

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	:		

RESPONSE OF HAMILTON COUNTY DEFENDANTS TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

RESPONSE

I. PRELIMINARY STATEMENT

The Hamilton County Defendants ¹ incorporate by reference herein the Joint Response to Plaintiffs' Motion for Summary Judgment (Doc. 171). They file separately to respond to several issues that are of particular importance to Hamilton County.

¹ Defendants from Hamilton County include: Timothy M. Burke, Michael R. Barrett, V. Daniel Radford, Todd A. Ward, John S. Dowlin, Tom Neyer, Jr., Todd Portune (all in their official capacities only), Hamilton County Board of Commissioners, Hamilton County Board of Elections.

II. BACKGROUND

a. Nature of Plaintiffs' Claims

Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. 1983 and under section 2 of the Voting Rights Act, 42 U.S.C. 1973. They assert that the continued use of punch card balloting equipment and other voting technologies that do not provide “error notification,” create a systemic failure that disadvantages all voters in general, and in a greater degree disadvantages African-American voters. Plaintiffs advance three theories of recovery: 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; 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; and, 3) Defendants have maintained and operated voting systems that have a discriminatory effect and disparate impact on the right of African Americans to participate equally with whites in the electoral process in violation of Section 2 of the Voting Rights Act. *Plaintiffs' Motion for Summary Judgment* (Doc. 171).

Plaintiffs seek class relief under Civil Rule 23(a) and (b)(1) for their due process and equal protection claims for subclasses of persons consisting of: “(a) individual voters challenging the use of non-uniform, unequal, and inadequate voting technologies in and by the *State of Ohio* as violating 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 2 of the Voting Rights Act of 1965.” *Second Amended Complaint* (Doc. 119, ¶ 1)(emphasis added).

Depending on the moment and the particular issue before the court, Plaintiffs alternately insist and disclaim that they are seeking statewide relief on their claims. *See, eg., Id., Reply Brief Supporting Motion to Dismiss One Plaintiff and Add Another* (Doc. 104)(“The subclass of African American voters . . . is a statewide subclass.” (Emphasis original)), *Memorandum in Opposition to Defendants’ Motion to Drop County Defendants for Misjoinder* (Doc. 168)(County defendants “are being sued specifically for their intra-county racial disparities in residual ballots.”), *Oral Argument, August 20, 2003* (Doc. 118, pp 5-11)(comments of Plaintiffs’ attorney, Vasvari, discussing joinder of 84 omitted counties and the possibility of certifying a defendant class), *Motion for Class Certification* (Doc. 102)(no separate subclasses sought for named counties).

Likewise, Plaintiffs have been coy about whether each of their claims relates to undervotes, overvotes, or some combination of the two. For the purposes of this response, it is sufficient that Plaintiffs now concede that their Section 2 claim against the Hamilton County Defendants proceeds only on the basis of overvoting. *Plaintiffs’ Motion for Summary Judgment* at 26.

b. Statement of Additional Facts

Plaintiffs’ factual statement exalts perception over reality. It piles inferences atop of assumptions upon guesses. The thrust of Plaintiffs’ statement of facts is the same as the thrust of their argument: every one knows that punch cards are bad so we should stop using them. The Hamilton County Defendants will concede that the situation in Florida in 2000 was untenable. Hamilton County Defendants further concede that state and local elections officials have expressed concerns about punch card balloting, and that the public may perceive them as inaccurate. The perception of what happened in Florida, however, does not equate to a

constitutional or voting rights violation in Hamilton County, Ohio. Nor do the concerns or opinions of elections officials regarding the continued use of such equipment.

1) Plaintiffs' Experts

Mark Salling estimated the precinct level data relied upon by Plaintiffs' experts. *Salling Deposition* at 82.² With respect to Hamilton County, Salling's report is at least suspect, and possibly wrong with respect to the voters by race data. *Salling Deposition* at 151-163 (discussing apparent error in mapping Salling Exhibit 4E of Hamilton County with respect to race per precinct data -- Salling further explained that the map probably was census information of all adults responding to the "one race" category). This information may have also been forwarded to Plaintiffs' expert Engstrom. *Salling Deposition* at 69.

None of Plaintiffs experts have made any attempt to measure the effect of intentional overvoting -- they simply assume that it doesn't exist. Engstrom flat states this. *See, Engstrom's* report at 7. Engstrom makes this assumption even though he is not aware of any specific data supporting the assumption that "almost all or just about all," overvotes are accidental and that he is not aware of any common practice of overvoting as a way of protest. *Engstrom Deposition* at 97. Asher, on the other hand, acknowledges that protest voting is a common phenomenon -- referring to it as the Donald Duck vote. *Asher Deposition* at 95. In preparing his report on the 1978 Ohio gubernatorial election, Asher performed a physical examination of approximately 175,000 punch card ballots, identifying 14,584 of them which contained either an undervote or an overvote. *See, Asher, Schussler, Rosenfield Study* at p7 and Table 3. He identified approximately 2,756 ballots, constituting approximately 29% of the overvoted ballots, in which

² Curiously missing from the record filed by Plaintiffs are the exhibits to the depositions as well as the exhibits appended to Mark Salling's original report.

three or more valid holes had been punched.³ An additional 963 had at least two holes with at least one invalid hole.⁴ While he refrains from calling these acts intentional, Asher acknowledges that they are “unusual” and describes them as an anomaly that he can’t explain. *Asher Deposition* pp 47-48.

Asher also states categorically that Ohio has a “much better-run election system” than does Florida. *Id.* at 66. He states further that the Florida 2000 situation would not have happened here due in part to: automatic criteria for what constitutes a recount, a state-wide standard for determining what constitutes a valid vote, the use of bi-partisan as opposed to elected elections officials, and required ballot rotation. *Id.* pp 65-69.

2) Hamilton County Elections Officials

Timothy Burke, Chariman of the Hamilton County Board of Elections, indicates that while overvoting can happen unintentionally, he has been made aware of situations in which an individual has voted for “every space on the ballot in all of the races.” *Burke Deposition* pp 19-20. He further indicates that board has procedures for re-making ballots that are defaced, ripped, or put in backwards. *Id.* at 12-13. The ballots are re-made by a bi-partisan team. *Id.* If there is a question on how the ballot should be voted, or if the team cannot agree, the ballot is brought to the Board for a decision. *Id.* Burke is unaware of any situation in which the Board has been unable to agree on how to re-make and vote a ballot. *Id.* at 14.

³ Asher’s Table 3 is stated in terms of percentages - not raw votes. The raw figure was forced using his percentage of 18.9% x N (14,584).

⁴ This figure forced as stated in fn 3.

Julia Stautberg, Director of the Board of Elections,⁵ testified that there is a demonstrator voting machine at polling locations so that voters may practice prior to voting. *Stautberg Deposition* at 15. Poll workers are instructed to ask every voter if they require assistance or would like a demonstration. *Id.* at 23. Poll workers are trained on provisional voting. *Id.* at 24. Poll workers are trained on what to do with a soiled or defaced ballot. *Id.* There are voting instructions permanently affixed to the voting booth and handouts of the instructions are available to the voter. *Id.* at 32-33. The instructions were identified and made exhibits to Stautberg's deposition as exhibits H10, H11, and H12. (Copies attached and filed herewith). The instructions in the booth and on the ballot are prescribed by the Secretary of State. *Id.* The instructions inform the voter how to insert the ballot into the unit. *Id.* at 34. The voters are informed that they may receive up to three ballots in the event that they make an error in voting. *Id.* at 32.

In looking at specific Hamilton County elections, it is apparent that racial disparities in overvoting are not the problem Plaintiffs report them to be. In the 2001 Cincinnati mayoral election, there were only 113 overvotes out of more than 89,000 votes cast – a citywide rate of slightly more than one-tenth of one percent. *Affidavit of Williams*.⁶ The percentage rate of overvotes by ward revealed none with a rate higher than four-tenths of one percent. Twenty-five precincts had more than one overvote. No precinct had more than three overvotes, and an examination of all precincts where more than one overvote occurred revealed a range of 0.34 - 1.6 percent with six precincts being equal to or greater than one percent. *Id.*

⁵ Ms. Stautberg recently left her position to become a judge on the Hamilton County Municipal Court. She was replaced by John Williams.

⁶ Percentages were obtained by dividing the overvote by the ballots cast.

On the other hand, in the Republican primary for County Commissioner occurring March 2, 2004, overvoting occurred within the townships, with largely white populations, at a higher rate.⁷ All but one had rates over one percent, with a range of 0.7 to 2.0 percent.

REPUBLICAN PRIMARY COUNTY COMMISSIONER 2004

TOWNSHIP	% OVERVOTE (nearest 1/10 %)
Anderson	1.5
Colerain	1.1
Columbia	1.3
Crosby	0.7
Delhi	1.8
Green	2.0
Hamilton	1.5
Miami	1.7
Springfield	1.5
Sycamore	1.9
Symmes	1.5
Whitewater	1.4

3) Named Plaintiffs

Howard Tolley is Caucasian. *Requests for admissions* at ¶ 4. Tolley makes a habit of checking individual votes as he is voting to make sure that the proper chad has been dislodged. *Tolley Deposition* at 14-15. Art Slater is African-American. He has never had a problem with the voting machinery. *Slater Deposition* at 16. Slater knows what to do if he makes a mistake

⁷ The results of this election were certified on March 24, 2004. The townships were selected because they are largely homogeneous (white).

casting a ballot. *Id.* Slater has seen seniors who “maybe got confused with the ballot,” ask a polling official for assistance. He has not ever seen an official refuse a request for help. *Id.* at 21.

III. ARGUMENT REGARDING VOTING RIGHTS CLAIM AGAINST HAMILTON COUNTY.

a. Threshold Question

Before this Court proceeds to the merits of Plaintiffs’ Section 2 claims, it must first determine whether the Voting Rights Act requires local elections officials to prevent inadvertent errors by a properly informed individual voter. If the act has no such requirement, Plaintiffs’ Section 2 claim fails. The 1982 amendments to Section 2 were enacted to assure that minority voters have “equal access” to and an “equal opportunity” to participate in the electoral process. The legislative history of the Act is littered with such references. *See, eg. United States Code Congressional and Administrative News, 97th Cong., 2d Session, Vol. 2 pp193, 205, and 206.* The 1982 Amendments were specifically designed to codify the test applied by *White v. Regester*.⁸ *Id.* at 179. The amendments to Section 2 look to assure: “that the ‘political processes’ were ‘equally open’ and whether the members of the minority group had the same ‘opportunity’ as others in the electorate to ‘participate in the political processes and to elect representatives of their choice.’” *Id.* at 210, *see also: Whitcomb v. Chavis, 403 U.S. 124, 155 (1971)*(no basis to invoke constitutional remedies when a population segment is not being denied access to the political system).

It is axiomatic that there is no such thing as a perfect elections system. Plaintiffs’ experts admit this. *See Asher Deposition* at 129. Further, it is also clear that inadvertent errors by elections officials do not constitute standards, practices, or procedures under Section 2. *United*

⁸ 412 U.S. 755 (1973).

States v. Jones, 57 F.3d 1020, 1024 (11th Cir. 1995). A standard, practice or procedure must be more than a “run-of-the-mill” mistake that one would expect in the ordinary course of an election. *Coleman v. Board of Education*, 990 F.Supp. 221, 227(S.D.N.Y. 1997). As elections officials are not responsible under Section 2 for the inadvertent errors they can control, it only stands to reason that they are not responsible for the errors they cannot control, such as those committed by individual voters in the privacy of the voting booth.

Equality of access, opportunity, and participation are the touchstones of the 1982 amendments. These touchstones simply do not abrogate any notion of individual, personal responsibility in the exercise of the voting franchise in the manner which Plaintiffs now insist that they must. Equal access may be ignored through neglect or apathy. Equal opportunities may be lost or squandered. And, equal participation may be rendered useless by inadvertence or mistake. These conditions are brought about by individual voters and not by any particular balloting equipment. Plaintiffs avoid this discussion by claiming the technology is “error-prone.” While technology may have limitations, it is not “error-prone.” People are.

b. Overvotes are not Denied Votes.

The essence of Plaintiffs’ Section 2 claim is that the act of inadvertent overvoting results in vote denial. *Plaintiffs’ Motion for Summary Judgment* at 30. In arriving at this conclusion, Plaintiffs equate mistakes made by individual voters to intentional acts of elections officials resulting in racial gerrymandering, ballot box stuffing, conducting “whites only” primaries, and alteration of minority voter ballots. *Id.*, citing *Reynolds v. Sims*, 377 U.S. 533(1964). Unfortunately for Plaintiffs, the evidence simply does not demonstrate that Plaintiffs were denied in any way equal access to: the polls, the instructions placed in those polls, assistance (if required) from poll workers, or an equal opportunity to vote in every election appearing on the ballot.

Additionally, Plaintiffs' voting rights were not 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. Nor does the evidence indicate in any way that they were somehow denied the opportunity to elect representatives of their choice.

The Plaintiffs and the purported classes that they represent are all persons who are registered and eligible to vote in elections in Ohio. In its best light, Plaintiffs' case arises not because the franchise was denied to any of them, but rather because it was perhaps exercised by some of them in an improper manner. There simply is no vote denial in this case.

c. The Totality of Circumstances Does Not Support a Section 2 Violation in Hamilton County.

Despite claiming a systemic failure in the voting systems utilized by Hamilton, Montgomery, and Summit Counties, that causes unintentional overvotes, Plaintiffs have not even bothered to address the second part of a Section 2 analysis. Instead, they concentrate only on the Presidential election of 2000. Examining only one election undermines Plaintiffs' claim. See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)(history of bloc voting over time more probative than results of a single election). They look at no municipal races, no primary races, and no down ballot races in 2000. Kropf's last minute affidavit changes none of this. Her "rebuttal" analysis studies all residual voting (overvotes and undervotes combined) which is not the issue before this Court on Plaintiffs' Section 2 claim.

Even a cursory examination of other elections reveals that there is no disparate impact in Hamilton County. The results of the 2001 Mayoral race in Cincinnati suggest that any problem of overvoting is *de minimis*. Likewise, the township results from the County Commissioner race in 2004 indicate that overvoting exists across racial groups.

In any event, several prior cases have considered elections in Hamilton County and have found the following: 1) no white bloc voting in Cincinnati council races, *Clarke v. City of Cincinnati*, 40 F.3d 807, 814 (6th Cir. 1994); 2) no denial to African Americans to register, vote or otherwise participate in the process, *id.*; 3) political cohesiveness of African Americans within Hamilton County not proven, *Mallory v. State of Ohio*, 38 F.Supp.2d 525, 581 (S.D. Ohio 1997); 4) existence of "legally significant" racial bloc voting not proven, *id.*; and 5) no proof that African-Americans in Hamilton county have less opportunity to participate in the political process and elect representatives of their choice. *Id.*

Plaintiffs simply have not established under the totality of the circumstances shown with respect to Hamilton County that punch card ballots have a disparate impact on African-American voters. Under these circumstances, summary judgment should be denied to Plaintiffs and entered in favor of the Hamilton County Defendants.

d.) Plaintiffs Do Not Have Standing to Assert a Section 2 Claim.

A plaintiff who challenges a state practice must demonstrate a realistic danger of sustaining a direct injury from its application. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. *Id.* The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Id.* Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. *Id.*

In addition, Plaintiff Slater does not have standing for the reasons stated in *Hamilton County Defendants' Memorandum in Opposition to Plaintiffs' Motion for Leave to Drop One Plaintiff and Name Another*. (Doc. 103).

Art Slater is the only Plaintiff who is a member of the African-American subclass who votes in Hamilton County. It is undisputed that Slater has suffered no injury in fact. He has never had any problem exercising his voting franchise with punch card equipment, and he is aware that he may obtain assistance if a problem arises. The remaining Plaintiffs are either not African-American, or they have never voted in Hamilton County. Under these circumstances, none of the Plaintiffs have standing to assert a Section 2 claim relating to intra-county disparities (assuming they even exist) with respect to the punch card voting system in Hamilton County, Ohio.

IV. ARGUMENT REGARDING § 1983 CLAIMS.

In *Monell v. Dept. of Social Services*, the Supreme Court held that municipalities maybe liable under §1983 for injuries caused by official policies or customs. It must be shown that the County, through a custom or policy, caused the alleged constitutional violation. *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978). The custom or policy must be the "moving force" behind the violation. *Id. at 694*. "To satisfy the Monell requirements a plaintiff must 'identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993), quoting *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987).

Plaintiffs have identified no policy, practice, or procedure on the part of the Hamilton County defendants that give rise to their claims. The only policies they have identified are the policy of certifying particular voting systems, and the policy of allowing non-uniform voting systems on a statewide basis. These are State policies performed under the auspices of the

Secretary of State and his board of voting machine examiners over which the Hamilton County Defendants have no input. R.C. 3506.05. No voting equipment may be used in the state without the certification of the board of voting machine examiners. It is unreasonable to place the burden upon local boards of elections and county commissioners to perform additional due diligence in the selection, approval, and utilization of voting systems that have been specifically approved for use by the State of Ohio. *See Children's Healthcare is a Legal Duty v. Deters*, 894 F. Supp. 1129, 1132 (S.D. Ohio, 1995)(county prosecutor not a proper party when following state law). Such reliance also provides the rational basis to overcome any of Plaintiffs' alleged shortcomings in the choice of voting equipment.

V. JOINDER AND REMEDIES

a. Plaintiffs Fail to Meet their Burden of Proof Regarding Remedy

Plaintiffs seek a ruling from this Court that Defendants deprived them of rights under the United States Constitution and the Voting Rights Act due to certain voting technologies used in many counties in Ohio. In order to rule in Plaintiffs' favor — either upon summary judgment or at trial — this Court must find that it can fashion an order that delivers the relief requested by Plaintiffs.

Defendants submit that no such remedy exists. The dilemma this Court faces is two-fold. First, it must find that it has the power to fashion a remedy that will alleviate the harm of which Plaintiffs complains. Second, this Court must determine that the declaratory and injunctive relief sought by Plaintiffs can be granted without the absent counties, who are not before this Court and who have been denied the opportunity to rebut the charges of discrimination against them. Plaintiffs cannot proceed to trial if this Court lacks the power to fashion a viable remedy, or, if as

a practical matter, cannot grant the declaratory and injunctive relief requested without the absent counties.

1. No Remedy Exists to Alleviate the Alleged Deprivations.

Courts are only empowered to decide controversies in which they can “grant a viable remedy.” *Levy v. Miami-Dade County*, 358 F.3d 1303 at *5, *6 (11th Cir. 2004). A federal court must decide “whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Id.*, quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962). This requirement is embedded in every case brought before a federal court, but it is of unique importance in voting rights cases.

Every plaintiff in a case involving voting rights must “demonstrate the availability of a judicial remedy in the liability phase of the case to overcome concerns of nonjusticiability.” *Levy v. Miami-Dade County*, 254 F. Supp.2d 1269, 1284 (S.D. Fla. 2003), *aff’d*, 358 F.3d 1303 (11th Cir. 2004); *see also* *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1991) (A challenged voting practice is not responsible for the claimed injury if a plaintiff cannot establish “that an alternate election scheme exists that would provide better access to the political process”.) The justiciability doctrine applies to voting rights claims asserting constitutional deprivations as well as violations of the Voting Rights Act. *See Levy*, 254 F. Supp.3d at 1293-1284; *Burton*, 178 F.3d at 1199.

A plaintiff must affirmatively “demonstrate the existence of a proper remedy” in order to avoid dismissal on a Section 2 claim. *Burton*, 178 F.3d at 1199 construing *Thornburg v. Gingles*, 478 U.S. 30 (1986). Where constitutional deprivations are alleged, a plaintiff bears the initial burden of demonstrating that sought-after remedy will directly address the harm complained of. *Levy*, 254 F. Supp.2d at 1284.

Broadly viewed, Plaintiffs' proposed remedy is to replace all punch card systems with systems that 1) prevent overvoting, and 2) provide error notification. Without any serious discussion of whether it is constitutionally permissible to eliminate both intentional and unintentional overvoting, Plaintiffs insist that the elimination of overvotes is a desirable result. While a system that prevents overvoting absolutely 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 undervoting - particularly within Hamilton County - which is directly related to their constitutional claims. Nor have they done any reasoned 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.

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 (and arguably constitutionally deprive) citizens' rights 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.

On this basis alone, summary judgment cannot be granted in Plaintiffs' favor. The failure of Plaintiffs to provide evidentiary support on this crucial issue at this juncture of the litigation entitles Defendants to judgment as a matter of law.⁹

⁹ If this Court evaluates the evidence and finds it lacking on this issue, summary judgment adjudication is appropriate because discovery is closed and a bench trial of Plaintiffs' claims will not alter the status of the evidence. In the interests of judicial economy, entry of summary judgment in Defendants' favor is warranted.

2. Declaratory and Injunctive Relief Cannot be Granted Without the Absent Counties.

Plaintiffs pursued this litigation without naming 84 of Ohio's 88 counties, their boards of election, and their boards of county commissioners. Many of these absent counties use voting technologies which Plaintiffs assert in this litigation deprives them of their constitutional and federal statutory rights. *Second Amended Complaint*, ¶ 61. The relief Plaintiffs seek in this litigation requires this Court to fashion injunctive and declaratory remedies which impact the rights of the absent counties without affording them the opportunity to defend against the discrimination for which the remedies would be imposed or address the costs of implementing the proposed remedy at the county level. Put simply, Plaintiffs have failed to meet their prima facie burden of demonstrating to this Court that it can fashion injunctive and declaratory relief which will eradicate the discrimination, not exacerbate it, while *not* trampling on the rights of the absent counties.

The Sixth Circuit as well as other federal courts have consistently ruled that, “... in the absence of an indispensable party, the federal courts are no more empowered to render a declaratory judgment than we would be to give affirmative relief.” *National Labor Relations Board v. Doug Neal Management Company*, 620 F.2d 1133, 1139 (6th Cir. 1980) quoting *Kimball v. Florida Bar*, 537 F.2d 1305, 1307 (5th Cir. 1976). The Sixth Circuit's analysis is based on the well-established principle that a court should not fashion a remedy against an absent party if that party is indispensable to the litigation and if the absent party's rights, as a practical matter, will be impacted by the order of relief.

The presence of an indispensable party “is required in order that the court may make an adjudication equitable to all persons involved.” 3A Moore's Federal Practice P. 19.05(2). Indeed, “It is not necessary that an absent person would be bound by the judgment in a technical sense. It is enough that as a practical matter his rights will be affected.” *Id.* at P.19.07-1(2).-1). Further, “where such a

community of interest exists that no decree can be rendered without affecting the interest of the absent party, that party is indispensable.”

Doug Neal Management, 620 F.2d at 1139.¹⁰ If a district court fails to abide by this principle, the Sixth Circuit has specifically ruled that an appellate court may, sua sponte, take steps to protect a party who was absent in litigation in which its interests were adjudicated and a remedy imposed.

Id.

In *Bowling Transportation, Inc. v. NLRB*, 352 F.3d 274 (6th Cir. 2003), this Court, sitting by designation on the Sixth Circuit, authored an opinion in which it cited the Sixth Circuit’s *Doug Neal Management* decision. In *Bowling Transportation*, this Court wrote that dismissal of an action is warranted if any one of three factors is present: (1) the absent party is likely to be harmed by the prosecution of the litigation; (2) one of the parties may be subject to multiple or otherwise inconsistent obligations if the litigation proceeds; or (3) complete relief cannot be accorded the parties without the absent party’s involvement in the litigation. *Id.*, 352 F.3d at 282 citing *Doug Neal Management*, 620 F.2d at 1138.¹¹

In this case, all three of these factors support dismissal. First, absent parties will be significantly harmed if this litigation proceeds without them. This Court in its March 22, 2004 Order states:

¹⁰ See *Carpenters 46 Northern California Counties Joint Apprenticeship & Training Committee & Training Board v. Eldredge*, 459 U.S. 917 (Rehnquist, dissent to denial of certiorari) (In this opinion in which the Sixth Circuit’s decision in *Doug Neal Management* is cited, Justice Rehnquist cautions that a court should not order relief against absent parties who are not afforded an opportunity to rebut the charges of discrimination against them. *Id.*, 459 U.S. at 921.)

¹¹ A finding that a party is indispensable is not necessary for this Court to rule that declaratory relief, without the absent counties, is not proper. See *Abbot Laboratories v. Gardner*, 387 U.S. 136, 155 (1967) (“And courts may refuse declaratory relief for the nonjoinder of interested parties who are not, technically speaking, indispensable.”)

Under Ohio Rev. Code Anno. §3506.02(A) and (B) (Anderson 2003) (hereafter “O.R.C.”), the Board of Elections or the Board of County Commissioners of such County on the recommendation of the Board may adopt a voting machine for use in an election. *Consequently, the Court is of the view that no adequate equitable relief can be granted without the inclusion of the County Defendants in the present matter.*

(Emphasis supplied.) This Court has ruled that in order to implement the remedies the plaintiffs seek in conformance with Ohio law, the counties who are using allegedly discriminatory technology must be included in the litigation. Therefore, this Court’s March 22, 2004 Order necessitates that in order to effectuate the remedy Plaintiffs seek, absent counties will be required to expend significant monies to adopt the voting technology sought by Plaintiffs, without having been afforded the opportunity to defend against the charges of discrimination leveled by Plaintiffs.

Second, without the absent parties involvement, any court-imposed remedy will be limited and subject both the absent and included counties to inconsistent obligations. Those sued will be under a court mandate to purchase and install voting technology outside of the Help America Vote Act and may be required to pay a portion of the costs attendant to this litigation. Those not sued will be under no obligation to provide a remedy prior to 2006 and of course will avoid any obligation relating to the financial burdens of this case.

Third, complete relief cannot be accorded without the absent parties. This Court’s March 22, 2004 Order made clear that it interprets Ohio law to require the counties’ inclusion in order to effectuate the relief Plaintiffs’ seek. In order to eradicate the alleged discrimination which forms the basis of Plaintiffs’ lawsuit, all counties in Ohio would be required to adopt the voting technology Plaintiffs seek. Since most of the counties are absent parties, complete relief cannot be ordered by this Court. Each of these factors independently support dismissal of this lawsuit.

Based on the analysis outlined by the Sixth Circuit as applied to the unique circumstances of this litigation, Defendants submit that dismissal of this lawsuit — not entry of summary

judgment in Plaintiffs' favor — is the legally appropriate course for this Court to undertake. *See Angel v. Commonwealth of Kentucky*, 314 F.3d 262 (6th Cir. 2002) (The Sixth Circuit Court of Appeals affirmed a federal district court's dismissal of plaintiff's case, in part, because the plaintiff had failed to name a party who was indispensable to the prospective injunctive relief sought by plaintiff.); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993 (10th Cir. 2001) (The Tenth Circuit Court of Appeals affirms a federal district court's dismissal of an action seeking a mandatory injunction in the nature of a mandamus because plaintiff was unable to join three parties who would be impacted by the court-ordered remedy.); *see also Continental Casualty Company v. Taco Bell Corp.*, 127 F. Supp.2d 864, 870 (W.D. Mich. 2001) citing *Doug Neal Management* (Dismissal of a declaratory judgment action because, without the absent party "it does not appear that this Court could shape the judgment or other relief in such a way to accord complete relief;" *see also Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967) (Court may refuse to grant declaratory relief for the non-joinder of parties who are not, technically speaking, indispensable).

Because the record is devoid of any showing by the plaintiffs that the relief they request is available and will be universally effective, Plaintiffs' motion for summary judgment should be denied. Plaintiffs' claims are not justiciable and the remedies sought cannot, as a practical matter, be granted given the failure of the plaintiffs to bring all the counties in Ohio before this Court's jurisdiction.

VI. CONCLUSION

For the reasons contained herein, summary judgment for Plaintiffs is inappropriate and ought to be denied. Further, summary judgment for the Hamilton County Defendants as to all of Plaintiffs' claims is appropriate and should be granted forthwith.

Respectfully submitted,

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PROSECUTING ATTORNEY
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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ David T. Stevenson
David T. Stevenson (0030014)
Assistant Prosecuting Attorney
Attorney for Hamilton County Defendants

APPENDIX

EXHIBITS

Salling Deposition Exhibit 4E

Stautberg Deposition Exhibits H10, H11, H12

Plaintiffs' Response to Hamilton County Defendants' Request for Admissions

Affidavit of John H. Williams

DEPOSITION EXCERPTS

Asher Deposition excerpts pages 47-48, 65-69, 95 and 129

Burke Deposition excerpts pages 12-14 and 19-20

Engstrom Deposition excerpt page 97

Salling Deposition excerpt page 69

Slater Deposition excerpt page 16

Stautberg Deposition excerpts pages 15, 23-24 and 32-34

Tolley Deposition excerpts pages 14-15