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CASE NO. 05 - 3044

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**Effie Stewart, et al., Plaintiffs-Appellants**

v.

**J. Kenneth Blackwell, et al. Defendants-Appellees**

On Appeal From the United States District Court for the Northern  
District of Ohio at Akron, case no. 5:02CV02028

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**JOINT PETITION FOR RE-HEARING EN BANC FILED BY THE  
HAMILTON, MONTGOMERY, AND SUMMIT COUNTY LOCAL  
GOVERNMENT DEFENDANTS**

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## I. PETITION STATEMENT

The Local Government Defendants-Appellees <sup>1</sup> of Hamilton, Montgomery and Summit Counties, jointly move this Court under Federal Rule of Appellate Procedure 35 for a rehearing of this case *en banc*.

The implications of the panel decision present questions of exceptional constitutional importance and great public interest. By its significant intrusion into the historical power of the states to choose the manner of in which federal, state and local elections are conducted – specifically with respect to type of balloting systems that will be utilized – the panel decision alters the historical balance between the states and the federal government. <sup>2</sup>

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<sup>1</sup> The “local government” parties to this action include the county boards of elections, boards of county commissioners, the Summit County Council, and the individual members of the boards and council. Hamilton, Montgomery, Summit counties all used central-count punch-card voting systems for all of the voters within those counties during the 2000 election. They choose to file this petition jointly for that reason.

<sup>2</sup> The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, *Oregon v. Mitchell*, 400 U.S. 112, 124-125 (1970), subject only to the power of Congress to determine the time and manner of choosing Senators and Representatives. *U.S. Const. Art. I. Sec. IV.* “Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161(1892), see also *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Despite protestations to the contrary from the panel majority, its opinion has the practical effect of “constitutionaliz[ing] local election procedures, mandat[ing] uniformity and absolute equality in voting procedures, [and] holding that notice technology is constitutionally mandated.” (Panel decision at 28). The application of strict scrutiny to the state’s selection of a voting system coupled with replete references in the panel opinion to non-uniform and non-notice systems as “substandard,” “technologically unsound,” and “deficient,” clearly requires that state-wide voting systems for all future elections consist of one machine from one manufacturer that provides notice of potential errors to the voter. Despite the fact that elections will never be free of human error, the panel expressly declined to enunciate any acceptable standards for voting systems. Any minor disparity in voter error rates resulting from deviations in this formula is *per se* a constitutional violation.

The panel’s decision on plaintiff’s Voting Rights Act claim likewise overreaches. It is no longer enough to simply insure that all voters have equal opportunity and access to the election process. Under the panel’s reasoning, the mere existence of residual votes for any given election is sufficient to establish vote denial. Elections officials must now not only eliminate the possibility of machine error, they must also control for errors made by voters outside of the

officials' presence and without their knowledge lest they be subject to a claim that a vote was denied because a ballot was not "properly counted."

Finally, the panel decision relies upon unwarranted interpretations of existing Supreme Court decisions and conflicts with prior decisions of the Supreme Court and other appellate circuits.

## **II. PROCEEDINGS BELOW AND THE PANEL DECISION**

In October of 2002, plaintiffs instituted their action challenging certain Ohio election practices dealing with the certification and selection of voting systems in the State of Ohio. Plaintiffs alleged that the use of what they refer to as "non-uniform" and "non-notice" voting systems throughout the state violates the Equal Protection and Due Process clauses of the Fourteenth Amendment. They also alleged that the use of such equipment resulted in violations of Section 2 of the Voting Rights Act. Additionally, plaintiffs chose to attack only four of Ohio's eighty-eight counties: Hamilton, Montgomery, Sandusky, and Summit.

After a bench trial, the district court denied class certification. By separate opinion, the district court found that the plaintiffs failed to meet their burden of proof on their claims, entering judgment in favor of the defendants on all counts.

Following an appeal by plaintiffs, a panel of this Court – one judge dissenting – substituted its judgment for that of the district court. The panel

determined that the certification and use of non-uniform, and non-notice voting systems by the State of Ohio violates the Equal Protection Clause of the Fourteenth Amendment, remanding the matter to the district court with instructions to enter judgment for Plaintiffs. The panel further determined – again with one judge dissenting – that the district court was wrong in its determination that Plaintiffs had not proven that they were denied the right to vote under Section 2 of the Voting Rights Act. Interpreting the district court’s language that “plaintiffs have not established their vote denial claim,” as a dismissal for failure to state a claim (Panel Decision, at 29, 30), the panel remanded the Voting Rights Act claim to the district court to determine whether under the totality of circumstances a violation of the Act had occurred.

### **III. ARGUMENT IN SUPPORT OF RE-HEARING**

- a. The Reversal of the District Court’s Holding on Plaintiffs’ Voting Rights Claim Misstates the Holding of the District Court, Suggests the Wrong Standard to Decide the Claimed Violation, and Is Not Supported by the Evidence Adduced at Trial.

The holding of the district court that the plaintiffs did “not establish their vote denial claim,” is found at pages 30 and 31 of that court’s decision. While it consists of only three paragraphs, the holding correctly and concisely recites the law to be applied, the nature of plaintiffs’ claims (vote denial), and the facts

adduced in support of the claim at trial. The district court did not, as the panel concludes (Panel Decision at 29), merely find that the plaintiffs failed to state a claim. It is a clear holding that the plaintiffs' failed to prove their Voting Rights Act Claim at trial.

In so holding, the district court made the following explicit factual findings:

- punch-card ballots are widely employed throughout Ohio and are not employed disproportionately in African-American areas of the state;
- all voters in Hamilton, Montgomery, and Summit Counties use punch-card ballots;
- all voters in a county, regardless of race, use the same voting system to cast a ballot; and,
- African-American voters have the same opportunity to participate in the political process as other members of the electorate.

((R. 275, *Memorandum Opinion*, at 30, Apx. 112-13).

The general findings of the district court also acknowledge that none of the plaintiffs were denied equal access to: the polls; the voter instructions within the polls, voting booths, and on the ballot; and, assistance in casting a ballot if they required it. Nor were any of the plaintiffs prevented from casting their vote in the 2000 general election. ((R. 275, *Memorandum Opinion, Appendix I*, at ¶¶ 86-89, Apx 126-27). The plaintiffs did not argue or attempt to prove that any other voter was prevented from voting or denied access to the polls.

The panel decision ignores these factual findings and proceeds to parse the district court's holding as if it were reviewing a ruling on a Motion to Dismiss under Civil Rule 12(B)(6). Concentrating on the definition of a vote found within 42 U.S.C. 19731(c), the panel concludes that plaintiffs indeed stated a claim. (Panel Decision at 29). The panel then simply adds without further elucidation that "plaintiffs' evidence supports a denial of the right to vote." *Id.*

The panel's logic on this issue is flawed in some very important respects.

First, the only way that a properly marked punch-card ballot is improperly counted is if there some sort of machine error in tabulating the ballot.<sup>3</sup> While it is certainly true that there is evidence in the record that such errors are possible given the fragile nature of the ballot and the handling that occurs during the tabulation process, it is also true that these are *systemic* errors that occur randomly without regard to the race of the voter or location of the voting precinct. In petitioners' counties, all voters vote by punch-card ballot which are counted at a central location. Any such machine errors therefore occur without a disparate impact on African-American voters.

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<sup>3</sup> Plaintiffs did not allege or argue that ballots of African-Americans were lost, removed from the tabulation process, spoiled by others, or counted at less than full value.

Other incidents of non-voted (residual) ballots occur when the ballot is improperly marked or left unmarked by the individual voter. While no vote is tallied for such ballots, they are, in fact, "properly counted." Both types of residual votes (over-votes and under-votes) only occur when an individual voter exercises his franchise. Appellants' case arose not because the franchise was denied to any voter, but rather because it was perhaps exercised by some of them in an improper manner. There is nothing in the history of the Voting Rights Act or its subsequent amendments indicating that acts of individual voters which leave a ballot unmarked or improperly marked resulting in a non-vote constitute a "denial" of that individual's vote by the political subdivision administering the election.

Section 2 of the Voting Rights Act is intended to assure that minority voters have "equal access" to and an "equal opportunity" to participate in the electoral process. Section 2 simply does not require local elections officials to prevent inadvertent errors by a properly informed individual voter. Indeed, as *Bush v. Gore* states: "[n]o reasonable person would call it 'an error in the vote tabulation' or a 'rejection of legal votes' when electronic or electromechanical equipment performs precisely in the manner designed and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently

specify.” 531 U.S. 98, 119 (2000), Rehnquist, concurring (internal citations omitted). The decision by the panel holding otherwise is unwarranted.

In its remand order, the panel also pointedly admonishes the district court to follow a vote dilution case -- *Johnson v. DeGrandy*, 512 U.S. 997 (1994) -- and ignore evidence of what occurred during the election in other parts of the State -- particularly Franklin County. *Johnson* is a reapportionment case which rejects the argument that no violation of the Voting Rights Act occurs if the percentage of officials mirrors the percentage of the minority population. Given that this is a vote denial case, what utility a dilution case has in deciding it is highly questionable. It provides no guidance, practical or otherwise, with respect to analyzing the use of particular voting systems in the administration of elections.

The panel decision further ignores the fact that the evidence it would now have the district court suppress was adduced and relied upon by the plaintiffs at trial. It was intended by them to demonstrate that “DRE” technology performed better than punch-card systems. The defendants were and are free to use -- and the district court to rely upon -- such evidence in determining whether disparities are explained by race or some other factor.

Finally, remand on the voting rights claim to resolve issues related to the “totality of circumstances” would be futile in this instance. The plaintiffs

presented no evidence regarding historical conditions mandated for such determination. The evidence that was presented supports the defendants. (See, *eg.* (R. 275, *Memorandum Opinion, Appendix I*, at ¶¶ 92-96, Apx 127).

- b. The Reversal of the District Court's Holding on Plaintiffs' Equal Protection Claim Does Not Clearly Identify the Violation Established, Wrongly Applies Strict Scrutiny to Voting Technology and Places Improper Reliance on *Bush V. Gore*.

On appeal, the plaintiffs clearly stated that their claim based upon the Equal Protection Clause relates to the State's permitting the use of different voting systems with varying degrees of accuracy. In so doing they appeared to have abandoned any Equal Protection claim against the individual counties. The panel decision certainly seems to be directed toward this reasoning. Nonetheless, the panel reversed the district court and ordered it to enter judgment for plaintiffs without specifying to which defendants the judgment was to apply. Until this uncertainty is resolved, Hamilton, Montgomery, and Summit Counties offer the following:

None of the individual counties or their boards of elections are free to insist that the State change its system and require uniformity throughout the State. The Counties note that *all* voters in their respective jurisdictions used the same equipment at all relevant times pertinent herein. Therefore, any equal protection

claim against the individual counties must be found on the basis of some other factor – such as race.

In this matter, there has never been even a circumstantial showing, must less any attempt to prove, that the selection of punch-card equipment by any of the county boards was motivated by any racial animus or an intent to disadvantage African-American voters. The “proof” offered at trial rested solely on very thin statistical evidence that punch-card voting systems may have a disparate impact on the ability of African-Americans to properly cast a ballot. Even if true, such proof is not enough to establish an equal protection violation as such a violation may not be proved by references to racial disparities alone. *Washington v. Davis*, 426 U.S. 229, 242 (1976). There must be some showing of a racially discriminatory purpose. *Id.* at 240.

The panel’s application of strict scrutiny to the State’s choice of equipment is simply without foundation. Cobbling together a pinch of this and a dash of that, the panel attempts to portray their posture as “well-settled.” As the dissent rightly points out, however, none of the Supreme Court precedents cited by the panel resemble plaintiffs’ claim. (Panel Decision at 35, Gilman dissenting). The one circuit decision that did support the panel decision (*Shelley I*), was vacated immediately and reversed and has subsequently been repudiated. *See, Southwest*

*Voter registration Project v. Shelley*, 344 F.3d 882 (9<sup>th</sup> Cir. 2003)(*Shelley I*), vacated by 344 F.3d 913, rev'd by 344 F.3d 914 (en banc)(*Shelley II*); *Weber v. Shelley*, 347 F.3d 1101 (9<sup>th</sup> Cir. 2003)(applying rational basis to the selection of electronic voting equipment -- a direct conflict with the panel decision). The panel majority also points to a district court decision, *Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F.Supp.2d 1106, that referred to strict scrutiny in resolving a motion for judgment on the pleadings in a choice of equipment case. But, given the Ninth Circuit's decisions in *Shelley II* and *Weber*, *Common Cause* has no further utility.

In sum, the authority relied upon by the panel majority in applying strict scrutiny has no resemblance to the claims made by the plaintiffs, is based on a district court decision which no longer enjoys support, or consists of a circuit decision which was never the law in the first place.

Compounding the panel majority's use of strict scrutiny is its abject refusal to enunciate any standards that will be presumed to be acceptable. Simply stating the system's broken and must be fixed -- the panel places the legislatures of the several states within the circuit in the position of having to guess as to what some future panel might accept. So long as voters are involved in the process, there will be an element of human error in every election. Under the majority's rationale,

even systems utilizing the same equipment will be subject to the most exacting Equal Protection review if the equipment does not read and tally a vote for every ballot cast.

The panel majority's reliance on is likewise misplaced. *Bush* is solely about standards (or more accurately the lack thereof) and not about equipment. In fact, seven members of the Court specifically deny that equipment is at issue. For example:

The question before the Court is not whether local entities, in the exercise of their expertise may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.

*Bush v. Gore*, 531 U.S. 98, 109 (2000); and,

It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

*Id.* at 134, Souter dissenting.

The panel simply ignored this language and the cautionary instruction within *Bush* that it was to be limited to its own facts. *Id.* at 109. It chose instead to imbue *Bush* with an exaggerated sense of importance that the *Bush* Court directly cautioned against.

- c. As Plaintiffs Did Not Seek Countywide Sub-class Certification, the Panel Erred in Ordering Such Sub-classes to Be Certified.

The panel decision ordering the certification of a sub-class for African - American plaintiffs within Hamilton, Summit, and Montgomery Counties (Panel Decision at 31) goes beyond what the plaintiffs requested of the district court. (R. 102, *Motion for Class Certification*, Apx. pg. 154). Indeed, throughout the proceedings below, plaintiffs specifically *denied* that they were seeking certification of anything other than a state-wide sub-class for African-American Voters. (R. 104, *Reply Brief Supporting Motion to Dismiss One Plaintiff and Add Another*, attached exhibit 2). The panel not only substituted its decision for that of the district court on this issue, it gave plaintiffs more than what they asked for below.

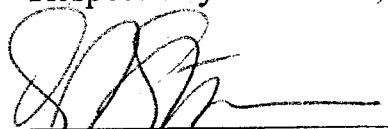
- d. Standing

The panel decision on standing ignores existing Supreme Court precedent as announced by *United States v. Hays*, 515 U.S. 737 (1995). *Hays* holds that voters living in one particular part of the state asserting only a generalized grievance against governmental conduct of which they do not approve have no standing to assert a claim arising in another part of the state in which they have suffered no individualized harm.

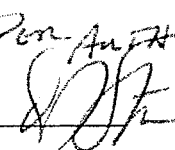
#### IV. CONCLUSION

For all of the foregoing reasons , the Sixth Circuit should exercise its authority to re-hear this matter en banc and reverse the existing panel decision as it pertains to Hamilton, Montgomery and Summit Counties.

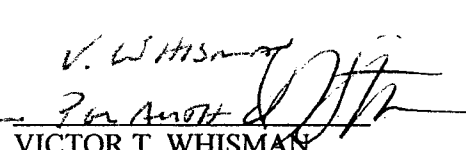
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this Brief in Support of Rehearing En Banc was served upon all counsel of record noted below by United States Mail this 5<sup>th</sup> day of May, 2006.

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