments here." 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

Legislative immunity protects actions, not individuals. *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 272 (5th Cir. 2000); *see also Da Vinci Inv., Ltd. P'ship v. Parker*, 622 Fed.Appx. 367, 372–73 (5th Cir. 2015). "And absolute [legislative] immunity only protects those duties that are functionally legislative, not all activities engaged in by a legislator." *Bryan*, 213 F.3d at 272 (citing *Hughes v. Tarrant Cty. Tex.*, 948 F.2d 918, 920 (5th Cir. 1991)). The grant or denial of the privilege, then, hinges on the nature of defendants' action.

In making this determination, the Court turns to two guideposts erected by the Fifth Circuit:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are legislative facts, such as generalizations concerning a policy or state of affairs, then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the particularity of the impact of the state action. If the action involves establishment of a general policy, it is legislative; if the action singles out specific individuals and affects them differently from others, it is administrative.

*Hughes*, 948 F.2d at 921 (quotation marks, citations, and brackets omitted).[5]

Here, the challenged conduct was not legislative under either test. The decision to discard votes was made on a voter-by-voter basis, requiring

individualized application of Mississippi Code § 23–15–13 and § 23–15–573. To apply those statutes defendants apparently investigated where each voter lived, when he or she moved to that location, and whether or not he or she submitted a proper written request to transfer precincts or wards, culminating in rejection of each plaintiff's duly filed affidavit ballot. None of those facts are generalizations that in any way concern policymaking. Rather, they are specific and relate to a single individual. The impact of defendants' action is also individualized. Discarding each vote affected only the voter who cast it. Defendants did not, by discarding any vote, engage in establishing a law or policy for future voters. *See, e.g.*, *Parker*, 622 Fed.Appx. at 372 ("The denial ... did not involve the determination of a policy, but, instead, applied general rules ... to one specific piece of property.").

For these reasons defendants may not avail themselves of legislative immunity.

## III. The Merits of Plaintiffs' Complaint

The Federal Rules of Civil Procedure require "a pleading [to] contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). "[T]he pleading standard ... does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To determine whether to grant or deny dismissal, the Court "take[s] the well-pled factual allegations of the complaint as true and view[s] them in

the light most favorable to the plaintiff [s]." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). If plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (citations omitted). Defendants concede that they acted under color of state law. Determining if plaintiffs have stated a claim turns on whether they have alleged the violation of any right secured by the U.S. Constitution or a federal statute.

The parties argue over the existence of a federally *created* right to vote in state elections. The point is not germane. The Supreme Court has plainly declared that "the Constitution of the United States *protects* the right of all qualified citizens to vote, in *state* as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added). Once a State has given its citizenry the right to vote, the administration of that grant is subject to the federal guarantee of equal protection. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). This Court has previously found it "well established ... that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *McLaughlin v. City of Canton, Miss.*, 947 F.Supp. 954, 974 (S.D. Miss. 1995)

(quotation marks and citation omitted). Therefore, the question is whether plaintiffs have adequately pled an equal protection claim.

This case differs from more conventional race or sex-based equal protection challenges. Each of the plaintiffs proceeds as a class-of-one. The Fifth Circuit articulated, in *Wilson v. Birnberg*, what a plaintiff must show to advance a class-of-one claim:

> The usual equal protection challenge is that a statute discriminates on its face ... against certain protected groups or trenches upon certain fundamental interests. Equal protection also protects against the unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike. To be a class of one, the plaintiff must establish (1) he was intentionally treated differently from others similarly situated and (2) there was no rational basis for any such difference.

667 F.3d at 599 (quotation marks, brackets, and citations omitted). In the election context, the Court must determine whether defendants are alleged to have engaged in "willful conduct ... undermin[ing] the organic processes by which candidates are elected." *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980) (quotation marks and citation omitted).

Plaintiffs allege that defendants "voted to deny the federal constitutional rights of the Plaintiffs ... [and] disenfranchised qualified voters ... [by] casting out affidavit ballots." Docket No. 1. The complaint does not claim that these deprivations were in part or in whole the result of defendants' negligence. Rather, plaintiffs'

action is premised upon intentional misconduct—they allege a naked power grab.

Taking these allegations as true, as the Court must at this stage, they state a claim that defendants intentionally treated plaintiffs differently from others voting by affidavit ballot, and there was no rational basis for the disparate treatment beyond an impermissible desire to alter the outcome of the election. *See*, *e.g.*, *Wilson*, 667 F.3d at 600 ("[Plaintiff] alleged intentional discrimination, not unintended irregularities.... The complaint claimed enough. Further proceedings are needed.").

## IV. Conclusion

Defendants' first motion to dismiss is granted to the extent that this Court lacks jurisdiction to determine the outcome of the election. It is denied in all other respects. The remaining motions to dismiss are denied, except that the House's motion for Eleventh Amendment immunity is moot. The parties are directed to contact the Magistrate Judge's chambers within 10 days to obtain a scheduling order.

**SO ORDERED**, this the 27th day of January, 2017.

1The contents of that petition remain a mystery, as it has not been made a part of this record.

2Also a mystery is which ballots the special committee invalidated because it never identified who it determined had voted illegally. What is certain, however, is that at least one of plaintiffs' ballots was among those discarded. Defendants considered only nine affidavit ballots and they chose to eliminate five. Therefore, between one and five of plaintiffs' ballots were canceled.

3Defendants argued at length in their papers and at oral argument that 28 U.S.C. § 1344 controls the present suit and altogether prevents this Court from exercising jurisdiction. Counsel's contention, however, was foreclosed by the Supreme Court nearly 50 years ago. *See Powell v. McCormack*, 395 U.S. 486, 516, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ( "[T]here is absolutely no indication that the passage of this Act [28 U.S.C. § 1344] evidences an intention to impose other restrictions on the broad grant of jurisdiction in § 1331.").

4The facts in *Bond* are remarkably similar to the facts in this case. "Hearings were conducted before a special committee of the House which, by majority report, recommended that Mr. Bond be excluded. The House, adopting that report, excluded him by passing House Resolution 19 by majority vote." Jurisdictional Statement and Motion to Advance at 6, Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966) (No. 87), 1966 WL 115343, at *6.

5The *Hughes* court discussed various tests for determining whether an action was protected by legislative immunity, and "did not choose any one of these particular standards, but instead used them as general guidelines." *Bryan*, 213 F.3d at 273. This Court relies upon those same guidelines.

6/12/2018

United States Court of Appeals, Fifth Circuit.

Billie Faye KEYES; Joshua Allen; Courtney Rena Fortune; Karli Ford Matthews; Shelton S. Matthews, Plaintiffs–Appellees

v.

Philip GUNN; Mark Baker; Richard Bennett; Charles Jim Beckett; Bill Denny; The Mississippi House of Representatives, Defendants–Appellants

No. 17-60097

**ON PETITION FOR REHEARING**

Appeal from the United States District Court for the Southern District of Mississippi,

Before STEWART, Chief Judge, and JOLLY and OWEN, Circuit Judges.

PERCURIAM:

IT IS ORDERED that the petition for rehearing is DENIED