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Homeless coalitions appeal to entire federal Sixth Circuit Court of Appeals in challenge to Ohio's perfect-form requirements for absentee and provisional ballots

Ohio Democratic Party joins coalitions in seeking to protect voting rights

CLEVELAND, OHIO – Today, the Northeast Ohio Coalition for the Homeless, Columbus Coalition for the Homeless, joined by the Ohio Democratic Party, plaintiffs in a voting-rights lawsuit against Ohio Secretary of State Jon Husted and Ohio Attorney General Michael DeWine, sought to have all fifteen judges of the U.S. Court of Appeals for the Sixth Circuit hear their challenge against Ohio voting laws known as S.B. 205 and S.B. 216. The laws require throwing out absentee and provisional ballots on trivial technical errors on ballot forms—even where elections boards do not otherwise question voters' identity and eligibility.

In June 2016, federal District Judge Algenon Marbley, of the Southern District of Ohio, ruled in favor of the plaintiffs' claims that the laws violated the Constitution's Fourteenth Amendment right to equal protection as well as the Voting Rights Act. The judge found that the laws burden the fundamental right to vote without a sufficient state interest, and that the laws disproportionately impact African-American voters.

Defendants Husted and Ohio appealed the court's decision, and the plaintiffs cross-appealed. Earlier this month, a three-member panel of the Sixth Circuit Court of Appeals ruled on the parties' respective appeals.

The panel's majority (Judge Boggs and Judge Rogers) upheld one piece of the plaintiffs' relief, that pertaining to minor errors with birthdates and addresses on absentee-ballot forms, but otherwise reversed the district court's rulings for the plaintiffs. Judge Keith wrote a searing dissent recounting the long history of civil-rights struggle and chastising the majority for failing to defer to the district court's factual findings of discriminatory impact.

Notably, in the piece the majority found *for* the plaintiffs, the majority minced no words in noting the utter absence of evidence of fraud—a justification Husted and Ohio had tried to push in their post-trial briefing, although there was no evidence the legislature was ever really concerned about it. The majority opinion states: "the district court was not presented with a shred of evidence of

mail-in absentee-voter fraud.... [A]s is apparent from the record, there is no indication of a legitimate fraud concern at all.”

As argued to the full court, although the panel majority got it right regarding absentee-ballot forms with date-of-birth and address errors, it failed to apply the same logic to other minor errors (such as identification or printed name), as well as to provisional ballots. Left untouched, for example, was Husted’s position that a voter who writes her name even in *legible* cursive letters in the name field should be disenfranchised merely for not printing.

Today’s petition to the entire Sixth Circuit (also known as an “en banc petition”) seeks to fix some of the majority’s inconsistencies and other errors. The petition seeks review on the following bases:

- The Sixth Circuit is in conflict with another circuit court, the Eleventh Circuit, regarding whether the plaintiffs—as opposed to only the Department of Justice—may challenge S.B. 205/216 under the Voting Rights Act’s so-called “materiality provision.” That provision prohibits denying the right to vote “because of an error or omission” on, e.g., a voter’s application, “if such error or omission is not material in determining whether such individual is qualified under State law to vote....” This provision was a hard-fought victory of the civil-rights movement and intended to prevent just the sort of chicanery Ohio is engaged in here. As a result of the circuit conflict, voters in presidential swing-state Florida, which is in the Eleventh Circuit, have more rights to defend against any assault on voting rights than voters in swing-states Ohio and Michigan, both in the Sixth Circuit.
- The panel majority failed to address the perfect-form requirements regarding identification and printed name, only addressing the date-of-birth and address requirements.
- The panel majority created a 14th Amendment equal-protection problem when it struck down the perfect-form requirements relating to absentee ballots, but upheld them as to provisional ballots, even where voters’ identity is not in dispute for either.
- The panel majority also was at odds with the Equal Protection Clause as well as U.S. Supreme Court (*Bush v. Gore*) and Sixth Circuit authority when it ignored the wildly disparate ways in which Ohio’s elections boards are treating absentee- and provisional-ballot forms (the white, more rural, Republican-leaning counties count ballots with mistakes on them while the more minority, urban, Democratic-leaning counties toss ballots with identical mistakes). *See* the attached charts for examples.
- The panel majority conflicted with Supreme Court and Sixth Circuit precedent when, to establish an equal-protection violation, it required a showing that the laws unduly burden *all* voters, not just a subset.
- The panel majority conflicted with precedent when it failed to give due deference to the district court’s factual findings regarding the disproportionate impact of the laws on African-American voters.

- The Sixth Circuit is in conflict with another circuit court regarding how to assess whether the state violated section 2 of the Voting Rights Act—namely, whether the court should examine the cumulative impact of a law’s restrictions or analyze the impact of each restriction separately.
- The panel majority’s requirement that any disparate impact be “significant” conflicts with Sixth Circuit precedent requiring only that an adverse effect on a protected group be shown.

Subodh Chandra, NEOCH’s and CCH’s lead counsel, said, “The plaintiffs are concerned about the confusion, inconsistency, and unwarranted disenfranchisement that will result if the panel majority’s decision is permitted to stand as is. Thousands of legitimate votes—including in the upcoming presidential election—are at stake. And yet Secretary Husted and Attorney General DeWine continue to undermine the right to vote.”

The case is captioned *Northeast Ohio Coalition for the Homeless, et al. v. Husted, et al.*, Sixth Circuit Case Nos. 16-3603 and 16-3691. Chandra and Sandhya Gupta, of The Chandra Law Firm, LLC, www.ChandraLaw.com, along with Caroline Gentry and Ana P. Crawford of Porter Wright Arthur & Morris LLP, in Dayton, represent NEOCH and CCH. Don McTigue and Derek Clinger of McTigue & Colombo LLC in Columbus represent the Ohio Democratic Party.

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