

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION- AKRON

EFFIE STEWART, <i>et al.</i>	:	Case no.	5:02cv2028
	:		
Plaintiffs	:	(Hon. David D. Dowd)	
	:		
-v-	:		
	:		
J. KENNETH BLACKWELL, <i>et al.</i>	:		
	:		
Defendants	:		

FINAL ARGUMENT OF HAMILTON COUNTY DEFENDANTS

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I. INCORPORATION BY REFERENCE

In support of their final argument, the Hamilton County Defendants incorporate by reference the following documents:

- a. Final Fact Stipulation (Doc. 234);
- b. Joint Supplemental Stipulation of Facts (Doc. 244);
- c. Statement of Facts and Proposed Conclusions of Law filed by all Defendants (Doc. 241);
- d. The Final Arguments Offered by the Several Defendants; and,
- e. Response of Hamilton County Defendants to Plaintiffs' Motion for Summary Judgment (Doc. 190).

II. ADDITIONAL PROPOSED FINDINGS OF FACT

a. The National Commission of Federal Election Reform adopted guidelines regarding residual vote rates developed by the Cal-Tech / MIT post-2000 election study that characterized residual vote rates as follows: 1) 0% - 1%; GOOD; 2) 1% - 2%; ACCEPTABLE; 3) 2% - 3%; WORRISOME; and, 4) > 3%; UNACCEPTABLE. (T.P. (Saltman) Vol 2 at 308, lines 9-16).

b. In the Presidential election of 2000, Hamilton County Ohio had a residual vote rate within the acceptable range at 1.67%. (Plaintiffs' exhibit 17 at 15).

c. In the Presidential election of 2000, Hamilton County had a lower residual vote rate than 60 of Ohio's eighty-eight counties, regardless of the voting technology used. (Plaintiffs' exhibit 17 at 14-16).

III. ADDITIONAL PROPOSED CONCLUSIONS OF LAW

a. "The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be

regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, "words will be interpreted as taking their ordinary, contemporary, common meaning," *Perrin v. United States*, 444 U.S. 37, 42 (1979), so that "in construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985); see also: *Hudson v. Reno*, 130 F.3d 1193 (6th Cir., 1997); *Anness v. United Steelworkers of America*, 707 F.2d 917 (6th Cir., 1983).

b. *Denial* means "the refusal of a claim or request, etc., or of a person making a request." Random House American College Dictionary (1966) 323.

c. *Deny* means "to refuse to grant (a claim, request, etc.)," Random House American College Dictionary (1966) 324. *See also*: Black's Law Dictionary (6th Ed.1990) 436 ("to refuse to grant or accept).

d. In the context of Section 2 of the Voting Rights Act, "vote denial occurs, as the term denotes, when the ability to vote is denied on account of race." *Muntaqim v. Coombe*, 366 F.3d 102, 105, fn 5 (2d Cir., 2004)

IV. ARGUMENT

Any reasoned analysis of Plaintiffs' claims in light of the existing evidence clearly demonstrates that they are not entitled to the relief they seek. Indeed, real issues exist as to whether this matter involves a case or controversy within the meaning of Article III in the first instance. Plaintiffs' standing to assert the claims they bring is, at best, tenuous. Additionally, Plaintiffs offer no viable remedy which performs consistently better than the voting technologies they are challenging, and none of the proffered remedies eliminate every shortcoming present in the challenged systems. Finally, any remaining problems inherent in the use of pre-scored punch

card ballots have been rendered moot by the mandated replacement of such systems required by the Help America Vote Act.

For these reasons - discussed in further detail below, the Defendants are entitled to judgment in this matter.

- a. No Vote Denial in Violation of Section 2 of the Voting Rights Act.
Plaintiffs' Section 2 claims against Hamilton County

Plaintiffs' Section 2 claims against the individual counties (Montgomery, Summit, and Hamilton) relate solely to the phenomenon known as "over-voting," that occurred during the presidential election of 2000. (Plaintiffs' Motion for Summary Judgment, Doc. 171). The essence of this claim is that the act of inadvertent over-voting results in vote denial. *Plaintiffs' Motion for Summary Judgment* at 30.

Unfortunately for Plaintiffs, participation in the electoral process and casting a vote in an improper manner, whether through an over-vote or an under-vote, simply does not equal a denial of the right to vote. Taken in the context of Section 2, it is apparent that Congress intended "denial" to mean precisely that -- an absolute prohibition or exclusion of certain persons from the electoral process. History records vote denials occurring as a result of such things as: poll taxes, grandfather clauses, literacy tests, whites only primaries, ancestry qualifications, and property ownership qualifications.¹ Whatever this Court is now dealing with, it is not an absolute prohibition or exclusion of anyone from the electoral process. Equating an invalid vote with the denial of the right to vote, is roughly akin to claiming that the quarterback who threw an interception resulting in his team losing never played during the game.

¹ See eg. *Rice v Cayetano*, 528 U.S. 495 (2000) (Hawaiian Ancestry); *South Carolina v Katzenbach*, 383 U.S. 301 (1966)(grandfather clause); *Terry v. Adams*, 345 U.S. 461 (1953)(white primary), *Hill v. Stone*, 421 U.S. 289 (1975) (property ownership)

Further, Plaintiffs' position defies both logic and common sense. By definition, both over-votes and under-votes only occur when an individual voter exercises his franchise. In its best light, Plaintiffs' case arises not because the franchise was denied to any voter, but rather because it was perhaps exercised by some of them in an improper manner. Acceptance of their position can only be attained by torturing the definition of "denial" beyond all recognition. Put simply, none of the prospective class members - and certainly none of the named plaintiffs - have been denied anything. Plaintiffs, to the extent they wished, were given equal access to: the polls, the instructions placed in those polls, assistance (if required) from poll workers, and an equal opportunity to vote in every election appearing on the ballot. Plaintiffs indeed admit this. Following Plaintiffs' logic one step further by applying it to under-votes, vote "denials" would occur whenever the under-vote rate within a particular precinct exceeded some national rate of intentional under-voting for President as determined through post-election exit polls and other surveys of questionable reliability.² A Section 2 violation would occur any time that more African American precincts than Caucasian precincts within a particular county, or state, exceeded this national average. Elections officials would never know until the votes were tallied whether their particular jurisdiction was Section 2 compliant.

Nor were Plaintiffs' voting rights abridged in any sense of the term. There is no evidence that they cast valid votes that were ignored, uncounted, or counted at any less than full value. And the record is absolutely devoid of any evidence that Plaintiffs were unable to elect representatives of their choice.

² The rates are not constant from year to year. Plaintiffs' expert, Martha Kropf notes wild variations during the presidential elections from 1980 through 2000 from a low of .34% to a high of 1.29%. (Plaintiffs' exhibit 3 at 20 [table 1]).

b. The Totality of Circumstances Does Not Support a Section 2 Violation against Hamilton County.

If the use of pre-scored punch card ballots were inherently prone to cause African Americans to cast inadvertent residual votes as Plaintiffs insist, this tendency would appear year after year, election after election, and race after race - up and down the ballot. The best that can be said is that the evidence demonstrates that sometimes, in some elections, African Americans cast invalid residual votes at relatively higher rates than at other times, in other elections. It can also be said that sometimes, in some elections, Caucasians cast invalid residual votes at relatively higher rates than at other times, in other elections. The record is simply devoid of any explanation why the residual over-vote rate for African Americans was almost non-existent in the 2001 mayoral election in Cincinnati, and was comparatively high in the “vote for nine” race for Cincinnati City Council in 1999, and in the Presidential election of 2000. Neither has an explanation been offered for the unusually high residual over-vote rate for Caucasians in the 2004 Republican primary for county commissioner. As all voters in each of these elections used punch card ballots, it is counter-intuitive to blame the equipment for these results.

In any event, thanks to Plaintiffs’ expert Roy Saltman, we now know that Hamilton County’s residual voting rate in the Presidential election of 2000 was within an acceptable range. By performing better in that election (the only one at issue in this case) than more than two-thirds of other counties in Ohio – including four counties using optical scan equipment – the totality of circumstances weighs overwhelmingly in favor of Hamilton County. In addition, when under-voting is considered, it is apparent that Hamilton County was at least as good as, if not better than, Plaintiffs’ panacea of choice - Direct Recording Electronic systems. Again, relying on one of Plaintiffs’ experts, Richard Engstrom, Hamilton County with punch cards compares favorably to Franklin County with its DRE system as to under-voting.

While it may be arguable that “something” is going on with respect to certain elections, Plaintiffs haven’t bothered to try to adequately explain it. Equally compelling race-neutral explanations for residual vote totals exist; some of which: the number of candidates in a particular race; the closeness of the election; the use of negative campaigning; the presence of write-in candidates; the effect of new and inexperienced voters; voter apathy; turnout; fraud; age, education and poverty levels within the voting population; and, internal conflicts within individual voters, may explain the phenomenon that Plaintiffs attribute only to race. Unless and until all of these factors are negated, there simply is no basis to find that the Hamilton County Board of Elections has committed a Section 2 violation by using state-approved punch card balloting equipment in the Presidential election of 2000.

c. Remedies

Insisting simply that there must be some better way, Plaintiffs have skirted the issue of what remedy they are seeking entirely, preferring to leave to the Court the task of judicially crafting what should rightly be a legislative fix. Insisting only that any remedy replacing punch card systems prevent over-voting and provide error notification, it is left to the court to determine what, if any, systems are appropriate to the task.

While systems that prevent over-voting do exist and certainly would eliminate any disparate impact with respect to that phenomenon, Plaintiffs have offered no evidence that error notification eliminates a disparate impact with respect to under-voting. Indeed, their original infatuation with DRE systems³ appears to have faded in light of Engstrom’s findings regarding under-voting in Franklin and Hamilton Counties. Nor have Plaintiffs presented any reasoned

³ See Engstrom’s report, Plaintiffs’ exhibit 11 comparing Franklin County touchscreens to Hamilton, Montgomery, and Summit Counties punch card results.

analysis regarding the impact of their proposed solution on African-American or other voters in areas such as turnout, participation in down ballot races, primaries, or issue races.

With respect to “error notification,” it is simply not legally required. States have no constitutional responsibility to prevent individual voters from making mistakes and no obligation to inform them when they have. Nor is there any such requirement within the Voting Rights Act. Indeed, the whole issue of “error notification” disappears entirely when voters take the time to read and follow the instructions placed within the polling locations and within every voting booth in the State of Ohio. These instructions describe the voting process in basic, elementary terms. Voters unable to understand these instructions will, upon request, receive assistance from elections officials at the polling location in casting their ballot.

No voting system is perfect, and no voting system will anticipate or eliminate every error occurring due to human factors. DRE systems permit the casting of blank ballots, and when the “vote button” is pushed prematurely, the vote is cast and cannot be recalled. Scantron systems may repeatedly register stray marks and incompletely filled in circles. Insisting on error notification in down ballot races where no vote was recorded is dangerously close to compelling voters to cast a vote in a race that they had no intention of addressing. Error notification of any type will serve to measurably increase the amount of time devoted to the voting process, resulting in delays that will frustrate and deter other voters waiting in line. ⁴

In addition, the asserted security interests cited by Plaintiffs and attributed to the State of Ohio evidence the inability of this Court to grant Plaintiffs a remedy which will not further impact

⁴ Interestingly, any increased delay in voting is now being attacked as both a constitutional and Voting Rights Act violation in the Southern District of Ohio. See, *Spencer v. Blackwell, et al.* S.D. Ohio Case No. 1:04cv738 (claiming that Ohio statutes permitting in precinct challengers on election day are unconstitutional because (among other reasons) in precinct challenges to voter eligibility would delay the voting process).

(and arguably constitutionally deprive) citizens' right to vote. This demonstrates the unique problems associated with Plaintiffs' request to have a judicial tribunal mold a remedy which is, in reality, a policy determination for which the executive and legislative branches of government are responsible to ascertain, debate and decide.

Until Plaintiffs provide some evidence as to what voting system will cure all of the perceived shortcomings of punch cards; and, more importantly, will not expose the Defendants to future claimed violations, this Court should decline Plaintiffs' invitation to mandate an incomplete remedy.

d. The Evidence Does Not Support A Violation of the Fourteenth Amendment as to Hamilton County.

Plaintiffs Fourteenth Amendment claims assert that: 1) Defendants have conducted and maintained a "dual, non-uniform, and unequal" elections system in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution; and, 2) Defendants have maintained and operated balloting systems that fail to count all votes cast in violation of the Due Process Clause of the 14th Amendment to the United States Constitution. Both claims fail.

In the first instance, Plaintiffs have produced no evidence in support of either claim that any of the Defendants has intentionally discriminated against any of the named Plaintiffs on the basis of their race. The claims instead center on very thin evidence that punch card voting systems have a disparate impact on the ability of African American voters to cast a valid ballot. A disparate impact, standing alone, simply is not enough to establish a Fourteenth Amendment violation. Additionally, reaching the conclusion Plaintiffs' desire requires the Court to ignore substantial evidence that race is only one of many factors that may explain residual votes. Education, income, and standard of living all play a role, as clearly demonstrated by the residual vote totals in the Appalachian counties that registered the highest totals of such votes in the 2000

presidential election. The population of African Americans in most of these counties can only be described as *de minimis*.

Plaintiffs' statewide Equal Protection claim encounters other difficulties as well. Plaintiffs have stated, and it certainly appears, that this claim is based upon the maintenance of different voting systems within the State of Ohio as a whole. Neither Hamilton County nor its Board of Elections are free to insist that the State change its system and require uniformity throughout the State. Additionally, the Plaintiffs are seeking to enforce a remedy on only four of the State's eighty-eight counties which will directly deny due process and the right to be heard to the other eighty-four counties, or at least those that will be forced to incur expenses to replace existing systems as a result of any decision from this Court.

Finally, due process does not require that all counties within a state, or even all precincts within a county, use the same voting technology. *See, Bush v. Gore* 531 U.S. 98, 134 (2000)(Souter, J., dissenting). With respect to the counting of votes, due process requires only that there be a uniform standard for what constitutes a valid vote, and that all valid votes be counted. Plaintiffs have produced no evidence that any valid vote was not counted in the Presidential election of 2000. Nor have they produced any evidence that the standards for what constitutes a valid vote were ignored by Hamilton County or anyone else during the same election.

e. Plaintiffs Do Not Have Standing.

Plaintiff cannot claim - and indeed have not claimed - that they know for certain that the vote they cast for President in 2000 was not counted. They claim standing on the basis that they do not know, and that there is a chance, that the vote they cast fell into the residual vote category.

This claimed injury is hypothetical and conjectural at best, and non-existent at worst. Simply put, their position is no different than that of every other voter in the 2000 Presidential election, including those that did not use punch card systems.

f. The Claims of Plaintiffs Have Been Rendered Moot.

All of Plaintiffs' claims with respect to punch card voting systems are in the process of being resolved. Ohio's participation in the replacement of such systems through the Help America Vote Act is ongoing, and is slated to be completed within the next year. Simply because the Plaintiffs desire the scheduled action to occur at a faster pace, does not create an actual case or controversy.

V. CONCLUSION

Despite the hysteria surrounding their continued use, punch card voting systems have provided a generally accurate and cost effective method of conducting local and national elections for many years. The alleged problems with top-of-the-ballot contests disappear as the voter proceeds through the down-ballot elections. In search of the perfect remedy to a non-existent problem, Plaintiffs have attacked four counties, only three of which use punch card systems, without any rational or legitimate explanation as to their selection. Over the last two years, these counties have been forced to carry the burden for the rest of the State and to spend time, resources, and treasure in hopes of identifying and then fixing this "problem," even though Ohio has already mandated the remedy Plaintiffs seek. In short, this entire case has been little more than an academic exercise designed to bolster the contention that something was amiss in Florida in 2000.

A review of the entire record now before the Court reveals that, with respect to Hamilton County, Plaintiffs are weak on facts and short on law. The Hamilton County Defendants are entitled to judgment in this matter and request that the Court so order.

Respectfully submitted,

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