

State of New Hampshire
Supreme Court

NO. 2002-0814

2003 TERM

JANUARY SESSION

APPEAL OF PETER MCDONOUGH

APPEAL AND PETITION FOR ORIGINAL JURISDICTION

BRIEF OF *AMICUS CURIAE*, NEW HAMPSHIRE CITIZENS ALLIANCE FOR ACTION

By: Joshua L. Gordon, Esq.
Law Office of Joshua Gordon
26 S. Main St., #175
Concord, N.H. 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES *ii*

STATEMENT OF INTEREST BY *AMICUS CURIAE* *1*

SUMMARY OF ARGUMENT *2*

ARGUMENT *3*

 I. *Bush v. Gore* – Equal Protection Demands Strict Scrutiny of Ballot
 Counting Procedures *3*

 II. The State Has No Compelling Interest In, Nor Necessity For, Straight
 Ticket Voting *4*

 III. Straight Ticket Voting is New Hampshire's Hanging Chad *6*

 IV. Prospective Relief is Appropriate *7*

CONCLUSION *9*

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION *9*

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	5
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	3, 6
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	3
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966)	3
<i>Kramer v. Union School District</i> , 395 U.S. 621 (1969)	3
<i>United States v. Mosley</i> , 238 U.S. 383 (1915)	3
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	3

Other Federal Cases

<i>Hendon v. North Carolina State Board of Elections</i> , 710 F.2d 177 (4 th Cir. 1983)	6, 8
<i>Melchoir v. Todman</i> , 296 F. Supp. 900 (D. V.I. 1968)	6

New Hampshire and Other States' Cases

<i>Johnstun v. Harrison</i> , 197 P.2d 470 (Utah 1948)	5
<i>Murchie v. Clifford</i> , 76 N.H. 99 (1911)	5, 7, 8
<i>Putter v. Montpelier Public School System</i> , 697 A.2d 354 (Vt. 1997)	7, 8

Federal and State Constitutions and Statutes

UNITED STATES CONST., amd. 14	3, 6
CONNECTICUT CONST., art. 6 § 5, amd. XXIV (1986)	5
NEW HAMPSHIRE CONST. pt. I, arts. 1 & 2	3, 6
NORTH CAROLINA GEN. STAT. §§ 163-151(5)(b), - 170(6)(b) (1983)	5
NEW HAMPSHIRE RSA 656:10	6
NEW HAMPSHIRE RSA 659:17	6
NEW HAMPSHIRE RSA 659:66	5, 6

Secondary Authority

Eldon Cobb Evans, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES (1917)	4
Alexander Hamilton, James Madison, & John Jay, THE FEDERALIST PAPERS (C. Rossiter ed., 1961), <i>Federalist Paper No. 10</i> at 77	4
John F. Reynolds & Richard L. McCormick, <i>Outlawing “Treachery”: Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910</i> , 72 J. AM. HIST. 835 (1986)	4
Gregory Stuart Smith, <i>Statutory Preference for Straight-Ticket Voting in Counting Crossover Ballots</i> , 62 N.C. L. REV. 1173 (1984)	4
George Washington’s Farewell Address (Sept. 17, 1796), reprinted in DOCUMENTS IN AMERICAN HISTORY (H.S. Commager, ed. 1958) at 169	4
Adam Winkler, <i>Voters’ Rights and Parties Wrongs: Early Political Party Regulation in the State Courts, 1886-1915</i> , 100 COLUM. L. REV. 873 (2000)	4

STATEMENT OF INTEREST BY *AMICUS CURIAE*

New Hampshire Citizens Alliance for Action (NHCAA) is filing this *amicus curiae* brief because it believes that straight ticket voting is an impediment to fair elections and because it believes that a non-partisan organization can more effectively point out the constitutional infirmities of this inherently partisan issue.

NHCAA is a nonprofit, nonpartisan organization with a statewide membership. It works to encourage New Hampshire residents to communicate their views to their government on legislation affecting issues of public concern and to participate in elections. To further its mission of social, economic and political justice for all, NHCAA conducts legislative lobbying and electoral activities. NHCAA also works to ensure that community concerns are addressed by public policy, and assists voters in making informed choices by providing them with voting records of New Hampshire's elected officials. NHCAA also offers training in how to recruit candidates and run effective political campaigns. NHCAA has long been involved in all aspects of ensuring fair elections in New Hampshire. NHCAA maintains its offices at 4 Park St., Concord N.H. 03301, (603) 225-2097.

SUMMARY OF ARGUMENT

The *amicus curiae* first notes that equal protection bars arbitrary vote-counting procedures, and that the federal and state constitutions require strict scrutiny of these matters.

The *amicus curiae* then points out that there is no compelling state interest in straight ticket voting, and that there are other simpler and more effective ways of ensuring that partisan voters can indicate a preference for candidates of their party. Accordingly, the *amicus curiae* argues that New Hampshire's straight ticket voting procedure is unconstitutional.

The *amicus curiae* then suggests that this Court can apply its holding prospectively, thereby avoiding invalidation of the recent election.

ARGUMENT

I. *Bush v. Gore* – Equal Protection Demands Strict Scrutiny of Ballot Counting Procedures

Voters have a constitutional right to have their vote counted correctly. U.S. CONST., amd. 14; N.H. CONST. pt. I, arts. 1 & 2; *United States v. Mosley*, 238 U.S. 383, 386 (1915) (“the right to have one’s vote counted” is protected as much as “the right to put a ballot in a box”). In *Bush v. Gore*, the United States Supreme Court specifically addressed equal protection’s application to ballot counting procedures.

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. It must be remembered that 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.

Bush v. Gore, 531 U.S. 98, 104-05 (2000) (per curiam) (quotations and citations omitted).

Under equal protection doctrine, voting rights are accorded strict scrutiny. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (because “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”). Voting procedure laws must be “closely scrutinized and carefully confined.” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

Strict scrutiny means that the ballot counting law must be “*necessary* to promote a *compelling* state interest.” *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972) (emphasis in original). Thus, there are two aspects to be scrutinized by the court. The ballot counting procedure must be guided by a “*compelling*” state interest, and it must be “*necessary* to achieve the articulated state goal.” *Kramer v. Union School District*, 395 U.S. 621, 632 (1969).

II. The State Has No Compelling Interest In, Nor Necessity For, Straight Ticket Voting

Straight ticket voting is a holdover from another era. Before the 20th century, parties and elections were largely unregulated; *parties* prepared and provided the ballots. Often there was no official ballot and no official list of candidates. In order to indicate a split ticket, a voter might have to literally cut and paste ballots together. John F. Reynolds & Richard L. McCormick, *Outlawing “Treachery”: Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910*, 72 J. AM. HIST. 835, 836 (1986); *see generally*, Adam Winkler, *Voters’ Rights and Parties Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 876 (2000). This anachronism does not provide a compelling state interest.¹

Moreover, the founding fathers were profoundly skeptical of political parties. *See* Alexander Hamilton, James Madison, & John Jay, THE FEDERALIST PAPERS (C. Rossiter ed., 1961), *Federalist Paper No. 10* at 77. In his farewell address, President George Washington warned “against the baneful effects of the Spirit of Party generally.” *Washington’s Farewell Address* (Sept. 17, 1796), *reprinted in* DOCUMENTS IN AMERICAN HISTORY (H.S. Commager, ed. 1958) at 169, 172.

One argument for straight ticket voting is that it may help to speed up the voting process, and therefore reduce congestion at polling places. Gregory Stuart Smith, *Statutory Preference for Straight-Ticket Voting in Counting Crossover Ballots*, 62 N.C. L. REV. 1173, 1183-84

¹The term “ticket” to refer to a ballot is rooted in this history. Prior to the election reforms of the late 19th century, there was no official ballot in the modern sense of the word. People voted with “tickets” handed to them at the polls by party “ticket pedlars,” who might even assist the voter in putting their ticket into the ballot box. *Outlawing “Treachery,”* 72 J. AM. HIST. at 843-44 n. 15. The potential for (and actual) voting fraud inherent in this system led to the adoption of the “Australian” or secret ballot. *See* Eldon Cobb Evans, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES (1917).

(1984). This argument might have meaning if the ballot were exceedingly long, or if there were a radical change in long-term voter turnout trends.

Similarly, while straight ticket voting might help some voters by allowing a single vote for an entire party slate, going down the column and marking the box for each candidate of the voter's party is less a burden than the risk of indeterminate election results.

When straight ticket voting has been debated in the states, like redistricting it is always a partisan issue. Who, and what party, is in favor of it depends upon which party will benefit. An informal canvass of newspaper articles from around the United States during the last decade reveals that both Democrats and Republicans have variously supported and opposed straight ticket voting. As it is merely a matter of political expediency, it is difficult to find a compelling state interest. *See Burdick v. Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting).

Finally, any rule regarding how to count straight tickets is arbitrary and inherently susceptible of confusion. The case at bar is a good illustration. Rules established for counting crossover votes vary, and all seem simultaneously equally reasonable and equally capricious. *See e.g.*, N.C. GEN. STAT. §§ 163-151(5)(b), - 170(6)(b) (1983) (ballot marked for both straight ticket and for competing candidate to be counted as a straight-party vote); RSA 659:66 (ballot marked for both straight ticket and for competing candidate to be counted for the competing candidate); *Johnstun v. Harrison*, 197 P.2d 470 (Utah 1948) (ballot marked for both straight ticket and for competing candidate counted for competing candidate because straight-party candidate's name was affirmatively crossed out); *Murchie v. Clifford*, 76 N.H. 99, 107 (1911) (ballot marked for both straight ticket and for competing candidate cannot be counted for either candidate); CONN. CONST., art. 6 § 5, amd. XXIV (1986) (prohibiting straight-ticket voting).

III. Straight Ticket Voting is New Hampshire's Hanging Chad

Straight ticket voting is unconstitutional: there is no compelling state interest in straight ticket voting, whatever rule for counting the state adopts is inherently arbitrary and susceptible of confusion, and in the absence of a straight ticket box a person can easily enough vote for a straight ticket by marking all the boxes of her/his party. Accordingly, New Hampshire's provisions for straight ticket voting, RSA 656:10; RSA 659:17; RSA 659:66, violate the federal and state equal protection clauses. U.S. CONST., amd. 14; N.H. CONST. pt. I, arts. 1 & 2.

Other courts confronting the issue have found equal protection violations. *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983) (finding North Carolina's straight ticket counting statute unconstitutional) *Melchoir v. Todman*, 296 F. Supp. 900 (D. V.I. 1968) (finding Virgin Islands' straight ticket counting statute unconstitutional).

Straight ticket voting is New Hampshire's hanging chad. *Bush v. Gore*, 531 U.S. at 98 (vote-counting based on arbitrary standards unconstitutional).

IV. Prospective Relief is Appropriate

New Hampshire Citizens Alliance for Action takes no position on how to count the disputed ballots in this case. NHCAA is confident that, as in *Murchie*, 76 N.H. at 99, this Court will review each ballot and reach an appropriate judgment.

Other courts, when confronted with unconstitutional ballot counting statutes have been loath to invalidate an election, however. *See Putter v. Montpelier Public School System*, 697 A.2d 354 (Vt. 1997), and numerous authorities cited therein.

For example, in a recent case involving a local school board's expenditures on advocating a bonding referendum which voters subsequently approved, the Vermont Supreme Court wrote:

Voiding an election and ordering a new one represents one of the more extreme remedial measures available to a court sitting in equity. Nothing is so profoundly destabilizing to the local political process; budgets or projects debated during the campaign and approved by the electorate must invariably be delayed or postponed, and lame-duck incumbents may be unable as a practical matter to conduct the public business for which they were elected.

As a result, courts reviewing election challenges . . . have established a high threshold for what one court has described as the “[d]rastic, if not staggering” equitable remedy of election invalidation. “The setting aside of an election is an extraordinary remedy,” observed [one] court . . . “which the Court should grant only under the most extraordinary of circumstances.” Dilution of votes through malapportioned districts, purposeful or systematic discrimination against voters of a certain class, pervasive election fraud, and “other wilful conduct which undermines the organic processes by which candidates are elected,” represent the kinds of violations for which courts have typically employed the new-election remedy.

Conversely, courts have frequently declined to order a new election where the governmental misconduct, considered in light of all the circumstances, did not warrant so extraordinary and destabilizing a remedy. In determining whether such drastic relief is warranted, courts have focused on several key considerations, including the nature and severity of the federal violation, the probability that it actually affected the election result, the presence or absence of culpable intent, and the harm to the organic processes of the election.

Putter v. Montpelier Public School System, 697 A.2d 354, 357 (Vt. 1997) (numerous citations omitted).

New Hampshire's straight ticket voting statute is unconstitutional, but there is nothing in this case to suggest the extraordinary remedy of invalidating an election. As in *Murchie*, this Court is capable of determining the intent of Hillsborough County voters. Accordingly, this Court should hold that straight ticket voting is unconstitutional, as applied to future elections. *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983).

CONCLUSION

For the foregoing reasons, this Court should find that New Hampshire's straight ticket voting provisions are unconstitutional, but apply its decision prospectively.

Respectfully submitted,

N.H. Citizens Alliance for Action,
By its Attorney,

Law Office of Joshua L. Gordon

Dated: January 22, 2003

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

New Hampshire Citizens Alliance for Action requests that Attorney Joshua L. Gordon be allowed 10 minutes for oral argument separate from the time allotted to the parties, in accord with Supreme Court Rule 30(4).

I hereby certify that on January 22, 2003, copies of the foregoing will be forwarded to William M. Gardner, Secretary of State; Kristin M. Spath, Assistant Attorney General; Gary B. Richardson, Chair, Ballot Law Commission; W. Scott O'Connell, attorney for Peter McDonough; Steven M. Gordon, attorney for Peter McDonough; and Charles G. Douglas, III, attorney for John Coughlin.

Dated: January 22, 2003

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225