

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

Effie Stewart, et al.,)	
Plaintiffs)	CASE NO. 5:02CV2028
)	
v.)	Judge Dowd
)	
J. Kenneth Blackwell, et al.,)	Magistrate Judge Gallas
)	
Defendants)	

**Memorandum in Opposition to Sandusky County
Defendants' Motion for Summary Judgement**

I. Statement of the Case

Plaintiffs' Second Amended Complaint (Doc. 119) alleges that the balloting system the State and County Defendants have approved and implemented for use in Sandusky County deprives voters of their rights to equal protection and due process under the Fourteenth Amendment. Plaintiff Linda See is a registered voter in Sandusky County who is suing the State and County Defendants on behalf of all similarly situated voters in Sandusky County and the State of Ohio. The parties have filed cross-motions

for summary judgment, and the Plaintiffs submit this Memorandum in Opposition to the Sandusky County Defendants' Motion for Summary Judgment.¹

Unlike other balloting systems used in Ohio, the central-count optical system used in Sandusky County does not provide voters with error notification. Data collected by the State of Ohio (Appendix E, G), as well as Sandusky's own data (Appendix H), shows that central-count optical scan systems result in more unintentional undervotes and overvotes than other equipment, including electronic and precinct-count optical scan systems. The use of central-count optical scan equipment therefore discriminates against voters in violation of the Fourteenth Amendment, leaving some voters less likely to have their votes counted than others based solely on their place of residence. Plaintiffs have produced evidence that the use of central-count optical scan system results in the denial of votes, and the motion for summary judgment should be denied.

Because Plaintiff Linda See charges Sandusky County Defendants with constitutional violations alone, and not violation of Voting Rights Act, only Count One (Violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment) is addressed in this brief. Most of Sandusky County Defendants' equal protection argument repeats (sometimes word for word) the argument of the other Defendants. Compare Sandusky Brief (Doc. 172), at 12-15, 17-18, 20- 21, with State Brief (Doc. 173), at 18-24. Accordingly, Plaintiffs incorporate by reference the points made in the opposition to the other Defendants' summary judgment motion, as well as those stated in Plaintiffs' brief in support of their own motion for summary judgment, and do not repeat those points here.

¹ The appendices for both of Plaintiffs' memoranda in opposition are attached to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery

II. Statement of the Facts

Sandusky County employs the optical scan balloting system, with central tabulation, also known a “central-count” optical scan system. The critical feature of this system, for purposes of the constitutional claim at issue here, is that it does not allow for error notification – that is, the opportunity for voters to check their ballots for inadvertent overvotes or undervotes before their votes are cast. For this reason, central-count optical scan systems result in more lost votes than other types of voting systems used in the State of Ohio that *do* allow some form of error notification – including both electronic voting systems and precinct-count optical scan.

Barbara Tuckerman, Deputy Director of the Sandusky County Board of Elections, provided a detailed description of this system in her deposition. There, she stated that poll workers provide voters with a paper ballot and instruct them to use a special pencil in the voting booth to darken in the oval to the left of the candidate they wish to vote for. Tuckerman Deposition (Doc. 171 3a) at 8, 16, 80-82, Tuckerman Depo. Exhibit 6. Voters then take the completed ballot to the ballot box. When the polls close, the poll workers take the ballots to a tabulator at the Sandusky County Board of Elections office Tuckerman Deposition at 87. At that office, members of the Sandusky County Board of Election run the ballot cards through a tabulator for counting.

As Ms. Tuckerman acknowledged, voters can make mistakes using optical scan ballots in a variety of ways. First, stray pencil marks can be made on the optical scan ballot. Tuckerman Deposition (Doc. 171 3a) at 85, 91. Second, voters can use unauthorized devices, such as ink pens, to fill out their ballots. Third, they can partially fill-in the oval, creating uncertainty about whether the tabulator will count their ballot or

County, and Summit County. Specifically, Appendices E through H are incorporated herein.

not. Id. at 96. Finally, they can mistakenly vote for two candidates for the same office or leave an office blank that they intended to vote for.

Ms. Tuckerman testified that in the “last” election, there were only three overvotes cast in Sandusky County that were rejected by the tabulating machine. Id. at 102. However, since the most recent election prior to her Deposition in June of 2003 was a local ‘special election’ in the spring of 2003, this election could properly be classified as a low-turnout, “minor” election. Defendants’ own data, submitted to Plaintiffs in response to Plaintiffs’ First Request for Production of Documents, paints a different picture for the general election of November 2002. In that election, Sandusky County voters using the optical scan system with central tabulation cast a total of 35 overvotes for governor (.18%) and a total of 345 undervotes (1.76%). Appendix H (Heading Canvas, Governor and Lieutenant Governor, Run Date 12/10/02, Sandusky County Board of Elections.). In close elections, these discarded ballots – either alone or in conjunction with similar ballots in other Ohio counties -- could be enough to determine the outcome.

When voters cast an overvote or an undervote, they themselves do not have the opportunity to check the accuracy of their ballots by running them through a tabulator in the polling place first. This distinguishes them from voters using optical scan equipment in Allen and Hancock Counties, who do enjoy the use of precinct tabulators. Instead, under the central tabulation system in Sandusky County, members of the Board of Election use standards promulgated by the Ohio General Assembly to determine if *they* can ascertain the voter’s intent and then “correct” the ballot. As Barbara Tuckerman put it:

Q. So what you have with central tabulation is an effort by members of the board to infer the voter’s intent from the way the ballot is marked?

- A. Under certain circumstances. We have guidelines that the Secretary of State has set out for us, *like with punch cards*, like what determines whether or not *the Board can make that decision*. And they send this out before elections. Those orders are to be followed precisely. If you have this problem, this is how you determine it. The board ultimately makes that decision.

Tuckerman Deposition (Doc. 171 3a) at 70-72 (emphasis supplied).

The evidence of record shows that, overall, central-count optical scan systems result in more lost votes than other types of voting systems – including both electronic voting systems and precinct-count optical scan systems. The State’s own data shows that central-count optical scan systems resulted in a 1.8% residual vote rate in the last presidential election. This compares with a 1.0% residual vote rate for central-count optical scan systems, a 0.7% residual vote rate for electronic voting systems, and a 0.5% residual vote rate for lever systems. See Appendix E. The only systems in the State of Ohio that did worse than the central-count optical scan system was the infamous punch card which resulted in a 2.3% residual vote rate. Id. The data relied on by Defendants’ own expert, Dr. John Lott, corroborates these statistics. His data show that central-count optical scans fared worse than precinct-count optical scans in presidential elections from 1992-2000. See Kropf Affidavit (Doc. 171 7b), Tables 1 & 2. In fact, central-count optical scans performed worse than any other system except punch cards in these elections. Id. According to a report issued by the Ohio Secretary of State’s Office, submitted to Plaintiffs in response to their First Request for Production of Documents, in the 2000 Presidential election, the percentage of over- and under-voted ballots in optical scan counties statewide ranged from a low of 0.93% in Allen County (which used in-

precinct tabulation) to a high of 2.37% in Mahoning County (which used central tabulation). See Appendix G.

Defendants make much of the fact that Plaintiff Linda See is a former professor, administered “scantron” examinations to her students, misunderstood the extent of residual balloting in Sandusky County, and, personally, “never had a problem voting with a paper and pencil.” Doc. 172 at 9; See Deposition (Doc. 171 1a) at 15, 26. There are several factual and logical problems with these assertions. First, because Ms. See is suing on behalf of a broader class of persons, her specific identity is not dispositive here. Many of the persons in the Plaintiff class have lower levels of education and less experience with scanned instruments than she has. Moreover, Ms. See’s personal opinions about the extent of residual balloting in Sandusky County are not relevant to the issues in this lawsuit.

Second, because of the nature of the tabulating system in Sandusky County, Linda See is not in a position to know definitively whether she had a problem using optical scan technology or not. Her ballot was not tabulated in her presence, and since it is not individually identifiable, no one knows whether it was or was not counted. In the final analysis, voters simply do not know whether they “followed directions” or not unless and until they vote using actual notice, “second chance” technology.

III. Argument

Plaintiffs have explained the basis for their equal protection claim in their opposition to the other Defendants’ summary judgment brief, and will not repeat that argument here. Contrary to Defendants’ repeated assertions, Plaintiffs (including Ms. See) do not claim that they have the right to a “perfect” or “error-free” voting system.

Plaintiffs' claim is that the Fourteenth Amendment precludes the use of voting systems that result in substantially greater numbers of lost votes in some counties than others within a state. As another federal court recently put it, in describing a similar claim: "The question is whether the state may allow the use of different types of voting systems with substantially different levels of accuracy, or if such a system violates equal protection." Black v. McGuffage, 209 F. Supp. 2d 889, 898 (2002).

Plaintiffs' Fourteenth Amendment claims against Sandusky County and the other Defendants is solidly rooted in the Supreme Court's voting rights jurisprudence, including but not limited to Bush v. Gore, 531 U.S. 98, 105 (2000). This precedent articulates the basic principle that the state must give every vote "equal weight" and each voter "equal dignity." Sandusky Brief (Doc. 172) at 12 (quoting Bush, 531 U.S. at 105). Under this principle, election officials are prohibited from engaging in election practices that accord substantially different weight to voters in different jurisdictions. In particular, they must avoid election mechanisms that treat citizens in some counties less favorably than those in other counties, based on their "place of residence." Reynolds, 377 U.S. at 566; see also Moore v. Ogilvie, 394 U.S. 814 (1969); Gray v. Sanders, 372 U.S. 368 (1963)).²

Sandusky Defendants do not quarrel with the basic principle that the votes of citizens in different jurisdictions must be accorded equal weight. Nor do they quarrel with the legal standard applicable under the Fourteenth Amendment to practices alleged to infringe on the right to vote. In particular, Defendants acknowledge that an election practice is subject to strict scrutiny, if it "has an impact on [plaintiffs'] ability to exercise

² These cases are discussed at greater length in the Plaintiffs' opposition to the other Defendants' brief, and that discussion will not be repeated here.

the fundamental right to vote.” Sandusky Brief (Doc. 172) at 14 (citing McDonald v. Bd. of Election Comm’rs of Chicago, 394 U.S. 804, 807 (1969)). Defendants are certainly correct to state that a practice that has *no* impact on the right to vote is subject to rational basis review. Sandusky Brief (Doc. 172) at 12 (citing Mixon v. NAACP, 193 F.3d 389, 402 (6th Cir. 1999)). But if an election practice *does* have an impact on the right to vote, then it “must be carefully and meticulously scrutinized.” Reynolds, 377 U.S. at 562. Under this heightened level of scrutiny, an election practice may only be upheld if it is “necessary to promote a compelling state interest.” Mixon, 193 F.3d at 395.

Plaintiffs and Defendants therefore agree on the governing legal test under the Fourteenth Amendment. In particular, the parties agree that an election practice is subject to strict scrutiny if it has an impact on the right to vote. The sole issue in dispute, for purposes of Sandusky Defendants’ motion, is whether the use of central-count optical scan voting machines has an impact on the right to vote.

Far from demonstrating Plaintiffs’ failure to raise a triable issue of fact, the evidence of record demonstrates that the use of central-count optical scan systems *does* have an impact on the fundamental right to vote. The uncontested statistical evidence, drawn from the State’s own data, shows that central-count optical scan systems fare worse than any other system except for the notorious punch card. The table below summarizes the official results from the 2000 election:

Table 1: Residual Vote Rate in 2000 Presidential Election (State’s Data)

Type of Voting Equipment	Presidential Non-Vote Rate
Punch Card	2.3%

Votomatic Punch Card	2.3%
Datavote Punch Card	2.9%
Optical Scan	1.7%
Central Count Optical Scan	1.8%
Precinct Count Optical Scan ³	1.0%
Electronic	0.7%
Lever	0.5%

Appendix E (Source: Ohio Secretary of State 2000 General Election Statistics Database).

As this chart shows, central-count optical scan systems result in significantly greater numbers of non-votes than precinct-count optical scan, electronic, or lever voting systems. The only system with larger non-votes is the punch card voting system.

These results are consistent with those drawn from the dataset relied on by Defendants' expert John Lott. These results are summarized in the declaration of Martha Kropf, submitted in support of Plaintiffs' motion for summary judgment.

Table 2: Residual Vote Rate in 2000 Presidential Election (Lott's Data)

Type of Voting Equipment	Presidential Non-Vote Rate
Punch Card	2.22%
Votomatic Punch Card	2.21%

³Precinct-count optical scan systems (unlike central-count optical scan systems) provide the opportunity for voters to receive notice of mistaken votes, before those votes are actually cast.

Datavote Punch Card	2.95%
Optical Scan	1.91%
Central Count Optical Scan	1.58%
Precinct Count Optical Scan	0.87%
Electronic	0.67%
Lever	0.47%

Kropf Affidavit (Doc. 171 7b), Table 1, at 4.

The results drawn from the dataset used by Defendants' expert are thus fundamentally consistent with those drawn from the State's own data. In terms of no-votes, central-count optical scans fare significantly worse than precinct-count optical scan, electronic, and lever machines in the 2000 presidential race. The only type of system that central-count optical scan machines do better than are punch cards.

The same conclusion results from examination of Lott's dataset for 1992-2000 presidential races. In those races, punch card machines had the highest residual vote rate (2.29%), but central-count optical scan systems were not much better, with a residual vote rate of 2.14%. By contrast, electronic voting machines had a residual vote rate of 0.94% and precinct-count optical scan systems a rate of 1.15%. Kropf Affidavit (Doc. 171 7b), Table 2, at 5. Thus, the dataset upon which Defendants' own expert relies confirms the poor performance of central-count optical scan systems in the State of Ohio.⁴

⁴As explained in Plaintiffs' brief in support of their motion for summary judgment, Dr. Lott attempts to argue that punch card machines perform better on down-ballot races than other systems. Doc.

For these reasons, the evidence of record shows that the continuing use of central-count optical scan systems *does* in fact have an impact on the voting rights of citizens like Ms. See, who must use this equipment. At the very least, Plaintiffs have raised a triable issue of fact as to whether the use of central-count optical scan systems has an impact on the right to vote. In addition, Plaintiffs contend that the presence of Sandusky County in this lawsuit promotes judicial economy because it enables the Court to address in one decision the legality of *all* forms of voting technology currently used in Ohio that do not provide voters with “second chance,” actual notice capabilities.

Nothing in Ms. Tuckerman’s deposition supports a contrary conclusion or even remotely warrants summary judgment in Sandusky Defendants’ favor. As noted above, there is no dispute that Sandusky County’s optical scan system does not provide the opportunity for error notification. Ms. Tuckerman admitted that there are several ways in which voters can make mistakes with this sort of system. It is true that Ms. Tuckerman stated that there were only three overvotes in a recent, minor election. The data, however, paint a very different picture. As set forth above, in the 2002 gubernatorial election, Sandusky County’s central-count optical scan system resulted in a 1.76% undervote rate and .18% overvote rate, for a total residual vote rate of 1.94%. Appendix H. This is roughly consistent with the residual vote rate experienced in other Ohio counties that have employed central-count optical scan voting systems in the past.

Accordingly, Sandusky Defendants cannot rely on Ms. Tuckerman’s deposition to evade strict scrutiny, under which an election practice may only be upheld if necessary to

171 at 21-24. For the reasons explained in Plaintiffs’ prior brief, Dr. Lott’s findings on this point tell us nothing about the accuracy of punch card voting machines compared to other systems. In particular, he compares apples to oranges, by comparing non-vote rates in which voters in different parts of the state are voting for different races and different candidates.

serve a compelling government interest. The evidence in this case reveals no such interest. In an attempt to justify its use of a central-count optical scan system, rather than a precinct-count system that would allow error notification, Sandusky Defendants rely principally on costs. Sandusky Brief (Doc. 172) at 16 (citing Tuckerman Deposition at 60, 66-67). But as set forth in Plaintiffs' opposition to the other Defendants' motion, financial constraints are not an acceptable justification for a violation of constitutional rights. See, e.g., Bradley v. Milliken, 540 F.2d 229, 245 (6th Cir. 1976), aff'd 433 U.S. 267 (1977). They also assert that a precinct-count system would be more "cumbersome." But other jurisdictions – in Ohio and elsewhere – have found ways to implement such a system and Defendants cannot explain what makes it impossible for them to surmount this asserted obstacle. This justification is not rational, let alone compelling.

Finally, Sandusky Defendants repeat the other Defendants argument that they are entitled to make sure that new equipment is "secure" before implementing it. As set forth in response to the other Defendants' brief, this argument makes no sense as an excuse for using an inferior voting system – and makes particularly little sense in the case of Sandusky County, which is free to continue using an optical scan system, so long as it installs precinct-counters that will provide error notification. To reiterate the point made in response to the other Defendants' motion, Plaintiffs do *not* seek to force Defendants to implement any particular form of voting technology. Thus, Sandusky Defendants need not opt for an electronic voting system, about which security concerns have been raised; they may instead resolve the claims against them by moving to a precinct-count system with error notification. Accordingly, the security concern raised by Sandusky Defendants

is a red herring. It is not a rational, let alone compelling, justification for the continuing use of central-count optical scan voting equipment that fails to provide error notification.

Regardless of what level of scrutiny is employed, Sandusky Defendants' continuing use of central-count optical scan voting equipment cannot satisfy constitutional scrutiny under the Fourteenth Amendment. The use of this equipment has an "impact" on the voting rights of Ms. See and other voters who must use it; accordingly, the Defendants use of this equipment is subject to strict scrutiny, and can only be upheld if necessary to a compelling interest. The record in this case demonstrates no rational basis for Sandusky Defendants' equipment to use this inferior voting equipment, let alone a compelling one. Accordingly, the use of central-count optical scan voting equipment is unconstitutional under any level of scrutiny. See Black v. McGuffage, 209 F. Supp. 2d at 897-902 (holding that the use of different voting system with substantially different levels of accuracy states Fourteenth Amendment claim); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1108-10 (C.D. Cal. 2001) (same).

IV. Conclusion

For the foregoing reason, Sandusky Defendants' motion for summary judgment should be DENIED. Summary judgment should instead be entered in Plaintiffs' favor against Sandusky Defendants on the Fourteenth Amendment claim.

Respectfully submitted,

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This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 16th day of April, 2004.

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