No. 18-1470

IN THE
Supreme Court of the United States

JIM FEEHAN,
Petitioner,
v.

RICK MARCONE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Connecticut Supreme Court's refusal to remedy an unconstitutional election violated a fundamental precept of our democracy. "[T]he right of qualified voters… to cast their votes effectively… rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). The voters and the candidates had a constitutional right to a fair election. *See Burdick v. Takushi*, 504 U.S. 428, 438 & n.8 (1992). That did not happen here. The Connecticut Supreme Court wrongly held that, absent intentional misconduct, it could not remedy the unconstitutional election for State Representative in the 120th Assembly District. However, as the Sixth Circuit has correctly recognized, "intentional discrimination" is not a prerequisite to the judiciary's ability to remedy a *Bush v. Gore* violation. In addition, the Connecticut Supreme Court's timidity in failing to interject when the House of Representatives' majority caucus unabashedly protected the illegitimate seat of one of its own members has made a mockery of the constitutional right to a fair election.

Justice demanded judicial intervention to remedy this unconstitutional election and to give the people of the 120th Assembly District the opportunity to choose their state representative. But, the Connecticut Supreme Court refused:

> …to remedy a constitutional violation because it [thought] the task beyond judicial capabilities.

> And not just any constitutional violation. The [distribution of incorrect ballots and refusal to hold a new election] in th[is] case[ ] deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the [refusal to hold a new election] here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. [The Connecticut Supreme Court's refusal to act] enabled politicians to entrench themselves in office as against voters' preferences. [It] promoted partisanship above respect for the popular will. [It] encouraged a politics of polarization and dysfunction. If left unchecked, [Respondents] like the ones here may irreparably damage our system of government.
>
> And checking them is not beyond the courts….

Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (*Kagan, J., dissenting*).

The Petition for a *writ of certiorari* should be granted.

ARGUMENT

I. THE COURTS' ABILITY AND OBLIGATION TO REMEDY AN UNCONSTITUTIONAL ELECTION IS NOT DEPENDENT ON THE "INTENT" OF THE GOVERNMENT OFFICIALS

The issue here is whether a *Bush v. Gore* equal protection violation requires proof of intentional discrimination. Citing *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970) and *Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996), the Connecticut Supreme Court and the Respondents argue that Second Circuit law is that any voting rights violation requires "intentional or purposeful discrimination." *Feehan v. Marcone*, 331 Conn. 436, 481 (2019); Respondent (Young) Br. at 6-8; Respondents (Merrill) Br. at 15-19. However, the doctrinal underpinning of those Second Circuit decisions is derived from a seventy-five year-old decision in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). So it is important to consider whether that decision has any current import.

Snowden is no longer good law. The District Court on remand in *Hunter v. Hamilton County* explained that the Sixth Circuit had relied on *Bush v. Gore* in rejecting an argument about the continued viability of *Snowden* (the same argument advanced by the Respondents here):

> Next, Defendants argue that Plaintiffs failed to state an equal protection claim against the Board because they did not allege and cannot prove that the Board acted with "intentional or purposeful discrimination," citing *Snowden v.*

Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944). The Sixth Circuit expressly rejected this argument, saying:

> The Supreme Court has held in cases since *Snowden* that the Equal Protection Clause protects the right to vote from invidious and arbitrary discrimination. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30, 34, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).... In particular, the Court has spoken regarding the requirements of the Equal Protection Clause with respect to claims that a state is counting ballots inconsistently. *See Bush v. Gore*, 531 U.S. at 104–05, 121 S.Ct. 525 ("Equal protection applies ... to the manner of [the] exercise [of the right to vote]. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.") (citing *Harper v. Virginia State Bd. of Elections*], 383 U.S. 663 at 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)); id. at 105, 121 S.Ct. 525 ("The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."). Of great importance, a showing of intentional discrimination has not been required in these cases.

> Consequently, **we reject the defendant's argument that there can be no violation of the Equal Protection Clause here without evidence of intentional discrimination.**
>
> *Hunter*, 635 F.3d at 234 n. 13. It is therefore clearly established that to succeed on their equal protection claim, Plaintiffs must show only that the Board's actions resulted in the arbitrary and disparate treatment of the members of the electorate.

Hunter v. Hamilton County, 850 F. Supp. 2d 795, 834–35 (S.D. Ohio 2012) (internal brackets omitted; emphasis added). At best, the Respondents' argument demonstrates uncertainty about which holding – the Sixth Circuit's or the Connecticut Supreme Court's – is correct on the issue of whether proof of intentional discrimination is required for *Bush v. Gore* claims.[1] In the Petitioner's view, the

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[1] The Connecticut Supreme Court and Respondents also rely on *Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005) to say that only "an intentional act by a government official directed at impairing a citizen's right to vote" would be unconstitutional. *Feehan*, 331 Conn. at 476; Respondent (Young) Br. at 4-6, 9; Respondents (Merrill) Br. at 15-19. In *Shannon*, the Second Circuit had before it a due process claim, not an equal protection claim, so it could not have addressed the need for intentional discrimination for *Bush v. Gore* claims. This confusion may explain why, despite *Bush v. Gore*, the Connecticut Supreme Court opined that "the United States Supreme Court has not spoken" on the issue of whether "intentional" discrimination is required. *Feehan*, 331 Conn. at 478. In any event, *Shannon*'s analysis relies on *Powell* and *Gold* which, as discussed above, are both based on the obsolete analysis in *Snowden*.

Sixth Circuit is correct and the Connecticut Supreme Court is wrong. The absence of intentional misconduct cannot purify an unconstitutional election.

Snowden supports the Respondents. The Court in *Snowden* held:

> Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. … But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other….

Snowden v. Hughes, 321 U.S. at 11. But *Snowden* was decided in 1944. This Court was still almost twenty years away from recognizing that the judiciary has an obligation to protect the constitutional principle of "one-man, one-vote." *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). Tellingly, since *Bush v. Gore* was decided, which itself did not cite *Snowden*, this Court has not once cited *Snowden*, even in cases involving equal protection and the right to vote. *See Rucho v. Common Cause*, 139 S.Ct. 2484 (2019); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bush v. Gore*, 531 U.S. 98 (2000).

Outside of relying on the erroneous claim that *Snowden*'s "intentional discrimination" requirement is still good law, neither the Respondents nor the Connecticut Supreme Court explain how requiring intentional conduct makes any sense in the context of a *Bush v. Gore* claim. In a traditional equal protection claim, the constitutional infringement can be remedied with money damages. *See*, *e.g.*, *Tapalian v. Tusino*, 377 F.3d 1, 8 (1st Cir. 2004). Because these damages are being levied against the defendant(s), there is generally a scienter requirement. *See City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391 (1982).

However, the "denial of the right to vote constitutes a strong showing of irreparable harm, and one which cannot be compensated by money damages." *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016); *see also Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Coltharp v. Herrera*, 584 Fed. Appx. 334, 340 (9th Cir. 2014); *Georgia State Conference of the NAACP v. Fayette County Bd. of Com'rs*, 118 F. Supp. 3d 1338, 1347 (N.D. Ga. 2015). Therefore, the scienter requirement that exists for a money damages award is divorced from the Court's obligation to remedy constitutional deprivations of the right to vote and the right to a fair election. By failing to appreciate and fulfill this obligation, the Connecticut Supreme Court erred.

In *Bush v. Gore*, this Court understood that governmental intent has no relevance when evaluating the constitutional right to vote and the candidates' right to a fair election. For this reason,

"intentional discrimination" is not discussed. The failure of the Connecticut Supreme Court and some other lower courts to correctly follow *Bush v. Gore*; *see*, *e.g.*, *In re Contest of General Election Held on November 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453, 466 (Minn. 2009); has now created some confusion about whether intentional conduct is required for equal protection claims involving the right to vote.[2]

Professor Richard L. Hasen, one of the nation's leading election law scholars, provides an analysis of how *Bush v. Gore* claim should be evaluated. *See* Richard L. Hasen, "Bush v. Gore and the Future of Equal Protection Law in Elections," 29 *Fla. St. U.L. Rev.* 377 (2001). He presents five hypothetical scenarios about potential *Bush v. Gore* violations, two of which are relevant here. *Id*. at 393-398. In one hypothetical, voters at some polls use punch cards while others use optical scanning. Voters are assigned to their polls based on where they live. The rejection rate of punch card votes is significantly higher than for optical scanning votes. This is a *Bush v. Gore* violation because the different voting systems and error rates treat voters differently based on where they live and makes it less likely that one group of voters will have their votes counted. "[I]t

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[2] Commentators have noted that based on *Bush v. Gore* and the absence of an "intentional discrimination" requirement, a poll worker's error can rise to the level of a constitutional violation. *See*, *e.g.*, Lauren Watts, "Reexamining Crawford: Poll Worker Error As A Burden on Voters," 89 *Wash. L. Rev.* 175, 202 (2014); Richard L. Hasen, "The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore," 81 *Geo. Wash. L. Rev.* 1865, 1868 (2013); Daniel Tokaji & Owen Wolfe, "Baker, Bush, and Ballot Boards: The Federalization of Election Administration," 62 *Case W. Res. L. Rev*. 969, 993 (2012).

appears irrelevant that the choice of voting machine technology was not the product of intentional discrimination or animus against any voters or groups of voters…. In *Bush v. Gore*, the Court did not base its holding on intentional discrimination by Florida officials (or the Florida Supreme Court)." *Id.* at 395.

In another hypothetical, voters in one county are given "butterfly ballots," the design of which leads to voter confusion. This is a *Bush v. Gore* violation. "[V]oters are being treated differently depending upon the county in which they live. Imagine if voters in one county could walk right up to the polls, but voters in another county had to walk up a steep hill to get to the polls. The confusing ballot is like the steep hill, and it should not matter that election officials picked the hill because they thought it would be a good place to vote without distractions." *Id.* at 397.

Professor Hasen's hypotheticals explain why the instant election was unconstitutional. Voters in the 120th Assembly District who voted at seven of eight poll locations were able to vote for their state representative. Voters were assigned to these poll locations based on where they live. Voters assigned to the eighth poll location (Bunnell High School) were arbitrarily denied the right to vote for their state representative. This is a clear *Bush v. Gore* violation. The intent of the election officials is irrelevant.

"The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on

equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. at 104–05. The Connecticut Supreme Court wrongly engrafted into our Constitution an "intentional discrimination" requirement for *Bush v. Gore* claims. The plaintiff and the voters of the 120th Assembly District were wrongly denied their constitutional right to a fair election.

II. THE CONNECTICUT SUPREME COURT WRONGLY REFUSED TO REMEDY THE UNCONSTITUTIONAL ELECTION

The Democratic Caucus in the Connecticut House of Representatives brazenly used one-party rule to protect an illegitimate seat for one of its members. *See* Petition 11-14 & n.6&7. The Petitioner sought redress from the Connecticut Supreme Court through a motion for re-argument and/or reconsideration, but the motion was denied. The Respondents make no effort to defend their misconduct. Indeed, the misconduct is indefensible. Instead, the Respondents attempt to hide behind the mistaken argument that this Court has no authority to review the Petitioner's claims because they were raised in a timely filed post-decision motion.

This Court has repeatedly held that federal questions presented to the state courts for the first time in a petition for re-hearing or re-argument are "sufficiently well presented to the state courts to support [this Court's] jurisdiction." *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988); *see also Hathorn v. Lovorn*, 457 U.S. 255, 264-65 (1982); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 677–78 (1930). That the Connecticut Supreme Court refused

to resolve a federal constitutional claim that was presented to it in a timely filed post-decision motion does not bar this Court from remedying the violation.

This Court should grant the Petition to address and cure a blatantly unconstitutional election and process that has been infected by Connecticut's one-party rule. Absent this Court's intervention, the tyranny of Connecticut's majority party will drown the basic constitutional right to a fair election. This is repugnant to our Constitution:

> The Framers also understood that unchecked majorities could lead to tyranny of the majority.... The Framers believed that a proper government promoted the common good. They conceived this good as objective and not inherently coextensive with majoritarian preferences.... For government to promote the common good, it had to do more than simply obey the will of the majority.**... Government must also protect fundamental rights.** ...

Evenwel v. Abbott, 136 S. Ct. 1120, 1138 (2016) (*Thomas, J.*, concurring) (emphasis added; internal citations omitted). The Connecticut Supreme Court was wrong to defer to a kangaroo court of the Connecticut House of Representatives and to cede its obligation to protect a right as important and fundamental as the constitutional right to a fair election. *See Tenney v. Brandhove*, 341 U.S. 367, 382 (1951) (*Black, J.*, *dissenting*) ("May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and

their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?")

The Petition for a Writ of Certiorari should be granted.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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