

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

American Civil Liberties Union of Ohio, et al.;)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 1:08-cv-145
)	
Jennifer Brunner, et al.;)	
)	
Defendants.)	
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PLAINTIFFS’ STATUS REPORT REGARDING MOOTNESS

At the scheduling conference on February 21, 2008, this Court asked whether the enactment of S.B. 286, prohibiting central tabulation of optical scan ballots, would render Plaintiffs’ case moot. Plaintiffs, by and through undersigned counsel, hereby submit this status report regarding mootness of this case:

Plaintiffs do not believe merely prohibiting central count optical scans resolves their claims or constitutes voluntary cessation. “A defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.” *Friends of the Earth v. Laidlaw Env’tl Servs.*, 528 U.S. 167, 174 (2002). The party seeking the voluntary cessation exception bears a “heavy burden” of persuasion. *Id.* at 189. Indeed, this burden may be “formidable” since

it requires the party asserting mootness to show “that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* at 190 (emphasis added); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (issue of mootness is “a close one,” but held validity of public indecency ordinance not moot though plaintiff owner of nude dancing club had sold club, was 72 years old and did not intend to engage in the business anymore). When considering civil rights violations, the Sixth Circuit has further increased this burden by requiring that the defendant completely and irrevocably eradicate the effects of the challenged behavior in addition to providing a reasonable expectation that it will not recur. *See, e.g., Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 522 (6th Cir. 2001).

As most recently stated in their amended complaint (ECF Doc. 38), Plaintiffs have argued that the use of non-notice voting technology violates their rights under the federal constitution and statutes. The violation is created by the use of voting technology that does not provide voters at the polls with notice of ballot errors that will prevent their ballots from reflecting their intentions. Here, the enactment of S.B. 286 does not even qualify fully as voluntary cessation since Ohio law still permits counties to select and use non-notice equipment, and as of the date this status report’s filing, Defendants have failed to identify which voting technology they will use in November 2008. After May 1, 2008, only two types of voting technology will be prohibited by state statute: (1) central count optical scans pursuant to revised OHIO REV. CODE § 3506.21, and (2) direct recording electronic equipment without a voter verified paper auditable trail pursuant to OHIO REV. CODE § 3506.10. No other equipment previously used in Ohio has been prohibited or decertified, and nothing in the Revised Code requires notice technology. In fact, OHIO REV. CODE §§ 3506.12, 3506.15, and 3506.16 refer to and establish the parameters for the use of punch cards which also do not provide notice. Thus,

even the much-maligned punch cards remain available to Cuyahoga County. Until voters at the polls in Cuyahoga County have access to notice equipment, Plaintiffs' case is not moot.

Plaintiffs are aware that Defendants will soon begin to select yet another voting technology for use in elections held after May 1, 2008. Plaintiffs hope Defendants take seriously not only the mandates now contained in Ohio's election code, but also the concerns Plaintiffs and others have raised about the problems of non-notice technology. Though it is possible that Defendants will select equipment that will satisfy Plaintiffs' claims, it is also possible that Defendants will once again elect to use non-notice equipment due to availability, cost, or any number of reasons. Whether Cuyahoga County's compliance with state statutes will resolve Plaintiffs' claims remains speculative.

Plaintiffs recognize that discovery in voting cases can be costly and lengthy. However, filing another complaint after voluntarily dismissing this one would also subject Plaintiffs to additional expense and possibly prejudice their ability to seek timely relief. Thus, in the interests of judicial economy, Plaintiffs propose that this case be closed administratively until June 1, 2008, to afford Defendants time to select new voting equipment. On or before June 1, Defendants shall notify this Court and the Plaintiffs of their plans for the November 2008 general election and provide assurances that notice equipment will be used for that election. If new equipment is not selected by June 1, 2008 or if the equipment selected does not provide voters with notice, Plaintiffs may then request that the case be reopened and seek timely injunctive relief.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 12th day of March, 2008.

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