

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EFFIE STEWART, *et al.*,

Plaintiffs-Appellants

v.

J. KENNETH BLACKWELL, *et al.*,

Defendants-Appellees.

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No. 05-3044

THE STATE DEFENDANTS' PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

In an opinion with disastrous consequences for Ohio and other State's elections systems, a panel of this Court adopted a novel Equal Protection Clause analysis—based largely on its expansive reading of *Bush v. Gore*, 531 U.S. 98, a case the Supreme Court itself suggested was limited to the facts there—to apply strict scrutiny to the State's choice of what voting machine its citizens will use in an election. In particular, according to the panel, the Equal Protection Clause essentially prevents States from using different voting technologies in different precincts if that results in *any* difference in under-vote rates, i.e., the percentage of ballots that don't contain a vote for one or more of the contested races on the ballot. While Ohio has stopped using the particular voting technology originally at issue in this case—namely, punch cards—Ohio and its sister States face drastic consequences, both in principle and in practice, from this procrustean decision. The panel's decision is objectionable in principle as it reflects an unprecedented level of federal court intrusion into the State's sovereign right to choose how it will conduct its own elections. And as a practical matter, the decision is immensely burdensome, if not impossible, to comply with.

The intrusive federal oversight of state elections officials' decisions reflected in the decision has drastic ramifications both for the State's ability to adopt new voting technologies as they become available, as well as for the State's authority to

make myriad other decisions that come up in the course of an election. As to the first, the panel's decision essentially imposes a statewide uniformity requirement, meaning that local officials are not free to decide what provides the best cost/benefit ratio in their own area. And more broadly, any state official's decision that, in a federal court's view, differentially impacts voters in different precincts (e.g., how many voting machines to put in a given location) is now potentially subject to strict scrutiny review. Such strict review is hard enough to survive in theory, but is especially hard where, as here, the difference between precincts could be explained by voter choices. For example, differential undervote may reflect a conscious desire by certain groups of voters not to participate in certain races, a desire that would be difficult to document given ballot secrecy norms and the understandable desire to avoid interrogating voters about their choices (or lack thereof).

While rehearing en banc is "an extraordinary procedure," this case presents precisely the type of "precedent setting error of exceptional public importance" for which the procedure was designed. See 6th Cir. R. 35(c). The majority's opinion imposes these far reaching changes to Ohio's election system on grounds that are tenuous at best. In the dissenting judge's words:

The majority today imposes by judicial decree important changes to the Ohio electoral systems, doing so largely in reliance on the Supreme Court's murky decision in *Bush v. Gore*, a vacated Ninth

Circuit panel opinion in a California recall-election dispute, and two district court cases that never reached a final judgment on the merits.

See Op. at 33 (Gilman, J., dissenting). Relying on this questionable collection of precedent, the majority made it appear as though strict scrutiny is the well-established constitutional standard for determinations on selection of voting technology. But in doing so, as the dissent noted, the panel's opinion takes "quotations out of their factual and legal context," and a closer examination of their opinion shows that "the appropriate standard of review in voting-rights cases is far from settled." *Id.*

The State Defendants respectfully urge review by the entire Court before the panel's imposition of a new standard of review for voting machines puts Ohio's and the country's election system into a litigation tailspin.

STATEMENT OF THE CASE

The Plaintiffs initially sued Ohio's Secretary of State and four county boards of elections on October 11, 2002, alleging that the State of Ohio and the four counties violated the Voting Rights Act and the United States Constitution by permitting the use of punch card ballots. (R. 1, Complaint; Appx. at 49). The Plaintiffs eventually filed a second amended complaint against Ohio's Secretary of State, the Ohio Board of Voting Machine Examiners, and four county boards of elections. (R. 119, Second Amended Complaint; Appx. at 199). The Plaintiffs alleged that Ohio's use of punch card ballots violated the Voting Rights Act as

well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* Basically, the Plaintiffs contended that African-Americans in Ohio were denied the right to vote in violation of the Voting Rights Act because punch card ballots had a slightly higher non-voted ballot rate than other types of voting machines. That is, it was more frequent that punch card ballots did not show a vote in one or more of the contested races. In essence, the plaintiffs claimed that the higher non-voted ballot rate with punch card ballots did not result from voters deciding not to vote in a given race, but rather occurred because of voters' problems in recording their choices on the punch cards (e.g., hanging chads, incomplete punch-outs, etc.). Instead of couching this claim as vote dilution, the Plaintiffs argued that African Americans were simply denied the right to vote. Finally, the Plaintiffs alleged that the use of punch cards also violated the Due Process and Equal Protection Clauses.

After a four-day bench trial replete with expert testimony, the District Court determined that the Plaintiffs had failed to meet their burden of proof on any claim, (R. 275, Opinion), and the Court granted judgment to all Defendants. (R. 276, Judgment Entry).

On appeal, the panel here reversed the district court's decision, entered judgment for the Plaintiffs on their Equal Protection Clause claim and vacated and remanded the Plaintiffs Voting Rights Act Claim for further proceedings.

Additionally, the panel reversed the district court's decision on class certification, determining that Plaintiffs met the requirements of Rule 23 (a) and (b).

REASONS FOR GRANTING THE PETITION

A. Ohio's Ability to Administer Its Elections Is An Issue of Exceptional Public Importance.

States, and their local county boards of elections, have a vital interest in determining exactly what type of voting machine is used within their own individual jurisdictions. The United States Constitution empowers States to regulate the "time, place, and manner of holding elections." U.S. Const. Art. I. § 4. The States have been granted the same power to "appoint, in such Manner as the Legislature thereof may direct" Presidential electors. U.S. Const. Art. II § 1. Thus, States may "enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). States, therefore, have the authority to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983).

Although HAVA¹ places certain requirements on the States, HAVA did not strip the States of their authority to select different manufacturers and different

models of voting machines (to suit a particular jurisdiction's needs), as long as the voting machines selected fit into one of two broad categories of voting machines, as mandated by HAVA, such as PCOS (precinct count optical scan) or DRE (direct recording electronic). Yet, the panel's decision unduly restricts that authority, in that it would arguably force Ohio to outfit all of its eighty-eight counties (and the thousands of polling locations therein) with one specific voting machine, identical throughout the State by make, model and year.

The State's authority over the general machinery of elections includes the authority to select the specific type of voting machine to use – yet the decision below unduly restricts that authority. Although the State of Ohio no longer uses the specific punch card machines at issue, the panel's decision will indefinitely impair our ability to choose new voting machines, and will more broadly impair our authority over electoral structures. That is why further review is needed, as questions regarding a State and its local board of elections' ability to administer elections are important questions of federalism and implicate vital State interests. *Storer v. Brown*, 415 U.S. 724, 730 (1974). Perhaps nowhere is the State's authority to administer elections more crucial than in the selection of the voting equipment. New technology and financial demands are challenges that each State

¹ In response to both the Help America Vote Act (“HAVA”), 42 U.S.C. §15301 *et seq.* and various changes in Ohio law, the State of Ohio no longer will use punch cards for any election.

must deal with in preparing for elections. As new technology purports to ease the administration of elections, each local board of elections must make their own decisions and allocate resources accordingly. While HAVA seeks to establish requirements and provide funding to local boards of elections across the United States, localities will still maintain control of the administration of elections.

The panel decision destroys the ability of any county to choose one type of voting equipment over another. The dissent pointed out this scenario from the underlying evidence. Lucas County, which used lever machines, had a residual vote rate of 0.4% while Ross County, which used electronic voting, had a residual vote rate of 1.2% for the 2000 presidential election. *Id.* at *140. “Do these numbers dictate that, in a suit by a voter from Ross County, the county’s decision to use electronic-voting machines should be reviewed under a strict scrutiny standard?” asked Judge Gilman. *Id.* at 140, 141. We share his curiosity and we face the costs and consequences if the answer is yes.

The panel opinion opens the door for federal court intervention into the administration of local elections. “Any incremental change that leads to a potential disparity in voter-error rates becomes susceptible to legal challenges in which the State must show that its chosen practice or regulation is ‘necessary to promote a compelling state interest.’” *Id.* at 141, quoting *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999). This decision, therefore, tramples on federalism by imposing a

single court-imposed standard on all local boards regarding matters that are clearly matters of “exceptional public importance,” where one size does not fit all. See FRAP 35(a)(2).

While the plaintiffs-appellants focused on the statistical voting differences of only four counties in Ohio, the overall facts in this case are similar to other states that are in the midst of updating voting equipment and implementing HAVA requirements. As technology changes, laws have been implemented to pass controls for the technology. These laws allow states to continue to administer elections. The panel decision takes from Ohio’s local boards of elections the power to administer Ohio elections and instead places it in federal courts.

The panel opinion will irreparably harm this Circuit’s States and other states in administering elections. In light of the devastating practical and doctrinal effects of striking the use of particular voting equipment, the administering of elections merits the entire Court’s attention. No matter how the Court ultimately rules, this case certainly involves issues of “exceptional public importance.”

B. The Panel’s Use of Strict Scrutiny Review Conflicts With Precedent.

In adopting plaintiffs’ novel theory and creating new Equal Protection Clause jurisprudence, the stunningly broad panel opinion calls into question the constitutionality of every piece of voting equipment in the country, as well as the state’s “compelling interest” in using that equipment. The panel’s unwarranted

departure from existing Equal Protection Clause precedent warrants review. That is especially true in light of the panel's heavy reliance on *Bush v. Gore*, 531 U.S. 98 (2000), a case that the Supreme Court said should be limited to its facts, and on a circuit court opinion that was later disavowed by the circuit that authored it.

The panel treated the question of the appropriate standard of review for voting technology challenges as well-settled. In doing so, however, the panel erred on two fronts: (1) the standard of review for such challenges, as the dissent noted, is *not* well-settled, and (2) the cases the majority relied on deal only with general notions of "equality of voting power" in factual settings easily distinguishable for the voting technology challenge here. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 381 (1963). Indeed, from *Sanders* to *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court has *never* applied strict scrutiny to a voting-rights case addressing voting equipment. Rather, the "flexible framework" *Burdick* establishes is the leading Equal Protection Clause precedent in evaluating state voting laws and practices.

Nor does the panel's reliance on *Bush v. Gore* support its conclusion, and indeed, such reliance supports the need for en banc review. The Supreme Court itself noted that that decision was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Bush v. Gore*, 531 U.S. at 109. And the Supreme Court has never

since cited the case. The plaintiffs-appellants, however, heavily relied on *Bush v. Gore* to advance the new Equal Protection Clause theory reflected in the panel opinion.

Moreover, the panel opinion buttresses its reliance on *Bush v. Gore*, a case of questionable precedential value, by relying on another circuit court case that is also of questionable precedential value. In particular, the panel looked to *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894 (9th Cir. 2003) (per curiam) (*Shelley I*), a case the en banc Ninth Circuit itself largely reversed, see *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam *Shelley II*). In *Shelley I*, the court enjoined the use of punch cards based on a claim—nearly identical to that advanced here—that “using error-prone voting equipment in some counties, but not in others will result in votes being counted differently among the counties.” *Id.* at 895. The en banc court, however, vacated that opinion.

Indeed, in a later case, the Ninth Circuit repudiated the *Shelley I* standard when it examined the question of whether an electronic voting machine that does not provide a paper receipt violated the Equal Protection or Due Process clauses. *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003). Weber asked the court “to adopt a rule that the right to vote is infringed when the ease with which ballots can be manipulated is greater than the ease with which the manipulation can be detected.”

Id. at 1104. While recognizing that the right to vote is fundamental, the *Weber* Court went on to explain that “every electoral law and regulation necessarily has *some* impact on the right to vote, yet to strike down every electoral regulation that has a minor impact on the right to vote would prevent states from performing the important regulatory task of ensuring that elections are fair and orderly.” *Id.*

The court then succinctly summed up the problem that elections officials face when determining which voting machines to use. Paper ballots, such as punch cards, are prone to overvotes, undervotes, or hanging chads. Touchscreen systems remedy most of those problems, but are subject to the hypothetical concern of programming errors or computer viruses. *Id.* at 1106. The court, therefore, was forced to admit that “[n]o balloting system is perfect.” *Id.* Thus, the *Weber* Court applied rational-basis review to the decision to use electronic voting machines that do not have a paper backup. “So long as their choice is reasonable and neutral, it is free from judicial second-guessing.” *Id.* at 1107.

Against this legal backdrop, the panel opinion here errs both in the Equal Protection Clause view it rejects, and the view it adopts. First, the panel flatly rejected the idea that rational-basis review was appropriate regarding the administration of elections, and it applied strict scrutiny instead. See Panel Op. at 16. And in rejecting the “flexible framework” approach articulated by the Supreme Court, the panel runs square into the Supreme Court’s observation that

applying “every voting regulation to strict scrutiny...would tie hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433.

While the panel’s willingness to reject *Burdick* and to create new Equal Protection Clause precedent is troubling enough, even worse is the new test that has been formulated to analyze the administration of elections and new voting equipment. The panel opinion suggests that differential undervoting rates are Equal Protection violations. A State violates the Equal Protection Clause, the panel says, if there is a “greater likelihood” that some votes will be counted than others. But the decision gives no guidance as to what level of difference is required to establish a claim. While an exact equation may not be possible, some guidance must be provided to determine what a “greater likelihood” means.

Moreover, with an inexact approach to determining how much error is too much error, any and all errors will lead to litigation and will require States to justify every change in the administration of elections and voting equipment. And on that front, the panel provides no guidance as to what would be sufficient for a State to meet its burden under the strict scrutiny standard. Without more guidance, every State will be immersed in litigation during every election, an increasingly troublesome phenomenon.

While such litigation is perhaps an inevitable result of a closely-divided

electorate, vague guidelines like those supplied in the panel opinion only exacerbate the trend. The States need a clear exposition of Equal Protection constraints if they are to supervise their elections appropriately, and the panel opinion simply fails to provide that vital guidance.

C. The Panel's Decision on the Voting Rights Act Also Merits Review.

In addition to its novel Equal Protection holding, the panel also adopted a novel Voting Rights Act framework. In doing so, the panel decided two issues that warrant review from the entire court. First, the panel, in a question of first impression, determined that plaintiffs could use the Voting Rights Act to make a technology claim (i.e., a claim that the use of a certain voting technology had a differential impact on certain voters). No other court has ever applied the Voting Rights Act in that context. And before the Sixth Circuit commits to that approach on this vitally important question, the court as a whole should consider it.

Second, and more important, even assuming the Voting Rights Act applies to such claims, the panel adopted a flawed Voting Rights Act framework that conflicts blurs the line between vote denial claims and vote dilution claims. In particular, before the decision below, it was uniformly understood that there were two analytically distinct categories of cases under § 2 of the VRA: (1) vote denial claims and (2) vote dilution claims. The panel here determined that the plaintiffs' technology claims were correctly treated as vote denial claims, but then relied on

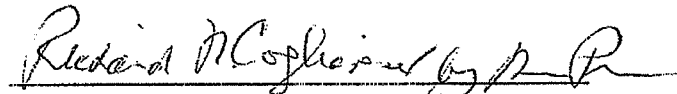
vote dilution case law (in particular, reapportionment case law) in analyzing those claims. In doing so, the court muddied, if not eviscerated, the boundaries between two previously distinct categories. The full court's attention is warranted before this Circuit elects to merge these two previously distinct categories.

CONCLUSION

For the above reasons, Ohio respectfully asks the Court to grant the petition, and undertake additional review of this decision, either by the panel or by the court as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *State Defendants' Petition for Rehearing With Suggestion for Rehearing En Banc* has been served by regular U.S. mail, this 5th day of May, 2006 upon the following:

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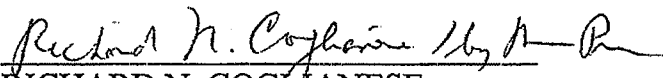
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