

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

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| Effie Stewart, et al., |) | Case Number 5:02-CV-2028 |
| |) | |
| Plaintiffs, |) | Judge David D. Dowd |
| |) | |
| -vs- |) | |
| |) | |
| J. Kenneth Blackwell, et al., |) | First Amended Complaint Filed |
| |) | With Consent of Defendants |
| Defendants. |) | |
| |) | |

Now come Plaintiffs, by and through undersigned counsel, and pursuant to Federal Civil Rule 15(a) file the following for their First Amended Complaint. Consent of all Defendants to file this Amended Complaint was obtained at the Settlement Conference held 5 February 2003, and memorialized in a writing filed with the Court – the Joint Status Report of the Parties Regarding Settlement Discussions, Docket Number 73 – on 18 February 2003.

INTRODUCTION

1. This is a class action lawsuit, brought pursuant to Section Two the Voting Rights Act of 1965, 42 U.S.C. §1973, and pursuant to the Reconstruction Era Civil Rights Act of 1871, 42 U.S.C. §1983, and brought on behalf of two distinct sub-classes of plaintiffs: (a) individual voters challenging the use of non-uniform, unequal and inadequate voting technologies in and by the State of Ohio as violating of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and; (b) African American voters challenging the use of non-uniform, unequal and inadequate voting technologies in and by the State of Ohio as violating Section Two of the Voting Rights Act of 1965.

2. Plaintiffs herein, individually and on behalf of the class and respective subclasses of persons similarly situated, seek permanent declaratory relief, holding that the Defendants, through the implementation, certification, selection and use of inadequate voting technology, including punch card systems and other systems lacking error notification, as explained in detail below, have without justification (a) denied the Plaintiffs, and each of them, Due Process and Equal Protection of the Laws as guaranteed to them by the Fourteenth Amendment, and; (b) denied certain of the Plaintiffs the right to vote as secured to them by Section Two of the Voting Rights Act of 1965, through the use of a system of voting that has a disproportionate and negative impact on the franchise of African American voters.

3. These Plaintiffs, and each of them, individually and on behalf of others similarly situated, further seek mandatory and prohibitory permanent injunctive relief, prohibiting the Defendants from continuing to select, use and certify for use certain inadequate voting technologies defined herein, and requiring them to implement, select, use and certify for use certain adequate technologies, as defined below, and additional relief specified herein.

PARTIES

4. The parties to this action fall into four groups: (a) Plaintiffs who appear on behalf of all persons similarly situated and assert their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (b) Plaintiffs who additionally appear to assert the rights of themselves and other African-American persons similarly situated under Section 2 of the Voting Rights Act of 1965; (c) Defendants who are members of state government; (d) Defendants who are members of local government, either as county commissioners or executives, or members of county boards of elections, and; (e) local entity defendants.

Parties Plaintiff for the Fourteenth Amendment Claims

5. Plaintiff Erin Otis (“Otis”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Montgomery County, Ohio.

6. Plaintiff Vernilla Randall (“Randall”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Montgomery County, Ohio.

7. Plaintiff Howard Tolley (“Tolley”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Hamilton County, Ohio.

8. Plaintiff Melford Elliot (“Elliot”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Summit County, Ohio.

9. Plaintiff Effie Stewart (“Stewart”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Summit County, Ohio.

10. Plaintiff Marco S. Sommerville (“Sommerville”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Summit County, Ohio.

11. Plaintiff Linda See (“See”) is, and at all times relevant hereto was, a natural person, a citizen of the State of Ohio and a registered voter who resides, and at all times relevant hereto did reside in Sandusky County, Ohio.

12. Each of these Plaintiffs resides in a county which uses inadequate voting technology, as defined in detail below, that does not afford them, or any of them, the ability to cast their ballots with prior notice of error and the opportunity to correct such errors before finally submitting their ballot for counting, and appears on behalf of all Ohioan so situated.

13. Each of these Plaintiffs is a citizen of the United States, and eligible to vote, and intends to vote in future elections, including elections for national and statewide elective office where candidates represent districts the boundaries of which cross county lines.

Parties Plaintiff for the Voting Rights Act Claim

14. Plaintiffs Otis, Randall, Elliot, Stewart and Sommerville are African-Americans and appear herein, additionally, on behalf of themselves and other African-American voters similarly situated who vote in counties which use inadequate voting systems, as defined in greater detail below, that does not afford them, or any of them, the ability to cast their ballots with prior notice of error and the opportunity to correct such errors before finally submitting their ballot for counting.

15. Plaintiffs Otis and Randall represent themselves, and similarly situated African-American voters residing in Montgomery County and throughout Ohio, for purposes of the Voting Rights Act Claim alleged herein.

16. Plaintiffs Elliot, Stewart and Sommerville represent themselves, and similarly situated African-American voters residing in Summit County and throughout Ohio, for purposes of the Voting Rights Act Claim alleged herein.

17. Each of these Plaintiffs has voted in past elections, including the Presidential Election of 2000, and intends to vote in future elections. Each desires to have his or her intended vote counted and to insure that fundamental fairness is afforded to all voters in Ohio. Each of the Plaintiffs set forth with particularity in Paragraphs 15 and 16 of this Complaint also represents African American voters who are at a disproportionate risk of having their votes rejected due to the fact that they are made to vote using inadequate voting technology that does not afford them, or any of them, the ability to cast their ballots with prior notice of error and the opportunity to correct such errors before finally submitting their ballot for counting.

State Government Defendants

18. The state defendants are duly appointed under state law and charged with carrying out the duties and responsibilities entrusted to them as officers of the state for the conduct of local, state, and federal elections within the State of Ohio.

19. Defendant J. Kenneth Blackwell (“Blackwell”) is, and at all times relevant hereto was, Secretary of State of the State of Ohio, and as such, the principal election official of the state. He is sued herein in his official capacity for purposes of obtaining equitable relief, as well as individually, for purposes of securing equitable relief, costs and fees to the extent contemplated by the doctrine set forth in *Ex Parte Young*.

20. Under the Ohio Election Code (R.C. Section 3501.01 et. seq.), the Secretary of State functions as the chief election officer of the State (R.C. Section 3501.04). He and his agents are charged with the duty of providing general supervision over the administration of the election laws throughout the State of Ohio and compelling election officers to observe the requirements of all state and federal election laws (R.C. Sections 3501.01 and 3501.05).

21. Defendants Raymond Butler (“Butler”), Geraldine Lewis (“Lewis”), and Larry Loutszenhiser (“Loutszenhiser”)(hereinafter collectively “the Board of Examiners”) are, and at all times relevant hereto were, members of the Board of Examiners for the Approval of Electoral Marking Devices. They are sued herein in their official capacities for purposes of obtaining equitable relief, as well as individually, for purposes of securing equitable relief, costs and fees to the extent contemplated by the doctrine set forth in *Ex Parte Young*.

22. The Secretary of State and the members of the Board of Examiners, certify and approve all voting systems for use in individual election jurisdictions, under R.C. Sections 3506.05 and 3507.04; they ensure that these systems conform to the Ohio Revised Code and the Constitution of the State of Ohio, including requiring these systems to register accurately every vote cast, and ensuring that all “marking devices” for elections are constructed so as to enable voters to “readily learn the method of operating them (R.C. Section 3506.06 (F)).” They are also charged with the duty of providing the board of elections in every county using vote marking devices with rules and regulations so as to ensure the accurate registering, counting, and canvassing of votes in all public elections (R.C. Section 3507.15).

23. At all times relevant hereto, Blackwell and the members of the Board of Examiners were acting under color and authority of state law, and in acting, served to formulate, ratify and to enforce state policy, custom and usage with respect to the implementation, use and certification for use of voting technology in and for the State of Ohio.

24. By certifying in specified counties punch card and optical scanning systems that lack the ability to provide voters with notice of errors and an opportunity to correct such errors, while concurrently certifying in other counties balloting systems that provide such notice and opportunities, the state defendants have created a dual system of voting rights in the State of Ohio in violation of their duties under the United States Constitution and federal statutory law.

Local Government Defendants

25. Defendants Alex Arshinkoff (“Arshinkoff”), Joseph Hutchinson (“Hutchinson”), Wayne Jones (“Jones”) and Rus Pry (“Pry”) are, and at all times relevant hereto were, members of the Summit County Board of Elections. Each is sued herein solely in his or her official capacity for purposes of obtaining equitable relief, attorney fees and costs of suit.

26. Defendants Christopher P. Heizer (“Heizer”), Stephen P. Harsman (“Harsman”), Sue A. Finley (“Finley”), Thomas J. Ritchie, Sr. (“Ritchie”), James S. Nathenson (“Nathenson”) and Dennis A. Lieberman (“Lieberman”) are, and at all times relevant hereto were, members of the Montgomery County Board of Elections. Each is sued herein solely in his or her official capacity for purposes of obtaining equitable relief, attorney fees and costs of suit..

27. Defendants Timothy M. Burke (“Burke”), Michael R. Barrett (“Barrett”), V. Daniel Radford (“Radford”) and Todd A. Ward (“Ward”) are, and at all times relevant hereto were, members of the Hamilton County Board of Elections. Each is sued herein solely in his or her official capacity for purposes of obtaining equitable relief, attorney fees and costs of suit.

28. Defendants Harry Heyman (“Heyman”), Thomas Younker (“Younker”), and John Rettig (“Rettig”) are, and at all times relevant hereto were, members of the Sandusky County Board of Elections. Each is sued herein solely in his or her official capacity for purposes of obtaining equitable relief, attorney fees and costs of suit.

29. For notational convenience, these defendants (Arshinkoff, Hutchinson, Jones, Pry, Heiser, Harsman, Finley, Ritchie, Nathenson, Lieberman, Heyman, Younker and Rettig) hereinafter may be referred to as the “Board of Election Defendants.”

30. Defendants Kimberly Zurz (“Zurz”), Michael T. Callihan (“Callihan”), Daniel A. Cosgrove (“Cosgrove”), Tim Crawford (“Crawford”), Pete Crossland (“Crossland”), Paul Gallagher (“Gallagher”), Louise L. Heydorn (Heydorn”), Michael J. King (“King”), Andrea Norris (“Norris”) , Cazzell M. Smith Sr. (“Smith”) and Tom Teodosio (“Teodosio”) are, and at all times relevant hereto were, members of the Summit County Council.

31. The Summit County Council is, and at all times relevant hereto was a body corporate and politic, the elected governing authority and policy setting arm of Summit County, Ohio, organized as an alternative form of County Government under Article X Section 1 of the Ohio Constitution of 1851, and Chapter 302 of the Ohio Revised Code, and charged, inter alia, with in part selecting the voting technology to be used by the voters of Summit County.

32. Defendants Charles J. Curran (“Curran”), Don Lucas (“Lucas”) and Vicki D. Pegg (“Pegg”) are, and at all times relevant hereto were, members of the Montgomery County Board of Commissioners, a body corporate and politic that is the elected governing authority and policy setting arm of Montgomery County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Montgomery County.

33. Defendants John S. Dowlin (“Dowlin”), Tom Neyer Jr. (“Neyer”) and Todd Portune (“Portune”) are, and at all times relevant hereto were, members of the Hamilton County Board of Commissioners, a body corporate and politic that is the elected governing authority and policy setting arm of Hamilton County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Hamilton County.

34. Defendants Brad Smith (“Smith II”), Daniel Liskai (“Liskai”) and Terry Thatcher (“Thatcher”) are, and at all times relevant hereto were, members of the Sandusky County Board of Commissioners, a body corporate and politic that is the elected governing authority and policy setting arm of Sandusky County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Sandusky County.

35. For notational convenience, these Defendants (Zurz, Callihan, Cosgrove, Crawford, Crossland, Gallagher, Heydorn, King, Norris, Smith, Teodosio, Curran, Lucas, Pegg, Dowlin, Neyer, Portune, Smith II, Liskai and Thatcher) hereinafter may be referred to as the “County Commissioner Defendants.” All are sued solely in their respective official capacities for purposes of obtaining injunctive relief, fees and costs.

Local Entity Defendants

36. Defendant the Summit County Council is, and at all times relevant hereto was a quasi-corporation, a body corporate and politic, the elected governing authority and policy setting arm of Summit County, Ohio, organized as an alternative form of County Government under Article X Section 1 of the Ohio Constitution of 1851, and Chapter 302 of the Ohio Revised Code, and charged, inter alia, with in part selecting the voting technology to be used by the voters of Summit County. For all purposes herein, the Summit County Council is a “person” within the meaning of 42 U.S.C. §1983.

37. Defendant the Montgomery County Board of Commissioners is, and at all times relevant hereto was, a quasi-corporation, a body corporate and politic, the elected governing authority and policy setting arm of Montgomery County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Montgomery County. For all purposes herein, the Montgomery County Board of Commissioners is a “person” within the meaning of 42 U.S.C. §1983.

38. Defendant the Hamilton County Board of Commissioners is, and at all times relevant hereto was, a quasi-corporation, a body corporate and politic, the elected governing authority and policy setting arm of Hamilton County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Hamilton County. For all purposes herein, the Hamilton County Board of Commissioners is a “person” within the meaning of 42 U.S.C. §1983.

39. Defendant the Sandusky County Board of Commissioners is, and at all times relevant hereto was, a quasi-corporation, a body corporate and politic, the elected governing authority and policy setting arm of Sandusky County, Ohio, charged, inter alia, with in part selecting the voting technology to be used by the voters of Sandusky County. For all purposes herein, the Sandusky County Board of Commissioners is a “person” within the meaning of 42 U.S.C. §1983.

40. Defendant the Summit County Board of Elections is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the laws of the State of Ohio, charged with conducting, managing, and overseeing elections within its geographical jurisdiction, and with selecting the voting technology to be used therein, and is a for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

41. Defendant the Montgomery County Board of Elections is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the laws of the State of Ohio, charged with conducting, managing, and overseeing elections within its geographical jurisdiction, and with selecting the voting technology to be used therein, and is a for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

42. Defendant the Hamilton County Board of Elections is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the laws of the State of Ohio, charged with conducting, managing, and overseeing elections within its geographical jurisdiction, and with selecting the voting technology to be used therein, and is a for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

43. Defendant the Sandusky County Board of Elections is, and at all times relevant hereto was, a public quasi-corporation, a body corporate and politic, organized under the laws of the State of Ohio, charged with conducting, managing, and overseeing elections within its geographical jurisdiction, and with selecting the voting technology to be used therein, and is a for all purposes herein a “person” within the meaning of 42 U.S.C. §1983.

JURISDICTION AND VENUE

44. Plaintiffs bring this action to enforce and to protect rights conferred by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and by Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973 et seq.

45. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state authority, of rights, privileges and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it

seeks to secure equitable relief under an act of Congress, specifically under 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights and 42 U.S.C. §1973, which provides a right of action to vindicate rights protected by the Voting Rights Act of 1965; under 28 U.S.C. § 2201(a), in that one purpose of this action is to secure declaratory relief, and; under 28 U.S.C. § 2202, in that one purpose of this action is to secure preliminary and permanent injunctive relief.

46. Venue is proper in this Court under 28 U.S.C. §1391(b)(1), in that this action is predicated upon a federal question, and because some of the defendants are situated within this judicial district, and all of the defendants reside within this state.

CLASS ALLEGATIONS

47. Plaintiffs bring this action on their own behalf and on behalf of two separate classes of all persons similarly situated pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

- a. The first plaintiff class consists of all voters in election jurisdictions in Ohio using punch card systems and/or voting systems that do not provide adequate error notification.
- b. The second plaintiff class consists of all African-American voters who reside in or are elected by persons residing in such election jurisdictions.

48. Both plaintiff classes satisfy all of the prerequisites for class certification stated in Civil Rule 23(a), in that the classes are so numerous as to make joinder of all parties impracticable, that each discrete class is united by common questions of law and fact, that the proposed representatives of each class have claims typical of the class, and in that the proposed class representatives will fairly and adequately represent the class, and are represented by counsel experienced in the litigation of class action cases.

49. The requirements of numerosity and impracticability of joinder are satisfied. Millions of individual voters throughout Ohio, including hundreds of thousands of African American voters, are required to vote in election jurisdictions with punch card voting systems and/or voting systems that do not provide adequate error notification. These voting systems place such voters at a disproportionate risk of having their ballots rejected. Accordingly, the size of both classes is numerous enough to warrant treatment as a class action under Rule 23(a).

50. The requirement of typicality is satisfied. There are questions of law and fact that are common to each discrete class. The common questions for the first class include whether the Fourteenth Amendment is violated by approval, certification, selection, or use of punch card voting systems and/or voting systems that do not provide adequate error notification. The common questions for the second class include whether Section 2 of the Voting Rights Act is violated by approval, certification, selection, or use of punch card voting systems and/or voting systems that do not provide adequate error notification.

51. The requirement of commonality is satisfied. The claims of the named plaintiffs are typical of the claims of both discrete classes. The named plaintiffs in the first class reside, are registered, and intend to cast their ballots in election jurisdictions that currently use punch card voting systems and/or voting systems that do not provide adequate error notification. The named plaintiffs in the second class are African-Americans who reside and are registered to vote in election jurisdictions that use punch card voting systems and/or voting systems that do not provide adequate error notification.

52. The requirement of adequacy of representation is satisfied. The named plaintiffs will fairly and adequately represent the interests of the both discrete classes. They have no interests antagonistic to the classes. In all instances, they seek declaratory and injunctive relief

on behalf of their entire respective class, and such relief will benefit all members of the respective classes. Finally, counsel who are competent and experienced in civil rights and class action litigation represent them.

53. The plaintiff classes satisfy Rule 23(b)(2) because the defendants have engaged in a course of conduct common to all members of the respective classes, and final declaratory and injunctive relief in favor of both classes is therefore appropriate.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

54. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 53 of this Complaint above.

Ohio Maintains a Non-Uniform and Unequal System of Voting

55. The Ohio Revised Code and the State Government Defendants authorize the use of a variety of systems for recording and counting votes cast during an election, including mechanical voting machines, electronic voting systems, and optical scan voting systems. They likewise authorize the counting of ballots at a central location or in-precinct.

56. Selection of the voting system used to record and count votes in an election jurisdiction -- and the decision whether to count votes centrally or in-precinct -- is left to the discretion of the voters, the county board of election, or the county board of commissioners in each of the 88 election jurisdictions in Ohio, subject to certification and approval by the State Government Defendants.

57. With a punch card voting system, a voter places his or her punch card ballot in a vote recording device, presses a stylus through the hole in the vote recording device that corresponds to his or her preferred candidate, and in so doing, detaches from the punch card the chad that corresponds to his or her preferred candidate.

58. Subsequently, the punch card is placed in a vote counting machine, which reads the ballot based on the passage of light through the spaces in the punch card created by detached chad.

59. With a central counting system, ballots are counted at a central location. Under this system, it is not physically possible for a ballot to be placed in the vote counting machine while the voter is present because ballots are cast at a precinct polling place and counted at a central counting location.

60. With an in-precinct counting system, ballots are counted at each election precinct. Under this system, ballots may be placed in the vote counting machine while the voter is still in the precinct.

61. At the time of the 2000 Presidential election, the state defendants approved and certified nine different voting systems in Ohio:

- a. seven election jurisdictions used optical scan voting systems with central counting; this system did not provide voters with error notification;
- b. one election jurisdiction used an optical scan voting system with in-precinct counting; this system provided voters with error notification;
- c. two election jurisdictions used optical scan voting systems that employed a combination of central and in-precinct counting; the in-precinct counting systems provided voters with error notification;
- d. one election jurisdiction used an electronic touch screen system with precinct counting; this system provided voters with error notification;
- e. five election jurisdictions used electronic touch screen systems with central counting; these systems provided voters with error notification;

- f. one election jurisdiction used a mechanical lever system with in-precinct counting; this system did not provide voters with error notification, which physically prevents over-voting;
- g. one election jurisdiction used a mechanical lever system with central counting; this system did not provide voters with error notification, but it physically prevents over-voting;
- h. six election jurisdictions used punch card systems with precinct counting; these systems did not provide voters with error notification;
- i. sixty-four election jurisdictions used punch card systems with central counting; these systems did not provide voters with error notification.

Voting Systems in the Counties Mentioned Herein

62. Under Ohio law, each of the respective Boards of Elections named herein is responsible for either choosing directly, or recommending to their respective County Commissioners or County Council, the system of voting technology to be used in its geographical jurisdiction. Each of the Boards of Commissioners of the County Council named herein is also empowered under Ohio law to select the method of voting technology used within its geographic jurisdiction.

63. Thus, with respect to each county named herein, the selection of the means of voting technology addressed herein, is a policy decision made either by the Board of Elections of the County Commissioners or Council, or made by the Board of Elections and ratified by the County Commissioners or Council. In either case, it represents the official policy and practice of the Board of Elections and County Commissioners or Council, adopted and implemented under color and authority of state law. In adopting, maintaining, selecting, suggesting or ratifying the respective systems of voting technology identified below, the Boards of Election and the Board of Election Defendants, and the Boards of Commissioners and County Commissioners Defendants were all, and each of them, acting under color and authority of state law.

64. Each of the Respective Boards of Elections named herein also performs all the other duties of a board of elections under Ohio law, including without limitation the conduct and oversight of elections within its county.

65. The Summit County Commissioners and Board of Elections have selected a punch card voting system with central ballot tabulation (“central counting”) and conducts elections with this system. The punch card voting system with central counting it employs cannot provide effective error notification to voters that use the system.

66. The Montgomery County Commissioners and Board of Elections have selected a punch card voting system with central ballot tabulation (“central counting”) and conducts elections with this system. The punch card voting system with central counting it employs cannot provide effective error notification to voters that use the system.

67. The Sandusky County Commissioners and Board of Elections have selected a optical scan voting system with central ballot tabulation (“central counting”) and conducts elections with this system. The optical scan voting system with central counting it employs cannot provide effective error notification to voters that use the system.

68. The Hamilton County Commissioners and Board of Elections have selected a punch card voting system with central ballot tabulation (“central counting”) and conducts elections with this system. The punch card voting system with central counting it employs cannot provide effective error notification to voters that use the system.

The Nature and Causes of Ballot Error

69. A “residual vote” occurs when a voting system determines that a ballot does not contain a permissible vote in a particular race. There are two kinds of residual votes:

- a. “Overvotes” occur when the voting system determines that the voter has cast more votes in a particular race than permitted in that race, notwithstanding the voter's actual intent. Almost every overvote is an error and does not accurately reflect the intent of the voter to cast no more votes than are permitted in a particular race;
- b. “Undervotes” occur when the voting system determines that the voter has cast no vote in a particular race, or fewer votes than permitted for the office in question, notwithstanding the voter's actual intent. The vast majority of undervotes at the “top” of a ballot – those occurring in the most high profile and significant political contests – do not accurately reflect the intent of the voter to cast an invalid vote. In addition, many of the undervotes not at the “top” of a ballot are errors and do not accurately reflect the intent of the voter to cast an invalid vote. Undervotes are far more common than overvotes.

70. Punch card voting systems are prone to the certain errors. As the U.S. Supreme Court recently observed, “punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.” *Bush v. Gore*, 121 S.Ct. 525, 529 (2000). This failure is caused by the interface between punch card recording devices and ordinary voters. The result of this interface is improper placement of the punch card ballot into the vote recording device (e.g., not far enough in, backwards, or upside down), and improper application of the stylus to the vote recording device and the punch card ballot (e.g., with insufficient pressure, or at an angle). Problems are also caused by the buildup of chad in the machines, which may make it difficult or impossible to cleanly punch the card. These problems cause “hanging” chad that remain attached to the ballot by one, two, or three corners; “pierced” chad that are penetrated by the stylus but not dislodged from the ballot; and “dimpled” chad that are dented but not penetrated or dislodged. Light can never pass through dimpled chad, and often it cannot pass through hanging and pierced chad.

71. Voters often cannot properly match the names of candidates on the recording device to the appropriate hole on the recording device and the corresponding chad on the punch card. Sometimes this results from mechanical inadequacies, such as misaligned equipment or equipment not easily read at the angle from which it is seen by the voter.

72. Both of these problems are aggravated by the fact that voters cannot readily determine by looking at their completed punch card ballots whether the vote recording device has accurately recorded their intended votes.

73. The problems set forth above may be created or aggravated by inadequate education of voters in the proper operation of the equipment, and/or inadequate training of and assistance from election officials.

Error Notification

74. Unintentional overvotes and undervotes occur in punch card voting systems. This problem is aggravated by the fact that voters using this system cannot readily determine by looking at their ballots whether the vote counting machine will not count their intended votes and instead consider them to be overvotes and/or undervotes. Accordingly, voters using the punch card voting system must have an effective means of error notification to ensure that the vote counting machines will accurately count their intended votes.

75. Other voting systems are available and currently in use elsewhere in the United States and Ohio with in-precinct counting features that provide error notification to voters. Specifically, when using these systems, the equipment is programmed to reject any ballot with an overvote or an undervote that cannot be read, and the voter who has a ballot rejected must have the opportunity to correct the vote. This error notification substantially reduces the risk that a voter will not have his or her vote counted.

76. Punch card voting systems with central counting are not capable of providing error notification to voters because the voter is not present when votes are placed in the vote counting machine.

77. Punch card voting systems with in-precinct counting capability, such as the "PBC 2100" machine, are not presently capable of providing effective error notification to voters in certain circumstances, including the following:

- a. If a ballot contains a single undervote, the PBC 2100 will not detect any overvotes;
- b. In a race where a voter may vote for more than one candidate, the PBC 2100 will not detect any undervotes;
- c. The PBC 2100 can detect only two residual votes at a time. Thus, if a punch card contains more than two residual votes, the voter must return to the punch card recording device two or more times in order to accurately record his or her votes.

The Presidential Election of 2000

78. According to data released by the State Government Defendants, the rate of residual votes for the entire State of Ohio in the 2000 Presidential election was approximately 1.96%, or 94,403 discarded ballots out of a total of 4,819,675 ballots cast.

79. According to data released by the State Government Defendants, the rate of residual votes in the 2000 Presidential election varied substantially among Ohio's different election systems:

- a. The rate of residual votes in the 6 counties that used electronic touch screen voting systems with error notification was less than 1.5%. For example, the rate of residual votes in Franklin County was .548%;
- b. The rate of residual votes in the 6 counties that used optical scan systems without voter notification averaged 1.75%, and several of these counties had rates that were substantially higher than the mean. For example, the rate of residual votes in Sandusky County was 2.64%;

- c. The rate of residual votes in the 70 counties that used punch card systems without voter notification (including both central and precinct count systems) was 2.5% or more. For example, the residual vote rate was 3.19% for Summit County, and in Montgomery County it was 2.78%. Within these counties, specific precincts encountered even more problems with residual ballots. For example, the residual vote rate was 15% for Akron City Precinct 3-F, and it was 17% for Dayton City 14th Ward Precinct C.

80. The dual system of voting created by defendants has resulted in the following inequities: Voters living in election jurisdictions using punch card voting systems are significantly less likely to have their intended votes counted than voters who live in election jurisdictions that use optical scan voting or electronic touch screen systems; Voters living in election jurisdictions that use voting systems without error notification are significantly less likely to have their intended votes counted than voters living in election jurisdictions that use voting systems with error notification.

COUNT ONE
VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION
CLAUSES OF THE FOURTEENTH AMENDMENT

81. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 80 of this Complaint above.

82. Apart from the problems with punch card balloting systems, as set forth in detail above, the optical scanning system of voting also is prone to error. These errors include:

- a. Voters may make a mark within the oval or may “complete the arrow” on the ballot in a manner that is not sufficiently large to be read by the vote counting machine. For example, voters may draw an “x” rather than fill in the entire area;
- b. Voters may use their own marking implements rather than the official ones supplied for their use;

- c. Voters may mark the wrong area of their paper ballot sheets. For example, voters may draw a circle around the oval or their preferred candidate's name, or draw a line through the non-preferred candidate's name;
- d. Voters may properly mark the oval or arrow for their preferred candidate, and also write in the name of their preferred candidate. The vote counting machine would reject both of these votes as overvotes;
- e. The vote counting machine may identify stray marks as votes, which would lead to the rejection of the intended vote as an overvote.

83. Unintentional overvotes and undervotes occur in both optical scan and punch card voting systems. This problem is aggravated if these systems are deployed in such a way that voters cannot readily determine by looking at their marked ballots whether the vote counting machine will not count their intended votes and instead consider them to be overvotes and/or undervotes. Accordingly, voters must have an effective system of error notification to ensure that the vote counting machines accurately count their intended votes.

84. Optical scan voting systems are available with in-precinct counting features that provide error notification to voters. Specifically, when using these systems, the voter inserts his or her ballot directly into the counting equipment, or the polling place personnel may do so while the voter is still in the polling place; the counting equipment must be programmed to reject any ballot with an overvote or that cannot be read; and the voter who has a ballot rejected must have the opportunity to correct the vote. This error notification substantially reduces the risk that a voter will not have his or her vote counted.

85. Optical scan voting systems also are available with in-precinct counting features capable of providing error notification to voters of "marginal marks," a type of undervote in which the optical scan vote counting machine can detect a mark in the appropriate space on an optical scan ballot that is insufficient to register as a vote.

86. A marginal mark on an optical scan ballot is closely analogous to a hanging, pierced, or dimpled chad on a punch card ballot: both demonstrate the intent of the voter to vote for a particular candidate, and both cannot be counted as a vote by the respective vote counting machine.

87. Voting systems with central counting, whether part of a punch card voting system (as in Summit and Montgomery Counties) or an optical scan voting system (as in Sandusky County), are not capable of providing error notification to voters because the voter is not present when votes are placed in the vote counting machine.

88. By selecting, implementing, ratifying, and using, arbitrarily, the use of optical scan voting system that does not provide voters with notice of error and an opportunity to remedy errors, Defendant the Sandusky County Board of Elections, the Sandusky County Board of Commissioners, Heyman, Younker, Rettig, Smith II, Liskai and Thatcher, jointly and severally, have acted to deprive the voters of Sandusky County of the Equal Protection of the Laws and the Due Process of Law Guaranteed to them by the Fourteenth Amendment.

89. By selecting, implementing, ratifying, and using, arbitrarily, the use of punch voting system with central counting, that does not provide voters with notice of error and an opportunity to remedy errors, Defendant the Summit County Board of Elections, the Summit County Council, Arshinkoff, Hutchinson, Jones, Pry, Zurz, Callihan, Cosgrove, Crawford, Gallagher, Heydorn, King, Norris, Smith and Teodosio, jointly and severally, have acted to deprive the voters of Summit County of the Equal Protection of the Laws and the Due Process of Law Guaranteed to them by the Fourteenth Amendment.

90. By selecting, implementing, ratifying, and using, arbitrarily, the use of punch voting system with central counting, that does not provide voters with notice of error and an opportunity to remedy errors, Defendant the Hamilton County Board of Elections, the Hamilton County Board of Commissioners, Burke, Barrett, Radford, Ward, Dowlin, Neyer and Portune, jointly and severally, have acted to deprive the voters of Hamilton County of the Equal Protection of the Laws and the Due Process of Law Guaranteed to them by the Fourteenth Amendment.

91. By selecting, implementing, ratifying, and using, arbitrarily, the use of punch voting system with central counting, that does not provide voters with notice of error and an opportunity to remedy errors, Defendant the Montgomery County Board of Elections, the Montgomery County Board of Commissioners, Heizer, Harsman, Finley, Ritchie, Nathenson, Lieberman, Curran, Lucas and Pegg, jointly and severally, have acted to deprive the voters of Montgomery County of the Equal Protection of the Laws and the Due Process of Law Guaranteed to them by the Fourteenth Amendment.

92. Specifically, and without limitation, the Boards of Commissioners, County Council, Boards of Election, County Commissioner Defendants and Boards of Election Defendants have acted, jointly and severally within their respective jurisdictions to deprive the voters within those jurisdiction of the equal protection of the laws by arbitrarily suggesting, selecting, implementing, certifying and using systems of voting technology which make it significantly more likely that the voters in those counties will not have their votes counted than is the case for voters in other Ohio counties which employ more modern voting technology which provides error notification and/or limit or prevents overvotes.

93. Specifically, and without limitation, the Boards of Commissioners, County Council, Boards of Election, County Commissioner Defendants and Boards of Election Defendants have acted, jointly and severally within their respective jurisdictions to deprive the voters within those jurisdiction of the due process of law by arbitrarily suggesting, selecting, implementing, certifying and using systems of voting technology which, without rational basis, substantially burdens them in the exercise of their right to vote, and raises substantial risks that their votes will not be counted.

94. The State Government Defendants, jointly and severally, have deprived the voters in Summit, Hamilton, Montgomery and Sandusky Counties of the equal protection of the laws, by arbitrarily certifying, approving, ratifying and allowing the use, within those counties, of the voting systems described in greater detail above, which do not provide voters in those counties with notice of error and an opportunity to remedy errors, which notice and opportunity are provided to voters in other Ohio counties which employ more modern voting technology with error notification and correction, which systems were approved for use by these Defendants.

95. The State Government Defendants, jointly and severally, have further deprived the voters in other Ohio counties of the equal protection of the laws by arbitrarily certifying, approving, ratifying and allowing the use, within those counties, of voting technologies with no error notification, and with ineffective error notification, while simultaneously certifying the use of more modern voting technology with error notification and correction.

96. The State Government Defendants, jointly and severally, have deprived the voters in Summit, Hamilton, Montgomery and Sandusky Counties, and other Ohio counties using voting technologies with no error notification, or with ineffective error notification, of due process of law on the same basis specified against the county defendants in Paragraph 93 above.

SECOND COUNT
VIOLATION OF SECTION 2 OF THE VOTING
RIGHTS ACT OF 1965

97. Plaintiffs restate as if fully rewritten here each and every claim, assertion, and allegation set forth in Paragraphs 1 to 96 of this Complaint above.

98. African-American voters in Ohio who participated in the 2000 Presidential election and used punch card or other forms of voting technology without error notification disproportionately resided and voted in election wards and precincts with the highest rates of residual votes. For example, African-American voters comprise the majority in 57 precincts in Summit County, and the average residual vote rate for these precincts was 6.7%.

99. In contrast, white voters comprise the majority in 567 precincts in Summit County, and the average residual vote rate for these precincts was 2.9%. Similarly, the precincts within Summit County where the highest percentages of residual voting occurred were areas whose demographic make-up is overwhelmingly African American. For example, precinct 3-F had a residual ballot rate of 15%, precinct 3-K had a rate of 14%, and precincts 3-R and 3-I both had rates of 11%.

100. Similar patterns exist in other counties throughout the State in which large numbers of African Americans reside and punch card ballots are used, including, without limitation, in Hamilton County and Montgomery County.

101. African-Americans reside and vote disproportionately in election jurisdictions that use some or all of these inadequate voting systems. In particular, ninety percent of the black population in Ohio resides in 15 counties. Of these 15 counties, 9 use notice voting systems. If Franklin County is excluded from the other 8 notice counties, white voters in the remaining 8 counties have greater access to notice technology than black voters.

102. As a consequence of these inequities, plaintiffs Otis, Randall, Elliot, Stewart, Sommerville, and other African-American voters are significantly less likely to have their votes counted than non-minority voters. Thus, in elections at all levels, including municipal, state, and federal elections, African-American voters have less opportunity than other members of the electorate to participate fully in the electoral process, and to elect representatives of their choice.

103. These disparities result from the approval, selection, and use of punch card voting systems; voting systems that lack error notification; and voting systems with inadequate education of voters and inadequate training of and assistance from local election officials.

104. The following practices, alone and in combination, have a disparate impact on the rights of African-American voters to have their votes accurately recorded and counted, in violation of Section 2 of the Voting Rights Act:

- a. the certification and use of the punch card voting system, as approved by the State Government Defendants, and selected and/or used by the Summit County Board of Election, Summit County Council, the Montgomery County Board of Election, Montgomery County Board of Commissioners, the Hamilton County Board of Elections, and the Hamilton Board of Commissioners, and the individual County Commissioner Defendants and the Board of Election Defendants within their respective jurisdictions.
- b. the certification and use of voting systems that lack any error notification or lack effective error notification, as approved by the State Government Defendants, and selected and/or used by the Summit County Board of Election, Summit County Council, the Hamilton County Board of Election, Hamilton County Board of Commissioner, the Montgomery County Board of Election, Montgomery County Board of Commissioners, the Sandusky County Board of Election, and Sandusky County Board of Commissioners, and the individual County Commissioner Defendants and the Board of Election Defendants within their respective jurisdictions.

**NEED FOR INJUNCTIVE RELIEF WITH
RESPECT TO ALL CLAIMS**

105. Unless enjoined by this Court, future elections will be conducted under the non-uniform, unequal, inadequate systems set forth above.

106. Plaintiffs have suffered and will continue to suffer irreparable harm as a result of Ohio's system of voting. Plaintiffs have no adequate remedy at law.

PRAYER

WHEREFORE, having fully stated their claims against them, these Plaintiffs, and each of them, individually and on behalf of those similarly situated as specified herein, hereby respectfully demand that this Court issue the following relief against these Defendants:

- A. Assume jurisdiction over this action, and;
- B. Certify this matter as a class action, and;
- C. Appoint the Plaintiffs class representative for a class of Plaintiffs asserting the Fourteenth Amendment claims set forth in Count One above, and;
- D. Appoint Plaintiffs Otis, Randall, Elliot, Stewart and Sommerville class representatives for the class of African American plaintiffs asserting the Voting Rights Act claims asserted in Count Two above, and;
- E. Appoint undersigned counsel as class counsel with respect to both claims, and;
- F. Declare that the State Government Defendants, jointly and severally, through certification and approval of the punch card voting system, and its selection and use by local election authorities, have violated Section 2 of the Voting Rights Act of 1965 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and;

- G. Declare that the State Government Defendants, jointly and severally, through certification and approval of other voting systems without any error notification or without effective error notification, and their selection and use by local election authorities, have violated Section 2 of the Voting Rights Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution; and
- H. Declare that the County Commissioner Defendants and the Board of Election Defendants, through the selection, implementation, certification, maintenance and use of punch card and other voting systems without any error notification or without effective error notification, in their respective jurisdictions, have violated Section 2 of the Voting Rights Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution; and
- I. Permanently enjoin the State Government Defendants from certifying and approving, and the County Commissioner Defendants and the Board of Election Defendants from selecting or using, punch card voting systems, and;
- J. Permanently enjoin the State Government Defendants from certifying and approving, and the County Commissioner Defendants and the Board of Election Defendants from selecting or using, other voting systems that lack effective error notification, and;
- K. Permanently enjoin the State Government Defendants from certifying and approving, and the County Commissioner Defendants and the Board of Election Defendants from selecting or using, punch card balloting systems without notice technology while concurrently certifying and approving or using more advanced balloting systems that provide other voters with notice technology, and;
- L. Issue a permanent mandatory injunction requiring the State Government Defendants to certify and approve, and the County Commissioner Defendants and the Board of Election Defendants to select and use, voting systems that do not have a disparate impact upon the voting strength of minority voters, and;

- M. Issue a permanent mandatory injunction requiring the State Government Defendants to implement uniform standards for the official recording and reporting of all undervotes and overvotes in every electoral contest conducted in the State of Ohio, and
- N. To retain jurisdiction of this matter for such time as is necessary to enforce the mandate of and judgment and order this Court issues in furtherance of this relief, and;
- O. To award reasonable attorney fees and costs of suit pursuant to 42 U.S.C. §1988(b), 42 U.S.C. §19731, Civil Rule 54(D), and such other rules as may provide for the recovery of fees and costs for suits brought to vindicate the rights asserted herein, and;
- P. Grant such other relief, be it legal or equitable, as this Court, in the sound exercise of its jurisdiction, deems just.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The foregoing was filed today, Tuesday, March 25, 2003, through the Court Electronic Filing System. Copies will be distributed to opposing counsel, and may be obtained through operation of, the Court ECF System.

/s/ Raymond Vasvari

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