

**COPY**

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT  
OF HINDS COUNTY, MISSISSIPPI**

**TRUDY BERGER, et al.**

**PLAINTIFF**

**VS**

**CAUSE NO. 251-08-694CIV**

**GOVERNOR HALEY BARBOUR AND**

**SECRETARY OF STATE DELBERT HOSEMANN**

**DEFENDANTS**

**DECLARATORY JUDGEMENT AND ORDER**

On September 9, 2008, this cause comes before the court on Plaintiff Trudy Berger's petition for Declaratory and injunctive relief against the State Board of Election Commission, whose members include Defendants Governor Haley Barbour and Secretary of State Delbert Hosemann. Defendant Commissioners are required by law to disseminate an official sample ballot to election commissioners statewide at least fifty-five (55) days before the November 4, 2008 General election (Section 23-15-367(3)). On the sample ballot Defendant Commissioners grouped the candidates for National Office (President, U.S. Senate, U.S. House of Representatives) in the first positions on the sample ballot, as required by law (Section 23-15-367). The Defendant Commissioners excluded from the candidates for National Office a U.S. Senator's "special election" race between Ronnie Musgrove and Roger Wicker. The Musgrove/Wicker U.S. Senate race was moved to the end or bottom of the ballot and placed with special elections for non-partisan state judicial races.

Plaintiff Trudy Berger, a Pike County Election Commissioner filed a complaint for Declaratory Relief, a Temporary Restraining Order and a Permanent Injunction against the Defendant Commissioners. On September 9, 2008, this Court issued a Temporary Restraining Order maintaining the status quo until notice could be given to

the Defendants Commissioners and a hearing on the matter was scheduled for 11:00 a.m. on September 11, 2008.

On September 10, 2008, the Defendant Governor and Defendant Secretary of State filed a Writ for Extraordinary Relief before the Mississippi Supreme Court. Upon the allegations of the Defendant Commissioners, the Mississippi Supreme Court dissolved this Court's Temporary Restraining Order without direction except to allege that the Court failed to comply with Miss.R.Civ.P. Rule 65. The Supreme Court also dismissed all other requests for relief sought by the Defendants. By dissolving the trial court's Temporary Restraining Order of September 10, 2008, the Mississippi Supreme Court paved the way for the Defendant Commissioners to disseminate the challenged sample ballot to local election commissioners throughout the state. There was no hearing or determination of whether the ballots were improper, illegal, confusing or would have a chilling effect on the voting rights of the citizens of the State of Mississippi. Plaintiff Berger alleges irreparable harm in the unlawful compilation of the Defendant Commissioners' sample ballots for Mississippi's state and federal elections. She claims that voters will be confused by the unlawful and disjointed placement of a U.S. Senate candidate's race outside of the common category designated for candidates for National Office. Since these issues are of great interest for and will likely have great impact on the voting public's confidence in the fair and just administration of federal and state elections; and finally, may even have the appearance of disenfranchising Mississippi voters, the Court endeavors to bring clarity to the interpretation of two very important sections of Mississippi's election code.

Contrary to the assertions of Defendant Election Commissioners, this Court has made no attempt to enjoin the upcoming general and special elections. It is the unusual actions of the Defendant Commissioners that has provided the impetus that has propelled this ball of confusion in the Courts. Additionally, the court is of the opinion that the Defendants' Motion to Dismiss this matter is without merit and is merely a red herring that need not be addressed by the court, inasmuch as it is not essential to the timely resolution of this matter.

Thus, having reviewed the submissions of the parties, heard their arguments and being otherwise thoroughly advised in the premises, the Court addresses Plaintiff's request for declaratory relief regarding the legality of the sample ballot that has been distributed to the local election commissioners in our Great State. The court FINDS, DECLARES and ORDERS as follows:

The statutes which are determinative of the issues regarding the disseminated sample ballot are Sections 23-15-367 and 23-15-511, Miss. Code Ann. which state in pertinent parts:

**§ 23-15-367. Arrangement of names of candidates, order of titles of offices, and printing of official ballot generally; order in which titles of various offices are to be listed on the ballot; furnishing of sample of official ballot; alphabetical arrangement in primary elections.**

**(1) Except as otherwise provided by Sections 23-15-974 through 23-15-985 and**

**subsection (2) of this section, the arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangements need not be uniform.**

**(2) The titles for the various offices shall be listed in the following order:**

- (a) Candidates for national office;**
- (b) Candidates for statewide office;**
- (c) Candidates for state district office;**
- (d) Candidates for legislative office;**
- (e) Candidates for countywide office;**
- (f) Candidates for county district office.**

**The order in which the titles for the various offices are listed with each of the categories listed in this subsection is left to the discretion of the officer charged with printing the official ballot.**

(3) It is the duty of the Secretary of State, with the approval of the Governor, to furnish the designated commissioner of each county a sample of the official ballot, not less than fifty-five (55) days prior to the election, the general form of which shall be followed as nearly as practicable.

Coupled with the reading of Section 23-15-367, Section 23-15-511 gives guidance on how special election candidates shall be designated or clearly distinguished on the official ballot when the special election is held at the same time as the General Election.

**§ 23-15-511. Form of ballots; posting of sample ballots; ballot security envelopes.**

The ballots shall, as far as practicable, to be in the same order of arrangement as provided for paper ballots that are to be counted manually, except that such information may be printed in vertical or horizontal rows. Nothing in this chapter shall be construed as prohibiting the information being presented to the voters from being printed on both sides of a single ballot. In those years when a special election shall occur on the same day as the general election, the names of candidates in the special election shall be placed on the same ballot by the commissioners of election or officials in charge of the election, but the general election candidates shall be clearly distinguished from the special election candidates. At any time a special election is held on the same day as a party primary election, the names of the candidates in the special election may be placed on the same ballot, but shall be clearly distinguished as special election candidates or primary election candidates....

The language in these two statutes is clear and unambiguous. The legislative intent is explicit and definite. The order of the listing of the category of National Officers (President, Senate and House) is to be placed at the top or first on the sample ballot. If there is a special election for any of the offices, "the general election candidates shall be clearly distinguished from the special election candidates." There is no provision which permits the Secretary of State, even with the approval of the Governor, to change the law which unequivocally states that candidates for National Office shall be first in order on the ballot, and where there is a special election for a National office that office to be "clearly distinguished" from candidates for general election. Clearly distinguished is not synonymous with the removal from its place in the category of candidates for National Office and moving it to the very bottom or end of the ballot. Clear distinction

has and must be accomplished by simply bold typing "**SPECIAL ELECTION**" as a "header" above the title of the office sought. This "header" distinction has been used for special elections of judges, supervisors, sheriffs, superintendents, circuit clerks, etc. without disruption of the order or placement of candidates on the ballot.

The court is advised that there has not been a special election among candidates for National Office since 1981. So, it is somewhat understandable that the Defendants Governor and Secretary of State strangely argue that "historical practices" by election officials take precedence over compliance with Mississippi law. They further argue that abandoning the Secretary of State's eight (8) year policy or practice of putting state special elections at the bottom or end of the ballot and now starting to comply with Sections 23-15-367 and 23-15-511 would necessitate preclearance by the Department of Justice to avoid violating the Voting Rights Act. This court is not convinced by these arguments and the Defendants have cited no authority for their contentions. The Court opines that the on-going policies and practices of moving "special elections" to the bottom of the ballot runs afoul of Mississippi's election law and it is the top to bottom of ballot movement outside the category and order prescribed by Mississippi law that must be precleared. On the other hand, it is undisputed that Sections 23-15-367 and 23-15-511, Miss. Code Ann. (1972) have both been precleared by the Justice Department and it appears that the placement of candidates for National Offices first on the ballot, with special elections being *clearly distinguished*, by a header of "Special Election" would pass Constitutional muster and would align itself well with the Voting Rights Act.

The Defendant Commissioners also argue that the Section 23-15-367 is "entirely silent" about where special election candidates for National Offices are to be placed on the sample ballot. To the contrary, the statutes speak loudly about the special election placement on the ballot. First Section 23-15-367 explicitly states that candidates for the U.S. Senate shall come first on the ballot, along with others who are seeking National Office. Then, where there is a "special election" for the U.S. Senate seat, Section 23-15-511 provides that the race should be *clearly distinguished* from those in the general election, not moved to another place on the ballot. If there is "silence", then it comes in the absence of authority by Defendant Election Commissioners arbitrarily moving a

candidate for National Office outside the order and category mandated by Section 23-15-367 of the Mississippi Code and placing the race at the bottom of the ballot with unrelated state races.

A simple header that reads: "Special Election" is acceptable for distinguishing the U.S. Senate race as it remains in the order and category with all other candidates for National Offices. This Court can see no justifiable reason for moving any U.S. Senate race from its common category of candidates for National office, except to secrete the U.S. Senate race or to confound the voters. It is well settled law that where the provisions of the law are clear and unambiguous, as is the case with Sections 23-15-367 and 23-15-511, this Court is not required to employ rules of construction to determine or change the statutory meaning.

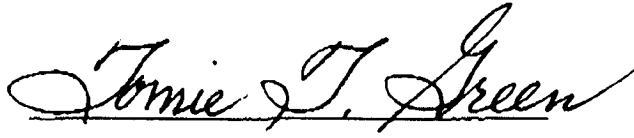
IT IS THEREFORE THE FINDING AND DECLARATION OF THIS COURT that Sections 23-15-367 and 23-15-511, and the principles of fairness and justice demand that the Defendant Commissioners shall follow Mississippi law and place the U.S. Senate race between Ronnie Musgrove and Roger Wicker on the official sample ballot along with all others candidates seeking National Office, and not at the bottom or end of the ballot. Because said race is a special election set by the Governor during a general election, the Defendant Commissioners shall *clearly distinguish*, by header or similar method, the special U.S. Senate race from the general election candidates for National Office within the order and category prescribed by Section 23-15-367, Miss.Code Ann. (1972) as amended.

Since the Defendant Commissioners represented to this Court that in order to meet the fifty-five (55) day deadline for dissemination of the official sample ballot on September 10, 2008, immediately after the Mississippi Supreme Court dissolved the Temporary Restraining Order, but before the September 11, 2008 hearing, they mailed the sample ballots to local election commissioners.

IT IS FURTHER ORDERED AND ADJUDGED that, the Defendant Commissioners shall REVISE or AMEND the official sample ballot disseminated on or about September

10, 2008 and redistribute or re-disseminate said official sample ballots ,with all deliberate speed, in accordance with this declaratory order, and consistent with State law.

SO ORDERED AND ADJUDGED this the 12<sup>th</sup> day of September 2008.

A handwritten signature in cursive script that reads "Tomie T. Green". The signature is written in black ink and is positioned above a horizontal line.

CIRCUIT JUDGE