

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EFFIE STEWART, et al., :  
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 Plaintiffs, : Case No.: 5:02CV2028  
 :  
 vs. : Judge David Dowd, Jr.  
 :  
 BLACKWELL, et al. :  
 :  
 Defendants. :

**SANDUSKY COUNTY DEFENDANTS' REPLY IN SUPPORT  
OF THEIR MOTION FOR SUMMARY JUDGMENT**

Plaintiff Linda See's Memorandum in Opposition to Sandusky County Defendants' Motion for Summary Judgment ("Plaintiffs' Memorandum in Opposition") fails to permit Ms. See to survive the Sandusky County Defendants' Motion for Summary Judgment for the following compelling reasons:

- 1) Ms. See's Equal Protection claim against Sandusky County fails because she has no evidence that Sandusky County's method of voting is not uniform;
- 2) The undisputed evidence is that, as long as Ms. See follows directions, every intentional vote that she casts will be counted (stated another way, Ms. See cannot demonstrate that she has a constitutional right to fail to follow directions when she votes); and
- 3) Ms. See has no evidence that there is any problem whatsoever with Sandusky County's use of an optical scan ballot with central tabulation.

These reasons are set forth in more detail below.

**I. Ms. See's Equal Protection Claim Against Sandusky County Fails Because She has No Evidence That Sandusky County's Method Of Voting Is Not Uniform.**

As an initial matter, Sandusky County hereby adopts and incorporates by reference all of the arguments set forth in the other Defendants' Reply in Support of their Motion for Summary

Judgment, as well as the arguments that Sandusky County set forth in its Motion for Summary Judgment and its Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. As before, the only reason that Sandusky County did not simply join in the other Defendants' Reply in Support of their Motion for Summary Judgment, and refrain from filing their own Reply, is because: 1) they are the only defendants who currently use an optical scan ballot, and 2) they are the only defendants that have *not* had a race discrimination claim made against it under § 2 of the Voting Rights Act.

As she did in her Motion for Summary Judgment, Ms. See continues to rely upon case law concerning Equal Protection issues brought against *a state* due to that *state's* unequal treatment of its voters. (Plaintiffs' Memorandum in Opposition at 7-8, 13). For example, she cites to *Gray v. Sanders*, 372 U.S. 368 (1963), for her argument that "election officials are prohibited from engaging in election practices that accord substantially different weight to voters in different jurisdictions." (Plaintiffs' Memorandum in Opposition at 7). However, a close examination of the *Gray* case reveals that the plaintiffs there had sued the Georgia Secretary of State and officials of the Georgia State Democratic Executive Committee from using a system (provided for by a state statute) of allocating unit votes to counties based upon their population. *Id.* at 369. Importantly, the *Gray* case does not provide that a voter can sue a county when that county has provided for a uniform system of voting throughout that county.

Thus, the *Gray* case and the other cases relied upon by Ms. See are completely inapplicable to the Sandusky County Defendants. As stated in Sandusky County Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Sandusky County's Memorandum in Opposition"), Ms. See has failed to come forward with any evidence that suggests that Sandusky County does not provide all of its voters with a uniform method of voting

throughout Sandusky County. (Sandusky County's Memorandum in Opposition at 3-4)<sup>1</sup> Since Sandusky County Defendants treat all of its voters equally, regardless of where they live in Sandusky County, the Sandusky County Defendants must be granted summary judgment on Ms. See's Equal Protection claim (the only claim brought against them).<sup>2</sup>

**II. The Undisputed Evidence Is That, As Long As Ms. See Follows Directions, Every Intentional Vote That She Casts Will Be Counted (Stated Another Way, Ms. See Cannot Demonstrate That She Has A Constitutional Right To Fail To Follow Directions When She Votes).**

Even if Ms. See had come forward with evidence to support her Equal Protection claim against Sandusky County, Ms. See has not disputed the Sandusky County Defendants' argument that so long as she (and any other voter in Sandusky County) follows directions, every intentional vote that she casts will be counted. While she has not explicitly asserted that she has a constitutional right to fail to follow directions when she votes, her arguments reflect that this is precisely what she wants this Court to hold. Unfortunately for Ms. See, there is no case law which supports such a holding.

Ms. See first contends that voters in Sandusky County can make stray pencil marks on the optical scan ballot. (Plaintiffs' Memorandum in Opposition at 3). However, Ms. Tuckerman has also indicated that this has never been a problem, since when board members look at the ballot they can clearly tell that it was an unintentional stray mark, since it is usually below an

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<sup>1</sup> Nor has Ms. See attempted to argue that Sandusky County has somehow violated the Equal Protection rights of its voters because voters in other counties use different methods of voting. Sandusky County Defendants presume that Ms. See did not argue this because: 1) there is no case law to support such a position, and 2) a defense to such an argument would be that so long as all 88 Ohio Counties use the *same* method of voting technology, no matter how error prone it may be or how many security concerns it might present, than any and all Equal Protection claims would fail (surely a result that none of the parties desire).

<sup>2</sup> Ms. See alternatively argues that even if she has failed to come forward with any evidence to support her Equal Protection claim, this Court should still deny the Sandusky County Defendants' Motion for Summary Judgment because to do so "promotes judicial economy" because it enables the Court to address the optical scan with central tabulation voting method. (Memorandum in Opposition at p. 11). Not only would the acceptance of this argument violate Federal Rule of Civil Procedure 56, but, more importantly, it would violate the Art. III, § 1 "Cases" and "Controversies" requirement of the Constitution of the United States. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

oval with a totally colored oval (the one they can tell the voter intended to vote for), and Sandusky County therefore puts a little white circle over the stray mark. (Sandusky County's MSJ at 7). Second, Ms. See claims that voters can use unauthorized devices, such as ink pens, to fill out their ballots. (Plaintiffs' Memorandum in Opposition at 3). However, this only will occur if the voter ignores one explicit oral instruction from a poll worker not to do that, as well as two written instructions (one handed to the voter and one posted in the voting booth right in front of the voter's eyes), which again explicitly instruct the voter not to do such a thing. (Sandusky County's MSJ at 3). Finally, Ms. See claims a voter can partially fill-in the oval, creating uncertainty about whether the tabulator will count their ballot or not. (Plaintiffs' Memorandum in Opposition at 3-4). Again, a voter would have to ignore the written instructions which give an example of how to "[f]ill in the **OVAL** to the **LEFT** of your choice," which is a *completely blackened oval*. Moreover, the evidence shows that if this occurs, and the ballot is rejected by the tabulating machine, an examination reveals that it is clear that the voter didn't intend to vote for someone else, and that oval is filled in completely. (Sandusky County's MSJ at 6, Exhibit 6).<sup>3</sup>

The undisputed evidence, as set forth by two of the Plaintiffs' own expert witnesses, is that so long as a voter on an optical scan ballot (even one which is tabulated at a central location) follow directions, every intentional vote that they cast will be counted. (Sandusky County's MSJ at 18-20). While Ms. See makes the unsupported assertion that Sandusky County "voters simply do not know whether they 'followed directions' or not unless and until they vote using actual

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<sup>3</sup> Without citing to any evidence, Ms. See also states that a voter can "mistakenly vote for two candidates for the same office or leave an office blank that they intended to vote for." (Plaintiffs' Memorandum in Opposition at 4). There is no evidence that either of these two events ever "mistakenly" happens, and instead, the undisputed evidence is that this will only occur if a voter fails to follow directions. (Sandusky County's MSJ at 3-6,18-20; Tuckerman Depo. at 71). Finally, even when a voter does fail to follow directions, Sandusky County does follow the guidelines from the Ohio Secretary of State that allow for the determination of the intent of the voter. (Sandusky County's MSJ at 7).

notice, 'second chance' technology," (Plaintiffs' Memorandum in Opposition at 6) this unsupported assertion is belied by the Plaintiffs' expert witness's own testimony. Dr. Asher conceded both that a voter using an electronic voting machine in Franklin County still must examine their own ballot for mistakes prior to casting it, and that a voter on that electron voting machine *could still mistakenly* cast a valid vote for someone other than who that voter intended to vote for. (Sandusky County Defendants' MSJ at 19, FN. 6). Because Ms. See can come forward with no case law which suggests that she has a constitutional right to fail to follow explicit directions when she votes, her claim against Sandusky County fails.

### **III. Ms. See Has No Evidence That There Is Any Problem Whatsoever With Sandusky County's Use Of An Optical Scan Ballot With Central Tabulation.**

Ms. See contends that strict scrutiny is applicable to reviewing Sandusky County's Use of an optical scan ballot with central tabulation because it somehow impacts her right to vote. (Plaintiffs' Memorandum in Opposition at 8). To support her contention, she first points to the Residual Vote Rate in Ohio's 2000 Presidential Election, specifically, the fact that the average residual rate for all the counties that used an optical scan ballot with central tabulation in that race was 1.8%, and the average residual rate for all the counties that used an optical scan ballot with in precinct tabulation was 1.0%.<sup>4</sup> The first fundamental flaw with relying upon these statistics is that in Ohio's 2000 Presidential election, Sandusky County *did not use* an optical scan ballot, and therefore, these statistics are irrelevant.<sup>5</sup> (Tuckerman Depo. at 21).

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<sup>4</sup> Ms. See does not state why a .8% difference between an optical scan ballot with central tabulation and an optical scan ballot with in precinct tabulation is unacceptable to her, but a .3% difference between an optical scan ballot with in precinct tabulation and an electronic voting machine (0.7% residual vote rate) is acceptable to her. She fails to explain this even though she concedes she does not seek a "perfect" or "error-free voting system." (Plaintiffs' Memorandum in Opposition at 6,12).

<sup>5</sup> Even if Sandusky County had used an optical scan ballot in the 2000 Presidential Election, the fact that all the counties that used an optical scan ballot, *when combined together*, may have had an average Non-Vote Rate of 1.7%, this would not demonstrate that *Sandusky County* had a Non-Vote Rate of 1.7%.

Additionally, Ms. See's selective use of the statistics of a 0.93% residual vote rate in Allen County (which used optical scan with in precinct tabulation) and 2.4% residual vote rate in Mahoning County (which used optical scan with central tabulation) leaves out several significant facts. (Plaintiffs' Memorandum in Opposition at 5-6). What was not brought to the Court's attention was the fact that the only other county that used an optical scan with in precinct tabulation in the 2000 Presidential election was Hancock County, which had a residual vote rate of 1.2%. The following Counties, *all of which used optical scan ballots with central tabulation in that election*, had the same or a lower residual vote rate than did Hancock County:

- 1) Ashland County (1.2%);
- 2) Geauga County (.8%);
- 3) Hancock County (1.0%)<sup>6</sup>; and
- 4) Ottawa County (1.1%).

(Appendix G to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County ("Appendix G")). Additionally, Coshocton County only had a residual vote rate of 1.5% in that race, and Lucas County only had a residual vote rate of 1.4%. Both of these counties used an optical scan ballot with central tabulation. (Appendix G). Not only has Ms. See failed to offer any evidence for the fact that counties who used optical scan ballots with in precinct tabulation had a higher residual vote rate than counties that used optical scan ballots with central count tabulation, but she has offered no evidence that any of the specific voting methods of any of these counties were even examined.<sup>7</sup>

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<sup>6</sup> Hancock County apparently used optical scan ballots with both in precinct and central tabulation.

<sup>7</sup> Similarly, Ms. See fails to explain why *every* single county that used an optical scan ballot with central tabulation had a *lower* residual vote rate for the race for U.S. Senate in the 2000 general election than did Allen County, which

The only election involving Sandusky County's use of an optical scan ballot with central tabulation that Ms. See actually relies upon is the 2002 general election for governor. In that race, Sandusky County had a .18% rate of overvotes (a total of 35 overvotes out of 19,632 total votes cast) and a 1.76% rate of undervotes (a total of 345 undervotes out of a total of 19,632 total votes cast). (Plaintiffs' Memorandum in Opposition at 4). Ms. See offers no comparison of any other residual vote rate of any other County with any other voting method from the 2002 general election for governor. Moreover, she offers no evidence that demonstrates that these rates were not the result of intentional undervoting or overvoting from this race.<sup>8</sup> Instead, she appears to be contending that these rates, by themselves, demonstrate that this Court should declare Sandusky County's method of voting unconstitutional. However, she has no legal authority to support such a contention.

Therefore, her reliance upon the above statistics to support her claim fails, as there is no evidence that the use of an optical scan ballot with in precinct count would actually result in a lower residual vote rate in Sandusky County. Thus, rational basis is the standard of review which applies. As previously stated, the Sandusky County Defendants have a rational basis for choosing to utilize an optical scan ballot with central location tabulation. (Sandusky County's MSJ at 15-18).

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used an optical scan ballot with in precinct tabulation. (Appendix G). Similarly, Plaintiff's expert witness Roy G. Saltman could not explain what has caused high income/low minority districts to tend to have slightly higher no-vote percentages for lever and electronic machines than they do when an optical scan ballot with central tabulation is utilized. (Saltman Depo. at 194-195).

<sup>8</sup> Ms. See has presented evidence that intentional undervoting does occur, and that, at least in the context of a presidential election, between 0.23% and 0.77% voters actually *admit* to intentionally casting an undervote for president. (Kropf Depo. at 128-129). However, the Plaintiffs' own expert witnesses have seriously questioned the reliability of these admissions. (Asher Depo. at 145-150; Engstrom Depo. at 130-135).

#### IV. Conclusion.

Ms. See's Equal Protection claim fails because Sandusky County conducts a uniform method of voting for all of its voters. Her claim also fails because the undisputed evidence is that as long as she follows directions (which she has not contended are confusing or difficult to follow, for anybody), every intentional vote that she casts will be counted. Finally, her claim fails because the only evidence that she (and the rest of the Plaintiffs) has come forward with concerning optical scan ballots with central tabulation is that *some* counties that have used them in certain races have experienced a higher residual vote rate than other counties that have used different voting methods in the same race. However, Ms. See's evidence also establishes that some counties that have used optical scan ballots with central tabulation in the same or other races have experienced a *lower* residual vote rate than have other counties that have used different voting methods in the same race (including electronic voting methods and optical scan ballots with in precinct tabulation). This evidence, taken together, as well as Ms. See's complete failure to establish evidence concerning these discrepancies, demonstrates that Ms. See has failed to establish *anything* whatsoever. This failure includes her burden to demonstrate a disputed issue of material fact as to whether or not Sandusky County has violated her constitutional rights.

For all of the above reasons, as well as those set forth in Sandusky County Defendants' Motion for Summary Judgment, Sandusky County respectfully requests that this Court grant them summary judgment on all of the claims against them.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 30, 2004, a copy of the foregoing was filed electronically. Notice of the filing will be sent to and can be accessed by all parties by operation of the Court's electronic filing system.

/s/ Jeffrey Stankunas  
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