

**THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**EFFIE STEWART, et al.,**

**Plaintiffs,**

v.

**J. KENNETH BLACKWELL,  
Ohio Secretary of State, et al.,**

**Defendants.**

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**CASE NO: 5:02CV-2028**

**JUDGE DOWD**

**MAGISTRATE JUDGE GALLAS**

**DEFENDANTS' TRIAL BRIEF**

**I. INTRODUCTION**

As the November 2004 election quickly approaches, the Plaintiffs in this case are asking this Court to order the State of Ohio to bypass important security checks and eliminate punch card and central-count optical scan ballot equipment. Instead of guaranteeing the accuracy and security of the voting machines, the Plaintiffs seek to rush the implementation of unproven technology into Ohio's election system by asserting a Voting Rights Act violation and claiming that the Defendants have violated plaintiffs' Due Process and Equal Protection rights.

The evidence provided by both parties demands a more prudent, calculated approach to implement a new ballot systems that complies with state and federal law . The Plaintiffs have not proven and cannot prove that any Ohioan has been denied the right to vote. Thus, this Court

should reject the Plaintiffs' request that it run Ohio's voting system. The facts demonstrate that throughout this litigation, Defendants have taken great strides in implementing a secure, trustworthy and fair voting system. The Defendants are continually working to improve the system by implementing the Help America Vote Act (HAVA) and House Bill 262. This Court should refuse Plaintiffs' demands to hurry changes to Ohio's elections system and should allow Ohio to continue to implement its voting system changes as required by both federal and state law.

## **II. STATEMENT OF FACTS**

Plaintiffs are registered voters who reside in Hamilton, Montgomery, Sandusky and Summit Counties. Stip. Facts ¶¶ 1-4. Plaintiffs' claims are asserted against Defendants Ohio Secretary of State J. Kenneth Blackwell, members of the Board of Voting Machine Examiners, and members of the Hamilton, Montgomery, Sandusky and Summit County Board of Elections. *Id.* at ¶¶ 6-11. Plaintiffs' Complaint alleges that punch card ballot devices and optical scan devices, some of which use central ballot tabulation, violate their rights under the Due Process Clause, the Equal Protection Clause, and that punch card devices also violate their rights under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Although the Plaintiffs acknowledge that the State will soon be implementing the requirements of HAVA, they have brought this litigation in order to "force" the State to do the very thing it is doing voluntarily.

Throughout the course of this litigation, the Ohio Secretary of State's Office has worked to replace traditional punch card ballot machines with more modern voting technologies. Within weeks of the October 2002 effective date of HAVA, Governor Bob Taft contacted the U.S. General Services Administration to confirm Ohio's intent to meet all deadlines and requirements in order to receive HAVA funding.

Blackwell, as part of the elections reform process, reconfigured his office and required many of his senior staff to work on HAVA. Stip. Facts. ¶44. In May of 2003, Blackwell's office finalized Ohio's HAVA Plan and published the document for the public's review. *Id.* at ¶45. In that same month, Ohio released its Request for Proposal ("RFP") to solicit proposals from vendors that wished to supply the State with HAVA compliant voting systems.<sup>1</sup>

The Secretary of State's Office solicited bids during the RFP process, and in September 2003, the Secretary of State's Office qualified the following four vendors to offer voting devices in Ohio: 1) Sequoia Voting Systems, 2) Diebold Elections Systems, 3) Election Systems & Software, and 4) Maximus/Hart Intercivic/DFM Associates, pending a security review for all prospective voting devices.<sup>2</sup> *Id.* at ¶46. The security review assessments included an examination of voting machine consumer source codes, and scrutiny of the potential for penetration and points of failure specific to each voting machine. The security reviews revealed that there were 57 potential security risks within the software and hardware for the prospective voting devices, and, in December 2003, the Secretary of State ordered the qualified voting device vendors to resolve the identified security concerns. *Id.* at ¶47. These security concerns prompted the Secretary of State's office to seek a waiver as set forth in HAVA. HAVA § 102(a)(3)(B).

In January 2004, the U.S. Congress passed the Omnibus Appropriations Act that guaranteed the State of Ohio the monies necessary to implement its HAVA plan. P.L. 108-199. Shortly afterwards, the Ohio Secretary of State's Office submitted a request to the State's Controlling Board for release of monies to begin the process of replacing the State's existing

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<sup>1</sup> The Ohio Secretary of State's Office was able to negotiate voting machine contracts that were \$30 million lower than the projected estimate noted in Ohio's State HAVA plan.

<sup>2</sup> Sequoia Voting Systems has subsequently declined to participate as a vendor for the State of Ohio.

voting technologies. The request was temporarily delayed because the General Assembly expressed concerns that security risks are still an issue with DRE machines *Id.* at ¶48. The General Assembly did create a House-Senate Ballot Security committee to ensure that all replacement machines will provide accurate, reliable and tamper-proof results. *Id.* The State of Ohio, as part of its continuing obligation to conform to the requirements and timetable established by the Help America Vote Act, passed H.B. 262. *Id.* at ¶49. Under the terms of that law, the State and all of its counties are upgrading their voting technology. Through HB 262, the State has put into place a funding mechanism to have new voting machines in time for the November 2005 election.

Although there might be some debate about the best way for the State of Ohio to implement the requirements of HAVA, no State official has commented that the State will not comply with those requirements. Ohio's officials are acting responsibly in guaranteeing the State and its voters the best technology, and technology in which the public will have complete confidence. It is, therefore, undisputed that the State of Ohio has taken substantial actions to replace its current voting technology, and that the State has sufficient federal funding to implement its planned changes once all security concerns have been satisfied.

### **III. DISCUSSION OF CONTROLLING LAW**

#### **A. The State of Ohio and Its County Boards Of Elections Have Not Violated The Voting Rights Act.**

In order to remedy the historical disenfranchisement of certain minority groups, Congress passed the Voting Rights Act, 42 U.S.C. § 1973. This Act prohibits any voting practice or procedure that results in “a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....” 42 U.S.C. § 1973(a). In order to show a violation of this Act, Plaintiffs must prove that they have been denied the right to vote on the basis of their race,

based upon the totality of the circumstances. *Id.*, *See e.g., Johnson v. Florida*, 353 F.3d 1287, 1304 n. 22(11<sup>th</sup> Cir, 2003), *citing Farrakhan v. Washington*, 338 F.3d 1009, 1015 n.11 (9<sup>th</sup> Cir. 2003). The Plaintiffs have not demonstrated that the punch card ballot, as used in the State of Ohio, interferes with a minority's ability to elect representatives of its choice.

### **1. Ohio's Political Process Is Equally Open To African-Americans**

As noted above, § 2 of the Voting Rights Act requires a covered racial minority to demonstrate that the State has enacted a voting practice or procedure that results in a denial or abridgement of the right to vote because its members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The Plaintiffs have failed to prove such a situation exists in Ohio and have not provided any evidence to the Court. Similarly, although the Plaintiffs allege that punch card ballots exclude African-American voters, they have failed to demonstrate that African-American voters in Ohio have not been able to elect their chosen candidates.

### **2. Plaintiffs' Second Amended Complaint Fails To State A Voting Rights Act Violation.**

In order for a plaintiff to prevail in this type of litigation, he or she must demonstrate a claim under traditional § 2 requirements. Under § 2, two different types of discriminatory practices and procedures are covered: those that lead to "vote denial" and those that result in "vote dilution." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11<sup>th</sup> Cir. 1999). In their Memorandum Contra Defendants' Motion for Summary Judgment, and not in their Complaint, Plaintiffs specified that they were asserting a vote denial claim under § 2. (Plaintiffs' Memo Contra p. 6). However, Plaintiffs have not properly asserted a vote denial claim, nor have they established adequate proof of such claim.

**a. The Plaintiffs Have Failed To Assert Or Prove A Vote Denial Claim.**

In deciding a vote denial claim, “a court must assess the impact of the contested structure or practice on minority electoral opportunities ‘on the basis of objective factors.’” *Gingles*, 478 U.S. at 44 *quoting* S. Rep. No. 97-417 at 27. The Plaintiffs fail to either properly plead or to demonstrate such a claim.

First, the Plaintiffs focus on punch card ballots in only three counties, rather than the entire state of Ohio. Their own complaint contradicts using this limited focus, however, providing that “ninety percent of the black population in Ohio resides in 15 counties. Of these 15 counties, 9 use notice voting systems.” *Second Amended Complaint* at ¶ 101. Thus, by the Plaintiffs’ own complaint, 60% of the counties containing 90% of the black population of the State of Ohio use the very voting technologies the Plaintiffs are claiming should be made mandatory. There is no allegation, nor is there any proof, that punch card machines are only used in minority-majority precincts in Hamilton, Montgomery and Summit Counties. In fact, the Plaintiffs’ own expert, Herb Asher, testified that of the ten counties with the highest residual vote rates,<sup>3</sup> eight of the counties were Appalachian counties, one was Holmes County, and the last one was Summit County. Asher Depo. at 83-84.

Second, Plaintiffs failed to fully examine the effect punch card voting has on blacks in the State of Ohio. Their experts only examined statistics for the 2000 presidential election in Franklin, Hamilton, Montgomery, Summit, and Sandusky Counties. This narrow focus does not demonstrate whether punch cards actually exclude people on the basis of race from participating

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<sup>3</sup> A “residual” vote occurs whenever a voter, either intentionally or unintentionally, fails to record a legal vote for a particular office. This could occur either because the voter intentionally chose not to vote for any candidate for an office, or, in one way or another, improperly recorded a vote for a candidate for the office.

in the political process. As a result, the Court should find that the Plaintiffs have not met their burden of asserting a proper vote denial claim.

**3. The Totality of Circumstances Show that The Plaintiffs in This Case Have Not Been Denied the Right to Vote.**

Even assuming that Plaintiffs have set forth a proper vote denial claim, they have failed to provide proof of any of the typical factors required in a § 2 claim. The central issue surrounding any § 2 Voting Rights Act Claim is that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The intent of the Voting Rights Act is “to combat electoral structures and procedures that deprive minority voters of an opportunity to participate effectively in the political process.” *Southwest Voter Registration Education Project v. Shelley*, 278 F. Supp. 2d 1131, 1142 (C.D. Cal.) *aff’d* 344 F.3d 914 (9th Cir. 2003) (*en banc*).

The Sixth Circuit has recognized that, although the Voting Rights Act is remedial legislation meant to correct historical discrimination, the 1982 Amendments to the Act were heavily contested in Congress. The Act is a “significant intrusion into the rights of States,” “the words of the 1982 amendment were chosen with particular care and courts should be cautious in construing them.” *Kent County*, 76 F.3d at 1390.

The Senate Report accompanying the 1982 Amendments to the Voting Rights Act set forth the “typical factors” that might show a violation of § 2. Those factors include: a history of official discrimination in the State to participate in the democratic process; racially polarized voting; the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; and other facts as provided

in whether political campaigns have been characterized by overt or subtle racial appeals; and other factors as provided in S. Rep. 97-417 at 28-29 *cited* in *Gingles*, 478 U.S. at 36-37.

Instead of stating a traditional Voting Rights Act claim, the Plaintiffs claim that Ohio has violated the rights of minorities in three counties by using punch card technology without in-precinct error notification. *Second Amended Complaint* at ¶¶ 99-101. Yet, both the very language of the Plaintiff's Second Amended Complaint, as well as the expert testimony in this case, disproves their Voting Rights Act Claim.

**a. Prior Voting Rights Act Litigation in Ohio Demonstrates that Recent History Of Racial Discrimination In Ohio Does Not Exist.**

The Plaintiffs, much like the plaintiffs in *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997) *aff'd* 173 F.3d 377, have failed to allege a recent history of racial discrimination in elections. In the past, the State of Ohio has successfully defended itself from § 2 Voting Rights Act cases. These cases, such as *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997) *aff'd* 173 F.3d 377, 38 F. Supp. 2d 525 (S.D. Ohio 1997) *aff'd* 173 F.3d 377 (6th Cir. 1999), *Voinovich v. Quilter*, 507 U.S. 142 (1993), and *State, ex rel. Rogers v. Taft*, 64 Ohio St. 3d 193 (1992), demonstrate why the Plaintiffs in this case cannot prevail.

Of course, as demonstrated through *Mallory*, such a recent history does not exist in the State of Ohio. Rather, the Plaintiffs' evidence demonstrates that whites are just as likely as blacks to undervote in Franklin and Hamilton Counties, and that whites in Summit County are more than two times more likely to undervote than blacks in Hamilton County. Plaintiffs have failed to provide any evidence that the punch card machines in the State of Ohio interact with "social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* This court, like numerous others before it, should reject the notion that the State of Ohio has violated § 2 of the Voting Rights Act in the

manner in which it conducts elections. Furthermore, this Court should find that Plaintiffs failed to meet the burden of proof for their Voting Rights Act claim.

**B. The State of Ohio and Its County Boards Of Elections Have Not Violated Plaintiffs' Constitutional Rights To Due Process Or Equal Protection.**

Although the Plaintiffs claim that the use of voting systems that do not include error notification violates the Due Process and Equal Protection Clauses, they are incorrect on that claim as a matter of law. Furthermore, Plaintiffs have failed to bring forth **sufficient** evidence in support of their constitutional claims.

**1. Error Notification Technology On Voting Equipment Is Not Constitutionally Mandated.**

Although there is no constitutional right to cast a vote for Presidential electors, once a State legislature grants its citizens the right to vote for President, the State needs to accord equal weight and equal dignity to each voter. *Bush v. Gore*, 531 U.S. 98, 105 (2000). If the State practice at issue “does not infringe on the right to vote, we examine the challenged statute under the rational basis standard.” *Mixon v. NAACP*, 193 F.3d 389, 402 (6th Cir. 1999). Since the certification and selection of voting technology does not infringe directly upon the right to vote, the Defendants merely need to have a rational basis for not requiring error notification in the voting technologies present for Ohio’s citizens.

No court in the country has ever determined that the Constitution of the United States requires voter error notification technology to be employed in elections. As the Second Circuit recognized long ago, the Constitution contains no guarantee that an election be free from error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). If error-free elections are not constitutionally mandated, it stands to reason that error-free voting technology also is not subject to a

constitutional requirement. Yet, the Plaintiffs in this case actually seek an error-free election with complete federal court oversight.

The Plaintiffs in this case seem to like the voting technology used in Franklin County. Richard Engstrom, for example, used the Franklin County voting technology against which he compared punch cards. Engstrom Depo. at 19. Yet, the Franklin County system that Engstrom spoke so highly about does not contain voter error notification. *See* Asher Depo. at 110. In fact, none of the Plaintiffs' experts compared the voting systems currently in use in Ohio to voting technologies with error notification. Therefore, Plaintiffs' reliance on error notification as a constitutional right and a fix-all for elections is both legally and factually insufficient.

**2. There Is No Constitutional Right To A Perfect Election System.**

Although the Plaintiffs in this case are asking this Court to order the State of Ohio to implement the most technologically up to date voting system, they have no constitutional right to such system. When dealing with Congressional elections, the Constitution grants to the States the power to decide the "Times, Places, and Manner of holding Elections for Senators and Representatives...." U.S. Const. Art. I. Sec. IV. The only limitation it places upon this power is that "Congress may at any time by Law make or alter such Regulations, except as to the Places of Choosing Senators." *Id.* Likewise, for Presidential elections, the Constitution grants the States the right to select Presidential electors without any popular vote. U.S. Const. Art. II Sec. I.

Thus, so long as the States do not engage in invidious discrimination in violation of the Fourteenth or Fifteenth Amendment, the Constitution affords the States great leeway in implementing the way elections are conducted. Likewise, as long as States follow the mandate

of “one man, one vote,” it is beyond debate that the right to vote in any manner is not an absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

**a. The Defendants Have Rational Reasons For Allowing Voters To Use Punch Card Ballots In Elections.**

The Sixth Circuit has recognized that while any legislation that grants some residents the right to vote while denying that right to others is subject to strict scrutiny analysis, if the state practice does not infringe on the right to vote itself, it is subject to rational basis review. *Mixon*, 193 F.3d at 402. So long as the regulation does not directly impact the right to vote, but rather a claimed right to vote in a particular manner, such a regulation is subject to rational basis review. *McDonald v. Board of Election Comm’rs of Chicago*, 394 U.S. 804, 807 (1969) (using rational basis review on an Illinois regulation that allowed certain people to receive absentee ballots but refusing to give absentee ballots to unsentenced inmates).

The State of Ohio has certified, pursuant to State law, several different types of voting machines for the local Boards of Elections to use. Each County Board of Elections, then, has a choice as to which certified voting technology it will use. The State had rational reasons for initially certifying the punch card ballot and for keeping that ballot in use. Similarly, the Counties had rational reasons for purchasing the Votomatic Punch Card Ballot machine and for continuing its use until new equipment is ready to be implemented.

The use of punch cards in the 2000 election was imminently reasonable and rational. Furthermore, Ohio has previously gone through a statewide recount where the predominant voting technology at issue was the punch card ballot. With more than 3,000,000 votes cast in the race for Attorney General in 1990, a complete recount resulted in a change of only approximately 150 votes. *In re Election of November 6, 1990*, 58 Ohio St. 3d 103 (1991).

The State of Ohio and the County Defendants must be absolutely sure that voting equipment is safe and secure. As it has become apparent from concerns all over the United States, no government official wants to introduce an unsafe or unproven voting system. Such a system would only lead to more litigation as, no doubt, the Plaintiffs' lawyers would immediately file yet another lawsuit against these Defendants for introducing the very technology they are asking for here. The State and County Defendants would then be responsible for turning around and spending millions more dollars to further "upgrade" their voting machines in order to remedy those problems.

As the Plaintiffs' experts freely admit, Ohio has instituted a "good elections system." It is a system that objectively determines what constitutes a vote. It is a system that properly functioned under the glare of a complete statewide recount. It is a system that treats all voters equally.

Finally, if the Plaintiffs do have a constitutional right to the "more modern voting technology equipment with error notification," that would mean that federal courts would be continually deciding litigation whenever a "new" voting machine was introduced. No doubt each such machine would have somebody serve as its champion in litigation, claiming that the Constitution requires the State to upgrade to this "new and improved" technology. Such changes are not required by the Constitution and should not be entertained by this court.

**b. The Sandusky County Defendants Have Rational Reasons For Using Optical Scan Ballots With Central-Count.**

As an initial matter, it has been stipulated that Sandusky County has and continues to uniformly administer the optical scan ballot with central location tabulation to all of its voters. (Stip. Facts. ¶ 72). Therefore, to the extent *Bush v. Gore* could apply the Equal Protection Clause to Sandusky County, Sandusky County is according equal weight and equal dignity to

each of its voters. See 531 U.S. 98, 105 (2000). To the extent that Plaintiffs may attempt to claim that Sandusky County is violating the equal protection rights of its voters because voters in *other* Ohio counties get to use different voting equipment, the Plaintiffs can come forward with no legal authority to support such a claim. In fact, the legal authority that they have relied upon supports an equal protection claim only when the defendant against whom the claim was made was responsible for providing for different methods of voting for *its* voters. See *Black v. McGuffage*, 209 F. Supp. 2d 889, 892 (N.D. Ill. 2002) (the equal protection claim made in that case was made against *only* the State of Illinois, and not the local defendants). Because there is not even a claim that Sandusky County is valuing one Sandusky County resident's vote over that of another, no further analysis is necessary, and Plaintiff's equal protection claim against Sandusky County fails. See *Id.* at 104-105.

Even assuming *arguendo* that Plaintiffs could come forward with legal authority to state a claim under the Equal Protection Clause based upon the fact that Sandusky County uses different types of voting equipment than that used in some of Ohio's other counties, Sandusky County has rational reasons for using an optical scan ballot with central count. First of all, this type of voting equipment has been certified for use by the State Defendants. (Stip. Fact ¶ 13). Importantly, the Plaintiffs' own expert witnesses concede that, except for a machine malfunction (which can occur even with the DRE's and optical scan ballots with in-precinct count), as long as a voter follows the directions, *every* intentional vote they cast will be counted. (Saltman Depo. at 189; Asher Depo. at 122-124).

Similarly, the only evidence presented has shown that when looking solely at residual votes in the race for president in the 2000 Presidential Election, several counties had the same or a lower residual vote rate than did half of the counties that used optical scan ballots with in-

precinct count. (Stip. Fact ¶ 79). Moreover, just because residual vote rates can vary by county, these rates can be affected by variables other than the type of voting equipment used, such as the poverty and education level of the particular counties' voters. (Asher Depo. at 91-92).

Additionally, Sandusky County chose to have an optical scan ballot with central-count, as opposed to in-precinct count, because the in-precinct count machines are more expensive and cumbersome. (Stip. Fact ¶ 71). Finally, as set forth above, security issues surrounding the DRE's have also provided Sandusky County with a rational basis for its current utilization of optical scan ballots with central count.

#### **IV. PROPOSED WITNESSES**

1. Dana Walch, Ohio Secretary of State's Director of Election Reform – Mr. Walch will describe the Ohio Secretary of State's current and future implementation of the Help America Vote Act.
2. Patricia Wolfe, Ohio Secretary of State's Director of Elections – Ms. Wolfe will discuss her role in Ohio's election administration, which includes corresponding with the Board of Elections, reviewing ballot language, and preparing objectives and memos for the Secretary of State.
3. Dr. John R. Lott, Jr. – Mr. Lott, Defendants' expert, will provide expert testimony regarding his expert report, which challenges Plaintiffs' experts' assertions about punch card voting systems.
4. Dr. Martha E. Kropf – Dr. Kropf, Plaintiffs' expert, will provide testimony about her expert reports.
5. Mr. Roy Saltman – Mr. Saltman, Plaintiffs' expert, will provide testimony about his expert report.

6. Mr. Herb Asher – Mr. Asher, Plaintiffs’ expert, will provide testimony about his expert report.
7. Richard L. Engstrom, PhD. – Mr. Engstrom, Plaintiffs’ expert, will provide testimony about his expert report.
8. Mark Salling – Mr. Salling, Plaintiffs’ expert, will provide testimony about his expert report.
9. Erin Otis - Ms. Otis, as a Plaintiff, will provide testimony about her voting experiences in Montgomery County.
10. Vernellia Randall - Ms. Randall, as a Plaintiff, will provide testimony about her voting experiences in Montgomery County.
11. Howard Tolley – Mr. Tolley, as a Plaintiff, will provide testimony about his voting experiences in Hamilton County.
12. Art Slater – Mr. Slater, as a Plaintiff, will provide testimony about his voting experiences in Hamilton County.
13. Effie Stewart – Ms. Stewart, as a Plaintiff, will provide testimony about her voting experiences in Summit County.
14. Marco Sommerville – Mr. Sommerville, as a Plaintiff, will provide testimony about his voting experiences in Summit County.
15. Linda See – Ms. See, as a Plaintiff, will provide testimony about his voting experiences in Sandusky County.
16. Barbara Tuckerman- Ms. Tuckerman, the Director of the Sandusky County Board of Elections (formerly the deputy director), will provide testimony about Sandusky County’s past, present, and future methods of voting.

17. Alex Arshinkoff – Mr. Arshinkoff, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting.
18. Wayne Jones - Mr. Jones, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting.
19. Joe Hutchinson - Mr. Hutchinson, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting
20. Russ Pry – Mr. Pry, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting.
21. Brian Williams, Current Director of Summit County Board of Elections – Mr. Williams, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting.
22. John Schmidt, Current Deputy Director of Summit County Board of Elections - Mr. Schmidt, as a Defendant from Summit County, will provide testimony about Summit County’s method of voting.
23. Chris Heizer, Director of Montgomery County Board of Elections – Mr. Heizer, as a Defendant from Montgomery County, will provide testimony about Montgomery County’s method of voting.
24. John Williams, Director of Hamilton County Board of Elections – Mr. Williams, as a Defendant from Hamilton County, will provide testimony about Hamilton County’s method of voting, and will also testify to the results of Hamilton County Elections and public records maintained by the board.
25. Any person identified in the Plaintiffs' witness disclosures.

**V. PROPOSED EXHIBITS**

1. Accupoll News Announcement on certification
2. House Bill 262 of the 125<sup>th</sup> General Assembly
3. Affidavit of Steven P. Harsman of Deputy Director of Montgomery County Board of Elections
4. 2000 Census Data for all Ohio Counties
5. 2000 Presidential Election Results in Ohio
6. 2000 Congressional Vote Data in Ohio
7. 2000 Voter Turnout Data in Ohio
8. 2000 Senate Vote Data in Ohio
9. Martha Kropf Vitae
10. Martha Kropf Expert Report, including Paper to Appear in December 2003 issue of Politics and Policy
11. Martha Kropf Methodological Appendix to Affidavit
12. Martha Kropf Letter to Ray Vasvari dated 10-9-2003
13. Martha Kropf Affidavit/Report dated March 17, 2004
14. Martha Kropf Deposition and all exhibits introduced during her deposition
15. Newspaper Article – *Bush in Good with NASCAR Crowd*
16. Barbara Tuckerman Deposition and all Exhibits introduced during her deposition
17. Roy G. Saltman Expert Report
18. Roy G. Saltman Deposition and all Exhibits introduced during his deposition
19. Roy G. Saltman Vitae
20. John R. Lott, Jr. Expert Report

21. John R. Lott, Jr. Report examining precinct level data
22. John R. Lott, Jr., Deposition and all Exhibits introduced during his deposition
23. John R. Lott, Jr. Vitae
24. Ohio Secretary of State's December 2, 2003 Press Release – *Blackwell Seeks Improvements and Additional Security Assurances From Electronic Voting Machine Vendors*
25. Ohio Secretary of State's May 8, 2003 Press Release – *Blackwell Announces Final Draft of Election Reform Plan*
26. Ohio Secretary of State's September 10, 2003 Press Release – *Blackwell Qualifies Six Election Systems, Four Vendors*
27. Los Angeles Times April 10, 2001 Article – *Some Faiths Abstain from Casting Ballots*
28. Richard Engstrom Expert Report
29. Richard Engstrom Deposition and all Exhibits introduced during his deposition
30. Richard Engstrom Vitae
31. Fort Worth February 8, 2001 Article – *Vote Troubles May Aid Sales*
32. The Columbus Dispatch April 29, 2004 Article – *Senate OK's New Voting Machines*
33. Herb Asher Deposition and all Exhibits introduced during his deposition
34. Herb Asher Expert Report
35. Herb Asher Study
36. Herb Asher Letter to Paul Moke 10-12-2003
37. Herb Asher – Dissertation of Jeannette Fraser
38. Herb Asher Vitae with publications
39. Ohio Secretary of State's Security Report

40. Ohio Secretary of State's Draft Plan 30 day
41. Taft Letter
42. Mark Salling Expert Report
43. Mark Salling Election Race Maps (Overs1, Overs2, Summit1, Summit2)
44. Mark Salling Letter to Ray Vasvari
45. Mark Salling resume
46. Mark Salling Deposition and all Exhibits introduced during his deposition
47. The optical scan ballot used by the Sandusky County Board of Elections in the November 2002 General Election, which is entitled "General Election Ballot- November 5, 2002, Sandusky County, Ohio." The parties have stipulated to the admissibility of this exhibit.
48. The written directions that the Sandusky County Board of Elections has posted in the voting booth right in front of the voter's eyes in each election in which an optical scan ballot has been utilized. The parties have already stipulated to the admissibility of this exhibit.
49. All deposition transcripts taken in this case. The parties have already stipulated to the admissibility of this exhibit.
50. Selected election results from Hamilton County Commissioner Republican Primary 2004
51. Any exhibit identified in Plaintiffs' Exhibit Disclosures
52. 1980 NES survey and underlying data
53. 1984 NES survey and underlying data
54. 1988 NES survey and underlying data
55. 1992 NES survey and underlying data
56. 1996 NES survey and underlying data

57. 2000 NES survey and underlying data
58. Ohio Secretary of State election results for 2000 Presidential race
59. Franklin County certified election results for the 2000 Presidential race
60. Official national vote totals for President in 1980, 1984, 1988, 1992, 1996, 2000
61. Census Information for Hamilton County
62. Dana Walch – Deposition and all exhibits introduced during the deposition
63. Pat Wolfe – Deposition and all exhibits introduced during the deposition

## VI. EVIDENTIARY ISSUES

1. Whether expert reports that were submitted after the time period set forth by this court and that are in violation of Federal Rules of Civil Procedure 26(a)(2)(C) will be admitted into evidence.

Respectfully submitted,

Jim Petro  
Attorney General

/s/Richard N. Coglianesse

Arthur J. Marziale, Jr. (0029764)

Senior Deputy Attorney General

*E-mail:* [amarziale@ag.state.oh.us](mailto:amarziale@ag.state.oh.us)

Richard N. Coglianesse (0066830)

*E-mail:* [rcoglianesse@ag.state.oh.us](mailto:rcoglianesse@ag.state.oh.us)

Holly J. Hunt (0075069)

*E-mail:* [hhunt@ag.state.oh.us](mailto:hhunt@ag.state.oh.us)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 17th Floor

Columbus, OH 43215-3428

(614) 466-2872

(614) 728-7592 (facsimile)

*Counsel for State Defendants*

*/s David T. Stevenson*

\_\_\_\_\_  
David T. Stevenson (0030014)  
Assistant Prosecuting Attorney  
Hamilton County Prosecutor's Office  
230 East Ninth Street Suite 400  
Cincinnati, Ohio 45202-1474  
E-mail: [dstevens@prosecutor.hamilton-co.org](mailto:dstevens@prosecutor.hamilton-co.org)  
513-946-3120  
513-946-3018 (facsimile)  
*Counsel for Hamilton County Defendants*

*/s Anita L. Davis*

\_\_\_\_\_  
Anita L. Davis (0012849)  
Assistant Prosecuting Attorney  
Summit County Prosecutor's Office  
53 University Avenue  
Sixth Floor  
Akron, Ohio 44308  
E-mail: [davis@prosecutor.summitoh.net](mailto:davis@prosecutor.summitoh.net)  
330-643-2800  
330-643-2137 (facsimile)  
*Counsel for Summit County Defendants*

*/s Victor T. Whisman*

\_\_\_\_\_  
Victor T. Whisman (0008033)  
Assistant Prosecuting Attorney  
Montgomery County Prosecutor's Office  
301 West Third Street  
P.O. Box 972  
Dayton, Ohio 45422  
E-Mail: [whismanvt@mcoho.org](mailto:whismanvt@mcoho.org)  
937-225-5760  
937-225-4822 (facsimile)  
*Counsel for Montgomery County Defendants*

*/s Jeffrey A. Stankunas*

\_\_\_\_\_  
Jeffrey A. Stankunas (0072438)  
Isaac, Brant, Ledman & Teetor  
250 East Broad Street, Suite 900  
Columbus, Ohio 43215  
E-Mail: [jeffreystankunas@isaacbrant.com](mailto:jeffreystankunas@isaacbrant.com)  
614-221-2121  
614-365-9516 (Facsimile)  
*Counsel for Sandusky County Defendants*

**Certificate of Service**

I hereby certify that on July 19, 2004, a copy of foregoing *Defendants' Trial Brief* 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:

Scott T. Greenwood  
American Civil Liberties Union  
1 Liberty House  
P.O. Box 54400  
Cincinnati, OH 45202

Richard Saphire  
Professor of Law  
University of Dayton  
300 College Park  
Dayton, OH 45469-2772

Laughlin McDonald  
American Civil Liberties Union  
2725 Harris Tower  
233 Peachtree Street NE  
Atlanta, GA 30303

Daniel P. Tokaji  
Moritz College of Law  
55 W. 12<sup>th</sup> Avenue  
Columbus, OH 43210

/s/ Richard N. Coglianese  
Richard N. Coglianese  
Assistant Attorney General