

ORIGINAL

2024-EC-00406

FILED

APR 09 2024

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. _____

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

**TATE REEVES, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF MISSISSIPPI**

APPELLANT

v.

JOHNNY GARY

APPELLEE

TIME-SENSITIVE EMERGENCY MOTION TO STAY OR VACATE

***EXPEDITED CONSIDERTAIION REQUESTED*
RELIEF SOUGHT PERTAINS TO A SPECIAL
ELECTION SET FOR APRIL 16, 2024**

COMES NOW, Tate Reeves, in his Official Capacity as Governor of the State of Mississippi, pursuant to Miss. R. App. P. 8(c), and files this Emergency Motion to Stay or Vacate, and in support shows:

INTRODUCTION

This motion involves a pure legal question in a dispute over a special election lawfully set by the Governor to take place in just a few days. Last year, Johnny Gray received fifteen more votes than Debra Hibbler in the Democratic primary for the office of Leflore County Chancery Clerk and Gray was declared the winner. Hibbler challenged the election. But, during that litigation, Gray took office as Chancery Clerk after he was declared the winner of the uncontested November general election. In February 2024, a specially appointed judge held that the Democratic primary election was tainted by fraud. As a result, under Miss. Code Ann. § 23-15-937, the judge set aside the Chancery Clerk elections. The judge further ordered that the Governor must set a special countywide election between Gray and Hibbler to determine which candidate is entitled to serve the remainder of the term.

MOTION# 2024-1205

On March 6, 2024, the Governor issued a Writ of Election setting the special election for April 16, 2024. Just over two and a half weeks ago, Gray sued the Governor and the county election commissioners in Leflore County Circuit Court to block the special election. Gray contended that the Governor's writ of election was void because it conflicts with statutes governing special elections for vacant offices—Miss. Code Ann. § 23-15-831 *et seq.* On April 8, the Circuit Court declared the writ of election void and enjoined the election commissioners from conducting next week's special election. The Circuit Court concluded that, although the office of Leflore County Chancery Clerk is not vacant (Gray currently holds that office), the writ sets a special election in contravention of Miss. Code Ann. § 23-15-835—which appears in Article 25 of the Election Code's procedures for "Vacancies in Office." The Circuit Court thus declared the writ void and awarded Gray an injunction. That ruling was erroneous as a matter of law. Section 23-15-835 prescribes a 90-day notice period and other procedures for special elections to fill vacant offices. But the special election set for April 16 is not a special election to fill any vacant office.

The Governor has immediately appealed by filing his notice of appeal under Miss. R. Civ. P. 4 and now moves for relief from the Circuit Court's judgment under Miss. R. App. 8(c). This Court should immediately stay or vacate that judgment and permit the special election scheduled to take place on Tuesday, April 16 to proceed.

FACTUAL BACKGROUND

The 2023 elections for Leflore County Chancery Clerk were the subject of a primary election contest brought under Miss. Code Ann. § 23-15-921 *et seq.* *Exhibit A* - Final Judgment of the Circuit Court of Leflore County in underlying election contest – pp. 1-2. Appellee Johnny Gary was certified as the winner of the primary in the race for Chancery Clerk of Leflore County. *Exhibit A*, pp. 1, 3. His opponent, Debra Hibbler, filed an election contest. *Exhibit A*, p. 1. A special judge

appointed by the Mississippi Supreme Court conducted and the election of Gary was set aside and vacated due to election fraud. *Exhibit A*, p. 16. The special judge further ordered that a special election be held at a date set by the Governor. *Exhibit A*, p. 16. Gary currently holds the office of Leflore County Chancery Clerk pending the results of the special election. See *Exhibit H* – Order of the trial court of April 8, 2024, p. 3.

Governor Reeves issued a writ of election setting a special election to be held on April 16, 2024. *Exhibit B* – Writ of Election.

On March 20, 2024, Gary sought Declaratory Relief in Circuit Court against Governor Reeves, claiming that the writ of election is null and void as a matter of law under Miss. Code Ann. §§ 23-15-833 and -835. *Exhibit C* – Complaint of Gary for Declaratory Relief and Injunction; *Exhibit D* – Motion of Gary for Declaratory Relief and Injunction. Gary also sought mandamus or an injunction against the Leflore County Election Commission to block the commissioners from holding the special election on April 16. *Exhibit C; Exhibit D*.

Governor Reeves filed a Motion to Dismiss the Gary's complaint. *Exhibit E*. Eric Mitchell filed a Motion to Intervene that was granted by the Court. *Exhibit F* – Motion to Intervene; *Exhibit G* – Order granting Motion to Intervene. Mitchell was a party in a companion election contest in the Circuit Court of Leflore County related to a supervisor election, and his special election is also set for April 16, 2024. Several days after conducting a hearing on the parties' motions, on April 8, the Leflore County Circuit Court Clerk entered a stamped-filed final judgment. *Exhibit H* – Order of trial court of April 8, 2024. That judgment grants Gary the full relief sought in his complaint by declaring the writ of election void and enjoining the election commissioners from conducting the April 16 special election. *Exhibit H*, p. 6.

ARGUMENT

I. The office of Leflore County Chancery Clerk is not vacant, and the Governor’s Writ of Election is proper under Miss. Code Ann. § 23-15-937, which governs special elections where no vacancy in office exists.

It is obvious, as the Circuit Court recognized, that the office of Leflore County Chancery Clerk is not currently vacant. Gray assumed office following last year’s elections. The special judge’s order set aside those elections. *Exhibit A*, p. 16. But Gray currently holds the office of Leflore County Chancery Clerk and will continue to hold that office until a special election is held to determine who will serve the remainder of the current term.

Miss. Code Ann. § 23-15-937 governs special elections following a successful election contest when a county office is not vacant. That statute provides that when an election contest results in the setting aside of an election “the Governor ... shall call a special election for the office or offices involved.” Miss. Code Ann. § 23-15-937. And when, a “contestee has already entered upon the term” of office “he shall vacate the office” after “the qualification of the person elected at the special election.” Miss. Code Ann. § 23-15-937.

Here, Gary was elected to the office of Leflore County Chancery Clerk last year. In February 2024, the elections were set aside, and the Governor was ordered to set a special election under Miss. Code Ann. § 23-15-937. *Exhibit A*, p. 16. But, under that statute, Gary remains in office as Leflore County Chancery Clerk until the special election is completed. Indeed, as this Court has explained, when a “term of office is entered before the adjudication of the election contest, under Mississippi Code Section 21-15-937,” the person who entered the term “is the lawful holder of the office until the special election is held.” *Parks v. Horton*, 299 So.3d 777, 778 (Miss. 2020).

Because the office of Leflore County Chancery Clerk is not currently vacant, Governor Reeves properly issued the writ of election establishing April 16 as the date of the special election to determine who will serve the remainder of the office's current term. Miss. Code Ann. § 23-15-937. That statute does not mandate that the Governor select a specific date for a special election to fill a non-vacant office. The Governor has discretion to select the appropriate date. As this Court has recognized, Miss. Code Ann. § 23-15-937 governs special elections for contested primary elections and requires a special election set by the Governor. *Moore v. Parker*, 962 So.2d 558, 567-68 (Miss. 2007); *Smith v. Hollins*, 905 So.2d 1267, 1277 (Miss. 2005).

II. Miss. Code Ann. §§ 23-15-833 and 23-15-835 are not applicable when there is not a vacancy.

The Leflore County Circuit Court erroneously declared the Governor's writ of election void based on Miss. Code Ann. § 23-15-835. The Circuit Court held that statute "requires the county election commissioners, upon receipt of the writ of election, to immediately give notice of the special election ninety (90) days before the election." *Exhibit H*, p. 4. Miss. Code Ann. § 23-15-833 and § 23-15-835 may strictly apply when a special election has been ordered to fill a vacant office. But there is not a vacancy here.

Miss. Code Ann. §§ 23-15-833 and -835 appear in Article 25 of the Election Code's provisions for "Vacancies in Office." Miss. Code Ann. § 23-15-833 requires that a special election day to fill a vacancy in a county elective office be held in November. Further, Miss. Code Ann. § 23-15-835 requires 90-days' notice of a special election to fill a vacancy in a county office. But, again, there is not a vacancy here in the office of Chancery Clerk. Gary is currently serving as Leflore County Chancery Clerk. And, under Miss. Code Ann. § 23-15-937, Gary remains in office as Leflore County Chancery Clerk until a special election is completed. Indeed, as this Court has explained, when a "term of office is entered before the adjudication of the election contest, under

Mississippi Code Section 21-15-937,” the person who entered the term “is the lawful holder of the office until the special election is held.” *Parks v. Horton*, 299 So.3d 777, 778 (Miss. 2020). Since by their plain terms Miss. Code Ann. § 23-15-833 and Miss. Code Ann. § 23-15-835 do not apply—because there is no vacancy in the office of Leflore County Chancery Clerk—the writ does not conflict with these two statutes. *See Barbour v. State*, 974 So. 2d 232, 240 (Miss. 2008) (“[C]ourts cannot restrict or enlarge the meaning of an unambiguous statute.”) (citations omitted). The Circuit Court erred in enlarging their application to void the Governor’s writ.

In short, the trial court erred in relying on Miss. Code Ann. § 23-15-835’s notice requirement or any other portions of that statute to declare the writ of election null and void and enjoin the April 16 special election.

III. The Governor did not act in contravention of the Mississippi Constitution or any applicable statute when he exercised his discretionary executive power to set this special election for April 16, 2024.

The trial court’s ruling that set aside the writ of election also relied on the proposition that the Governor’s writ “acknowledged” the applicability of the 90-days’ notice period for special elections called to fill a vacancy by “mandating compliance with 23-15-835 in the Writ of Election.” *Exhibit H*, p. 5. This is not the case, as the language of the writ shows. The writ was issued on March 6, 2024, setting the special election for April 16, 2024. The writ expressly states: “All relevant laws **not in conflict with the terms of this Writ of Election** shall apply to this special election.” (emphasis added). Plainly, the ninety 90-days’ notice period for special elections to fill a vacancy contained in Miss. Code Ann. § 23-15-835 directly conflicts with the writ. Thus, by the plain terms of the writ, this notice period does not apply.

Moreover, the 90-days’ notice period is not the only requirement contained in Miss. Code Ann. § 23-15-835. This statute also defines where the election commission shall post notice of the

special election: “at the courthouse;” and how the election commission shall prepare for and conduct the special election: “as in the case of a general election.” These requirements of Miss. Code Ann. § 23-15-835 do not conflict with the terms of the writ and thus are applicable to the election commission when conducting this special election. There is absolutely no ambiguity, inconsistency, or impossibility created by the citation to Miss. Code Ann. § 23-15-835 contained in the *Writ of Election*.

In sum, the Governor did not act in contravention of the Mississippi Constitution or any applicable statute when he exercised his discretionary executive power to set this special election for April 16. The Circuit Court’s judgment voiding the writ and enjoining the April 16 special election should be stayed or vacated.

IV. In these circumstances, seeking relief from the Leflore County Circuit Court in this first instance is not practicable.

It would be impracticable for Governor Reeves to move for the relief sought here in the trial court before seeking this Court’s intervention due to time constraints and the fast-approaching April 16 special election. The Circuit Court entered its judgment more than 18 days after Gray filed his complaint, over 10 days after hearing the parties’ motions, and only five business days before the April 16 special election. Even assuming that Governor Reeves could file a motion for stay or reconsideration today, and assuming that the Circuit Court would act quickly in ruling on the motion, that delay would further hinder this Court’s ability to review the Circuit Court’s ruling if/when sought by the parties—where prompt action is needed to minimize further delay and uncertainty regarding the April 16 special election.

CONCLUSION

The trial court erred in declaring the *Writ of Election* null and void and enjoining the election set for April 16, 2024. This Court should therefore stay or vacate the Leflore County

Circuit Court's April 8 judgment and order the April 16 special election to proceed as scheduled.

RESPECTFULLY SUBMITTED, this the 9th day of April 2024.

TATE REEVES, in his Official Capacity as
Governor of the State of Mississippi

BY: LYNN FITCH, ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

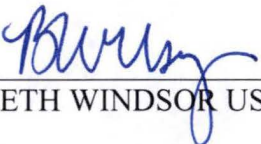
I, Beth Windsor Usry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I filed the above document with the Clerk of this Court and sent a copy via U.S. Mail and email to:

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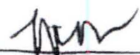
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This the 9th day of April 2024.



BETH WINDSOR USRY

RECEIVED
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BY: 

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

DEBRA TATE HIBBLER

PLAINTIFF

VERSUS

CIVIL ACTION NO. 2023-0071

JOHNNY LEE GARY, JR.

DEFENDANT

FINAL JUDGEMENT


The court is aware that no election is perfect.¹ But the 2023 Democratic primary election for Chancery Clerk was so riddled with fraud in the procurement and filing of absentee ballots, and violations of the Mississippi Election Code,² that the court has no choice but to set it aside and order a special election.

I. BACKGROUND

Debra Tate Hibbler and Johnny Lee Gary, Jr. were the only two candidates in the August 8, 2023 Democratic primary for Chancery Clerk of Leflore County. On election night, after all precinct votes were counted, Hibbler led Gary by 130 votes. After the first set of absentee votes were counted on election night, Hibbler's lead was cut to only 36 votes. On August 16, when the Resolution Board met to count absentee ballots that had arrived pursuant to the five-day mail-in rule, Gary led by 15 votes and was declared the winner, having received 2,239 votes (50.17%), to Hibbler's 2,224 votes (49.83%), or three thousandths of the votes cast. By any standard, this was a slim margin of victory.

¹As counsel for Gary put it, "The Mississippi Supreme Court "recognizes that no election is flawless. Therefore, it considers ordering a new election to be a last resort." *citing Wesley v. Wash. Co. Dem. Exec. Com.*, 235 So.3d 1379, 1386 (Miss. 2017).

²Miss. Code Ann. § 23-15-1, *et seq.*

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Kelly H. Roberts
ELMOR STOCKSTILL, CIRCUIT CLERK
BY: , D.C.

Hibbler hired legal counsel who, upon examination of the contents of three absentee boxes and six precinct boxes, discovered what he believed to be numerous and substantial irregularities and violations of the Mississippi Election Code, leading Hibbler to timely file a Petition to Contest the Election with Robert Sims, Chairman of the Leflore County Democratic Executive Committee ("LCDEC"). Sims reported that no investigation would be conducted, prompting Hibbler to timely file a Petition for Judicial Review in this court.

The case was tried before a Special Election Tribunal consisting of the undersigned judge sitting by appointment of the Mississippi Supreme Court, together with Leflore County's five Election Commissioners who attended the entirety of the trial.³

Because much of the evidence in this case was also to be offered as evidence in a separately-filed Democratic primary election contest for District 4 Supervisor filed by Wayne Self against Eric Mitchell, Civil Action No. 2023-0072-CICI; and because the two cases had the same counsel for both petitioners, the same counsel for both respondents, and the same special judge was assigned by the Supreme Court, all parties and counsel agreed for the two cases to be consolidated for trial purposes. The consolidated trials proceeded for five non-consecutive days, beginning October 13, 2023.

Over the course of the trial, the contestants' counsel reopened three absentee boxes and six precinct boxes in the courtroom under the supervision of the court and the Leflore County Sheriff's Department. Counsel called eleven witnesses to testify. Due to an illness, Leflore County Circuit Clerk Elmus Stockstill, who was scheduled to testify, tragically and unexpectedly

³Miss. Code Ann. § 23-15-931

passed away. In addition to the witnesses' testimony, the parties stipulated 155 exhibits into evidence, some of which were collective exhibits consisting of multiple documents.

Following the trial, the court required the parties to submit proposed findings-of-fact and conclusions-of-law. After receiving and considering counsels' proposals and conducting its own research, the court prepared a summary draft of its Findings of Fact and Conclusions of Law ("FFCL"), following which, the court set a face-to-face conference with the five Leflore County Election Commissioners to learn and consider their views concerning the evidence. And because the two cases were consolidated, the court read out loud each of its individual findings of fact from both cases, and offered each commissioner the individual opportunity to discuss and express their respective opinions, and to dissent to any of the facts found by the court.

Following the review, each of the commissioners were afforded an opportunity to list their disagreement with any of the court's findings. However, all commissioners signed statements indicating their full agreement with the court's findings of fact. The commissioners' respective votes on the court's findings of fact in this case are collectively attached hereto as Exhibit One, and their votes on the court's findings of fact in Civil Action No. 2023-0072-CICI are collectively attached as Exhibit Two. Both these Exhibits are incorporated herein and made a part hereof.

II. LEGAL PRECEDENT

Certification of an election by elected officials is presumed accurate, and to overcome the presumption of correctness, Hibbler was required to meet the so-called *Russell* test by showing either that enough illegal votes were cast for Gary to change the result of the election,

or that there were enough disqualified votes to make it impossible to discern the will of the voters.⁴

Specifically, *Russell* states:

We have employed a two pronged test which though it has been stated in different ways, essentially provides that special elections will be required only when (1) enough illegal votes were cast for the contestee to change the result of the election, or (2) so many votes are disqualified that the will of the voters is impossible to discern.⁵

This test provides two independent paths, one of which the court must traverse to set a special election. In his proposed Findings of Fact and Conclusions of Law, Gary states that “enough illegal votes were cast in the East Greenwood Precinct alone to change the results of the election,” but he urges the court to set the special election for a single precinct, East Greenwood. But, as set out in the court’s FFCL and agreed by the Election Commissioners and adopted herein, numerous violations of the Election Code were found in precincts other than East Greenwood – far more than were necessary to overcome Gary’s slim lead. And while this court is aware of our Supreme Court’s holding that “mere technical irregularities will not vitiate the validity of an election where there is no evidence of fraud or intentional wrongdoing.”⁶ But fraud was found to have occurred in this case. And in very clear terms, our Supreme Court has also informed, not only the public, but also the specially-appointed trial judges who hear election

⁴*Noxubee Cnty Dem. Exec. Comm. v. Russell*, 443 So. 2d 1191, 1197 (Miss. 1983).

⁵*Russell* at 1197

⁶*Smith v. Hollins*, 905 So.2d 1267, 1270 (Miss. 2005) accord *Campbell v. Whittington*, 733 So.2d 820, 826 (Miss. 1996). See also *Straughter v. Collins*, 819 So.2d 1244, 1252 (Miss. 2002).

dispute cases, that absentee voting presents a heightened risk in the election process, and that the provisions that relate to absentee voting are mandatory. For instance, in *Campbell v.*

Whittington, the Court stated:

As opposed to voting at the polls, in a public setting where the integrity of the election process can be ensured, absentee voting takes place in a private setting where the opportunity for fraud is greater. To ensure the integrity of the election process through absentee voting, the legislature has seen fit to provide other safeguards. These provisions are mandatory.⁷

This precedential mandate is particularly applicable in this case, given the fraud that occurred and the facts deduced at trial as unanimously agreed by the Election Commissioners.

Some of those facts are set out below:

- Three witnesses established that Dorothy Nichols, also known as Dorothy Glen, came into their homes and committed acts that amount to fraud in the procurement and filing of absentee ballot applications and envelopes.⁸
- No witnesses were called to testify that their absentee ballots were legally and properly procured, completed, and submitted.
- The same Dorothy Nichols witnessed 56 of the absentee ballot applications and envelopes introduced into evidence.
- Delivery to the clerk's office of many of the absentee ballot applications and envelopes handled by Nichols was unreasonably delayed for more than three weeks;
- More than a hundred statutory violations were found in the 102 absentee applications and envelopes entered into evidence;

⁷*Campbell v. Whittington*, 733 So. 2d 820, 827 (Miss. 1999) (emphasis added) citing *Rogers v. Holder*, 636 So.2d 645, 649 (Miss., 1994).

⁸The specifics of her fraudulent conduct are discussed below. Understandably, Gary makes no mention of Nichols in his proposed FFCL.

- Scanning of the absentee ballots in the clerk's office took place in a room with the door shut, out of view of the public, despite requests by members of the public to open the door and allow public view;
- After all precinct votes were counted, Hibbler led Gary by 130 votes; and only after the absentee votes were counted did Gary take the lead by 15 votes.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact include those set out herein, and those set out in Exhibits One and Two attached hereto and incorporated herein. In applying the court's holding in *Campbell, Rogers*, and other precedent, the court finds that the following violations of the Election Code that were established at trial by clear and convincing evidence have undermined the "integrity of the election process:"⁹

Findings of Fact Regarding Fraud

The court's findings of fact regarding fraud as set out below should be read together with the more extensive findings of fact agreed by all five Election Commissioners. But the court thinks it important to set out some of them below:

Of the absentee ballots that were witnessed in whole or in part by Nichols;

- Thirty-six envelopes lacked a postmark;
- Seven applications were not witnessed by a person authorized to administer an oath, as required by law;¹⁰
- Many of the ballot applications and envelopes handled by Nichols were unreasonably delayed in their delivery to the Circuit Clerk's office. For instance, the court notes:
 - Exhibit 5 27 days,
 - Exhibit 6 25 days,
 - Exhibit 12 22 days,
 - Exhibit 15 25 days,

⁹*Id.*

¹⁰See Miss. Code § 23-15-627.

- Exhibit 17 22 days,
- Exhibit 19 25 days,
- Exhibit 23 25 days,
- Exhibit 29 21 days,
- Exhibit 48 20 days.

Nichols' handling of the absentee ballot applications and envelopes in question went far beyond the limited involvement contemplated by Miss. Code § 23-15-717, which states that an elector qualified to vote absentee

shall complete an application form as provided in Section 23-15-627, and said elector shall fill in the application as is appropriate for his particular situation; and Miss. Code § 23-15-631, which instructs an absent elector to mark their ballot in secret while in the presence of the attesting witness, then “fill out and sign” the elector's certificate on the envelope while the attesting witness completes the witness's certification. Rather than merely serving as a witness, the court finds that Nichols was largely responsible for completing all portions of these materials, save only the elector's signature.

The evidence at trial, including the credible testimony of Trinika Lawrence, establishes that Nichols played a substantial role in the outcome of the primary. Her handling of absentee ballot applications and envelopes was “shadowed by allegations and a reasonable inference of fraud; in other words, at least a ‘hint of unseemliness.’”¹¹

Testimony of Trinika Lawrence.

Lawrence testified that

- Nichols and a second person, Bobbie Peoples, came uninvited to her apartment at a local assisted living facility,
- falsely indicated they were official election workers,

¹¹See *Rogers v. Holder*, 636 So.2d 645, 649 (Miss. 1995)

- closely watched as she selected each candidate on her ballot, and
- left the apartment with Lawrence's completed application, envelope, and ballot.
- Lawrence was not afforded the ballot secrecy required by law.
- Even though Nichols and Peoples left Lawrence's apartment with her ballot and envelope, the Democratic Absentee Ballot Received Report offered into evidence by Petitioners reveals that Lawrence's absentee ballot never reached the Circuit Clerk's office.¹²

Many of the same violations found in the absentee ballot materials handled by Nichols were also found in other applications and envelopes accepted by the Resolution Board.

With respect to the 102 applications and envelopes introduced by Hibbler, the court finds the following statutory violations occurred:

- 63 of the envelopes do not have a postmark in violation of Miss. Code Sections 23-15-631, 637.¹³
- 21 of the applications are not signed by a witness or, if required, a person authorized to administer oaths in violation of Miss. Code § 23-15-627, 631.¹⁴
- On 11 of the applications and envelopes, the voter signatures do not match, in violation of Miss. Code § 23-15-639.¹⁵
- 14 of the envelopes were stamped "filed" by the Circuit Clerk's office prior to Election Day, but not considered until August 16, in violation of Miss. Code § 23-15-639 and § 23-15-651.¹⁶

¹²See Exhibit 154.

¹³See Ex. 46-50, 57, 59, 61, 62, 65, 68).

¹⁴See Ex. 2, 7, 16, 21, 34, 37, 39, 43-45, 62, 64, 70, 72).

¹⁵See Ex. 8, 36, 41, 52, 54-55, 62, 68, 71, 73)

¹⁶See Ex. 45, 61, 65, 66, 77).

- 1 ballot was accepted on August 16, despite having arrived in an envelope postmarked on August 10, in violation of Miss. Code § 23-15-637.¹⁷

Testimony of Melvina Ware.

In the beginning of her testimony, Resolution Board member Melvina Ware testified that

- she reviewed all of the North Itta Bena absentee ballot materials.
- there are nine elements board members look for, and these elements are found in the Resolution Board guidelines published by the Secretary of State.
- A postmark is not one of the nine elements.¹⁸
- She was confident in the work performed by the Resolution Board.
- The Resolution Board relies entirely upon the color of the ballot envelope when determining whether the application and envelope must be signed by someone authorized to administer oaths or may be signed by an attesting witness only.
- The Board does not consider the reason for voting absentee as marked by the voter on the application.
- She would be “shocked” to find any significant irregularities, particularly among the North Itta Bena absentee ballots.

However, when given the opportunity to examine the challenged absentee applications and envelopes from the North Itta Bena precinct, Ware affirmed that the applications lacked a witness signature or, if witnessed, required the signature of someone authorized to administer oaths, which they lacked. She then admitted that she indeed was “shocked” at the discrepancies and that she might have been the Resolution Board member in charge of South Itta Bena.

Ware clearly established that the Resolution Board paid no attention to the postmarks which, she testified, would have to be policed by the Circuit Clerk because, in her view, the

¹⁷See Ex. 70.

¹⁸See Ex. 155.

Clerk's office was the "gatekeeper" for absentee ballot materials and that, by the time those materials reached the Resolution Board,

- no one was looking for a postmark,
- no one confirmed that postmarks were within the time allowed,
- no one reviewed the date of the "filed" stamp placed on the envelopes by the Clerk.

Based on the Mississippi Election Code¹⁹ and the trial testimony of Resolution Board member Ware, the Circuit Clerk's office in Leflore County serves a gate-keeping function with regard to the absentee ballots offered to the Resolution Board for consideration, and this "gatekeeper" responsibility was not adhered to during the primary.

When serving as the county registrar, the Circuit Clerk's office is charged with ensuring all absentee ballots offered to the Resolution Board for consideration are submitted by electors who completed their ballot in person in the Clerk's office, or requested a ballot by mail and actually mailed it back to the Clerk's office.²⁰

The Circuit Clerk is likewise charged with determining whether the postmark requirement has been satisfied. As with other absentee ballot requirements, the presence of a postmark establishes whether a mail-in ballot was actually returned by mail, as opposed to being hand-delivered, as occurred in *Lewis*, and it establishes the date when the postal service took custody of the absent elector's ballot. Not unlike the record in *Lewis*, the record before this Court

¹⁹Exhibit 155.

²⁰*Lewis v. Griffith*, 664 So.2d 177, 187 (Miss. 1995) (invalidating absentee ballots hand-delivered to the clerk's office by the clerk herself where the absent electors were able-bodied members of her family who could have complied with the requirement that such ballots be either executed in the clerk's office or returned by mail).

undermines confidence in the absentee ballots offered by the Circuit Clerk to the Resolution Board, and calls into question the results of the primary.

In addition to violations arising out of the failure of the Circuit Clerk's office to perform its gate-keeping function, and of the Resolution Board to accurately screen absentee ballot materials, three witnesses testified to actual fraud in the handling of absentee ballots. The first was Lawrence (see above), and the next two were Teresa Smith and Willie Smith.

Testimony of Teresa Smith and Willie Smith.

Similar to Lawrence's experience, the Smiths received an unsolicited visit from Peoples at their apartment in a local assisted living facility. While Mrs. Smith was in the bathroom, Peoples sat down with Mr. Smith and began to complete his ballot for him. The Smiths each testified that Peoples selected the candidates she marked on Mr. Smith's ballot; he did not select those candidates himself or tell Peoples which to select. When Mrs. Smith discovered what was occurring she objected, and Peoples left with Mr. Smith's completed application, envelope, and ballot. The Democratic Absentee Ballot Received Report offered into evidence by Petitioners reveals that Mr. Smith's absentee ballot was cast in the primary.²¹

Three witnesses testified to absentee ballot violations occurring within the Circuit Clerk's office on August 8. Margaret Buchanan, Larry Griggs, and Sam Abraham each testified that the Clerk closed an interior door in his office on the night of the election and proceeded to scan absentee ballots behind the closed door, outside of the view of the public, in violation of Miss. Code § 23-15-523 and § 23-15-581. When Abraham objected, the Clerk insisted the door remain closed. This was a willful violation of the Election Code.

²¹See Ex. 148.

Hibbler testified the Resolution Board could not maintain a proper count of absentee ballots on August 16, and received at least a half dozen ballots that were not in a secured ballot box. Although Warc did not recall ballots being delivered outside a secured ballot box, Hibbler produced a number of unopened envelopes marked “accepted” by the Resolution Board with uncounted absentee ballots still sealed inside.²²

The court finds the number and magnitude of the absentee ballot violations proven at trial to be strong circumstantial evidence weighing against the validity and reliability of every absentee ballot. The Court further finds it has no means of excluding the numerous invalid, illegal, and fraudulent absentee ballots because they were “irredeemably and totally mixed in” with the other ballots.²³

In this case, “[t]he stain of illegality [has] bled from” the known invalid absentee ballots onto the other absentee ballots, “tainting the entire lot,”²⁴ and the court concludes as a matter of law, all absentee ballots cast in this primary must be thrown out.²⁵

Hibbler won a substantial majority of the ballots cast at the voting precincts but, due to the absentee ballots, lost the Democratic nomination for Chancery Clerk. At trial, Hibbler provided credible testimony substantiating that she won a majority of the votes cast at the polls, but lost her race due to absentee ballots. Her testimony was substantially supported by other testimony provided by Griggs.

²²See e.g. Ex. 63-64.

²³See *Self v. Mitchell*, 327 So.3d 93, 95 (Miss. 2021).

²⁴*Thompson v. Jones*, 17 So.3d 524, 528 (Miss. 2008).

²⁵*Self*, 327 So.3d at 95.

Griggs testified that he was interested in the outcome of the primary because his brother was a candidate, so he went to the Leflore County Courthouse (“Election Central”) on the evening of August 8 to monitor the results as they were periodically provided by the Circuit Clerk.

Griggs arrived at Election Central as the voting precincts closed. He gathered printed copies of the election results as they were released.²⁶ The first set of results Griggs received, printed at 8:26 p.m., reflected the results of 7 of the 18 precincts. Gary led by 128 votes. The second set of results Griggs received, printed at 9:12 p.m., reflected the votes of 15 of the 18 precincts, and Hibbler led by 102 votes. The third set of results Griggs received, printed at 10:39 p.m., reflected the vote of all 18 precincts, and Hibbler's lead had grown to 130 votes.

The court finds Griggs' testimony concerning these precinct results to be credible. Additionally, Griggs, Buchanan, and Abraham all testified that the Circuit Clerk made the decision to scan absentee ballots behind a closed door at Election Central on August 8. Griggs, in particular, established that this occurred late in the evening. He testified that he asked the Clerk after 11:00 p.m. when the absentee ballot count would be complete. The Clerk responded that it would be another hour or so, then he closed the door to the room where a scanner technician was working to complete the count outside of the view of the public. The court finds this testimony to be credible.

The fourth and final set of results Griggs received at Election Central was printed at 12:19 a.m. on August 9, following completion of the absentee ballot count. Although Hibbler still was in the lead, her lead had been considerably diminished by the absentee ballots. Rather than

²⁶See Ex. 138.

the 130 vote margin she enjoyed when the last precincts reported, she was ahead by only 36 votes.

On August 16, the Resolution Board met a second time to count absentee ballots that had arrived pursuant to the five-day mail-in rule. It was only following this count that Hibbler's lead was gone, and she trailed Gary by 15 votes.

During the August 16 meeting, the Resolution Board accepted 42 of the 102 challenged absentee ballot applications and envelopes. These 42 ballots were accepted after the preliminary results of the primary were known.

Of the 42 ballots accepted by the Resolution Board, many of these ballots were so significantly flawed that, when confronted with the ballot applications and envelopes at trial, Ware – a member of the Resolution Board – testified she was “shocked.” This testimony calls into question the seriousness and validity of the count conducted by the Resolution Board.

Additionally, 14 of the ballots that were received prior to August 8 should have been counted then, but were not counted until August 16. This discrepancy was not explained.

The Court finds by clear and convincing evidence that fraud and substantial, serious violations of the Election Code occurred with regard to absentee voting. These violations include the fraudulent procurement by Nichols²⁷ and Peoples of absentee ballots. Given the number and egregiousness of Election Code violations, the court finds that dozens of absentee ballots were invalid and illegal – far more than Hibbler’s 15-vote loss originally reported.

²⁷The court notes that, in a prior election contest, Nichols (then known as Glenn) was found to have “no credibility as a witness” and to be a person with “a propensity to use false addresses to attempt to meet the requirement for candidacy for public office.” *Glenn v. Powell*, 149 So.3d 480, 482 (Miss. 2014).

The illegal ballots have been irrevocably commingled with the valid ballots, rendering it impossible to determine which ballots were legal, and which were not.

The court finds by clear and convincing evidence, including the credible trial testimony of Hibbler and Griggs, that Hibbler won a majority of the legal votes cast at the precincts. When the last precincts reported, she enjoyed a considerable margin of 130 votes. Under these circumstances, this Court finds that all absentee ballots cast in the primary must be thrown out and a new election ordered.

In his proposed Findings of Fact and Conclusions of Law, Gary concedes that the court should find “that enough illegal votes were cast in the East Greenwood Precinct alone to change the results of the election.” However, Gary proposes, without citing authority, that the court should order a new election only in the East Greenwood Precinct. The court declines to do.

The court agrees with counsel for Hibbler that “the authority to order another election on a precinct-by-precinct basis no longer exists once the general ‘election for which the contest nomination is made’ has been conducted,” citing Mississippi Code Section 23-15-937 which provides that

if the judgment is in favor of the contestant, the election of the contestee shall thereby be vacated and the Governor, or the Lieutenant Governor, in case the Governor is a party to the contest, shall call a special election for the office or offices involved.²⁸

Thus, this Court lacks authority to order a precinct-by-precinct election. And even if the court had such authority, it would decline to do so in this case because of the fraudulent acts committed and because of the numerous violations of the Election Code. Additionally, throwing

²⁸See also *Blakeney v. Mayfield*, 226 Miss. 53, 64, 84 So.2d 427, 428 (1956); *Randle v. Ivy*, 268 So. 3d 530, 533 (n. 3) (Miss. 2019) (“Although the statute numbers have changed, the text of the statute that Blakeney interpreted matches the pertinent part of Section 23-15-937.”).

out all absentee ballots, including those that were legally cast, would disenfranchise all absentee voters, leaving the true winner of all legally-cast votes a mystery and a scar on our election system.

IV. CONCLUSION

Based on all that is stated above together with Exhibit One and Exhibit Two, the Court finds the clear and convincing evidence requires a new election for Chancery Clerk of Leflore County. The Court finds, after excluding all absentee ballots, and considering the numerous Election Law violations in this case, the will of the people is impossible to discern and neither the voters nor the candidates can be confident in the certified results. It is, therefore

ORDERED, that the election of Johnny Lee Gary, Jr. is hereby set aside and vacated. It is further

ORDERED, that Debra Tate Hibbler and Johnny Lee Gary, Jr. are to participate in a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor. It is further

ORDERED, that the Circuit Clerk or a Deputy Clerk shall provide a certified copy of this FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGEMENT, together with its two Exhibits to:

- The Honorable Tate Reeves, Governor of the State of Mississippi;
- The Honorable Lynn Fitch, Attorney General of the State of Mississippi;
- The Leflore County Election Commission;
- The Honorable W. Dewayne Richardson, District Attorney for Leflore County.

SO ORDERED, this the 13th day of January, 2024.

Jess Dickinson
Jess Dickinson, Circuit Court Judge by special
appointment of the Mississippi Supreme Court

FILED

FEB 15 2024
Kelly H. Roberts
ELMUS STOCKSTILL, CIRCUIT CLERK
BY *Kelly H. Roberts*, D.C.



I hereby certify that the foregoing is a true and correct copy of the original thereof, as the same appears of record in my office.
Given under my hand and official seal
This 15th day of February, 20 24
Elmus Stockstill, Clerk of the Circuit Court
Leflore County, Mississippi
By *Kelly H. Roberts*, D.C.

STATE OF MISSISSIPPI

Office of the Governor



WRIT OF ELECTION

TO THE ELECTION COMMISSIONERS OF LEFLORE COUNTY:

Following the August 8, 2023, Democratic primary election for Leflore County Chancery Clerk, Debra Tate Hibbler timely filed in the Circuit Court of Leflore County, Mississippi a Petition captioned *Debra Tate Hibbler v. Johnny Lee Gary, Jr.*, Civil Action No. 2023-0071, challenging the results of the primary election.

On or about February 15, 2024, the Honorable Jess Dickinson, Special Judge, presiding, entered a Final Judgment holding as follows: "[A]fter excluding all absentee ballots, and considering the numerous Election Law violations in this case, the will of the people is impossible to discern and neither the voters nor the candidates can be confident in the certified results." The Final Judgment went on to state: "Debra Tate Hibbler and Johnny Lee Gary, Jr. are to participate in a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor."

On February 21, 2024, the Governor's Office received from the Leflore County Circuit Clerk a certified copy of the Final Judgment.

Therefore, pursuant to the Constitution and laws of the State of Mississippi, and the February 15, 2024 Final Judgment of the Circuit Court of Leflore County, I, Tate Reeves, Governor of the State of Mississippi, do hereby issue this Writ of Election and declare that a special election shall be held on **Tuesday, April 16, 2024** for the position of Leflore County Chancery Clerk.

In accordance with the Circuit Court's Final Judgment, for this special election for the position of Leflore County Chancery Clerk, the only candidates who shall appear on the special election ballot are Debra Tate Hibbler and Johnny Lee Gary, Jr.

The special election shall be held and notice shall be given in a manner consistent with Miss. Code Ann. § 23-15-835 and the laws of the State of Mississippi governing special elections. All relevant laws not in conflict with the terms of this Writ of Election shall apply to this special election.

The Election Commissioners of Leflore County shall govern themselves accordingly.

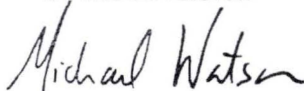
IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed.



DONE at the Capitol, in the City of Jackson, this the 6th day of March in the year of our Lord, two thousand twenty-four, and of the Independence of the United States of America, the two hundred and forty-eighth.


TATE REEVES
Governor

BY THE GOVERNOR


MICHAEL WATSON
SECRETARY OF STATE

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

PLAINTIFF

V.

Cause No.: 2024-0021-CIC

TATE REEVES, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF
THE STATE OF MISSISSIPPI AND
THE LEFLORE COUNTY ELECTION
COMMISSION

DEFENDANT

COMPLAINT FOR DECLARATORY
RELIEF AGAINST THE GOVERNOR, AND
FOR A PRELIMINARY AND PERMANENT
INJUNCTION AND/OR WRIT OF
MANDAMUS AGAINST THE LEFLORE
COUNTY ELECTION COMMISSION

COMES NOW Plaintiff, Johnny Gary, by and through counsel, and files this his complaint for declaratory relief against Tate Reeves, in his official capacity as Governor, and a writ of mandamus and/or preliminary and permanent injunction against the Leflore County Election Commission, defendants, and in support hereof would respectfully show unto the Court the following, to-wit:

1. That the Plaintiff is an adult resident citizen of Greenwood, Leflore County, Mississippi. Plaintiff is the Chancery Clerk of Leflore County, Mississippi and was a candidate and declared the winner of the August 7, 2023,

Democratic Primary and the November 7, 2023, General Election for chancery clerk in Leflore county and therefore has standing to bring the action.

2. Defendant, Tate Reeves, is the Governor of the State of Mississippi and, pursuant to M.R.Civ.P. 4 (d)(5) may be served with process by service upon the Attorney General of the State of Mississippi, Honorable Lynn Fitch at 550 High Street, Suite 1200, Jackson, Mississippi 39201.

3. Defendant, the Leflore County Election Commission (hereinafter "LCEC") may be served with process by service on its chairperson, Preston Ratliff, at the Leflore County Courthouse, Greenwood, Mississippi. Defendant LCEC is legally responsible for conducting all elections, general and special, in Leflore County, Mississippi.

I. JURISDICTION AND VENUE

4. That this Court has jurisdiction pursuant to Art. 6, § 156 of the Mississippi Constitution M.R.Civ.P. 57(a) and Miss. and Code Ann. §11-41-1.

5. That venue is proper because the LCEC is domiciled in Leflore County, Mississippi.

II. STATEMENT OF THE FACTS

6. That the Democratic primary for chancery clerk of Leflore County was held on August 7, 2023, and Plaintiff was certified as the winner of said primary.

7. That the loser of the primary filed and election contest and on February 15, 2024, the Circuit Court of Leflore County entered a final judgment setting aside the results of the August 7, 2023 Democratic Primary and November 7, 2023 General Election for the position of Chancery Clerk and declared a vacancy in said position. (Exhibit "1").

8. Miss. Code Ann. §23-15-937 authorizes the Governor to "call" a special election yet said statute does provide the Governor guidance on when the special election may be held or set. The Mississippi Supreme Court has held that while §23-15-97 authorizes the Governor to "call" a special election this call is subject to "other applicable laws governing [county] elections." *Moore v. Parker*, 962 So.2d 558, 568 (¶35) (Miss. 2001).

9. That the Governor did more than "call" a special election to fill a vacancy in a county or county district office, he set an election on April 16, 2024 in direct contravention of "other applicable laws", i.e., Miss. Code Ann. §23-15-833 and Miss. Code Ann. §23-15-835. (Exhibit "2").

10. That the Writ of Election sets a special election in contravention of Miss. Code Ann. §23-15-833 which requires all county and county district elections to be held on the first Tuesday after the first Monday in November and

the scheduling of elections for county and county district offices violates the Legislature's mandate and are null and void.

11. More specifically, Miss. Code Ann. §23-15-833 provides in pertinent part that:

“Except as otherwise provided by law, the first Tuesday after the first Monday in November of each year shall be designated the regular special election day, and on that day, and on that day an election shall be held to fill any vacancy in county, county district, and district attorney elective offices.”

12. That the office of chancery clerk of Leflore County is a county office within the meaning of §23-15-833.

13. That the Writ of Election (Exh. “2”) further sets an election without providing ninety (90) days notice as required by Miss. Code Ann. §23-15-835.

14. Therefore, the Governor has ordered the LCEC to act in violation of its statutory duty to conduct all special elections for county and county district offices on the first Tuesday after the first Monday in November of each year and only after giving ninety (90) days notice.

15. Hence, the writ of election constitutes a nullity is unenforceable and void as a matter of law.

16. Plaintiff would further show that the writ commands LCEC to act without authority of law and conduct an election of April 16, 2024 and without providing ninety (90) days notice.

III. REQUEST FOR DECLARATORY RELIEF

17. That Plaintiff restates and realleges ¶1-16 and incorporates them herein.

18. That pursuant to M. R. Civ. P. 57(a) and (b)(1) Plaintiff requests that the Court declare the Writ of Election issued by the Governor setting the special election for chancery clerk in Leflore County on a date other than the first Tuesday after the first Monday in November to be violative of rights granted to him by Mississippi Code Ann. §23-15-833 to have an election on the first Tuesday after the first Monday in November and therefore to the extent it seeks to schedule the election on a date other than November 5, 2024, the writ is null and is void as a matter of law because the Governor lacks the constitutional and/or legal authority or discretion to set such an election for the position of chancery clerk in Leflore.

19. That plaintiff further alleges that the writ (Exh. "2") violates his right to ninety (90) days notice of an election and requests that the Court declare that the Writ of Election issued by the Governor sets a special election on April 16, 2024 and prevents the election commissioners from "posting notices at the courthouse and in the county for ninety (90) days prior to such election ..." and is null and void because it compels the members of LCEC to violate their mandatory duty set in Miss. Code Ann. §23-15-835 and the rights of Plaintiff.

20. That for the foregoing reasons Plaintiff requests that the Court declare the Writ of Election null and void.

**IV. REQUEST FOR WRIT OF MANDAMUS
AND/OR INJUNCTIVE RELIEF
AGAINST LCEC UNDER §23-15-833**

21. That Plaintiff restates and realleges ¶¶ 1-20 above and incorporates them herein as if fully copied herein.

22. That the Writ of Election orders LCEC to schedule and hold an election on April 16, 2024, in violation of their oath to obey and comply with the laws of the State of Mississippi and rights afforded to Plaintiff under said statute.

23. More specifically, the Governor, by and through the Writ of Election, has directed the members of LCEC to violate the duty imposed on them under §23-15-833 and 23-15-835 by scheduling and holding an election on April 16, 2024.

24. That Plaintiff therefore requests that this Court issue a writ of mandamus, or preliminary and permanent injunction against LCEC and its members enjoining them from setting or holding a county or county district special election on a date other than the first Tuesday after the first Monday in November or in this case on November 5, 2024.

**V. Request for Writ of Mandamus
and/or Injunctive Relief under
§23-15-835**

25. That Plaintiff restates and realleges ¶1-24 and incorporates them within this herein by reference.

26. That the Writ of Election imposes a duty on LCEC to schedule and hold an election only forty-one (41) days after it was issued in violation of Miss. Code Ann. §23-15-835 which provides that all such elections shall be held after the election commission provides at least ninety (90) days notice to the public and Plaintiff as a member of the public.

27. That Plaintiff requests that the Court find that the scheduling of said election is therefore violation of law and issue a writ of mandamus or injunction enjoining LCEC and its members from scheduling a special election for Chancery Clerk in Leflore County without first posting notices for at least ninety (90) days prior to the election as required by Miss. Code Ann. §23-15-835.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests the following relief:

A. A declaratory judgment declaring that the Governor's Writ of Election is null and void because it violates Miss. Code Ann. §23-15- 833 and/or §23-15-835 and therefore the Governor lacks the authority or discretion to schedule an election for a county or county district office on a date other than the first Tuesday after the first Monday in November or at a time less than ninety (90) days prior to the election;

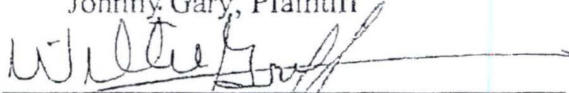
B. A writ of mandamus or preliminary and permanent injunction enjoining LCEC from holding and/or conducting a special election for a county or county district office on a date other than the first Tuesday after the first Monday in November of each year as required by §23-15-833.

C. A writ of mandamus and/or preliminary and permanent injunction against LCEC enjoining it from holding and/or conducting a special election for a county and/or county district office without first posting notice of the same for at least ninety (90) days prior to said election.

Respectfully submitted, this the 20th day of March, 2024.

Johnny Gary, Plaintiff

By:



Willie Griffin, His Attorney, MSB #5022

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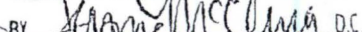
Attorneys for Plaintiff

FILED
LEFLORE COUNTY

MAR 20 2024

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KELLY H. ROBERTS, CIRCUIT CLERK

BY:  D.C.

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

PLAINTIFF

V.

Cause No.: 2024-0021-CCT

TATE REEVES, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF
THE STATE OF MISSISSIPPI AND
THE LEFLORE COUNTY ELECTION
COMMISSION

DEFENDANT

**MOTION FOR DECLARATORY RELIEF,
FOR WRIT OF MANDAMUS AND/OR
PRELIMINARY AND PERMANANT INJUNCTION
(Demand for Speedy Hearing)**

COMES NOW Plaintiff, Johnny Gary, by and through his undersigned attorney, pursuant to M.R.Civ.P. 57(a) and (b)(1), M. R. Civ. P. 65(a) and Miss. Code Ann. §11-41-1 and moves the Court for declaratory relief against Governor Tate Reeves and for a writ of mandamus preliminary and/or permanent injunction against the Defendant, Leflore County Election Commission (hereinafter "LCEC"), and in support hereof would show unto the Court the following, to-wit:

1. That Plaintiff has filed a complaint for declaratory relief, writ of mandamus and/or preliminary and permanent injunction in this cause with attached exhibits. (Exh. "A").

2. That Plaintiff would show that the Governor issued a Writ of Election to LCEC directing it to hold and conduct a special election on April 16, 2024, for the position of chancery clerk in Leflore County.

3. That the position of chancery clerk of Leflore County is a county office within the meaning of Art. 6, §168 of the Mississippi Constitution and therefore is governed by Miss. Code Ann. §23-15-833.

4. That the order entered by the Circuit Court of Leflore declared a vacancy in the position of Chancery Clerk in Leflore County and thereby necessitating the setting of a special election.

5. That on March 6, 2024, the Governor set a special election on April 16, 2024.

6. That the setting of a special election on April 16, 2024, is in contravention of Miss. Code Ann. §23-15-833 which provides in pertinent part that:

“Except as otherwise provided by law, the first Tuesday after the first Monday in November of each year shall be designated the regular special election day, and on that day, and on that day an election shall be held to fill any vacancy in county, county district, and district attorney elective offices.”

7. The Governor’s Writ of Election further violates Miss. Code Ann. §23-15-835 because it mandates that LCEC set an election less than the ninety (90) days as required by said statute.

8. That the procedures for setting a special election for a county or county district office is clearly established law and the Governor is without authority or discretion to set a county or county district election on a date other than the first Tuesday after the first Monday in November or at a time less than ninety (90) days prior to the election. Plaintiff has a statutory right to an election on the first Tuesday after the first Monday in November and the writ issued by the Governor violates that right.

9. Therefore, Plaintiff requests, pursuant to M. R. Civ. P. 57(b)(1), that this court set a speedy hearing on the request for declaratory relief and at said hearing Plaintiff requests that this court, find and declare that the Governor lacks the authority to set a county or county district election on a day other than as provided for in §23-15-833 and that the Governor's Writ of Election issued to LCEC is, therefore, null and void.

10. Plaintiff further requests that the Court, pursuant to Miss. Code Ann. §11-41-1, issue a writ of mandamus to LCEC prohibiting it from holding an election on April 16, 2024 and/or without providing ninety (90) days notice as requested by Miss. Code Ann. §23-15-833 and §23-15-835 respectively.

11. In the alternative, Plaintiff requests, pursuant to M. R. Civ. P. 65(a), that LCEC be enjoined from holding a special election for a county or county

district office on any date other than the first Tuesday after the first Monday in November after providing ninety (90) days notice as requested by law.

12. In the alternative, pursuant to Miss. R. Civ. P 65(a), Plaintiff requests that the Court issue a preliminary and permanent injunction against LCEC enjoining it from setting and holding county and county district election except as provided for in §23-15-833 and §23-15-835.

13. That as a candidate Plaintiff has standing to bring this action and there is a substantial likelihood that he will prevail on the merits and will suffer irreparable harm unless this Court set an immediate hearing and determine whether the LCEC should be enjoined from scheduling and holding a special election on April 16, 2024, as set forth in said statute.

WHEREFORE, PREMISES CONSIDERED, Plaintiff moves the Court for declaratory relief against Governor Reeves declaring that he lacked authority to set a county or county district election on April 16, 2024 and a writ of mandamus or preliminary and permanent injunction against LCEC prohibiting it from scheduling and conducting an election on April 16, 2024, as ordered by the Governor on grounds such an election as ordered by the Governor in the Writ of Election would violate §23-15-833 and §23-15-835.

Respectfully submitted, this the 20th day of March, 2024.

Johnny Gary, Plaintiff

By:



Willie Griffin, His Attorney, MSB #5022

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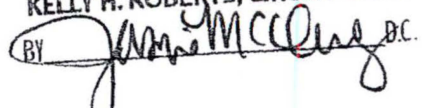
Attorneys for Plaintiff

FILED
LEFLORE COUNTY

MAR 20 2024

KELLY H. ROBERTS, CIRCUIT CLERK

BY



IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

PLAINTIFF

v.

CAUSE NO. 24-21-CICI

TATE REEVES, ET AL.

DEFENDANTS

MOTION TO DISMISS OF GOVERNOR REEVES
WITH INCORPORATED MEMORANDUM OF LAW

COMES NOW, Tate Reeves, in his Official Capacity as Governor of the State of Mississippi under Miss. R. Civ. P. 12(b)(6), and files this his Motion to Dismiss. In filing this Motion to Dismiss Governor Reeves does not waive any issues jurisdictional or otherwise raised in the Motion to Transfer to Special Judge or Consolidate currently pending in this action. In support of this Motion to Dismiss, Governor Reeves shows:

INTRODUCTION

Governor Reeves properly exercised his discretionary authority in setting the special election of the Chancery Clerk of Leflore County for April 16, 2024. Governor Reeves enjoys this authority pursuant to the statutes governing special elections where there is no vacancy in the position. Plaintiff claims that the Governor's *Writ of Election* violates Miss. Code Ann. §§ 23-15-833 and 23-15-835. The Governor seeks dismissal of this action because the statutory authority relied upon by Plaintiff does not apply.

The statutes offered by Plaintiff address the process for a special election when there is a vacancy in office. Here, Plaintiff was the incumbent candidate and retained

his office after the August 8, 2023, primary election results were vacated due to voter fraud. There is no vacancy in the Office of Chancery Clerk in Leflore County. Therefore, pursuant to statutory authority governing special elections, the Governor has the discretion of setting date of the special election. For these reasons, the *Writ of Election* issued by the Governor is proper and valid, and Plaintiff's Complaint for Declaratory Relief must be dismissed.

FACTS AND PROCEDURAL HISTORY

I. 2023 Election and Prior Court Action

Plaintiff Johnny Gary ("Gary"), the incumbent candidate for Chancery Clerk of Leflore County, and Debra Hibbler were the candidates in the August 7, 2023, primary election. Gary was certified as the winner of the primary. Hibbler filed an election contest in this court, and a special judge appointed by the Mississippi Supreme Court entered an order that set aside and vacated the election of Gary. It was further ordered that Hibbler and Gary were to participate in a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor. (Complaint, p. 2-3; Exhibit 1 to Complaint [Final Judgment of Leflore Circuit Court], pp. 1, 16).

With the election of Gary being set aside, under Miss. Code Ann. § 23-15-937, Gary was returned to office as Leflore County Chancery Clerk pending the results of the special election. To this day, Gary still serves as the Chancery Clerk of Leflore County. There is no vacancy of the seat.

II. Declaratory Relief Sought against Governor Reeves

Gary now seeks Declaratory Relief against Tate Reeves in his Official Capacity as Governor of the State of Mississippi (“Governor Reeves”) requesting that the *Writ of Election* issued by Governor Reeves be declared null and void. The *Writ*, dated March 6, 2024, was issued to the Election Commissioners of Leflore County declaring a special election be held on April 16, 2024, for the position of Leflore County Chancery Clerk. (Doc. 1 *Motion for Declaratory Relief, for Writ of Mandamus and/or Preliminary and Permanent Injunction*).

This *Writ of Election* was issued pursuant to the January 13, 2024, *Final Judgment* of the Leflore County Circuit Court ordering “that Debra Tate Hibbler and Johnny Lee Gary, Jr. are to participate in a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor.” *See* Exhibit 1 to the instant complaint/motion – *Final Judgment*, p. 16. The relief sought against Governor Reeves is a declaration that Governor Reeves lacked authority to set a county or county district election on April 16, 2024, because “the Governor lacks the authority to set a county or county district election on a day other than as provided for in Miss. Code Ann. § 23-15-833 [i.e., anytime other than November], and that the Governor’s *Writ of Election* issued to LCEC is, therefore, null and void.” (Doc. 1, ¶ 9).

III. Mandamus or Injunction Sought Against Election Commission

Also, this case seeks mandamus or an injunction against the Leflore County Election Commission to prohibit the LCEC from holding the election on April 16, 2024.

STANDARD OF REVIEW

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Plaintiff’s Complaint must be dismissed because statutory authority relied upon is inapplicable.

Plaintiff claims that the *Writ* is invalid for two reasons: 1) the special election was not set for November, and/or 2) the *Writ* does not give a 90-day notice prior to the date of the special election. Plaintiff relies on Miss. Code Ann. § 23-15-833 and § 23-15-835 to support his argument. This argument would be correct if there was a vacancy of the office; however, there is not. Plaintiff Gary was returned to office after the Circuit Court vacated the election results and still holds the position of Chancery Clerk to this day. The position is not vacant.

Plaintiff alleged that “the Governor did more than ‘call’ a special election to fill a vacancy in a county or county district office, he set an election on April 16, 2024 in direct contravention of ‘other applicable laws,’ i.e., § 23-15-833 and § 23-15-835.” *See* Complaint at ¶9. Plaintiff’s assertion is misguided because these statutes do not apply here – they only apply to cases where there is a vacancy of the office. Miss. Code Ann. § 23-15-833 requires a special election day to fill a vacancy in a county elective office be held in November. Further, Miss. Code Ann. § 23-15-835 requires 90 days’ notice of a special election to fill a vacancy in a county office. But neither statute

applies because there is not a vacancy in the office of Chancery Clerk. Therefore, the *Writ of Election* is not set in direction contravention of “other applicable laws.” Plaintiff’s reliance on the aforementioned statutes is a fatal flaw requiring dismissal of this matter.

II. The *Writ of Election* is proper under the applicable statute governing special elections with no vacancy.

Since there is no vacancy of the position of Chancery Clerk, the *Writ of Execution* specified that the date of the special election shall be on April 16, 2024. The applicable statute governing special elections when there is no vacancy of the seat is Miss. Code Ann. § 23-15-937, which provides that when an election is set aside, if the contestee (Gary) has already entered upon the term, he shall remain in office until the election of someone at the special election, and the Governor is to call a special election for the office involved. Since the election of Gary was set aside, under Miss. Code Ann. § 23-15-937, Gary was returned to office as Leflore County Chancery Clerk pending the results of the special election. Therefore, there was no vacancy in the office, and Miss. Code Ann. § 23-15-937 is the controlling statutory authority. When a “term of office is entered before the adjudication of the election contest, under Mississippi Code Section 21-15-937,” the person who entered the term “is the lawful holder of the office until the special election is held.” *Parks v. Horton*, 299 So.3d 777, 778 (Miss. 2020). Based on the clear language of Section 23-15-937, Gary is currently the lawful holder of the office, and the office is not vacant. *Id.* at 781. Simply put, an election contest does not create a vacancy.

Since there is no vacancy of the seat, Governor Reeves properly issued the *Writ of Election* under Miss. Code Ann. § 23-15-937, which provides that when the results of an election are vacated, the “Governor ... shall call a special election for the office ... involved.” This statute does not mandate a notice period or a specific date on which a special election must be held. It gives the Governor the discretion of selecting an appropriate date for the special election. The Supreme Court has recognized this authority stating that Section 23-15-937 governs special elections for contested primary elections and requires a special election to be called for by the Governor. *Moore v. Parker*, 962 So.2d 558, 567-568 (Miss. 2007); *Smith v. Hollins*, 905 So.2d 1267, 1277 (Miss. 2005). Since there was not a vacancy in the office of Chancery Clerk, Gary and Hibbler did not have to qualify for the special election. Therefore, the governor properly exercised his discretionary authority in setting the date for the special election. For this reason, Gary’s claims against Governor Reeves fail and this cause of action should be dismissed.

CONCLUSION

Since Gary has not stated a claim upon which relief can be granted as fully briefed above, Gary is not be entitled to a declaratory judgment and this cause against Governor Reeves should be dismissed.

RESPECTFULLY SUBMITTED, this the 26th day of March 2024.

TATE REEVES, in his Official Capacity as
Governor of the State of Mississippi

BY: LYNN FITCH, ATTORNEY GENERAL
FOR THE STATE OF MISSISSIPPI



BY: BETH WINDSOR USRY, MS Bar No. 99267
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CERTIFICATE OF SERVICE

I, Beth Windsor Usry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I filed the above document with the Clerk of this Court and sent a copy via U.S. Mail and email to:

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FILED
LEFLORE COUNTY

MAR 26 2024

KELLY H. ROBERTS, CIRCUIT CLERK

BY  D.C.

This the 26th day of March 2024.


BETH WINDSOR USRY

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

PLAINTIFF

V.

Cause No.: 2024-0021-CICI

**TATE REEVES, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF
THE STATE OF MISSISSIPPI AND
THE LEFLORE COUNTY ELECTION
COMMISSION**

DEFENDANT

MOTION TO INTERVENE

COMES NOW Eric Mitchell (“Intervenor”) by and through counsel, pursuant to Miss. R. Civ. P. 24 (b)(2), and moves the Court to intervene in this action and in support hereof would show unto the Court the following, to-wit:


1. That Intervenor is a party to an election contest in the circuit court of Leflore County styled “Wayne Self v. Eric Mitchell”, Cause no. 2023-0074.
2. That on February 22, 2024, final judgment was entered and on March 6, 2024, Governor Tate Reeves issued a Writ of Election setting the election in said cause on the same day, April 16, 2024 being the same date for election in this cause. Exh. 1 & 2.
3. That the Writ of Election issued in the Gary case and the Writ of Election Intervenor complains about is the subject of the same violations of Miss. Code Ann. §23-15-833 and/or §23-15-835 and therefore Intervenor’s “claim... and

the main action have a question of law or fact in common.” Miss. R. Civ. P. 24(b)(2).

4. That the main action arises from a request by Gary to declare the executive action of the Governor null and void for violation of §23-15-833 and/or 23-15-835, and for injunctive relief against LCEC, being the same claim intervenor would ascertain in a separate action. Therefore, an adjudication of the rights asserted by intervenor will not unduly delay or prejudice the rights of the original party.

WHEREFORE, PREMISES CONSIDERED, Intervenor Mitchell moves the Court for an order authorizing him to intervene in this action.

Respectfully submitted, this the 26th day of March, 2024.



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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Willie Griffin, Attorney for Plaintiff, Eric Mitchell, hereby certified that I have caused a copy of the foregoing motion to intervene to be served on the following counsel, via email.

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Claire Barker
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Telephone: (601) 359-3824
Email: Claire.Barker@ago.ms.gov

This the 26th day of March, 2024.


Willie Griffin

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

VS.

CAUSE NO. 2024-0021 CICI

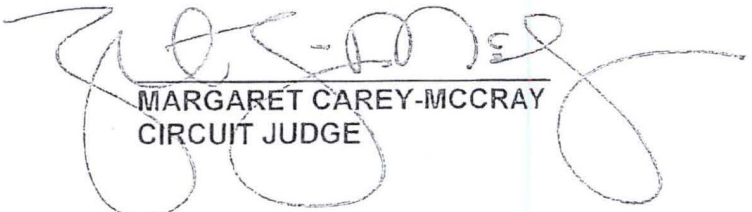
TATE REEVES, ET AL

ORDER

THIS MATTER is before this Court on Eric Mitchell's ("Intervenor") Motion To Intervene. The Court being advised that there is no opposition to said motion, finds it well-taken and grants the same.

IT IS THEREFORE ORDERED, that the Motion to Intervene, filed by Eric Mitchell ("Intervenor") is hereby granted.

SO ORDERED AND ADJUDGED, this the 5th day of April 2024.


MARGARET CAREY-MCCRAY
CIRCUIT JUDGE

FILED
LEFLORE COUNTY

APR 08 2024

KELLY H. ROBERTS, CIRCUIT CLERK

BY Kelly Roberts D.C.

EXHIBIT G

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

JOHNNY GARY

V.

CIVIL ACTION NO. 2024-0021(CM)(L)

TATE REEVES, ET AL

ORDER AND OPINION

THIS MATTER is before the Court on Petitioner's Complaint for Declaratory Relief against the Governor of the State of Mississippi, and for a Preliminary and Permanent Injunction and/or Writ of Mandamus against the Leflore County Election Commission. Petitioner, Johnny Gary [herein "Gary"] specifically seeks (1) a declaration that the Writ of Election issued by Mississippi Governor Tate Reeves [herein, "the Governor"] is null and void because (a) it does not set the special election for Chancery Clerk, a county office, on the statutory "regular special election day" as designated in *Miss Code Ann. § 23-15-833*; (b) it sets a special election in contravention of the notice required by *Miss. Code Ann. §23-15-835* and (2) to enjoin the Leflore County Election Commissioners from conducting the special election on April 16, 2024 for the foregoing reasons. The Court, having considered the filings of the parties, argument of counsel, and being otherwise advised, finds specifically as follows:

Summary of Facts and Procedural History

Gary, the incumbent, was certified the winner of the August 7, 2023 Leflore County Democratic Party primary election for the office of Chancery Clerk of Leflore County. The election was contested. A five (5) day trial was held in October 2023. Consistent with statutory authority, the general election was held and Gary, the winner of that contest, was sworn into office in January 2024 pending a ruling on the election contest. *Miss*

Code Ann. §23-15-937. On February 15, 2024, the Special Circuit Judge, Honorable Jess Dickinson, sitting by designation of the Mississippi Supreme Court, entered a Final Judgment setting aside the results of the primary and general election and ordered “a special countywide election for the office of Leflore County Chancery Clerk at a date set by the Governor.” *Debra Tate Hibbler vs. Johnny Lee Gary, Jr.* Civil Action No. 2023-0071 (February 15, 2024) The election contest was not appealed.

On March 6, 2024, the Governor issued a Writ of Election setting the special election for April 16, 2024 which is forty-one (41) days after the writ was issued. The Governor’s Writ of Election also specifically mandated that notice of the special election be given in a manner consistent with *Miss. Code Ann.* §23-15-835 and Mississippi laws governing special elections. The Writ also provided that all relevant laws not in conflict with the terms of the Writ shall apply to the special election.

On March 20, 2024, Gary filed the instant Complaint seeking declaratory and injunctive relief. Gary specifically requests that this Court find that the Governor’s Writ of Election sets a special election in contravention of *Miss. Code Ann.* §23-15-833 and §23-15-835. On March 21, 2024, the Governor filed a Motion to Transfer to Special Judge or Consolidate. The Governor also filed a Motion to Dismiss on March 26, 2024 asserting that the statutory authority Gary relies on is inapplicable because there is no vacancy in the office of Chancery Clerk. At the March 28, 2024 hearing in this matter, the Governor conceded that this Court has jurisdiction to consider the merits of Gary’s Complaint. The Court denied the request to transfer or consolidate.

Legal Analysis

Mississippi law is clear that as long as the Governor acts within the limits of the power conferred upon him by the Constitution and the laws, he is not subject to control by the courts. *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 239–41 (Miss. 2008). However, no Governor, or for that matter, any governmental official, can exercise power beyond their constitutional authority. *Id.* See also, *Fordice v. Bryan*, 651 So.2d 998, 1003 (Miss.1995). This Court acknowledges Mississippi's long standing precedents regarding the Constitution's clear mandate related to separation of powers and recognizes that its role is limited only to consideration of whether the Governor's Writ of Election contravenes *Miss. Code Ann.* §23-15-833 and §23-15-835 in a legally impermissible manner. See *Barbour vs. State*, 974 So. 2d 232, 239 (Miss. 2008).

The Governor's Writ of Election does not violate Miss. Code Ann. §23-15-833.

In this case, a special judge ruling in an election contest, set aside and vacated the August 8, 2023 Democratic Primary for Chancery Clerk of Leflore County. The special judge also ordered that a special election be held at a date set by the Governor. Only the two original candidates at the vacated primary election will participate. Notably, after this Election Contest was filed and during its pendency, Plaintiff Gary, the incumbent, won the general election and entered a new term of office in January 2024.

Pursuant to *Miss. Code Ann.* §23-15-937, the Governor called a special election for the office of the Chancery Clerk of Leflore County. By law, Gary is allowed to continue to serve until the winner of the special election is qualified to take office. *Id.* See *Parks v. Horton*, 299 So.3d 777 (Miss. 2020). Hence, Gary is the lawful office holder pending the outcome of the special election. The office of Chancery Clerk of Leflore County is not

currently vacant. See *Parks* at 781. Although the primary election in this case is vacated and the special election herein is to fill the permanent position or term, this court must follow the Mississippi Supreme Court's directive on whether a vacancy exists under the current circumstances. This court finds, therefore, that since the Chancery Clerk's position is not vacant, the Governor could have, but was not legally required to set the election herein on the regular special election day in November 2024 as described in §23-25-833.¹

The Writ of Election is ambiguous, inconsistent and fails to give the Election Commission a clear directive.

The Governor's Writ of Election declares that a special election be held in accordance with the Circuit Court's Final Judgment issued in the election contest. It specifically provides that the special election is to be held on the April 16, 2024. The Writ also mandates that notice of the election is to be given consistent with *Miss. Code Ann.* §23-15-835. Section 23-15-835 requires the county election commissioners, upon receipt of the writ of election, to immediately give notice of the special election ninety (90) days before the election. This cannot be done when the election is set to occur only forty-one (41) days after the writ is issued. The language and requirements of §23-15-835 are clear. Notice requirements provide the election commissioners and circuit clerk adequate

¹ *Miss. Code Ann.* §23-15-937 authorizes the Governor to call a special election pursuant to a final judgment of an election contest. *Miss. Code Ann.* §§23-15-833 and 23-15-835 provide directions on the time frame to conduct a special election. Generally, the first Tuesday after the first Monday in November of each year is designated as the regular special election day upon which an election is held to fill any vacancy in county offices. *Miss. Code Ann.* §23-15-833. (Rev. 2017)

Although the Governor was authorized to set the special election in accordance with §23-15-833, he chose not to follow this statute.

time to prepare to conduct a special election, including time for processing absentee ballots. See *Miss. Code Ann. 23-15-715*. This provision also ensures that the public receives timely notice of the special election and a full opportunity to participate, including the right to vote by absentee ballot.

The Governor's authority to issue a Writ of Election must be exercised in conformity with the body of election laws governing and relevant to special elections. Cf. *Moore vs. Parker*, 962 So 2d 558 (Miss. 2007) (*Governor to call municipal special election pursuant to specific authorizing statute "and other applicable law governing municipal special elections".*) (*Emphasis added*). The legislature provides for adequate notice in special elections. §23-15-835 clearly sets out a methodology for what the legislature deems to be adequate notice. It tells how, where and when said notice is to be given. *Id.* Compliance with its terms can only be achieved when a special election occurs at least ninety (90) days after the Writ of Election is issued.

The fact that a county position is filled by an election that is subsequently vacated in an election contest, requiring a special election under §23-25-937 has no bearing on the notice to be given at the election. The Governor acknowledged this by mandating compliance with §23-15-835 in the Writ of Election. The voters in this election, like all county special elections to determine who will complete an unexpired term, are entitled to the same ninety (90) day notice. The Writ of Election, by setting April 16, 2024 as the date for the special election, directly contravenes the ninety (90) day notice requirement under §23-15-835. Accordingly, the court finds that the Writ of Election exceeds the Governor's statutory authority.

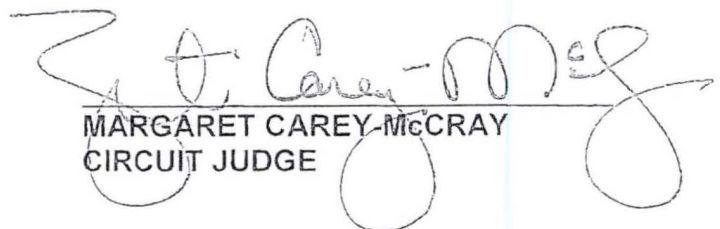
Additionally, the Governor's Writ of Election is inconsistent on its face. It requires the special election to be held only forty-one (41) days before the election while also requiring notice to be given consistent with §24-15-835. This is ambiguous, inconsistent, impossible and is not a clear directive to the election commissioners concerning an April 16, 2024 election.

The Court finding that the Governor's Writ of Election to the Election Commissioners of Leflore County herein is ambiguous, contravenes §23-15-835 and fails to provide a clear directive, DECLARES said Writ of Election to be null and void.

IT IS THEREFORE ORDERED that the Election Commission of Leflore County is hereby enjoined from conducting a special election for Leflore County Chancery Clerk under the current Writ of Election.

IT IS FURTHER ORDERED AND ADJUDGED that the Governor's Motion to Dismiss is **DENIED**.

SO ORDERED this the 5th day of April 2024.


MARGARET CAREY McCRAY
CIRCUIT JUDGE

FILED
LEFLORE COUNTY

APR 08 2024

KELLY H. ROBERTS, CIRCUIT CLERK
BY  D.C.