No.

IN THE

Supreme Court of the United States

BILLIE FAYE KEYES; JOSHUA ALLEN; COURTNEY RENA FORTUNE; KARLI FORD MATTHEWS; SHELTON S. MATTHEWS, PETITIONERS

v.

PHILIP GUNN; MARK BAKER; RICHARD BENNETT; CHARLES JIM BECKETT; BILL DENNY; THE MISSISSIPPI HOUSE OF REPRESENTATIVES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question:

> If state legislators intentionally discard ballots to swing an election, may the disenfranchised voters bring suit in federal court to enforce the guarantee of equal protection (As stated by the District Court in its Memorandum Opinion and Order on January 27, 2017, Appendix 2, p. 18.a, ROA.169.)?

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OPINIONS BELOW

The United States District Court for the Southern District of Mississippi denied Motions to Dismiss on absolute immunity, qualified immunity, lack of standing, failure to state a claim and immunity under the Eleventh Amendment in an Opinion and Order dated January 27, 2017. That opinion is Appendix 2 to the Petition. The United States Court of Appeals for the Fifth Circuit found lack of jurisdiction and dismissed in an opinion dated May 11, 2018 revised on May 16, 2018. That revised opinion is Appendix 1 to the Petition. The Fifth Circuit denied rehearing on June 12, 2018. Appendix 3 to the Petition.

JURISDICTION

Jurisdiction of this Petition for Writ of Certiorari is vested in the Court pursuant to 28 U.S.C. §1254(1). The Petition has been timely filed within ninety (90) days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit Court of Appeals on June 12, 2018.

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and], the laws of the United States . . . (emphasis added)

28 U.S.C. §1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343(a)(3):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> . . .
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

STATEMENT

A citizen in our democratic form of government has two ways in which he or she may directly participate: (1) by voting and (2) by serving on a jury.

The decision of the Fifth Circuit Court of Appeals denigrates the right to vote. The Plaintiffs are all voters whose right to vote is in question. Without question, the vote of one of the Plaintiffs was unconstitutionally discarded.

The United States District Court for the Southern District of Mississippi denied Defendants' Motion to Dismiss which alleged, among other things, lack of jurisdiction. The District Court posed the issue before the Court as:

> This case presents the question: If state legislators intentionally discard ballots to swing an election, may the disenfranchised voters bring suit in federal court to enforce the guarantee of equal protection? Yes, they can. Appendix 2, p. 18a, ROA.169

The Fifth Circuit reversed.

It found that there was no jurisdiction because the case presented an election contest not authorized under 28 U.S.C. §1344. But this case was not brought under §1344. It was brought under 28 U.S.C. §1343(a)(3) which grants jurisdiction to federal courts to consider cases arising under the Constitution. The federal right to vote arises under the Constitution.

No candidate for office was a party. Plaintiffs did not seek to have the Court declare the winner of an election. That had already been done pursuant to Mississippi state law and Blaine "Bo" Eaton was declared the winner in House of Representatives District No. 79. He had been sworn in and seated as a member of the Mississippi Legislature. It was after that that a Special Committee and the House of Representatives threw out five of nine affidavit ballots without identifying whose ballot was discarded or why. Only five votes needed to be disqualified in order to support a claim that Mr. Eaton had not already been

lawfully elected to the legislature.

REASONS FOR GRANTING THE PETITION

The federal courts have broad powers as courts of equity. Typically only after a hearing on the merits is a court able to fashion an appropriate equitable remedy. Here, the Plaintiffs are denied the opportunity to present their case. The ruling that there is no federal jurisdiction is consistent with the comments of Professor Erwin Chemerinsky in his recent book, Closing the Courthouse Door (Yale University Press 2017). He comments that "far too often legislators and officials have a strong incentive not to comply with the Constitution" and that "those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights." The Defendants in this case have failed to comply with the United States Constitution. A federal court is the place that a violation of the United States Constitution should be rectified.

I. The Fifth Circuit Erred in Holding that this Case is an Election Contest

The Fifth Circuit held that this case presents an election contest brought pursuant to 28 U.S.C. §1344. But the Complaint is brought pursuant to 28 U.S.C. §1343(a)(3):

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right , privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal

> rights of citizens or of all persons within the jurisdiction of the United States.

Neither the proclaimed winner or loser of an election is named as a party. The voters whose constitutional rights were violated are the plaintiffs. The persons alleged to have violated those constitutional rights are defendants. In 28 U.S.C. §1344 the Congress granted jurisdiction to all election contests where the right to vote was denied because of race, color or previous condition of servitude – whether those elections were local, state or national, except presidential electors, congress and state legislatures.[1] Congress also declared district courts to have "original jurisdiction of all civil actions arising under the Constitution . . . of the United States." 28 U.S.C. §1331. The panel decision does not address why the federal constitutional right to vote does not arise under the Constitution of the United States.

The district court, in fact, had already addressed that it did not have jurisdiction to hear this case "solely as an election contest," citing *Hubbard v. Ammerman*, 465 F. 2d 1169, 1176 (5th Cir. 1972). (Opinion, Appendix 2, p. 23a, ROA 17-60097.173) The district court, however, declared that it did have jurisdiction to consider denial of plaintiffs' federal constitutional right

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1 The Fifth Circuit itself has described 28 U.S.C. §1344 as the only Act of Congress "conferring jurisdiction" to hear any election under the enumerated circumstances. *Hubbard v. Ammerman*, 465 F. 2d 1169, 1180 (5th Cir. 1972). And see *Powell v. McCormick*, 395 U.S. 486, 516 (1969) ("There is absolutely no indication that the passage of this Act [U.S.C. §1344] evidences an intention to impose other restrictions on the broad grant of jurisdiction in §1331.")

to vote as a denial of equal protection, a claim arising under the Constitution of the United States, pursuant to 28 U.S.C. §1331.

The Fifth Circuit was misguided in its reliance on *Hubbard v. Ammerman*, 465 F. 2d 1169, 1176 (5th Cir. 1972) as a precedent for lack of jurisdiction. That case originated in Texas state courts solely as an election contest over a county court judgeship. While the election contest was on appeal in state court, a class action complaint was filed in federal court by voters who contended not that they had been deprived of the right to vote but that their votes had been diluted by ballot box stuffing. *Hubbard* rejected jurisdiction under §1344 because (1) none of the plaintiffs claimed he was entitled to recover possession of office and (2) the claims of ballot box stuffing was "a question of state law." There was no claim of a violation of equal protection by denial of the federal constitutional right to vote. That is the only question before the Court in this case.

Nor do the federal appeals court decisions cited by the Fifth Circuit (Opinion, Appendix 1, p. 10a) support its "election contest" result. *Curry v. Baker*, 802 F. 2d 1302, 1316 (11th Cir. 1986) states that a constitutional claim "must go well beyond the ordinary dispute over the counting and marking of ballots." *Curry* spoke to a trial which considered the counting and marking of ballots by a state party executive committee. This case is not about counting and marketing of ballots. It is about, as the district court correctly identified the question:

> . . . if state legislators intentionally discard ballots to swing an election, may the disenfranchised voters bring suit in federal court to enforce the guarantee of equal protection?

Hutchison v. Miller, 797 F. 2d 1279, 1285 (4th Cir. 1986) involved unsuccessful candidates contesting election results and seeking monetary damages. This case seeks equitable redress for deprivation of citizens' federal constitutional right to vote, not a claim by any candidate. The complaint does not seek monetary damages. Complaint ¶ 24, ROA.17-60097.17. *Gamza v. Aguirre*, 619 F. 2d 449, 453-54 (5th Cir. 1980) noted that the "complaint contended only that an inadvertent error denied them equal protection." It is no "inadvertent error" upon which Plaintiffs here rely but an egregious manipulation of the election process.

II. The Decision Denigrates the Right to Vote

The United States Supreme Court has consistently protected the right to vote:

> Every voter's vote is entitled to be counted once. It must be correctly counted and reported. . . . The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections. *Gray v. Sanders*, 372 U. S. 368, 380 (1963).
>
> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are

> illusory, if the right to vote is undermined. *Wesberry v. Sanders*, 376 U. S. 1, 17 (1964).
>
> We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U. S. 50, 56 (1970).
>
> 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. 98, 104-05 (2000).

III. The Decision Ignores the Courts' Equitable Powers

> The United States Constitution provides:
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and], the laws of the United States . . . Article III, §2. (emphasis added)

The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits . . . in equity." 1 Stat.78. The United States Supreme Court has long

since held that the jurisdiction thus conferred "is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568, 59 S. Ct. 657, 83 L. Ed. 987 (1939).

In Principles of Equity, Lord Kames discusses the purposes and power of equity:

> . . . a court of equity is necessary, first, to supply the defects of common law, and next, to correct its rigour or injustice. The necessity in the former case arises from a principle, That where there is a right, it ought to be made effectual; in the latter, from another principle, That for every wrong there ought to be a remedy. In both, the object commonly is pecuniary interest. But there is a legal interest which is not pecuniary; and which, for the sake of perspicuity, ought to be handled separately.

Henry Home, Lord Kames, Principles of Equity, 39 (3d ed 1778)[2]

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2 Lord Kames discussed the case of a qualified freeholder excluded from the roll by the failure of other county freeholders to meet:

> . . . there remain many rights established by law, and wrongs committed against law, that are not pecuniary; which being left unappropriated, must be determined in a court of equity: for the great principles so often above mentioned. That where there is a right it ought to be made effectual, and where there is a wrong it ought to be

The remedies prescribed in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) emanated from the court's equitable powers:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

More recently, the United States Supreme Court stated that "When federal law is at issue and the 'public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Kansas v. Nebraska*, 135 S.Ct. 1042, 1053 (2015).

As discussed above, there can hardly be any matter of greater public interest in a democracy than the right to vote. In this case plaintiffs clearly plead for equitable relief:

> The plaintiffs seek only such equitable and prospective remedy, including declaratory or injunctive relief, as the court deems appropriate to redress the violation of the federal

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repressed.

. . .

. . . it is incumbent upon the court of session to redress this wrong, by ordering the freeholders to meet under a penalty.

Kame, Principles of Equity at 274-75.

> constitutional rights of the plaintiffs to equal protection of the law. Complaint, ¶ 24, ROA.17-60097.17

The plaintiffs made other claims, including that the candidate for whom they voted be restored to his position in the Mississippi House of Representatives. That candidate, Blaine "Bo" Eaton, had been declared the winner of the election pursuant to state law. He had been sworn in as a member of the House of Representatives and was serving in that office when Plaintiffs' votes were discarded. Rule 8(a)(3) of the Federal Rules of Civil Procedure authorizes pleading in the alternative or for a different type of relief.

V. How and Why the Plaintiffs Votes Were Disenfranchised

The Fifth Circuit opinion stated that the Plaintiffs' "claims are not pellucid," and cites to the different treatment of nine affidavit ballots, five of which were rejected and four not rejected. Any lack of clarity demonstrates the egregious conduct of the Mississippi legislative committee which "voted to unseat Mr. Eaton along party lines to discard five of the nine affidavit ballots counted by Smith County election commissioners and the Secretary of State." (Opinion, Appendix 1, p. 8a, ROA.17-60097.170) Their purpose was to create a supermajority in the House.[3] The

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3 With his victory, Eaton blocks the GOP from having a supermajority in the House, a three-fifths margin that would have allowed Republicans, in theory, to make multimillion-dollar decisions about taxes without seeking help from Democrats . . . . A Tullos victory would have given Republicans 74 seats in the 122-member House.

legislative committee only needed to discard five ballots. The vote of at least one of the five Plaintiffs in this case had to be rejected. The legislative committee refused to divulge the identity of the five voters whose ballots had been rejected. Obviously, it would have been transparent had the legislative committee identified which ballots it discarded and why and which ballots it did not discard and why. Transparency was not the objective of this legislative committee. The grossly unfair effect is illustrated by the case of one of the Plaintiffs, Joshua Allen. As stated in the Complaint:

> Mr. Allen is a qualified voter of Smith County, eligible to vote for Representative of District 79. He appeared to vote at the precinct in which he resided on November 3, 2015 but his name was not on the poll book. He voted by affidavit ballot as authorized by Miss. Code §23-15-13. The Smith County Election Commission thereafter investigated Mr. Allen's status and determined that the Statewide Election Management System (SEMS) computer had erroneously transferred Mr. Allen's voter registration to Webster County, Mississippi. The Smith County Election Commission accepted the affidavit ballot. Mr. Allen, however, does not know if his vote was one of the five affidavit ballots thrown out by the Special Committee and Mississippi House of Representatives because there is no identification of the ballots discounted. Mr. Allen voted for Mr. Eaton.

Opinion, Appendix 2, p. 19a-20a, quoting BUSINESS INSIDER, Nov. 21, 2015, ROA.17-60097.170

Complaint ¶ 10, ROA.17-60097.10

The legislative committee attempted to disguise its obvious purpose to "swing an election" by citing to a case which addressed voter registration in a municipality[4] pursuant to a statute (Miss. Code §23-15-14) which had been repealed. The case, *Rush v. Ivy*, 853 So. 2d 1226, 1234 (Miss. 2003) was cited by the Fifth Circuit without discussion of its dubious precedential value. Opinion, Appendix 1, p. 12a.

The district court opinion was correct in holding:

> Taking these allegations as true, as the Court must at this stage, they state a claim that defendants intentionally treated plaintiffs differently from others voting by affidavit ballot, and there was no rational basis for the disparate treatment beyond an impermissible desire to alter the outcome of the election.

District Court Opinion, Appendix 2, p.32a, ROA.17-60097.180

VI. What is the Remedy

The Complaint appeals to the equitable power of the federal courts. As discussed above, equity developed as a means to counter the rigid application of the Common Law. Equity is elastic. An equitable result typically rests on the magnitude of the wrong at issue. This case is before the Court on motion to dismiss and

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4 Voters in a legislative race must register in a county, not a municipality.

Plaintiffs have not had the opportunity to develop a record which demonstrates the magnitude of the wrong.

The Fifth Circuit itself has exercised its equitable powers to set aside an election, including the power to: "(1) schedule new primaries and general elections, (2) set a new cutoff date for registration, and (3) set new cutoff dates for filing as candidates for the primaries." *Hamer v. Campbell*, 358 F. 2d 215, 224 (5th Cir. 1966).

That remedy has been described as "drastic, if not staggering." Kenneth W. Starr, "Federal Judicial Invalidation as a Remedy for Irregularities in State Elections," 49 *N.Y.U. Law Review* 1092, 1095 (1974), quoting *Bell v. Southwell*, 376 F. 2d 659, 662 (5th Cir. 1967). As Mr. Starr notes, however, a district court in equity is not bound to a single remedy:

> The federal judge sitting as a Chancellor in equity may detect malfeasance, perhaps of an egregious nature, but nonetheless stay his hand in providing full relief.

Starr, 49 *N.Y.U. Law Review* at 1099.

The Plaintiffs here propose no "drastic" remedy. They ask for equitable relief, and point to one possible equitable result that the court reject the unconstitutional denial of Plaintiffs' right to vote and validate the result of the election as certified by the Smith County Election Commission, accepted by the Secretary of State of the State of Mississippi; and determined in proceedings conducted by the Governor

and Secretary of the State of Mississippi pursuant to Mississippi state law. Miss. Code §23-15-605, Mr. Eaton had already been determined to be the lawful representative of House District 79. He was sworn in and seated as a member of the legislature.

The Plaintiffs also requested that the action in discarding their votes be declared in violation of the Equal Protection Clause. That, without more, might be a hollow victory for Plaintiffs. But they, and the public, would know that they had been unconstitutionally disenfranchised, and a federal court would say so.

CONCLUSION

The Court should grant a writ of certiorari to review and vacate the judgment of the Court of Appeals and remand to the District Court for consideration of this matter based on the evidence.

Respectfully submitted,

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