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July 17, 2009

Ms. Therese S. Barnes
Clerk, Supreme Court of Georgia
244 Washington Street
Room 572, State Office Annex Building
Atlanta, GA. 30334

Subject: Favorito, et al. v. Handel, et al.
Case No.: S09A1367

Dear Clerk,

Pursuant to the Court's instructions during oral argument on July 13, 2009, this letter serves as a letter brief with regard to the material that Mr. Ritter cited on behalf of the Government at oral argument and his response brief.

The State is attempting to frame the issue as a time, place, and manner issue, so as to subject this issue to rational basis scrutiny. However, the Appellants assert this is a counting and re-counting issue which results in un-equeal treatment of ballots during the aforementioned processes. The Appellants will now examine: 1). the Government's line of cases and 2). the Appellants' line of cases so as to ascertain the appropriate level of scrutiny to be afforded to a counting and re-counting challenge.

1). THE GOVERNMENT'S CASES.

The case law cited by the Government is not applicable to the counting and re-counting of ballots. The Government has cited Jennes v. Fortson, 403 U.S. 431 (1971) as authority that this issue should draw rational basis scrutiny instead of strict scrutiny. That case is about ballot access and not the counting and re-counting of votes; it is not relevant or material to the issue because it deals with entirely different subject matter e. g. 1st Amendment issues, and does not mention the counting and re-counting of ballots in its text. The Appellants concur that States have a legitimate interest in an efficient electoral process; however, that interest does not out weight the peoples' right to have their ballots treated equally; it ceases to be a time, place, and manner issue and becomes a right to have one's vote properly counted and re-counted.

2). THE APPELLANTS CASES.

The case law cited by the Appellants in their Motion for Summary Judgment is applicable because it deals with the issue of counting and re-counting, which is the real interest the Appellants are trying to safeguard. The Appellants have cited United States v. Mosley, 238 U.S. 383, 386 (1915); United States v. Classic, 313 U.S. 299, 313 (1941); Baker v. Carr, 369 U. S. 186, 209 (1962); Wesberry, Jr. et al. v. Sanders, et al., 376 U.S. 1, 17 (1964); Reynolds v. Sims, 377 U.S. 533, 555 (1964); Bush v. Gore, 531 U.S. 98, 104 (2000). These cases pertain to the issue before the Honorable Court-the effect of the use of touchscreen voting machines on the counting and re-counting processes in this State. The Appellants will quickly discuss each of the aforementioned cases.

First, the Supreme Court was presented with United States v. Mosley, in which two men in Oklahoma were conspiring to suppress the votes of qualified electors, all the voters of eleven precincts in Blaine County, Oklahoma, by omitting their votes from the count when returning the popular vote for the district's Congressional representative. In response to this attempted denial of the fundamental right to vote, the Supreme Court held, "We regard it equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." United States v. Mosley, 238 U.S. 383, 386 (1915). Thus, the judiciary acknowledged the fundamental nature of the franchise.

Second, the Supreme Court again upheld the fundamental right to vote and to have one's vote counted when they stated, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted…" United States v. Classic, 313 U.S. 299, 313 (1941). This opinion was in response to Commissioners of Elections conducting a Democratic primary election in Louisiana for Congressional representative, willfully altering the results of the primary election by falsely counting and certifying the ballots to be returned to the State. Thus, the judiciary again upholds the franchise as fundamental.

Third, the Supreme Court again reaffirmed and restated their previous opinions regarding the fundamental, protected right to vote when they received an appeal from the District Court for the Middle District of Tennessee. Baker v. Carr, was filed alleging that a 1901 statute apportioning the members of the state's General Assembly among the counties of the state deprived them of federally protected constitutional rights by virtue of debasement of their votes. The District Court dismissed the case, stating it lacked jurisdiction of the subject matter and that there was no claim upon which relief could be granted. The Plaintiffs appealed to the Supreme Court, which held, "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by false tally, cf. United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368; or by refusal to count votes from arbitrarily selected precincts, cf. United States v. Mosely, 283 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355, or by a stuffing of the ballot box, cf. Siebold, 100 U. S. 371, 25 L. Ed. 717; United States v. Saylor, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341." Baker v. Carr, 369 U. S. 186, 209 (1962).

Fourth, a case from Georgia, on point with Baker v. Carr from Tennessee, came before the Supreme Court on appeal after dismissal from the Northern District of Georgia. Wesberry, Jr. et al. v. Sanders, et al. had at issue a 1931 Georgia statute apportioning congressional districts by county. Since the creation of said districts, population growth had created a disparity in the number of people represented by, and by extension, number of people voting for, each Congressman. Plaintiffs and Appellants sought relief from the statute which they claimed deprived their right to have their votes counted with the same weight as the votes of other Georgians. The Supreme Court agreed and reversed the dismissal, stating, "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, Jr. et al. v. Sanders, et al., 376 U.S. 1, 17 (1964). Hence, the Court acknowledged the fundamental nature of the right to vote and that it is the very foundation of free society as all rights depend upon its security.

Fifth, the Supreme Court was presented with the case of Reynolds v. Sims, in which residents of the State of Alabama filed a case in the U.S. District Court for the Middle District of Alabama, protesting the apportionment of the Alabama Legislature. As in previous cases, the voters, raised a constitutionally protected matter – that they deserved to have their votes counted equally, and could not receive equal treatment and protection if the state was not divided by census results and population statistics rather than by county. When a three-judge panel in the District Court dismissed the case, Plaintiffs appealed to the Supreme Court, and the case subsequently became one of the most memorable pieces of case law confirming voting as a fundamental right. As it had repeatedly in the past, the Supreme Court agreed with the body politic that, "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." Reynolds v. Sims, 377 U.S. 533, 554 (1964). The Court further stated that, "The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, nor diluted by ballot-box stuffing Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341." Reynolds v. Sims, 377 U.S. 533, 555 (1964). The opinion in Reynolds explicitly states, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Id. at 555. The Supreme Court reversed the dismissal and remanded Reynolds to the District Court because, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Id. at 561-562. The Supreme Court later stated in the same opinion that, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political

processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters…" Id. at 565. The Reynolds Court unequivocally stated that the right to vote is fundamental and is necessary for a free society to exist and thrive.

Moreover, at the turn of the century, there was a controversy in Florida with the dispute over votes in the 2000 Presidential election and a complaint was filed by the Democratic candidate in a circuit court in Florida contesting the certification of the results. The circuit court certified the matter to the Florida Supreme Court, and the Plaintiffs made an application for a writ of certiorari, which was granted. Upon reaching the Supreme Court of Florida, it was ruled that there must be a recount of all presidential votes in the state. The Republican candidate filed in the U.S. Supreme Court for an emergency stay of the mandate, based on the fact that the Florida Supreme Court had not included specific standards to implement its order, which did not satisfy the minimum requirement for non-arbitrary treatment of voters necessary under Equal Protection Clause. The ruling by the Supreme Court in Bush v. Gore was that there existed a violation of the Equal Protection Clause. In his opinion, Chief Justice Rehnquist stated, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." Bush v. Gore, 531 U.S. 98, 104 (2000). He went on to confirm that, "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." Id.

Hence, the right to vote is a fundamental right. It has been expanded and protected by the General Government, the States, and the body politic. The numerous Constitutional Amendments and court rulings show the right is deeply rooted in our nation's history and tradition. It further shows that the right to have one's vote counted and re-counted without un-equal treatment and doubt is fundamental and draws strict scrutiny and not rational basis scrutiny, as the Government suggests because counting and re-counting is not time, place, and manner; it is the very cornerstone of liberty and the Government has shown no case law that applies rational basis scrutiny to the issue of counting and re-counting of ballots.

In summation, the Appellants have never claimed, as Appellees counsel contends in his letter to the Court that offering two alternative methods of voting violates equal protection. The Appellants do claim, and request a ruling from the court on Count 5, that electronic only balloting cannot provide equal protection to that of paper balloting in regards to voter verification discrepancy investigation, recount completeness and contested election evidence. Furthermore, the Appellants made clear in the final two pages of the previously filed PLAINTIFFS' RESPONSE TO DEFENDANTS' ASSERTIONS AS TO FACTS THAT THEY ALLEGE ARE UNDISPUTED that they do not oppose electronic voting if it is properly audited;. As explained in the aforementioned pages and referenced during the conclusion of his deposition, Plaintiff Favorito provided evidence to Appellees' Counsel showing his support for verifiable electronic voting by personally handing counsel, a video tape of his 2006 testimony

before the House Government Affairs Committee in favor of HB790, a bipartisan electronic voting audit bill. Also referenced at the conclusion of Plaintiff Favorito's deposition and provided by Plaintiff Favorito to Appellees counsel, is the 2004 Free Congress Foundation that ranks Georgia dead last nationally in "system reliability and recount preparedness". Georgia received a grade of F- on a national average of C+ in this report that refutes both the of the oral argument claims by Appellees' counsel of system reliability and the claims of no supporting Appellant reports. The fact that there are still numerous substantive disputes involving this case proves that the Appellants' right to a trial was improperly denied.

Sincerely,

Todd A. Harding
Attorney for Plaintiffs