

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND DIVISION**

American Civil Liberties Union of Ohio; )  
Amanda Shaffer; and Michael Montgomery; )

Plaintiffs, )

v. )

Jennifer Brunner, Secretary of State of the )  
State of Ohio; Cuyahoga County Board of )  
Elections; Jeff Hastings, Inajo Davis Chappell, )  
Robert S. Frost, and Eben O. McNair IV, )  
Members of the Cuyahoga County Board of )  
Elections; Cuyahoga County Board of County )  
Commissioners; Peter Lawson Jones, Timothy )  
F. Hagan, and Jimmy Dimora, Members of the )  
Cuyahoga County Board of County )  
Commissioners; )

Case No.: \_\_\_\_\_

Defendants. )  
\_\_\_\_\_ )

**Introduction**

1. This lawsuit is brought on behalf of: (a) voters challenging the use of non-uniform, unequal, inaccurate and inadequate voting technologies in and by Cuyahoga County as violating the Due Process and Equal Protection Clauses of the Fourteenth

Amendment to the United States Constitution, and (b) African-American voters challenging the use of non-uniform, unequal, inaccurate and inadequate voting technologies in and by Cuyahoga County as violating Section 2 of the Voting Rights Act of 1965.

2. Plaintiffs herein seek permanent declaratory relief, holding that the Defendants, through the implementation, certification, selection and use of inadequate voting technology, including the central count optical scan system (CCOS) which lacks error notification, as explained in detail below, have without justification (a) denied the Plaintiffs, and each of them, Due Process and Equal Protection of the Laws as guaranteed to them by the Fourteenth Amendment, and; (b) denied certain of the Plaintiffs the right to vote as secured to them by Section 2 of the Voting Rights Act of 1965, through the use of a system of voting that has a disproportionate and negative impact on the franchise of African-American voters in Cuyahoga County.

3. These Plaintiffs seek mandatory permanent injunctive relief, prohibiting the Defendants from replacing their existing voting technology with inadequate voting technologies, as defined herein, and requiring them to implement, select, use and certify for use certain adequate technologies, as defined below, and additional relief specified herein.

#### **PLAINTIFFS**

4. Plaintiffs Amanda Shaffer (“Shaffer”) and Michael Montgomery (“Montgomery”) are, and at all times relevant hereto were natural persons, citizens of the United States of America and the State of Ohio, and registered voters who reside, and at all times relevant hereto did reside in Cuyahoga County, Ohio, which, effective in the March 2008 primary,

is scheduled to move to CCOS technology, as defined in detail below, that does not afford them, or any of them, the ability to cast their ballots with prior notice of error and the opportunity to correct such errors before finally submitting their ballot for counting.

5. Each of these Plaintiffs intends to vote in future elections, including elections for national and statewide elective office where candidates represent districts the boundaries of which cross county lines.

6. Plaintiff Montgomery is African-American and has voted in past elections, including the Presidential Election of 2004, and intends to vote in future elections. He desires to have his intended vote counted and to insure that fundamental fairness is afforded to all voters in Cuyahoga County.

7. Plaintiff the American Civil Liberties Union of Ohio, Inc. (“ACLU of Ohio”) is a non-profit, non-partisan membership organization incorporated in the state of Ohio in 1971 with 9,435 dues paying members statewide, 1,920 of whom reside in Cuyahoga County and many of whom are registered to vote in the 2008 elections. Membership in the organization is available to anyone for minimum dues of US\$20.00 annually. Members of the ACLU of Ohio support its mission which is to protect and defend civil liberties. As such, members are civic activists with a strong interest in voting and efficient, fair elections.

#### **STATE GOVERNMENT DEFENDANT**

8. Defendant Jennifer Brunner (“Brunner”) is, and at all times relevant hereto was, Secretary of State of the State of Ohio, and as such, the principal election official of the state. She is sued herein in her official capacity.

9. Under the Ohio Election Code (OHIO REV. CODE §§ 3501.01, et seq.), the Secretary of State functions as the chief election officer of the State (OHIO REV. CODE § 3501.04). She and/or her agents are charged with the duty of providing general supervision over the administration of the election laws throughout the State of Ohio and compelling election officers to observe the requirements of all state and federal election laws (OHIO REV. CODE §§ 3501.01 and 3501.05).

10. The Secretary of State and/or her agents certify and approve all voting systems for use in individual election jurisdictions, under OHIO REV. CODE §§ 3506.05 and 3507.04; they ensure that these systems conform to the Ohio Revised Code and the Constitution of the State of Ohio, including requiring these systems to register accurately every vote cast, and ensuring that all “marking devices” for elections are constructed so as to enable voters to “readily learn the method of operating them (OHIO REV. CODE § 3506.06 (F)).” They are also charged with the duty of providing the board of elections in every county using vote marking devices with rules and regulations so as to ensure the accurate registering, counting, and canvassing of votes in all public elections (OHIO REV. CODE § 3507.15).

11. At all times relevant hereto, Brunner and/or her agents were acting under color and authority of state law, and in acting, served to formulate, ratify and to enforce state policy, custom and usage with respect to the implementation, use and certification for use of voting technology in and for the State of Ohio.

12. By requiring specified counties, including Cuyahoga County, use CCOS systems that lack the ability to provide voters with notice of errors and an opportunity to correct such errors resulting in a greater percentage of spoiled ballots, while concurrently

allowing other counties to use balloting systems that provide such notice and opportunities, Secretary Brunner and/or her agents created a dual system of voting in the State of Ohio in violation of their duties under the United States Constitution and federal statutory law.

#### **COUNTY DEFENDANTS**

13. Defendants Jeff Hastings (“Hastings”), Inajo Davis Chappell (“Chappell”), Robert S. Frost (“Frost”) and Eben O. (Sandy) McNair IV (“McNair”) are, and at all times relevant hereto were, members of the Cuyahoga County Board of Elections. Each is sued herein solely in his or her official capacity.

14. Defendants Peter Lawson Jones (“Jones”), Timothy F. Hagan (“Hagan”), and Jimmy Dimora (“Dimora”) are, and at all times relevant hereto were, members of the Cuyahoga County Board of Commissioners, a body corporate and politic that is the elected governing authority and policy setting arm of Cuyahoga County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Cuyahoga County. They are sued solely in their respective official capacities.

15. Defendant the Cuyahoga County Board of Commissioners is, and at all times relevant hereto was, a quasi-corporation, a body corporate and politic, the elected governing authority and policy setting arm of Cuyahoga County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Cuyahoga County. For all purposes herein, the Cuyahoga County Board of Commissioners is a “person” within the meaning of 42 U.S.C. §1983.

16. Defendant the Cuyahoga County Board of Elections is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the

laws of the State of Ohio, charged with conducting, managing, and overseeing elections within its geographical jurisdiction, and with selecting the voting technology to be used therein, and is for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

### **Jurisdiction and Venue**

17. Plaintiffs bring this action to enforce and to protect rights conferred by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*

18. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable relief under an act of Congress, specifically under 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; 42 U.S.C. §1973, which provides a right of action to vindicate rights protected by the Voting Rights Act of 1965; under 28 U.S.C. § 2201(a), in that one purpose of this action is to secure declaratory relief; and under 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief.

19. Venue is proper in this Court under 28 U.S.C. §1391(b)(1), in that this action is predicated upon a federal question, and because some of the defendants are situated within this judicial district, and all of the defendants reside within this state.

### **Ohio Maintains a Non-Uniform and Unequal System of Voting**

20. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 19 of this Complaint above.

21. The Ohio Revised Code and Secretary Brunner authorize the use of a variety of systems for recording and counting votes cast during an election, including mechanical voting machines, electronic voting systems, and optical scan voting systems. They likewise authorize the counting of ballots at a central location or in-precinct.

22. Selection of the voting system used to record and count votes in an election jurisdiction – and the decision whether to count votes centrally or in-precinct – is left to the discretion of the voters, the county board of election, or the county board of commissioners in each of the 88 election jurisdictions in Ohio, subject to certification and approval by the State Government Defendants.

23. Prior to the 2006 elections, Cuyahoga County voters cast ballots on punch card voting equipment.

24. With a punch card voting system, a voter places his or her punch card ballot in a vote recording device, presses a stylus through the hole in the vote recording device that corresponds to his or her preferred candidate, and in so doing, detaches from the punch card the chad that corresponds to his or her preferred candidate.

25. Subsequently, the punch card is placed in a vote counting machine, which reads the ballot based on the passage of light through the spaces in the punch card created by the detached chads.

26. In response to concerns regarding non-notice technology and the passage of the Help America Vote Act, the previous Secretary of State J. Kenneth Blackwell ordered each Ohio county to select among various types of direct recording electronic (“DRE”) voting machines or optical scan machines with in-precinct tabulation (“PCOS”) systems for future elections. Thus, beginning with the 2006 general elections and including all

elections held until January 2008, each of Ohio's 88 counties used one of five types of notice technology.

27. In 2006 and each election held in Cuyahoga County thereafter, voters cast their votes on the Diebold AccuVote TSX ("TSX"), which is a touchscreen DRE that includes a voter verifiable paper audit trail ("VVPAT") printer unit to create a verifiable paper record of the voter's selections.

28. When a voter appears at a polling location to vote, the voter receives a Voter Access Card, which allows the voter to cast a single ballot. Upon reaching the TSX, the voter inserts the card into the machine and follows the onscreen instructions to cast a ballot. Before the voter finally casts his or her ballot, he or she has the opportunity to review a screen that shows each of his or her selections and the VVPAT to verify those selections. After the ballot has been cast and stored on the TSX and memory card, the TSX re-programs the Voter Access Card so that it cannot be used until re-encoded. Supervisor cards are given to the poll workers and are used to open and close the voting machines on Election Day.

29. With a central counting system, ballots are counted at a central location designated by the board of elections. Under this system, it is not physically possible for a ballot to be placed in the vote counting machine while the voter is present because ballots are cast at a precinct polling place and counted at a central counting location.

30. With an in-precinct counting system, ballots are counted at each election precinct. Under this system, ballots may be placed in the vote counting machine while the voter is still in the precinct.

31. The TSX vote system is an in-precinct counting system.

32. On the date this Complaint was filed, 83 of Ohio's 88 counties plan to use one of 5 types of notice voting systems for the 2008 presidential preference primary, state primary and general elections.

33. On March 19, 2007, Secretary Brunner asked for the resignation of the four Cuyahoga County Board of Elections members by March 21, 2007 or else the board members would face a complaint and public hearing to be conducted in Cleveland by the Secretary of State's office.

34. On or about April 2, 2007, Secretary Brunner placed Cuyahoga County Board of Elections under administrative oversight pursuant to OHIO REV. CODE §3501.05(M) "for the following reasons:

a. The board [was] operating without a permanent director or deputy director.

b. Three of the four members of the Board have resigned in response to [Secretary Brunner's] request of March 18, 2007. The remaining Board member [did] not qualify as a quorum and thus [could not], on his own, vote on matters essential to the Board of Elections performance of statutory duties.

c. [The Secretary of State's] office has presented the sole remaining Board member, Mr. [Robert ] Bennett, with a complaint for his removal pursuant to R.C. 3501.16.

d. The new leadership of the Board of Elections will need support in improving operations of the agency."

35. Shortly thereafter, Defendants Hastings, Chappell, Frost, and McNair were installed as the new Board of Elections members.

36. On or about December 7, 2007, Secretary Brunner communicated to the Cuyahoga County Board of Elections that she wished the county to start voting on an optical scan system

37. On December 14, 2007, Secretary Brunner released the “Evaluation & Validation of Election-Related Equipment, Standards & Testing” (“EVEREST”) report, which recommended the elimination of all precinct count optical scan and DRE machines throughout the state of Ohio.

38. The EVEREST report also recommended Cuyahoga County move to a CCOS system for the March 4, 2008 primary.

39. On December 21, 2007, the Cuyahoga County Board of Elections members reached a 2-2 impasse on whether to replace its TSX system with a CCOS system.

40. On December 22, 2007, Secretary Brunner ordered the Cuyahoga County Board of Elections to adopt a CCOS system.

41. Delivery of the new CCOS voting equipment for use in all future Cuyahoga County elections began on or about December 28, 2007.

42. Under Ohio law, the Cuyahoga County Board of Elections is responsible for either choosing directly, or recommending to the Cuyahoga County Board of County Commissioners, the system of voting technology to be used in its geographical jurisdiction. The Cuyahoga County Board of Commissioners is also empowered under Ohio law to select the method of voting technology used within its geographic jurisdiction.

43. Thus, the selection of the means of voting technology addressed herein is a policy decision made either by the Board of Elections and Secretary Brunner, or made by the

Board of Elections and Secretary Brunner and ratified by the County Commissioners. In either case, it represents the official policy and practice of the Board of Elections, Secretary Brunner, and County Commissioners, adopted and implemented under color and authority of state law. In adopting, maintaining, selecting, suggesting or ratifying the system of voting technology, the Secretary of State, the Board of Election, and the Board of County Commissioners Defendants were all, and each of them, acting under color and authority of state law.

44. The Cuyahoga County Board of Elections also performs all the other duties of a board of elections under Ohio law, including without limitation the conduct and oversight of elections within its county.

#### **The Nature and Causes of Ballot Error**

45. A “residual vote” occurs when a voting system determines that a ballot does not contain a permissible vote in a particular race. There are two kinds of residual votes:

- a. “Overvotes” occur when the voting system determines that the voter has cast more votes in a particular race than permitted in that race, notwithstanding the voter's actual intent. Almost every overvote is an error and does not accurately reflect the intent of the voter to cast no more votes than are permitted in a particular race;
- b. “Undervotes” occur when the voting system determines that the voter has cast no vote in a particular race, or fewer votes than permitted for the office in question, notwithstanding the voter's actual intent. The vast majority of undervotes at the “top” of a ballot – those occurring in the most high profile and significant political contests – do not accurately reflect the intent of the voter to

cast an invalid vote. In addition, many of the undervotes not at the “top” of a ballot are errors and do not accurately reflect the intent of the voter to cast an invalid vote. Undervotes are far more common than overvotes.

46. The optical scanning system of voting is prone to error. These errors include:
  - a. Voters may make a mark within the oval or may “complete the arrow” on the ballot in a manner that is not sufficiently large or clear to be read by the vote counting machine. For example, voters may draw an “x” rather than fill in the entire area;
  - b. Voters may use their own marking implements rather than the official ones supplied for their use;
  - c. Voters may mark the wrong area of their paper ballot sheets. For example, voters may draw a circle around the oval or their preferred candidate's name, or draw a line through the non-preferred candidate's name;
  - d. Voters may properly mark the oval or arrow for their preferred candidate, and also write in the name of their preferred candidate. The vote counting machine would reject both of these votes as overvotes;
  - e. The vote counting machine may identify stray marks as votes, which would lead to the rejection of the intended vote as an overvote.
47. Unintentional overvotes and undervotes occur in CCOS voting systems. This problem is aggravated if these systems are deployed in such a way that voters cannot readily determine by looking at their marked ballots whether the vote counting machine will not count their intended votes and instead consider them to be overvotes and/or

undervotes. Accordingly, voters must have an effective system of error notification to ensure that the vote counting machines accurately count their intended votes.

48. Optical scan voting systems are available with in-precinct counting features that provide error notification to voters. Specifically, when using these systems, the voter inserts his or her ballot directly into the counting equipment, or the polling place personnel may do so while the voter is still in the polling place; the counting equipment must be programmed to reject any ballot with an overvote or that cannot be read; and the voter who has a ballot rejected must have the opportunity to correct the vote. This error notification substantially reduces the risk that a voter will not have his or her vote counted.

49. Optical scan voting systems also are available with in-precinct counting features capable of providing error notification to voters of “marginal marks,” a type of residual vote in which the optical scan vote counting machine can detect a mark in the appropriate space on an optical scan ballot that is insufficient to register as a vote.

50. A marginal mark on an optical scan ballot is closely analogous to a hanging, pierced, or dimpled chad on a punch card ballot: both demonstrate the intent of the voter to vote for a particular candidate, and both cannot be counted as a vote by the respective vote counting machine.

51. Voting systems with central counting are not capable of providing error notification to voters because the voter is not present when votes are placed in the vote counting machine.

52. The problems set forth above may be created or aggravated by inadequate education of voters in the proper operation of the equipment, and/or inadequate training of and assistance from election officials.

53. According to data released by the Defendants, the rate of residual votes in the 2000 and 2004 Presidential elections varied substantially among Ohio's different election systems; the residual ballot rates for counties using non-notice equipment were substantially higher than the residual ballot rates for counties using notice equipment.

54. National data from the 2004 Presidential election show that CCOS systems resulted in a residual ballot rate much higher than the mean of 1.1% and much higher than the rates for PCOS and touch screen DREs. Nationwide, CCOS systems had a residual vote rate of 1.7%; PCOS systems had a residual vote rate of 0.7%; and touchscreen DRE systems had a residual vote rate of 1.0%.

**COUNT ONE**  
**VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION**  
**CLAUSES OF THE FOURTEENTH AMENDMENT**

55. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 54 of this Complaint above.

56. The dual system of voting created by Defendants has resulted in the following inequity: voters living in election jurisdictions using voting systems without error notification, such as CCOS voting systems, are significantly less likely to have their intended votes counted than voters who live in election jurisdictions that use voting systems with error notification, such as PCOS or DRE systems.

57. By selecting, implementing, ratifying, and using, arbitrarily, optical scan voting systems that do not provide voters with notice of error and an opportunity to remedy

errors, Defendants the Cuyahoga County Board of Elections, the Cuyahoga County Board of Commissioners, Hastings, Chappell, Frost, McNair, Jones, Hagan and Dimora, jointly and severally, have acted to deprive the voters of Cuyahoga County of equal protection of the law and due process of law guaranteed to them by the Fourteenth Amendment.

58. Specifically, and without limitation, the Cuyahoga County Board of Commissioners, Cuyahoga County Board of Election, County Commissioner Defendants and Boards of Election Defendants have acted, jointly and severally to deprive the voters within Cuyahoga County of the equal protection of the laws by arbitrarily selecting, implementing, certifying and using systems of voting technology which make it significantly more likely that Cuyahoga County voters will not have their votes counted than is the case for voters in other Ohio counties which employ more reliable and accurate voting technology which provides error notification and/or limits or prohibits overvotes.

59. Specifically, and without limitation, the Cuyahoga County Board of Commissioners, Cuyahoga County Board of Election, County Commissioner Defendants and Boards of Election Defendants have acted, jointly and severally, to deprive the voters within Cuyahoga County of the due process of law by arbitrarily selecting, implementing, certifying and using systems of voting technology which, without rational basis, substantially burdens them in the exercise of their right to vote, and raises substantial risks that their votes will not be counted.

60. Secretary Brunner has deprived the voters in Cuyahoga County of the equal protection of the law, by arbitrarily certifying, approving, ratifying and allowing the use

within Cuyahoga County of the CCOS system described in greater detail above, which does not provide voters with notice of error and an opportunity to remedy errors, which notice and opportunity are provided to voters in other Ohio counties which employ more reliable and accurate voting technology with error notification and correction, which systems were approved for use by these Defendants.

61. Secretary Brunner has deprived the voters in Cuyahoga County using voting technology with no error notification, or with ineffective error notification, of due process of law on the same basis specified against the county defendants in Paragraph 63 above.

**COUNT TWO**  
**VIOLATION OF SECTION 2 OF THE VOTING**  
**RIGHTS ACT OF 1965**

62. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 54 of this Complaint above.

63. Section 2 of the Voting Rights Act, as amended, 42 U.S.C. §1973, prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right to vote on account of race or color.

64. According to the 2000 U.S. Census, *Census 2000 Summary File 3 (SF 3)*, there are vast racial disparities in the socio-economic status and educational attainment of African-Americans and whites living in Cuyahoga County. Such disparities have the effect of limiting African-American electoral participation.

65. African-American voters using non-notice equipment, including the CCOS system, cast disproportionately more residual ballots than white voters using the same equipment within the same jurisdiction.

66. These disparities result from the approval, selection, and use of voting systems that lack error notification and voting systems with inadequate education of voters and inadequate training of and assistance from local election officials.

67. As a consequence of these inequities, Plaintiff Montgomery and other African-American voters are significantly more likely to have their votes denied than non-minority voters. Thus, in elections at all levels, including municipal, state, and federal elections, African-American voters have less opportunity than other members of the electorate to participate fully in the electoral process, and to elect representatives of their choice.

68. The certification and use of voting systems that lack any error notification or lack effective error notification, as approved, selected, and/or used by the Secretary Brunner, Cuyahoga County Board of Election, Cuyahoga County Board of Commissioners, and the individual County Commissioner Defendants and the Board of Election Defendants have a disparate impact on the rights of African-American voters to have their votes accurately recorded and counted, in violation of Section 2 of the Voting Rights Act.

#### **NEED FOR INJUNCTIVE RELIEF**

69. The Cuyahoga County Board of Elections is in the process of replacing its notice TSX systems with non-notice CCOS systems and plans to conduct the March 4, 2008 primary and all subsequent elections on a non-notice CCOS system.

70. Unless enjoined by this Court, future elections will be conducted under the non-uniform, unequal, inadequate systems set forth above.

71. Plaintiffs will suffer irreparable harm as a result of Ohio's system of voting. Plaintiffs have no adequate remedy at law.

## PRAYER

**WHEREFORE**, having fully stated their claims against them, these Plaintiffs, and each of them, individually and on behalf of those similarly situated as specified herein, hereby respectfully demand that this Court issue the following relief against these Defendants:

- A. Assume jurisdiction over this action, and;
- B. Declare that the Defendants, jointly and severally, through certification and approval of voting systems without any error notification or without effective error notification, and their selection, implementation, and use by local election authorities, have violated Section 2 of the Voting Rights Act, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution; and;
- C. Preliminarily and permanently enjoin Secretary Brunner from certifying and approving, and the County Commissioner Defendants and the Board of Election Defendants from selecting or using, other voting systems that lack effective error notification; and;
- D. Issue a permanent mandatory injunction requiring Secretary Brunner to certify and approve, and the County Commissioner Defendants and the Board of Election Defendants to select and use, voting systems that do not have a disparate impact upon the voting strength of minority voters, and;
- E. Retain jurisdiction of this matter for such time as is necessary to enforce the mandate of and judgment and order this Court issues in furtherance of this relief, and;
- F. Award reasonable attorney fees and costs of suit pursuant to 42 U.S.C. §1988(b), 42 U.S.C. §1973l, Civil Rule 54(D), and such other rules as may

provide for the recovery of fees and costs for suits brought to vindicate the rights asserted herein, and;

G. Grant such other relief, be it legal or equitable, as this Court, in the sound exercise of its jurisdiction, deems just.

Respectfully submitted,

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