

**In The United States District Court
For The Northern District of Ohio
Eastern Division**

Effie Stewart, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No: 5:02CV-2028
	:	
J. Kenneth Blackwell,	:	Judge Dowd
Ohio Secretary of State, et al.,	:	
	:	Magistrate Judge Gallas
Defendants.	:	

**Defendants State of Ohio’s, Montgomery County’s, and Summit
County’s Reply To Plaintiffs’ Supplemental Brief Identifying
Undisputed Facts In Support Of Their Motion For Summary Judgment**

I. Introduction

The alleged “undisputed facts” offered in Plaintiffs’ Supplemental Brief fall well short of demonstrating that they are entitled to summary judgment. In fact, numerous “facts” cited by the Plaintiffs are neither undisputed nor facts. Plaintiffs’ brief, in several instances, relies upon irrelevant and inadmissible reports (See Defendants Motion to Exclude Expert Testimony of Martha Kropf and Roy G. Saltman (R. at 174) and Motion to Strike Martha Kropf’s Second Expert Report (R. at 185)) and inadmissible opinion evidence. Furthermore, Plaintiffs’ brief

cites to exhibits (*e.g.* R. at 206) that were filed in an untimely manner and in contravention of this Court's express orders. Collectively, these shortcomings compromise Plaintiffs' claims for relief. Because Plaintiffs' purported facts fail to support their claims, this Court should grant Defendants' Motion for Summary Judgment.¹

I. Defendants' Response to Plaintiffs' Undisputed Facts.

Contrary To The Representations Noted In Plaintiffs' Supplemental Brief, The Facts Below Fail To Support Plaintiffs' Misplaced Constitutional Theories.

1. With regard to the purported facts contained in paragraphs 1-11, Defendants do not dispute any of these factual claims.
2. With regard to the purported facts contained in paragraph 12, Defendants do not dispute Plaintiffs' claim that the State has certified a variety of voting systems, however, Defendants dispute the remaining purported facts because the use of the word "mistake" improperly assumes that voters unintentionally voted in a particular way. (R. at 171, Exh. (5e) H. Asher Dep. at 94-96 (describing a phenomenon called the "Donald Duck Vote" where voters intentionally vote for either themselves, another person, or some fictional character. Dr. Asher notes that these votes are not counted.)); (R. at 171, Exh. (3b) T. Burke Dep. at 19, Ln. 15-22 (Overvoting can be caused by any number of things including the decision by the voter to intentionally cast an over-vote.)) Plaintiffs' own expert witness has testified that all under and over votes are sometimes intentional acts. Defendants are also disputing the manner the term "second chance" voting is used, because there is undisputed evidence in the record noting that voters are informed that they may receive up to three ballots in the event that they make an error in voting. (R. at 171, Exh. (3d) J. Stautberg Dep. at 32, Ln. 3-8. ([v]oters are informed that they may receive up to three ballots in the event that they make an error in voting.))
3. With regard to the purported facts contained in paragraphs 14-15, Defendants do not dispute any of these factual claims.
4. With regard to the purported facts contained in paragraph 16, Defendants dispute Plaintiffs' use of the term "second chance feature" because the term assumes that a second chance feature will eradicate potential errors on the part of the voter. Plaintiffs' late and untimely-filed Exhibit (R. at 206) further undermines their purported fact by noting "it's the responsibility of the voter to make sure his/her ballot is the way he/she wants to vote. Voter education is the recommendation of the committee." (See R. at 206, Recommendations of the Election Study Committee at 1, 17-18.)

¹ Defendants incorporate by reference the responses submitted by the other named defendants in this action to the extent that they are not inconsistent with this filing.

5. With regard to the purported facts contained in paragraph 17, Defendants dispute the entire paragraph because voters can check their ballots, regardless of the voting technology used, for accuracy prior to casting their votes. See the reasons noted under Paragraph 4, *supra*.
6. With regard to the purported facts contained in paragraph 18, Defendants dispute the entire paragraph because voters are informed and have an opportunity to receive up to three ballots in the event that they make an error in voting. (R. at 171, Exh. (3d) J. Stautberg Dep. at 32, Ln. 3-8.)
7. With regard to the purported facts contained in paragraph 19, Defendants do not dispute any of these factual claims.
8. With regard to the purported facts contained in paragraph 20, Defendants dispute the characterization offered by Plaintiffs, suggesting that only punch card voting systems are susceptible to problems, on the basis that all voting systems are subject to some types of problems. (See R. at 148, Security Report.)
9. With regard to the purported facts contained in paragraph 21, Defendants do not dispute any of these factual claims.
10. With regard to the purported facts contained in paragraph 22, Defendants object to Plaintiffs' characterization of the words "second chance" for the reasons noted in paragraphs 2 and 4 *supra*.
11. With regard to the purported facts contained in paragraph 23, Defendants object to the term "actual notice" because a voter's actual notice occurs by examining his or her optical scan ballot. (R. at 171, Exh. (3a) B. Tuckerman Dep. at 8, 16, 80-82 and Dep. Exh. 6.)
12. With regard to the purported facts contained in paragraph 24, Defendants dispute the manner in which Dana Walch's testimony is characterized and paraphrased. Specifically, Mr. Walch does not expressly say that "DRE voting machines provide actual notice" as noted by Plaintiffs. (R. at 171, Exh. (2a) Walch Dep. at 58, Lns 11-20.)
13. With regard to the purported facts contained in paragraph 25, Defendants do not dispute the characterization of Pat Wolfe's testimony.
14. With regard to the purported facts contained in paragraph 26, Defendants dispute that Mr. Walch's statements were made in an expert context, or that Mr. Walch has been qualified as an expert and has the requisite expertise to reach any conclusions on the topic of voter error ratios.
15. With regard to the purported facts contained in paragraph 27, Defendants do not dispute any of these factual claims.

16. With regard to the purported facts contained in paragraph 28, Defendants do not dispute that the counties in Ohio experiencing the highest percentages of residual votes in the 2000 Presidential Election used punch card ballots, however, this phenomena was not the case for down ballot races (races below the presidential race) during Ohio's November, 2000 elections. (R. at 171, Exh. (6a) J. Lott's Expert Report.)
17. With regard to the purported facts contained in paragraph 29, Defendants state that these statements amount to inadmissible opinion evidence, because they were not made in an expert context. And also because Plaintiffs' have failed to qualify Secretary Blackwell as an expert and show how the Secretary has the requisite expertise to act as an expert on the use of voting technologies. Furthermore, the State's HAVA Plan has not been qualified as an expert report in this case.
18. With regard to the purported facts contained in paragraph 30, Defendants state that the State's HAVA Plan has not been qualified as an expert report in this case, and therefore the statements made under this paragraph are inadmissible for the purposes noted in Plaintiffs' Supplemental Brief.
19. With regard to the purported facts contained in paragraph 31, Defendants dispute the statements made under this paragraph because neither the Transmittal Letter of Secretary of State Blackwell nor the Report of Final Recommendations of the Election Study Committee have been qualified as expert reports, and both of these exhibits (R. at 206) were improperly filed without leave or permission from this Court.
20. With regard to the purported facts contained in paragraph 32, Defendants dispute the statements made under this paragraph for the reasons noted in paragraph 19, *supra*.
21. With regard to the purported facts contained in paragraph 33, Defendants dispute the statements made under this paragraph for the reasons noted in paragraph 19, *supra*.
22. With regard to the purported facts contained in paragraph 34, Defendants dispute the statements made under this paragraph for the reasons noted in paragraph 19, *supra*.
23. With regard to the purported facts contained in paragraph 35, Defendants state that Dr. Lott's report found that punch cards performed better than other systems in the 1992, 1996, and 2000 presidential elections. (R. at 171, Exh. (6a) J. Lott's Expert Report.)
24. Furthermore, Defendants dispute the statements attributed to Kropf's Affidavit, Tables 1 & 2 (R. at 171) because this report was not timely filed, contained information not included in her original expert report, and Defendants have filed a Motion to Strike this report. (R. at 185.)

25. With regard to the purported facts contained in paragraph 36, Defendants characterization of Dr. Lott's report fails to note that factoring in all races between 1992 and 2000, punch card ballots performed better than other voting technologies. (R. at 171, Exh. (6a) J. Lott's Expert Report.)
26. With regard to the purported facts contained in paragraph 37, Defendants dispute that Dr. Kropf's untimely second expert report is properly a part of this Court's record. This report was not timely filed, contained information not included in Dr. Kropf's original expert report, and Defendants have not been given an opportunity to cross examine Dr. Kropf's findings from this report. In addition, Plaintiffs filed this report without first seeking leave or permission from this Court. Finally, Defendants have filed a motion to strike Dr. Kropf's supplemental report.
27. With regard to the purported facts contained in paragraph 38, Defendants do not dispute the residual vote rate cited under this paragraph.
28. With regard to the purported facts contained in paragraph 39, Defendants dispute that these facts supports Plaintiffs' constitutional claims because Plaintiffs have offered this Court an inadequate basis of comparison. The charts that follow provide a more comprehensive data set of the residual vote rates for different voting systems and different electoral races. The charts also show that upon factoring all races across the board, punch card ballot residual rates are lower than other comparable voting systems.

County	Total Votes	Presidential Votes	Residual Votes	Residual Vote %	Senate Votes ²	Residual Votes	Residual Vote %
Delaware	55,959	55,403	556	0.99%	53,603	2,356	4.21%
Franklin	417,800	414,074	3,726	0.89%	392,741	25,059	6.00%
County	Presidential Votes	Senate Votes	Residual Votes ³	Residual Vote %	House Votes	Residual Votes ⁴	Residual Vote %
Delaware	55,403	53,603	1,800	3.2489%	54,151	(548)	(1.022%)
Franklin	414,074	392,741	21,333	5.1520%	388,881	3,860	0.98284%

² Residual Votes for Senate are calculated by the number of total votes minus the number of votes cast in the senate race.

³ Residual Votes in this column are calculated by the number of votes cast for President minus the number of votes cast in the senate race.

⁴ Residual Votes in this column are calculated by the number of votes cast for the U.S. Senate race minus the number of votes cast in the House Race. Negative Numbers are indicated by parenthesis.

County	Total Population	White Population	African-American Population	Total Votes Cast	Total Presidential Votes Cast	Total Residual Votes	Residual Vote Percentage
Adams	27,330	26,721	48	10,727	10,235	492	4.59
Gallia	31,069	29,596	839	13,203	12,776	427	3.23
Holmes	38,943	38,564	127	9,937	9,145	792	7.97
Jackson	32,641	31,953	193	12,918	12,490	428	3.31
Meigs	23,072	22,850	159	10,228	9,795	433	4.23
Monroe	15,180	15,079	40	7,377	7,115	262	3.55
Noble	14,058	13,010	940	6,210	5,899	311	5.01
Pike	27,695	26,786	246	11,084	10,560	524	4.73
Vinton	12,806	12,560	45	5,184	4,946	238	4.59
Summit	542,899	453,336	71,608	232,252	224,839	7,413	3.19
Hamilton	845,303	616,487	198,061	384,336	377,899	6,437	1.67
Montgomery	559,062	428,084	111,030	237,580	230,987	6,593	2.78
Sandusky	61,792	56,974	1,650	26,441	25,744	697	2.64
Cuyahoga	1,393,978	938,863	382,634	590,473	574,782	15,691	2.66

29. With regard to the purported facts contained in paragraph 40, Defendants dispute this paragraph for the reasons stated in paragraph 27, *supra*.
30. With regard to the purported facts contained in paragraph 41, Defendants dispute that these facts supports Plaintiffs' constitutional claims because Plaintiffs have offered this Court an inadequate basis of comparison. (See rationale noted under paragraph 27, *supra*.)
31. With regard to the purported facts contained in paragraph 42, Defendants do not dispute that "[s]ome residual votes occur when voters intentionally choose to case votes in a particular race. [and] Examining ballots does not allow for intentional and unintentional undervotes to be distinguished." However, Plaintiffs' claim that "[t]he

- only systemic way to estimate the incidence of intentional undervoting is through voter self-reports” is an undisputed fact that supports that constitutional claims is clearly erroneous. Plaintiffs’ expert indicated that to some degree exit polling can be compromised because there is no way possible of knowing whether voters were being truthful with regard to whether or not he/she cast a ballot. (R. at 171, Exh. (5a) M. Kropf’s Dep. at 66.) Furthermore, Plaintiffs have failed to offer any evidence whatsoever concerning intentional undervoting in the State of Ohio, the four Defendant counties, or their respective precincts.
32. With regard to the purported facts contained in paragraph 43, Defendants dispute the statements made under this paragraph for the reasons stated above. In addition, these opinions are not based upon studies performed on voters in the counties that are the subject of dispute in this case. (R. at 171, Exh. (5a) M. Kropf’s Dep. at 94.)
 33. With regard to the purported facts contained in paragraph 44 – 47, Defendants dispute these paragraphs for the reasons stated in paragraph 31, *supra*.
 34. With regard to the purported facts contained in paragraph 48, Defendants state that the statements made under this paragraph do not constitute a factual statement. And for this reason, these statements cannot be an undisputed facts.
 35. With regard to the purported facts contained in paragraph 49, Defendants state that the conclusions noted under this paragraph are hearsay, and merely the opinions of the elections summit’s participants and do not rise to the level of an indisputable fact sufficient to support Plaintiffs’ Motion for Summary Judgment. Furthermore, non of these people have been properly qualified as expert witnesses.
 36. With regard to the purported facts contained in paragraph 50, Defendants state that the statements attributable to Secretary Blackwell do not support Plaintiffs’ Motion for Summary Judgment because Secretary Blackwell was not qualified as an expert and Plaintiffs have failed to show how the Secretary has the requisite knowledge to act as an expert on this matter. Furthermore, Plaintiffs’ expert contradicts this statement. (R. at 171, Exh. (5e) H. Asher’s Dep. at 66.)
 37. With regard to the purported facts contained in paragraph 51, Defendants dispute the use of the term “actual notice” for the reasons noted under paragraph 11, *supra*. In addition, the voting systems for Defendant Counties are presently scheduled to be changed in accordance with the schedule noted under H.B. 262 and will be in place in 2005 or 2006, such an action makes this case moot as there is no time to modify these elections systems for the 2004 election and, those machines through the voluntary action of Defendants, will be replaced.
 38. With regard to the purported facts contained in paragraph 52, although the statements contained under this paragraph are irrelevant to support Plaintiffs’ constitutional claims, Defendants are not disputing the veracity of these representations.
 39. With regard to the purported facts contained in paragraph 53, Defendants dispute the characterization of punch card systems as “non-notice” for the reasons stated in

paragraph 11, *supra*. In addition, the purported facts noted under this paragraph are factually inaccurate in light of H.B. 262. (R. at 198, (copy of H.B. 262), Attached as Exh. A. to Defs.' Reply Brief In Support of Their Motion for Summary Judgment.)

Contrary To The Representations Noted In Plaintiffs' Supplemental Brief, The Facts Below Fail To Support Plaintiffs' Voting Rights Act Claim.

40. Defendants incorporate by reference their responses to Plaintiffs' facts set forth in the preceding paragraphs in response to paragraph 54.
41. With regard to the purported facts contained in paragraph 55, Defendants do not dispute any of these factual claims.
42. With regard to the purported facts contained in paragraph 56, Defendants state that Dr. Engstrom's report does not show the correlation alleged under this paragraph. (See Defs.' Mem. Contra Pls.' Mot. for Summ. J. at 2.)
43. With regard to the purported facts contained in paragraph 57, Defendants dispute all statements made under this paragraph because Plaintiffs have indicated that they have made a "vote denial" claim, and they have failed to present evidence demonstrating that African-Americans have been denied the right to vote. In addition, for no apparent reason, Plaintiffs failed to include Cuyahoga County as a comparison country despite the fact that this county has the largest African-American concentration in the State of Ohio. The undisputed facts show that Plaintiffs' trial attorney is currently writing an academic paper revolving around voting in the four Defendant counties and that he had alone made the decision on which counties to examine and Defendants have been unable to question that selection process.
44. With regard to the purported facts contained in paragraph 58, Defendants dispute these paragraphs for the reasons stated in paragraph 42, *supra*.
45. With regard to the purported facts contained in paragraph 59, Defendants dispute the assertions noted under this paragraph because these statements are simply Plaintiffs' inadmissible opinion, and Dr. Herb Asher, Plaintiffs' expert in this case, testified "there was, in fact, no such recent history of voting-related discrimination [in Ohio]." *See Mallory v. Ohio*, 38 F. Supp. 2d 525, 541 (S.D. Ohio 1997) *aff'd* 173 F. 3d 377 (6th Cir. 1999).
46. With regard to the purported facts contained in paragraphs 60-62, Defendants dispute these paragraphs because they are irrelevant. Moreover, these paragraphs merely rephrase Dr. Engstrom's opinions, and that are not indisputable facts that are sufficient to support Plaintiffs' Motion for Summary Judgment.
47. With regard to the purported facts contained in paragraph 63, Defendants dispute these assertions because they amount to an impermissible characterization of Engstrom's report, and thus, are not factual evidence.

48. With regard to the purported facts contained in paragraphs 64-65, Defendants dispute these assertions on the grounds that they are irrelevant and impermissible legal conclusions, and thus, are not factual evidence.
49. With regard to the purported facts contained in paragraph 66, Defendants dispute these assertions on the grounds that they are factually inaccurate. Franklin County's absentee votes are cast by punch card. As such, there may be overvotes stemming from Franklin County.
50. With regard to the purported facts contained in paragraph 67, Defendants state that these statistics undermine Plaintiffs' Voting Rights Act Claim by showing that African-Americans in Hamilton County undervoted at an identical rate to African-Americans in Franklin County, and the difference between Franklin County and Hamilton County was identical. Moreover, based upon these results a white voter in Summit County was twice as likely as an African-American in Hamilton County to undervote.
51. With regard to the purported facts contained in paragraphs 68-69, Defendants state that these assertions are irrelevant, argumentative, and are not factual evidence sufficient to support Plaintiffs' Voting Rights Act Claim.
52. With regard to the purported facts contained in paragraph 70, Defendants are not disputing the assertions made regarding the method of voting in Montgomery County, however, Defendants dispute the remaining conclusory statements that are improperly noted as factual evidence.
53. With regard to the purported facts contained in paragraphs 71-72, Defendants dispute these paragraphs on the basis that they contain irrelevant opinions and interpretations, rather than factual evidence.
54. With regard to the purported facts contained in paragraph 73, Defendants dispute these assertions on the basis that they constitute argumentative statements, and are not factual evidence.
55. With regard to the purported facts contained in paragraph 74, Defendants dispute these assertions on the basis that Dr. Lott's report examines the affect of voting systems statewide over a multitude of races and years, and Plaintiffs' mischaracterizes Dr. Lott's analysis and focus. (R. at 171, Exh. (6a) See generally J. Lott's Expert Report.)
56. With regard to the purported facts contained in paragraph 75, Defendants dispute these assertions on the basis that they are argumentative, a matter of opinion, and not factual evidence.
57. With regard to the purported facts contained in paragraphs 76-78, Defendants dispute these paragraphs on the basis that they are argumentative opinion and are not factual evidence.

58. With regard to the purported facts contained in paragraph 79, Defendants dispute this paragraph because it is based upon an improperly filed exhibit (R. at 206, filed on May 21, 2004) without leave or permission from this Court. In addition, unaccompanied by an affidavit, these documents are not authenticated as required by Rule 56 because they are neither sworn nor certified.

III. Conclusion

For the foregoing reasons, the Defendants respectfully request this Court grant them summary judgment on all counts.

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 4, 2004, a copy of foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Copies will also be mailed to the following:

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