

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EFFIE STEWART, et al.)
)
Plaintiff-Appellants)
)
-vs.-) Case No. 05-3044
)
J. KENNETH BLACKWELL, et al.,)
)
Defendant-Appellees.)

On Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division
Case No. 5:02-CV-2028 – David D. Dowd, District Judge.

PETITION FOR PANEL REHEARING AND REHEARING EN
BANC OF DEFENDANTS-APPELLEES THE SANDUSKY COUNTY
BOARD OF ELECTIONS, HARRY HEYMAN, THOMAS YOUNKER,
JOHN RETTIG, SANDUSKY COUNTY BOARD OF COMMISSIONERS,
BRAD SMITH, DANIEL LISKAI, AND TERRY THATCHER

Mark Landes (0027227)
marklandes@isaacbrant.com
Jeffrey A. Stankunas (0072438)
jeffreystankunas@isaacbrant.com
Isaac, Brant, Ledman & Teetor, LLP
250 East Broad St., Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121/Fax (614) 365-9516
Attorneys for Defendant-Appellees
The Sandusky County Board of Elections,
Harry Heyman, Thomas Younker, John Rettig,
Sandusky County Board of Commissioners,
Brad Smith, Daniel Liskai, and Terry Thatcher

Petition for Rehearing and Rehearing En Banc

For the reasons set forth in the following Memorandum in Support, Defendants-Appellees the Sandusky County Board of Elections, Harry Heyman, Thomas Younker, John Rettig, Sandusky County Board of Commissioners, Brad Smith, Daniel Liskai, and Terry Thatcher ("Sandusky County") respectfully petition this panel and this entire court en banc to rehear this matter to affirm the District Court's judgment and decision, at least with regard to Sandusky County.



Mark Landes (0027227)

marklandes@isaacbrant.com

Jeffrey A. Stankunas (0072438)

jeffreystankunas@isaacbrant.com

Isaac, Brant, Ledman & Teetor, LLP

250 East Broad St., Suite 900

Columbus, Ohio 43215-3742

(614) 221-2121/Fax (614) 365-9516

Attorneys for Defendant-Appellees

The Sandusky County Board of Elections,

Harry Heyman, Thomas Younker, John

Rettig, Sandusky County Board of

Commissioners, Brad Smith, Daniel Liskai,

and Terry Thatcher

Memorandum in Support

Sandusky County petitions this Court for a panel rehearing and rehearing en banc for two reasons:

- (1) Because all voters in Sandusky County use the exact same type of voting equipment, the panel decision directing the district court to enter judgment against Sandusky County on the Plaintiffs-Appellants' equal protection claim conflicts with *Bush v. Gore*, 531 U.S. 98 (2000); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *McGowan v. Maryland*, 366 U.S. 420 (1961), *Salsburg v. Maryland*, 346 U.S. 545 (1954); *Missouri v. Lewis*, 101 U.S. 22 (1879); *Mixon v. NAACP*, 193 F.3d 389 (6th Cir. 1999), and the plain language of the equal protection clause of the Fourteenth Amendment to the United States Constitution.
- (2) This matter involves questions of exceptional importance, as the practical effect is the constitutional outlawing of an established method of voting even though there is no evidence that it is technologically deficient.

I. Summary of Error and Brief Statement of Facts.

The Court's majority opinion with regard to Sandusky County directly conflicts with precedent of the Supreme Court, the Sixth Circuit, and other courts of appeals, as well as the plain text of the Equal Protection Clause. While the majority opinion repeatedly refers to "the State" in its decision, it concludes by

directing the District Court to enter judgment in favor of the Plaintiffs-Appellants on their equal protection claim. Since Sandusky County has uniformly administered the optical scan ballot with central location tabulation to all of its voters, there is no classification by which the panel decision could base its finding of a violation of the Equal Protection Clause. Additionally, the practical effect of the panel decision is the constitutional outlawing of an established method of voting, despite a complete lack of evidence that it is technologically deficient.

II. The Panel Decision Is In Conflict With Case Law Of The United States Supreme Court, The Sixth Circuit, Other Circuits, And The Plain Language Of The Equal Protection Clause.

With remarkably little reference to the past practices of Sandusky County, and despite its almost complete focus upon the actions of Defendant-Appellee Ohio Secretary of State J. Kenneth Blackwell (“State of Ohio”), the panel decision ordered the District Court to enter judgment in the Plaintiffs-Appellants’ favor on their equal protection claim. (See Panel Op. at 31). It did this notwithstanding the fact that all of the voters in Sandusky County are treated exactly the same.

A. The Equal Protection Clause Requires Only That Sandusky County Treat Those People Within Its Jurisdiction Equally.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that “no State shall deny to any person *within its jurisdiction* the equal protection of the laws.” (emphasis added). While the equal protection clause uses the word “State,” it is well established that county policies

executed by county officials are subject to the commands of the Fourteenth Amendment. See *Edelman v. Jordan*, 415 U.S. 651, 668, FN 12 (1974). The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The Supreme Court has held that although there is no constitutional right to cast a vote for Presidential electors, once a State legislature grants its citizens the right to vote for President, the State needs to accord equal weight and equal dignity to each voter. *Bush v. Gore*, 531 U.S. 98, 105 (2000). In *Bush*, the Supreme Court was presented with a situation where the Florida Supreme Court, with the power to assure uniformity, had ordered a statewide recount with minimal procedural safeguards. *Id.* at 109. In fact, the Supreme Court determined that the Florida Supreme Court, through the statewide recount, had ratified uneven treatment of voters in different counties. *Id.* at 107. For example, it determined that the standards for accepting or rejecting contested ballots might not only vary from county to county, but indeed they may have varied within a single county from one recount team to another. *Id.* at 106. The *Bush* Court ultimately found a violation of the Equal Protection Clause because the recount mechanisms implemented in response to the decisions of the Florida Supreme Court did not have at least some

assurance that the rudimentary requirements of equal treatment and fundamental fairness were satisfied. *Id.* at 109.

B. Sandusky County Treats All All People Within Its Jurisdiction Equally.

Plaintiffs-Appellants failed to demonstrate that Sandusky County engaged in any sort of classification within their jurisdiction, which is the territorial limits of Sandusky County. Similarly, Plaintiffs-Appellants failed to demonstrate that Sandusky County valued one person's vote over that of another. *Id.* at 104-105. In fact, it was stipulated that Sandusky County has uniformly administered the optical scan ballot with central location tabulation to all of its voters. (R. 234, Order, July 12, 2004, at Final Fact Stipulation No. 72, APX 280).¹ The majority opinion did not make any finding to the contrary.

To the extent that voters in other counties in Ohio, or in other states, use different methods of voting, including DRE's or optical scan ballots with in precinct tabulation, those voters are outside of Sandusky County's jurisdiction. A method of voting permitted by the Ohio Revised Code has been chosen by

¹ Ironically, the panel's decision, if left to stand intact, will result in Sandusky County classifying its voters by not having a uniform method of voting. Under the panel's decision, only the use of DRE's or the optical scan ballots with precinct location tabulation is constitutionally acceptable. Therefore, absentee voters will by necessity have to utilize a different type of voting method, such as the optical scan ballots with central location tabulation, because, as the Director of the Sandusky County Board of elections testified, "you can't put machines in the mail." (R. 265, Trial Transcript, Vol. IV, at 717-718, APX 513-514).

Sandusky County, and it has no legal authority to prohibit Ohio's other eighty-seven counties from using different types of voting systems. See O.R.C. § 3506.02, 3506.05-10. Similarly, and while the State of Ohio may have this authority, Sandusky County clearly has no legal authority to "decertify the use of non-notice and technologically unsound punch card and central count optical scan machines," as the majority opinion found to be "practicable and . . . necessary." (See Panel Op. at 25).

C. The Panel Opinion's Holding That Sandusky County Has Violated The Equal Protection Clause Because Voters In *Other Jurisdictions* Use Different Voting Methods Conflicts With Precedent.

In finding for the Plaintiffs-Appellants on their equal protection claim against Sandusky County, even though Sandusky County treats all of its voters equally, the panel essentially wrote out the "within its jurisdiction" language of the Equal Protection Clause.² Not surprisingly, this is in conflict with precedent of the Supreme Court, the Sixth Circuit, and other circuit court of appeals.

² Moreover, the case law that the panel decision relied upon supports an equal protection claim only when the defendant against whom the claim was made was responsible for providing for different methods of voting for *its* voters. (See Panel Op. at 16-19; see also *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Illinois, 2002)(the equal protection claim was made against *only* the State of Illinois, and not the local defendants); *Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001)(action brought only against California Secretary of State); and *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003)(action brought only against California Secretary of State)).

1. Supreme Court Precedent.

The Supreme Court has long held that the Equal Protection Clause of the Fourteenth Amendment does not apply to “local and municipal regulations that do not injuriously effect or discriminate between persons or classes of persons *within the places or municipalities for which such regulations are made.*” *Missouri v. Lewis*, 101 U.S. 22, 30 (1879)(emphasis added). What the Equal Protection Clause does mean is that “no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the *same place and under like circumstances.*” *Id.* at 31 (emphasis added). As stated above, Sandusky County’s use of optical scan ballots with central location tabulation was uniformly administered to *all voters within Sandusky County*. Therefore, the panel’s holding that the use of electronic voting in, for example, Franklin County, results in Sandusky County violating the equal protection rights of voters in Sandusky County is in complete conflict with *Lewis*.

In determining that Sandusky County violated Sandusky County voters’ right to equal protection because other jurisdictions utilize different voting methods, the panel’s decision does not limit its comparison to other counties in Ohio. Under its rationale, Sandusky County may violate its voters’ right to equal protection any time a county or other local government in another state chooses to utilize new and/or different voting methods. Such an outcome has been

reconsidered and again rejected by the Supreme Court:

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right to a trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding . . . diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment . . .

Salsburg v. State of Maryland, 346 U.S. 545, 551, FN 6 (1954)(quoting *Lewis*, 101 U.S. at 31)). Thus, the panel's holding is in clear contravention of Supreme Court precedent, which has been clear that the "Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite," See *McGowan v. Maryland*, 366 U.S. 420, 427 (1961).

Finally, and even though the panel's dissent determined that the majority opinion has impermissibly relied upon and expanded the holding of *Bush*, the panel decision actually conflicts with *Bush*, at least as it was applied to Sandusky County. (Dissent Op. at 36-40). The Supreme Court in *Bush* specifically stated that the question before them was *not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. 531 U.S. at 109. In fact, even the majority opinion's summary of the holding in *Bush* acknowledges this fact by characterizing it as "indicating that having one's vote

counted on equal terms with others *in the relevant jurisdiction* is the quintessential ‘right to vote’ case.” (See Panel Op. at 21)(emphasis added). Therefore, the panel decision not only conflicts with well established Supreme Court precedent, but it even conflicts with its own interpretation of Supreme Court case law.

2. Sixth Circuit Precedent.

The panel decision also conflicts with a more recent holding of the Sixth Circuit. In *Mixon v. NAACP*, the Sixth Circuit considered a similar claim made by voters and taxpayers of the Cleveland School District who challenged the constitutionality of H.B. 269. 193 F. 3d 389 (6th Cir. 1999). In *Mixon*, the plaintiffs contended that H.B. 269 unconstitutionally differentiated between those residents who resided in municipal school districts and those who did not by implementing an appointive system for school boards in municipal school districts while other school districts could elect their school boards. *Id.* at 402-403. The plaintiffs argued that this infringed upon their right to vote. *Id.* at 403.

The *Mixon* Court held that although the plaintiffs had a fundamental right to vote in elections before them, there is no fundamental right to elect an administrative body such as a school board, *even if other cities in the state may do so.* *Id.* (citing *Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967)). Additionally, the *Mixon* Court reaffirmed that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction.* *Id.*

at 402 (quoting *Dunn v. Blumstein*, 405 U.S. 330 (1972)). Thus, pursuant to *Mixon*, voters in Sandusky county only have a constitutionally protected right to vote on an equal basis with other citizens in Sandusky County. Had the panel decision determined that voters in Sandusky County have no fundamental right to vote via a method of voting which provides notice technology, even though voters in other counties in Ohio use such technology, than the panel decision would have been in line with the holding *Mixon*. Since the panel did not hold this way, its decision conflicts with *Mixon*.

3. Other Circuit Court of Appeals.

Not surprisingly, there is little case law directly on point with regard to the panel's holding that Sandusky County must treat its voters as other jurisdictions treat their own voters. However, the Third Circuit Court of Appeals has recently reject a similar conclusion. In *Rodgers v. Johnson*, Nos. 04-4390, 05-2396, 05-3563, 2006 WL 561806 (3rd Cir. March 9, 2006)(attached as Exhibit A), the plaintiff alleged an equal protection violation against the City of Philadelphia because it imposed a fingerprinting requirement with regard to his application to renew his gun license. *Id.* at * 1. This was a requirement that was not imposed by any of the other counties in the Commonwealth of Pennsylvania. *Id.* Citing to *Cleburne*, the *Rodgers* Court held that:

Rodgers' equal protection claim fails because the fingerprinting requirement applies to any person applying for a gun permit in the

City of Philadelphia. In other words, Rodgers has not asserted that he is being treated differently than other similarly situated persons who are applying for gun permits in the City of Philadelphia.

Id. The court in *Rodgers* went on to note that “the fact that other sixty-six counties in Pennsylvania do not impose the fingerprinting requirement does not make his claim viable because the ‘Equal Protection Clause relates to equality between persons as such, rather than between areas. . .’” *Id.* (citing *McGowan*, 366 U.S. at 427). Like the plaintiff in *Rodgers*, the Plaintiffs-Appellants’ equal protection claim against Sandusky County should have failed because they cannot demonstrate that other similarly situated voters in Sandusky County are being treated any differently.

III. This matter involves questions of exceptional importance.

This matter involves questions of “exceptional importance” as required by FRAP 35(a)(2), since the practical effect of the majority’s decision is that all local governments must now use the same method of voting or they risk violating the Equal Protection Clause. This is even more troubling in light of the fact that, unlike punch card ballots, there is no evidence that optical scan ballots with central location tabulation are technologically deficient.

In an opinion devoted almost exclusively to the problems associated with punch card ballots, the panel, in a mere footnote, explained the problems it found with optical scan ballots with central location tabulation:

We have focused on the inherent and easily identifiable flaws in the punch card system but the same goes for central count optical scan technology. The error rate for that technology is sufficiently high . . .

(See Panel Op. at 22, FN 16). As an initial matter, the panel decision was plainly wrong when it determined that the 2.64% residual vote rate in Sandusky County in 2000 occurred through the use of “central-count optical scan equipment,” since it is undisputed that Sandusky County still utilized the punch card ballot during that presidential election. (See Panel Op. at 8, FN 5; R. 265, Trial Transcript, Vol. IV, 689, 716-718, APX 491, 512-514). The Plaintiffs-Appellants have alleged that in the 2004 Presidential election, Sandusky County, through the use of the optical scan ballot with central location tabulation, experienced a residual vote rate of 1.52%. This was only 0.08% higher than the residual vote rate experienced by Franklin County (1.45%) through their use of DRE’s (which is the type of notice voting equipment that the panel decision apparently found acceptable) during that same election. (See Plaintiffs-Appellants’ Brief, at FN. 12, which directs the Court to <http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-all.pdf>; See Panel Op. at 28).³

³ In 2000, Knox County (1.0%) and Ross County (1.2%) used DRE’s, and Allen County (0.9%) and Hancock County (1.2%) used precinct count optical scan ballots. The following Counties, *all of which used optical scan ballots with central location tabulation in the 2000 Presidential election*, experienced similar or even lower residual vote rates than did the aforementioned counties with their notice technology: 1) Ashland County (1.2%); 2) Geauga County (.8%); 3) Hancock County (1.0%)(which apparently used optical scan ballots with both precinct and

More importantly, and *unlike punch card ballots*, there is no evidence that optical scan ballots with central location tabulation have any problems such as inherent fragility or “machine error”. (See Panel Op. at 3-5, 25). Similarly, the panel’s conclusion that the optical scan ballots with central location tabulation utilized in Sandusky County is somehow “deficient technology” that is a “technological burden [that] is not within the control of the voter” is completely unsupported by the record. (See Panel Op. at 14-15). In fact, the Plaintiffs-Appellants’ own expert witnesses, Roy G. Saltman and Dr. Herbert Asher, both testified that as long as a voter on an optical scan ballot completely understands and follows the directions given to them, regardless of whether the optical scan ballot is counted at the precinct or at a central location, every intentional vote that a voter casts will be counted (absent a machine malfunction). (R. 258, Trial Transcript, Vol. II, at 305-306, APX 428-429; R. 265, Trial Transcript, Vol. IV, at 837).

The majority’s interpretation of the Equal Protection Clause will result in local governments violating the Equal Protection Clause even when they uniformly provide the voters within their jurisdiction a method of voting by which every

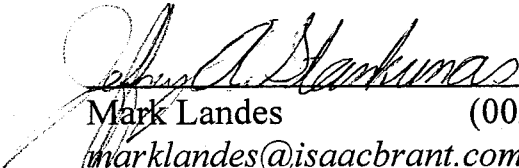
central tabulation); and 4) Ottawa County (1.1%). (R. 514, Trial Exhibit 35, APX 967-969). Accordingly, the panel decision found unconstitutional voting equipment that, in some counties, has lower residual vote rates than the type of voting equipment preferred by the panel).

voter who follows simple instructions will have their vote counted. This interpretation involves matters of exceptional importance because local governments can no longer utilize full proof voting methods, and instead they must take exceptional steps to safeguard against voters who refuse to follow directions.

IV. Conclusion.

Accordingly, Sandusky County respectfully requests that this Court grant their Petition for a panel rehearing and a rehearing en banc and to affirm the District Court's decision, at least with regard to Sandusky County.

Respectfully submitted,


Mark Landes (0027227)
marklandes@isaacbrant.com

Jeffrey A. Stankunas (0072438)
jeffreystankunas@isaacbrant.com
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 221-2121/(614) 365-9516 Fax
Attorneys for Defendant-Appellees
The Sandusky County Board of Elections,
Harry Heyman, Thomas Younker, John
Rettig, Sandusky County Board of
Commissioners, Brad Smith, Daniel Liskai,
and Terry Thatcher

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by U.S. mail, postage prepaid, this 5th day of May, 2006, upon the following:

Meredith Bell-Platts
Laughlin McDonald
Neil Bradley
American Civil Liberties Union
2725 Harris Tower
233 Peachtree Street, N.E.
Atlanta, GA 30303

Richard Saphire
Dayton Law School
300 College Park Drive
Dayton, OH 45469

Paul F. Moke
Wilmington College
1252 Pyle Center
Wilmington, OH 45177

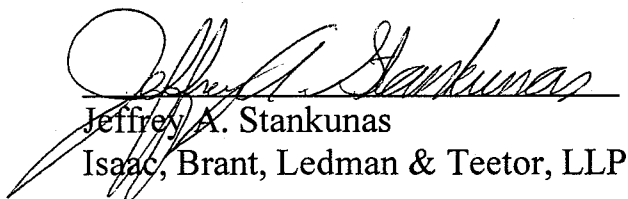
Daniel P. Tokaji
The Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210

Richard N. Coglianese
Holly J. Hunt
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, OH 43215

Victor T. Whisman
Montgomery County Prosecutor's
Office
301 West Third Street
P.O. Box 972
Dayton, OH 45422

Anita L. Davis
Summit County Prosecutor's Office
53 University Avenue, 6th Floor
Akron, OH 44308

David T. Stevenson
Hamilton County Prosecutor's Office
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202


Jeffrey A. Stankunas
Isaac, Brant, Ledman & Teetor, LLP