



SHERRI BEVAN WALSH

Prosecuting Attorney

County of Summit

December 7, 2006

Via Overnight Mail

Janice Yates, Office of the Clerk
U.S. Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street, Room 524
Cincinnati, Ohio 45202

MARY ANN KOVACH
Chief Counsel, Criminal Division

CRIMINAL DIVISION
53 University Avenue, 7th Floor
Akron, OH 44308-1680
(330) 643-2788
(330) 643-8277 Fax

Re: *Effie Stewart, et al. v. J. Kenneth Blackwell, et al.*
Case No.: 05-3044

JOHN F. MANLEY
Chief Counsel, Civil Division

CIVIL DIVISION
53 University Avenue, 6th Floor
Akron, OH 44308-1680
(330) 643-2800
(330) 643-2137 Fax

VICTIM SERVICES DIVISION
(330) 643-2800
(330) 643-2137 Fax

**CHILD SUPPORT
ENFORCEMENT AGENCY**
175 South Main Street
P.O. Box 80598
Akron, OH 44308-0598
(330) 643-2765
(330) 643-2745 Fax

JUVENILE DIVISION
650 Dan Street
Akron, OH 44310-3989
(330) 643-2943
(330) 379-3647 Fax

TAX DIVISION
Suite 118
220 South Balch Street
Akron, OH 44302-1606
(330) 643-2618
(330) 643-8540 Fax

Dear Ms. Yates:

This letter is in response to this Court's December 1, 2006 order. Defendant-Appellee Summit County requests that this Court dismiss the appeal for mootness. The issues in question at the outset of the case are no longer viable, as Summit County and other counties in Ohio no longer use punch cards voting. Shortly before en banc oral arguments were to commence, Plaintiffs - Appellants have finally agreed with the Appellees that their case is moot. Appellants now request that the District Court's ruling be vacated, and remand with instructions to dismiss the case as moot.

The function of vacating the lower court's judgment and ordering the case dismissed on remand is for the purpose of preventing a party from being barred from relitigating the issue in a subsequent suit, if that same issue arises. *Munsingwear*, 340 U.S. at 40. "When that procedure is followed, the rights of all parties are preserved[.]" *Id.* Otherwise the doctrine of *res judicata* would bar either party from addressing the issue in court in any subsequent litigation because of the judgment of the lower court. Vacating the district court's judgment, "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.*

Vacatur has been the traditional avenue when dealing with a case that has come before an appellate court, but has become moot along the way. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104. The court in *Munsingwear* goes on to cite a myriad of cases in a footnote that have held this to be the procedure. However, the court also cites exceptions. In *Schenley Distilling Corp. v. Anderson*, 333 U.S. 878, 68 S.Ct. 914, the Supreme Court dismissed the appeal without vacating and remanding, finding that both parties had agreed that the case had in fact become moot. Since all parties in this case now agree that the case is moot, this court should follow the exception and dismiss the appeal.

The litigation in this case has gone on for over four years. From the very beginning, the Defendants claimed that the issue was moot. The Defendants asserted time and time again that punch card voting was on the way out, and new electronic voting systems (in-precinct count optical scan or DRE's) were on the

way in as the new equipment. The Defendants received government funding, placed orders for new machines, trained staff, educated the public on the use of the new machines, and eventually implemented the use of the new voting equipment. This new voting equipment is in place in the entire State of Ohio.

The Defendants in this case received a favorable judgment from the District Court. This court, however, reversed, but granted a hearing *en banc*. It is on the eve of this *en banc* hearing that the Plaintiffs, rather than facing a possible decision in favor of the Defendants, suddenly agreed that their case is now moot, as the entire State of Ohio has now moved away from punch card voting. The Plaintiffs refused to accept the assurance of the Defendants that they were in fact changing to the electronic voting systems. Plaintiffs pressed for a judgment in the district court. Plaintiffs could have allowed the case to be put on the inactive status while Ohio was implementing the new systems. They continued to pursue a lengthy legal battle that cost both sides countless hours and expense, only to now agree that the issue is dead for mootness.

Vacatur would serve no purpose in the present matter. If the purpose of the vacatur is to ward off *res judicata*, then this is moot as well. The State of Ohio spent hundreds of millions of dollars in updating and modernizing the voting system. It was a major overhaul and a lengthy process that reasonably took several years to accomplish. The return to the use of punch cards is not likely. The likelihood of relitigation of this issue is so remote and miniscule; preserving the rights of the Plaintiffs in this case is an attempt at futility.

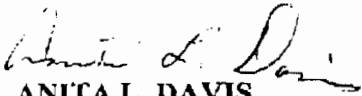
Furthermore, with relitigation such a distant and remote possibility, remanding would only be more costly to the parties involved. As mentioned above, this case has gone on for four years, and has cost countless hours and dollars. It could, in fact, have been completely avoided had the Plaintiffs allowed the Defendants a reasonable amount of time to implement their plans that existed before this litigation ever began. Both parties are in agreement that the issue is now moot. Remanding for proceedings in the lower court would be a waste of time and money for everyone involved, and it would hinder judicial economy.

Dismissing the case at this level is the most appropriate course of action. The likelihood that this issue would present itself in the future, infringing the rights of the Plaintiffs, is so remote a possibility that it makes little sense to remand and vacate for fear of *res judicata*. The State and the named counties have gone to considerable lengths to improve the system, exactly what the Plaintiffs asked for, and will not revert to the system that was the subject of the litigation. Furthermore, for the sake of expense and judicial economy, dismissal is the most logical approach.

Thank you for your attention to this matter.

Very truly yours,

SHERRI BEVAN WALSH



ANITA L. DAVIS

Assistant Prosecuting Attorney

ALD/tld

cc: All counsel