

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

EFFIE STEWART, et al.,	:	CASE NO. 5:02-CV-2028
	:	(Judge David D. Dowd, Jr.)
Plaintiffs,	:	(Magistrate Judge James S. Gallas)
v.	:	<b><u>THE MONTGOMERY COUNTY</u></b>
	:	<b><u>DEFENDANTS' POST-TRIAL</u></b>
J. KENNETH BLACKWELL, ETC.,	:	<b><u>BRIEF</u></b>
et al.,	:	
Defendants.	:	

---

**I. JUSTICIABILITY**

The Supreme Court has generally identified several characteristics which indicate whether a case or controversy is justiciable: 1) the case or controversy must not be one which seeks the ostensible issuance of an advisory opinion (Marbury v. Madison, 5 U.S. 137 (1803)); 2) the Plaintiff must demonstrably possess the proper “standing” to bring this issue before the court (Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)); 3) the issue must not concern a matter which presents a political question (Baker v. Carr, 369 U.S. 186 (1962)); and 4) the Plaintiff’s claim must be timely (Defunis v. Odegaard, 416 U.S. 312 (1974)).

Plaintiffs have maintained throughout these proceedings that their respective claims against each of the four counties herein, Hamilton, Montgomery, Sandusky, and Summit, are in the nature of intra-country vote disparities. These disparities are alleged to be along racial lines, evidenced by the 2000 presidential election results, examined

within the geographic and demographic context of the 2000 census data of each county. As such, the Plaintiffs claim that these disparities are actionable against the counties under Sec. 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, specifically as a vote denial claim.

**A. Non-Justiciability Due to Montgomery County Plaintiff's Lack of Standing**

The Sec. 2 Voting Rights Act plaintiff presented as the class representative for all black voters similarly situated in Montgomery County, Ohio is Professor Vernellia Randall of the University of Dayton School of Law.

It is undisputed that Professor Randall is an African-American, who is registered to vote in Montgomery County, Ohio. However, it is also undisputed that Professor Randall did not, in fact, vote in the 2000 presidential election. (Stip. Facts ¶ 85.)

The Plaintiffs' entire case as plead against these four counties, and all of the Plaintiffs' expert evidence adduced upon the record of the trial herein is exclusively and inextricably tied to analysis of the 2000 presidential election, and data extrapolated from the 2000 census of each respective county. That evidence and data have been utilized in an attempt to demonstrate the existence of a Sec. 2 Voting Rights case or controversy, applicable to all African-Americans in each of the named counties who participated in the 2000 presidential election by exercising their political franchise. Professor Randall, however, by her own stipulated admission, does not fall within that category.

It has been held that threshold individual standing is a prerequisite for all actions, including class actions. See O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Fallick v. Nationwide Mutual Insurance Co., et al., 1998

FED App. 0357P (6th Cir.) at p. 12. It has been further held that a class representative must demonstrate individual standing vis-a-vis the defendant, and cannot acquire standing merely by virtue of bringing a class action. See *Brown v. Sibley*, 650 F.2d 760, 770 (5th Cir., 1981); *Fallick v. Nationwide Mutual Insurance Co., et al.*, *supra*, at p. 12.

The evidentiary foundation or cornerstone upon which Professor Randall attempts to build her case for alleged infringement of her individual right to vote is an election in which she did not even participate. Professor Randall, therefore, suffered no injury in fact, even on a theoretical basis, from the use of punch card voting machines in Montgomery County, Ohio in the 2000 presidential election, and, as such, has no standing to allege a Section 2 Voting Rights Act violation stemming therefrom. See *Lujan v. Defenders of Wildlife*, *supra*, at 560-61.

Furthermore, having failed to exercise her franchise, the Professor not only lacks the ability to individually stand upon the evidentiary foundation of the 2000 presidential election results, vis-a-vis the demographics delineated from the 2000 census data, she consequently also lacks the requisite ability, as a threshold consideration, to represent those African-Americans in Montgomery County who did, in fact, vote in the 2000 presidential election. See *O'Shea v. Littleton*, *supra*; *Sierra Club v. Morton*, *supra*; *Brown v. Sibley*, *supra*; *Fallick v. Nationwide Mutual Insurance Co., et al.*, *supra*; and *Lujan v. Defenders of Wildlife*, *supra*.

Professor Randall's lack of individual standing and consequent lack of viability as a class representative cannot be cured by the simple, self-serving and speculative statement that she "intends" to vote in future presidential elections. (See Stip. Facts ¶ 85.) Again, the Plaintiffs' entire evidentiary case is predicated upon the 2000

presidential election results, examined within the context of geographic and demographic extrapolations made from the 2000 census for each of the respective Defendant Counties. Professor Randall cannot have suffered any alleged injury relative to the 2000 presidential election, having failed to participate therein. To now permit the Professor to ostensibly step into the shoes of those African-Americans in Montgomery County who did exercise their right to vote in the presidential election of 2000, for the purpose of class representation, would, in effect, constitute a grant of third party standing, which is neither sanctioned by law nor rules of judicial expedience, as a matter of prudential consideration.

Viewed another way, the self-serving and speculative statement that one “intends” to do anything, while possibly true, does not, of and by itself, rise to the level of actionable fact. The road to hell, they say, is paved with good intentions, and while the Montgomery County Defendants have accepted Professor Randall’s statement of intention as truthful, that statement, of and by itself, does not automatically translate into the actual and concrete existence of an imminent danger of injury-in-fact.

In short, Professor Vernellia Randall lacks individual standing to bring the Section 2 Voting Rights case specified in the Plaintiffs’ Complaint, tied specifically and factually as it is to the 2000 presidential election.<sup>1</sup> Professor Randall further lacks the ability, as a threshold consideration, without the necessity of even getting to Rule 23 analysis, to represent African-American voters in Montgomery County who, as a class, may allege

---

<sup>1</sup> Even if Plaintiffs’ Complaint were not specifically and factually tied to the presidential election of the year 2000, Professor Randall would still lack standing inasmuch as the record is devoid of any direct evidence that she exercised her franchise in any prior specific presidential election.

injury flowing from their use of punch card voting machines in the 2000 presidential election.

**B. Plaintiff's Complaint presents Non-Justiciable Political Questions as to all Defendants**

The question of whether the judiciary should refrain from entertaining a particular claim under political question analysis does not turn on a determination of whether the claim is itself meritorious but rather on whether the remedy to the conduct challenged in the claim is more appropriately left to determination and administration by the political, rather than the judicial, process. See Baker v. Carr, 396 U.S. 186, 217 (1962); Goldwater v. Carter, 444 U.S. 996 (1979).

Contrary to the representations of Plaintiffs' former trial counsel, the case-at-bar is not in any way akin to the situation presented by the former failure of Congress and the State Legislature to desegregate public schools, which necessitated the sort of judicial activism reflected in Brown v. School Board. Rather, it must be noted that the question of updating voting technology is one which has been specifically and directly addressed not only by the United States Congress, but also, in this case, by the Ohio State Legislature as well as by the Secretary of the State of Ohio.

The United States Congress, a coordinate branch of the federal government, specifically examined the question of voting technology, in the wake of the various allegations made following the Florida debacle in the 2000 presidential election, and responded by passing the Help America Vote Act (Public Law 107-252, 107th Congress), popularly known as HAVA.

Generally speaking, HAVA mandates the following:

1. that certain technological upgrades must be made to ensure greater accessibility for the disabled (see, Sec. 301(a)(3));
2. that certain economic incentives be provided to the states to encourage them to engage in technological upgrades (see, Sec. 101-106 and 251-253); and
3. that in the event that a state should need to retain and use older voting technology (i.e. punch card machines) during the statutory period permitted to complete an upgrade or replacement, that certain voter education programs be undertaken to ensure that voters can effectively utilize that older technology (see, Sec. 301(a)(1)(B)).

Art. I, Sec. 4 of the U. S. Constitution vests the Legislative Branch of each state with the power to prescribe the “manner” in which federal Senators and Representatives are elected, and additionally vests the Congress itself with oversight capacity relative to the same.

Congress, with the passage of HAVA, has expressly exercised its oversight capability under Art. I, Sec. 4, relative to the issue of voting technology as it bears on the manner in which federal congressional elections are conducted.

As a result of its desire to upgrade and/or replace its older voting technology, the Legislature of the State of Ohio has passed H. B. 434 and H. B. 262 to effectuate the state legislative activity necessary to ensure that the process of replacing Ohio’s older technology with the assistance of federal funds, is accomplished within the statutory framework and the timeline established by HAVA.

Winnowing the myriad arguments filed by the Plaintiffs herein down to a base common denominator, it would appear that the Plaintiffs’ primary complaint with regard to the manner in which Ohio is replacing its older technology is that it simply is not being

done fast enough to satisfy them. Immediate replacement is demanded, and nothing else, evidently, will suffice. Plaintiffs, invoking the Equal Protection Clause,<sup>2</sup> claim that this remedy is essentially mandated by Bush v. Gore, and predict dire consequences if every punch card machine in the state is not immediately removed.

This, however, is not Bush v. Gore. The State of Ohio does not have a constitutionally impermissible variety of rules applicable throughout the state for reviewing and recounting characteristically similar ballots. See Asher Deposition at T. 810. Furthermore, the Equal Protection Clause is not implicated simply by having a variety in the type of voting mechanisms utilized in the different counties of the state. This is directly reflected in comments made by Justice Souter in his dissent from the majority opinion in Bush v. Gore:

“It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction; though different mechanisms will have different levels of effectiveness in recording voters’ intentions: local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter’s intent that have been applied (and continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as “hanging” or “dimpled” chads). *Id.*, at p. 545.

As noted by Professor Asher (T. 809), what happened in Florida in the year 2000, as described above by Justice Souter, cannot happen in the State of Ohio specifically because the Secretary of State, as the chief election officer of the state, has promulgated uniform rules for interpreting how ballots are to be reviewed and counted

---

<sup>2</sup> Unlike their Sec. 2 Voting Rights claim, the Plaintiffs have admitted that their Equal Protection claim is a “state wide claim,” as opposed to one which is individually applicable to each of the four county defendants. (T. 784, lines 1-9.)

by the various types of voting mechanisms utilized in each and every jurisdiction throughout the state.

The State of Ohio, literally since the inception of this litigation, through the various actions taken by its chief election officer, Secretary Blackwell, to acknowledge and actualize Ohio's participation in the legislative scheme established by Congress, as well as through the political process of state legislation found at H. B. 434 and H. B. 262, has been actively engaged in complying with the requirements of HAVA, in order to effectuate the orderly replacement of its election machinery through the political process.

But, rather than allow the political process already at work to finish the desired orderly replacement of Ohio's election machinery within the timelines provided by statute, the Plaintiffs, instead, continue to pursue a judicial ban and immediate cram down of a largely unknown, untried, and, for the most part, flawed voting technology, before the State Legislature and the state officers who are vested with the constitutional obligation to safeguard elections are completely comfortable that they are not simply swapping an older form of voting technology for one which may be no better, and could, in fact, present the greater problem of wholesale election fraud through computer manipulation.

Again, as pointed out by Justice Souter, the choice of voting mechanisms or technologies is a matter of legitimate state interest, and the mere existence of variety in voting mechanisms, even with differing levels of effectiveness, does not rise to the level of an Equal Protection violation. The immediate replacement of all election machinery in the state, therefore, is simply not constitutionally mandated. The process of

choosing, reviewing, purchasing, and certifying or decertifying voting mechanisms or technologies by the state officers who are legally empowered to perform these duties, within the timeline and pursuant to the requirements established by Congress in HAVA, constitutes action exclusively committed to the Legislative Branch under Art. I, Sec. 4 of the U. S. Constitution, and therefore, presents a political question under the rule of Baker v. Carr.

Additionally, in Baker v. Carr, supra at p. 217, the U. S. Supreme Court, in pertinent part, held that a case or controversy presents a non-justiciable political question, not only in the case of a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” such as that presented by Art. I, Sec. 4, but also in the absence of judicially manageable standards for resolving the question presented.

It is logically impossible to predict, with any degree of legal certainty, whether the wholesale adoption and use of newer, largely untested, forms of voting technology will in any way “cure” the residual vote rate in general in Ohio, and in particular in predominantly minority precincts, since undervoting may logically continue for a variety of reasons: e.g., a purposeful intention to refrain from voting a particular race; lack of voter education and understanding with respect to machine usage; and/or confusion due to poor ballot design. Logically, any of these factors, as well as those of: apathy in a minority community regarding various candidates and issues; and a comparative lack of education and/or educational opportunities in a minority community, contributing to a fear or lack of confidence in the ability to effectively use new technology, all may lend themselves to, and result in, the production of the same sort of statistical “proof” which

constitutes the underpinning of Plaintiffs' allegations herein. This would arguably subject this Court to a repetitive and possibly endless review of residual ballot rates, and the myriad potential causes thereof, relative to whatever voting technology is successively certified and used in each of the 88 counties throughout the State, whether that certification and use occurs now or in the future as other technologies develop.

This points to the difficulty, if not impossibility, of establishing manageable standards for judicial review of questions bearing on the interface between technology and residual ballot rates, which are at the evidentiary heart of the Plaintiff's case.

For all of the foregoing reasons, it is respectfully suggested that the Judiciary should refrain from interfering with the process of replacing Ohio's election machinery, already initiated by Congress and the State Legislature, and administratively overseen by Secretary Blackwell, pursuant to both the separation of powers and political question doctrine.

**C. Plaintiffs' Claims are further Non-Justiciable due to Mootness**

The Plaintiffs herein seek to have this Court ban the continued usage of certain punch card and optical scan machines as unconstitutional and illegal, and to thereby force the procurement and utilization of newer types of voting technology throughout the State of Ohio, under the abstract theory that this may reduce the number of residual ballots statewide, and particularly in predominantly African-American precincts.

As previously noted, the United States Congress, through the passage of HAVA, has provided economic incentives to the states to upgrade their voting technology. Ohio, as has been demonstrated time and again upon the record of this litigation, has timely applied for, done everything necessary to, and has, in fact, received the federal

funds available to it to upgrade its voting technology. Consistent with this desire to upgrade, the State Legislature, with passage of House Bill 262, has appropriated the funds necessary to effectuate the across-the-board upgrades which have been mandated by Ohio Secretary of State, Kenneth Blackwell. This process of availing itself of federal funds, choosing vendors, etc., as the Court knows, is one which has been ongoing since the inception of this litigation, and continues with the current process of ensuring that the technology itself is such so as to ensure the integrity of the election process.

In short, the Plaintiffs are requesting that this Court order a result which is itself already occurring pursuant to the legislative process.

There is, in reality, therefore, nothing left for this Court to redress. The patent absence of a redressable issue herein bespeaks the absence of any real or actual controversy with respect to the replacement of Ohio's voting technology, within the allowable timelines established by the Help America Vote Act. The Plaintiffs' Complaint, therefore, fails to present a justiciable controversy on the basis of mootness. Defunis v. Odegaard, 416 U.S. 312 (1974).

## **II. CONCLUSION**

The United States Congress, with the passage of the Help America Vote Act, pursuant to the exercise of its constitutional power under Art. I, Sec. 4; and the Ohio Legislature, with the passage of H. B. 434 and H. B. 262, in concert with the actions of Secretary of State Kenneth Blackwell, to avail itself of the opportunity presented under HAVA to replace the State's election machinery, have legislatively adopted, funded, and administratively initiated the very redress sought by the Plaintiffs' Complaint – i.e. the

replacement of Ohio's election machinery with newer and, hopefully, more "foolproof" voting technology.

The exercise of these actions by the Federal and State Legislative Branches, with the concomitant administrative actions taken in support thereof by Secretary of State Kenneth Blackwell, as well as the lack of any judicially manageable standards by which to review questions bearing on the interface between voting technology and residual ballot rates, render the Plaintiffs' request for a judicially mandated technology replacement to be non-justiciable under the separation of powers and political question doctrines, and, frankly, to be moot as well, inasmuch as the redress sought has already been undertaken by the Defendants.

Moreover, the Sec. 2 Voting Rights Act claim of Professor Vernellia Randall, whether construed to be an individual or class action claim against the Montgomery County Defendants, must fail, inasmuch as the evidence adduced upon the record regarding such claim is inextricably linked to the 2000 presidential election, and Professor Randall failed to vote in said election. Professor Randall, therefore, lacks the individual and representative standing to bring this claim, and, as such, the claim is itself non-justiciable.

For all of the above reasons, this Court should refrain rendering any decision on the various related causes of action herein, on the basis of non-justiciability. However, in the event that this Court should find it prudent to reject the above non-justiciability analysis, the Montgomery County Defendants hereby adopt and incorporate any and all arguments, which may be applicable to their defense, posited in the post-trial briefs of

the other Defendants herein, and additionally make the following observations relative to the evidence adduced upon the record in support of the Plaintiffs' claims.

Professor Martha Kropf testified that, looking at the results of two exit poll surveys (a VNS survey from 1992 which sampled 54,806 voters, and an NES study which sampled a total of only 7,699 voters over a 20-year period), one could conclude that intentional undervoting is an extreme rarity (T. 94-95), regardless of the race of the voter (T. 100). However, she admitted that her conclusions were based on surveys which were nationally done, and not specific to Ohio (T. 100), and that, indeed, of the 7,699 people sampled in the NES survey, not only many but, depending on the year, all might have been from states other than Ohio (T. 112). Furthermore, Ms. Kropf did not control for education in her analysis and conclusions, even though she admitted that the factor of education is important with regard to the question of intentional undervoting (T. 121-122).

Professor Richard Engstrom testified that use of exit polling information, such as that which forms the foundation of Professor Kropf's study, is a dubious method by which to determine whether a voter purposefully or accidentally undervoted (T. 448, T. 471-473).

Therefore, the Plaintiffs' own expert witnesses contradict each other on the validity and usefulness of national exit poll surveys in determining whether a voter purposefully or accidentally undervoted.

Like Professor Kropf, Professor Engstrom admitted that education and income level are directly related to political participation (T. 488), but, as with Dr. Kropf, Professor Engstrom also did not examine income level relative to the so-called racial

gap in under and over voting (T. 488-489). And, as with Dr. Kropf, Professor Engstrom also did not look at the impact or effect of educational level on this question (T. 489). And, although Professor Engstrom admitted to knowing that the test for a Sec. 2 Voting Rights violation was the "totality of the circumstances" (T. 497), he made no attempt to control for education or income level as previously noted, nor did he control for age, disability or whether voters speak English as a first language (T. 489). Any and all of these factors may, of course, within the totality of circumstances, bear on the question of why residual votes are cast.

The Court itself inquired of Professor Engstrom what the measure of acceptability should be relative to the question of residual voting, which, of course, is at the very heart of the Plaintiffs' Equal Protection and Sec. 2 claims (T. 450). While Professor Engstrom refrained from providing a response to this question, Plaintiffs' expert Roy Saltman was not as circumspect.

The Court will note that Mr. Saltman referred to guidelines developed by the Cal Tech-MIT Post-2000 Election Study (T. 308-309). These guidelines were adopted by the National Commission on Federal Election Reform, and provide as follows: a) a residual vote rate of 0-1% is characterized as good; b) a residual vote rate of 1-2% is characterized as acceptable; c) a residual vote rate of 2-3% is characterized as worrisome; and a residual vote rate of 3% is unacceptable.

According to the chart found at p. 14 of Plaintiff's Exhibit 17, the residual vote rate for Montgomery County, Ohio in the 2000 presidential election was 2.78%. The Court will note that according to Mr. Saltman, Cal-Tech, MIT, and the National Commission on Federal Election Reform, that rate, while perhaps "worrisome," does not

fall within the unacceptable range. "Worrisome" residual voting patterns obviously do not rise to the level of a constitutional violation, or form an adequate foundation upon which to predicate a Voting Rights violation.

Therefore, even if the Court were to reject the Montgomery County Defendants' justiciability analysis, there is a distinct lack of evidence in the record by which to justify the wholesale and immediate replacement of the State of Ohio's election machinery. The Plaintiffs' claims, therefore, must be denied and judgment entered in favor of the Defendants.

Respectfully submitted,

MATHIAS H. HECK, JR.  
PROSECUTING ATTORNEY

By:     /s/ Victor T. Whisman  
VICTOR T. WHISMAN (#0008033)  
Attorney for Defendant Montgomery  
County Board of Commissioners and  
Board of Elections  
Assistant Prosecuting Attorney  
Montgomery County Prosecutor's Office  
301 West Third Street  
P.O. Box 972  
Dayton, Ohio 45422  
Telephone: (937) 225-5757  
Fax Number (937) 225-4822  
e-mail: whismanvt@mcoho.org

**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 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 the following:

MEREDITH E.B. BELL, ESQ.  
American Civil Liberties Union  
2725 Harris Tower  
233 Peachtree Street, NE  
Atlanta, GA 30303  
Attorney for Plaintiffs

RICHARD SAPHIRE  
Professor of Law  
University of Dayton  
300 College Park  
Dayton, Ohio 45469-2772  
Attorney for Plaintiffs

PAUL F. MOKE  
Professor of Social & Political Science  
Wilmington College  
1252 Pyle Center  
Wilmington, Ohio 45177  
Attorney for Plaintiffs

ANITA L. DAVIS  
Assistant Prosecuting Attorney  
Summit County Prosecutor's Office  
53 University Avenue, Sixth Floor  
Akron, Ohio 44308  
Attorney for Defendants Summit County Council  
and Summit County Board of Elections

ARTHUR J. MARZIALE, JR.  
Senior Deputy Attorney General  
DARRELL M. PIERRE, JR.,  
RICHARD N. COGLIANESE  
HOLLY J. HUNT  
Assistant Attorneys General  
Office of the Attorney General  
State of Ohio  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215-3428  
Attorneys for Defendant J. Kenneth Blackwell

JEFFREY A. STANKUNAS, ESQ.  
ISAAC, BRANT, LEDMAN & TEETOR  
250 East Broad Street, Suite 900  
Columbus, Ohio 43215-3742  
Attorney for Defendant Sandusky County Board of Commissioners  
and Sandusky County Board of Elections

DAVID T. STEVENSON  
Assistant Prosecuting Attorney  
Hamilton County Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202-1474  
Attorney for Defendant Hamilton County Board of Commissioners  
and Hamilton County Board of Elections

SCOTT T. GREENWOOD  
American Civil Liberties Union  
1 Liberty House  
P.O. Box 54400  
Cincinnati, Ohio 45202  
Attorney for Plaintiffs

LAUGHLIN MCDONALD  
American Civil Liberties Union  
2725 Harris Tower  
233 Peachtree Street NE  
Atlanta, GA 30303  
Attorney for Plaintiffs

DANIEL P. TOKAJI  
Professor of Law  
Ohio State University  
Moritz College of Law  
55 W. 12th Avenue  
Columbus, Ohio 43210  
Attorney for Plaintiffs

/s/ Victor T. Whisman

---

VICTOR T. WHISMAN (#0008033)  
Assistant Prosecuting Attorney