

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

<b>Effie Stewart, et al.,</b>	)	<b>CASE NO. 5:02cv2028</b>
<b>Plaintiffs</b>	)	<b>Judge Dowd</b>
	)	<b>Magistrate Judge Gallas</b>
<b>v.</b>	)	
	)	
<b>J. Kenneth Blackwell, et al.,</b>	)	
<b>Defendants</b>	)	
	)	

**PLAINTIFFS’ REPLY TO SEPARATE RESPONSE OF HAMILTON COUNTY TO  
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

The Hamilton County Defendants have filed a document entitled "Response of Hamilton County Defendants to Plaintiffs’ Motion for Summary Judgment" (Doc. 190, "Response Brief"). In a separate filing, the Plaintiffs have filed a Motion to Strike this Response Brief (Doc. 193), in its entirety or, alternatively, in part, on the grounds that the Brief does not comply with the Federal Rules of Civil Procedure and the Rules and Orders of this Court. In the event that the Court denies the Plaintiffs’ Motion to Strike, the Plaintiffs submit this Reply.<sup>1</sup>

The Plaintiffs have already addressed much of what is set out in the Response Brief, and

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<sup>1</sup> The Hamilton County Defendants have filed a response to Plaintiffs' motion to strike (Doc. 194) that mischaracterizes much of what took place between Paul Moke, counsel for the Plaintiffs, and David Stephenson, counsel for Hamilton County. Plaintiffs will reply to Hamilton County's response shortly in a separate document.

they will not restate those matters here.<sup>2</sup> To the extent Hamilton County raises matters that are addressed in the Defendants' Memorandum Contra Plaintiffs' Motion for Summary Judgment (Doc. 186, "Defendants' Brief Contra") previously filed (and signed by David Stevenson, Attorney for Hamilton County), Plaintiffs incorporate herein the responses included in their Reply Brief in Opposition to that document. Plaintiffs also incorporate the arguments contained in their brief in opposition to the Motion for Summary Judgment filed by Hamilton County and the other Defendants (Doc. 187).

Hamilton County asserts that the theory of Plaintiffs' case is that "every one knows that punch cards are bad so we should stop using them." Response Brief at 3. This has been an ongoing diversionary mantra for all of the Defendants in this case, and for reasons the Plaintiffs have fully developed elsewhere, nothing could be further from the truth. Ohio's voting system is indeed "bad." As a matter of public policy, Ohio should, as Secretary Blackwell himself has repeatedly and publicly argued, "stop using" the punch card machines. But the Plaintiffs do not rest on the fact that Ohio's system is "bad" only in the abstract or public policy sense. Plaintiffs fully recognize that a federal court does not sit to assess or judge the wisdom of state or local governmental policies, but to determine whether such policies violate the law. And in this case,

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<sup>2</sup> The Defendants, however, do make some rather odd claims and assertions. For example, they suggest that "overvotes are not denied votes." Response Brief at 9. But, of course, where a voter has a ballot invalidated because, or to the extent, that she mistakenly voted for more candidates or issues than were permitted, or where the voting equipment mistakenly detected more than one vote, she is "denied" the right to have her vote for that candidate or issue count as effectively as if that the race or issue in question had been left off the ballot. In addition, the Plaintiffs have never argued, as asserted in Response Brief at 15, that "error notification eliminates a disparate impact with respect to undervoting," nor have Plaintiffs ever "asserted security interests" (whatever that means) as suggested on the same page. (It is the Defendants who have claimed that alleged security problems with possible replacement technologies somehow affect the Court's power to adjudicate the issues in this case.) Finally, the Defendants accuse the Plaintiffs of never offering "any serious discussion of whether it is constitutionally permissible to eliminate both intentional and unintentional overvoting. *Id.* Since Plaintiffs have absolutely no idea of what this statement is meant to convey, or how it might affect the issues in this lawsuit, they confess to having nothing to say about it –

the record clearly reveals that the County's and State's policy of certifying and relying upon punch card voting equipment denies all voters in Hamilton County their rights under the Fourteenth Amendment, and denies minority voters their rights under the federal Voting Rights Act.

## **II. ARGUMENT**

### **A. Plaintiffs Arthur Slater and Howard Tolley Have Standing to Assert the Violation of Their Voting Rights, and the Rights of the Class Members Whom They Seek to Represent**

Plaintiffs do not contest the Defendants' recitation of the standing requirements set out in the Response Brief at 11.<sup>3</sup> But Plaintiff Slater has fully met each of these requirements. It is undisputed that (1) Mr. Slater is a resident of Hamilton County; (2) that, with the exception of a five year period, he has lived in the County since 1967; (3) that he is a registered voter in the County; (4) and that he has voted and continues to vote regularly and consistently in all elections for which he is eligible to vote in Hamilton County. Deposition of Arthur Slater (Doc. 171-1e) at 5-6, 15. Defendants argue that Slater "never had any problem exercising his voting franchise with punch card equipment," and from this they draw the conclusion that he has alleged "no injury in fact." *Id.* at 12. This argument misunderstands (or mischaracterizes) both the interaction of non-notice punch card voting equipment with the voters who must use that equipment and the Article III requirement of injury in fact.

That Arthur Slater or Howard Tolley or any other voter in Hamilton County does their

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"seriously" or otherwise.

<sup>3</sup> As with much else in the Response Brief, the Hamilton County Defendants are unclear as to whether their standing argument is directed only to Plaintiff Slater, or to Slater and Howard Tolley, or to one or both of them and other Plaintiffs in this case. But since the Brief purports to speak to Hamilton County's allegedly distinct interests in this case, and since it focuses explicitly on Mr. Slater in Section III (d), Plaintiffs will focus its arguments here on his

best to follow any instructions they may be provided about the use of the available punch card equipment cannot provide meaningful assurance that their ballot will actually be counted. As Plaintiffs have demonstrated in numerous other papers filed in this case, the unreliability of punch card equipment without error notification is inherent in both the ways in which voters must interact with the equipment and the ways that the punch card ballots are processed and tabulated. In particular, punch card voting machines suffer from the following inherent defects:

- The ballot is inherently fragile;
- The “chad” prevents reproducible results;
- Running ballot cards through machine readers may change the condition of loose chad;
- Voter ease of use is poor, due to the inherent difficulty in punching the correct hole;
- The user-unfriendliness of the system cannot be resolved through voter education;
- Voters do not see and cannot easily verify their choices.

Saltman Report (Doc. 171-4p) at 17.

For these reasons, even a voter exercising the utmost care can fail to puncture the voting card with a stylus in a way that will ensure that the vote actually will be counted when the cards are delivered from the voter’s precinct to the central location where they will be tabulated. And where the cards themselves do not have the names and offices of the candidates for voters to see – as is true in Hamilton County -- the voter has no way, prior to handing a card to a poll worker, to assess whether the card actually represents the choices that the voter thought he or she made in the voting booth. Thus, *no voter*, regardless of how careful, is in a position to know definitively whether or not he or she had a “problem” with the punch card equipment and *no voter* can

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standing.

definitively know that his or her vote was tabulated reflecting his or her preferences. And in any event, Mr. Slater and Mr. Tolley are suing on behalf of a broader class of voters, many of whom are certain to be less educated, less sophisticated, and less careful than they are.

The record before the Court (discussed in greater detail in the main reply brief) clearly establishes that voters in punch card counties, including Hamilton County, are subject to a significantly greater likelihood that, for one or more of a variety of reasons traceable to the equipment they must use in voting, their votes will not be counted when compared to voters who are fortunate enough to vote on electronic or other equipment that utilizes error notification. This situation will persist until the Plaintiffs are permitted to vote on equipment that has error notification, such as electronic touchscreens or precinct-count optical scans. Judge Guzman's conclusion in Black v. McGuffage, 209 F. Supp.2d 889, 894-45 (N.D. Ill. 2002), rejecting a standing claim nearly identical to Hamilton County's, is equally valid here: "The ballot machinery used in the jurisdictions in which Plaintiffs vote increases the likelihood that their votes will not be counted. That 'probabilistic injury is enough 'injury in fact' ... to confer standing in the undemanding Article III sense'" (citing cases).

**B. Hamilton County Defendants' New Evidence Does Not Alter the Fact that Their Punch Card Machines Discriminate Against African American Voters, in Violation of Section 2 of the Voting Rights Act**

Plaintiffs have explained the basis for their claim under Section 2 of the Voting Rights Act in their opening brief, in their opposition to Defendants' summary judgment motion, and in the accompanying reply to the opposition of the State, Hamilton, Montgomery and Summit Defendants. Because the facts and law underlying this claim have been discussed at length in these briefs, we address it only briefly here.

Defendants' Voting Rights Act claim arises from the intra-county racial disparities that result from the continuing use of punch card voting machines. In particular, Plaintiffs' Section 2 claim against Hamilton County rests on the fact that African Americans in Hamilton County overvoted in the 2000 presidential election at a rate of that is *6-7 times as high as whites*. This calculation is based on three methods to estimate voting behavior by race: homogeneous precinct analysis, ecological regression, and ecological inference. Federal courts have approved all three methods for use in voting rights cases, and Defendants do not seriously challenge the use of this methodology in this case.

Instead, Hamilton County Defendants have introduced new evidentiary material (discussed in Section II of their opposition brief), that although apparently available when they filed their joint Motion for Summary Judgment, was not previously made available to the Plaintiffs and which Plaintiffs' attorneys have had little time to assess.<sup>4</sup> Specifically, Defendants have now submitted an affidavit of John Williams. The Williams Affidavit, and the materials attached thereto, are directed at the 2001 Cincinnati mayoral election, and are offered in advance of the proposition that "racial disparities in overvoting are not the problem Plaintiffs report them to be," Response Brief at 6. What Defendants do not note, however, is that in 2001, there was also an election for the Cincinnati Council, and with respect to this election, there was a much higher incidence of overvoting among minority voters than non-minority voters.<sup>5</sup>

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<sup>4</sup> Much of this new material was not filed with the Defendants' main Response Brief, but was sent by commercial carrier to the Plaintiffs and was not received until after Hamilton County filed their Response.

<sup>5</sup> Twenty-one candidates ran for nine open seats on City Council. Voters who selected more than nine candidates cast overvotes, and their ballots for this race were discarded. A total of 2,279 voters cast overvotes, which was 2.6% of the total ballots cast. Significantly, the correlation between the precincts in the City of Cincinnati where overvotes occurred in the 2000 presidential election and those in the 2001 City Council election where overvotes

Furthermore, with respect to the 2000 presidential election, the report of Plaintiffs' expert Dr. Engstrom's is unrefuted in establishing the significantly higher rate of minority overvoting, regardless of which method of statistical analysis is used. Engstrom Report (Doc. 171-4n) at 6.

Defendants, moreover, are simply wrong to suggest that "intentional acts" of discrimination on the part of election officials are required in order to show a VRA violation. Section 2 expressly provides that practices which "result in" vote denial on account of race fall within its purview and the 1982 amendments were expressly designed to remove the requirement of intent. Thornburgh v. Gingles, 478 U.S. 30, 43 (1986). Intentional discrimination is therefore *not* required under Section 2.

**C. Hamilton County Defendants' Decision to Adopt, Use and Maintain Punch Card Voting Equipment Constitutes a Municipal Policy Sufficient to Satisfy the Requirements of 42 U.S.C. §1983 Under Monell.**

Hamilton County Defendants next argue, for the first time, that the County cannot be held accountable in a §1983 action for the violations of federal law alleged by the Plaintiffs.<sup>6</sup>

Defendants argue correctly that a municipal entity can only be held liable in a §1983 action for

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occurred is .55. This finding is significant at the .01 level of significance. In other words, there is a strong level of association between the areas where overvoting occurred in 2000 and where they again occurred in 2001, and this finding is not simply due to chance. Moreover, according to ecological inference analysis, the estimated percentage of African American voters who cast overvotes in this election is 4.2%, whereas the estimated percentage of non-African Americans who cast overvotes is 1.6%, a difference of 2.6%. These findings are based on official results for the 2001 City of Cincinnati election, as provided by the Defendants to the Plaintiffs pursuant to a request for production of documents. Analysis of racial demographics is based on the geographical database for Hamilton County that Plaintiffs' expert, Dr. Mark Salling, prepared in this case.

<sup>6</sup> The nature of Defendants' argument is unclear in many respects. Plaintiffs assume that this argument is directed only against the constitutional claims they assert, since Plaintiffs do not rely upon §1983 to assert their Voting Rights Act claim (and, as developed in Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment, Plaintiffs have not asserted a §1983 claim "to enforce HAVA"). In addition, Defendants' §1983 claim is made on behalf of "the Hamilton County defendants," Response Brief at 12, 13, without specifying precisely which defendants they have in mind. Accordingly, the Plaintiffs will assume that their arguments here on made on behalf of, and are limited to, the Hamilton County Boards of Commissioners and Elections, the only to Hamilton County municipal entities named as Defendants in this case.

conduct that is traceable to a “custom or policy,” but they are clearly mistaken in claiming that this requirement has not been satisfied in this case. The simple and undisputed fact is that Hamilton County Defendants have chosen to use the Votomatic punch card voting system for their elections, and that they continue to use this system to this date. It can scarcely be denied that the use of this voting system *is* their custom and policy. The only question – not addressed in Hamilton Defendants’ opposition – is whether that system violates Plaintiffs’ rights under the Fourteenth Amendment.

Defendants’ §1983 argument recycles, albeit in slightly different form, an argument that this court has already rejected. In particular, Defendants argued that they were improperly joined as a party because the State of Ohio bears total and complete responsibility for elections in Ohio, and that the counties are merely innocent bystanders with respect to any legal violations that may occur. See Motion of Montgomery, Hamilton, Summit, and Sandusky Counties for an Order Dropping Them as Parties and for Misjoinder Under Fed. R. Civ. P. 21 (Doc. 167). Similarly, Hamilton County Defendants now argue that the only policies identified by the Plaintiffs are “the policy of certifying particular voting systems, and the policy of allowing non-uniform voting systems on a statewide basis,” Response Brief at 12, and that only the State of Ohio can have policies in this regard. Once again, the Defendants misunderstand or mischaracterize the Plaintiffs’ legal theories and their duties and responsibilities under Ohio law.

As alleged in the Second Amended Complaint, under Ohio law the establishment and operation of Ohio’s election system, including the decision of what voting equipment counties will use, is a responsibility *shared* by state and county governments. Pursuant to ORC §3506.02, *et seq.*, the *counties* are responsible for adopting “voting machines, marking devices, and

automatic tabulating equipment... for use in elections in any county....” Once a county exercises its statutory duty to select and adopt such equipment, its decision (or, if you will, its “policy”) must be submitted to the state Board of Voting Machine Examiners and the Secretary of State for examination, approval and certification. §3506.05. As far as the Ohio Revised Code is concerned, the counties are free to pursue whatever policy they choose with respect to what voting equipment to adopt, given their individual considerations of local conditions, price, and the like. It is only after a county decides what policy it wishes to adopt on this matter that state officials become involved in the process. To suggest that Hamilton (or any other) County merely sits passively on the sidelines while the state makes all the important decisions simply flies in the face of reality – including the allocation of authority clearly set out in Ohio law.

Indeed, the extent to which the Hamilton County Defendants are deeply involved in the selection of election equipment is clearly revealed in the deposition of the Chair of the Hamilton County Board of Elections, Timothy Burke. Mr. Burke described in considerable detail the process utilized by the Board in identifying and examining equipment that it was considering for adoption by the County. Deposition of Timothy Burke (Doc. 171-3b) at 23-25. When asked about the Board’s deliberations about potential replacement equipment under the State’s HAVA plan, Burke stated: “...it’s my understanding that, talking about the counting equipment, that we are to make a selection for new equipment that meets the requirements of HAVA.” *Id.* at 26. And the extent of the policy judgment exercised by the County Defendants is furthered revealed in Burke’s testimony concerning the factors that the Board was taking into account in evaluating how it might choose between a variety of equipment that was available to it. *Id.* at 40; see also Deposition of Julie Stautberg (Doc. 171–3d) at 43-44 (describing the policy considerations

entertained by the Hamilton County Board of Elections in deciding what voting equipment to adopt). In light of the above, there can be no question that the decisions to purchase, fund, operate, or retain any particular voting equipment, whether the current punch card system or any other, is, *primarily and in the first instance*, a policy determination committed to the Hamilton County Defendants.

Hamilton County Defendants are thus accountable under §1983 for adopting and implementing voting equipment that violates the constitutional rights of the Plaintiffs. They cannot wash their hands of responsibility, and insist that the State alone is the appropriate defendant, when they indisputably chose to deploy the punch card voting machines that are the subject of this litigation.

**D. Hamilton County Defendants Arguments Regarding Remedy and Joinder Cannot Exculpate Them from Liability for Their Ongoing Violation of Plaintiffs' Voting Rights Under the Fourteenth Amendment and Section 2.**

The Defendants' final arguments are that the Court lacks the remedial power necessary to grant the Plaintiffs the relief they seek in this case, and that relief cannot be granted without the presence of all the other counties that are using error-prone voting equipment.<sup>7</sup> While the question of remedy is premature, and need not be decided by the court at this stage, Defendants' argument needlessly complicates what is in fact a very simple remedial issue.

As an initial matter, it bears emphasis that the only question before the court on Plaintiffs' summary judgment motion is the liability of Hamilton County and the other

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<sup>7</sup> The issue of whether all of Ohio's 88 counties might or should have been joined as defendants was raised by the Court from the bench in a previous hearing in this case. But to the Plaintiffs' recollection, none of the Defendants has, prior to the inclusion of the matter in Hamilton County's Response Brief, formally asserted this issue as a basis for a dispositive motion.

Defendants for the Fourteenth Amendment and Voting Rights Act violations complained of. The question is *not* what remedy for this violation should issue. Similar to Defendants' argument in their motion for summary judgment, Hamilton County Defendants' argument confuses the issues of liability and remedy. See Plaintiffs' opposition to Defendants' MSJ (Doc. 187) at 16-18.

That said, the remedy that should issue – were this Court to agree that Defendants' actions violate Plaintiffs' rights under the Fourteenth Amendment or Voting Rights Act – is exceptionally simple. With respect to Secretary of State Blackwell and the other State Defendants, the remedy that Plaintiffs will seek is decertification of the challenged voting systems (punch cards and non-notice optical scan). That is precisely the remedy that was ordered by the district court in Common Cause v. Jones, 2002 WL 1766410 (C.D.Cal. May 09, 2002) (final judgment requiring the California Secretary of State to decertify punch card machines effective March 1, 2004). With respect to the Defendants in the four named counties, the remedy sought will be that they stop using their current equipment and convert to a voting system that will reduce the substantial inaccuracies inherent in that equipment. As explained in our prior briefs, Plaintiffs do *not* seek to dictate to Defendants what sort of system they must move to. In particular, they are free to replace these systems with either electronic or precinct-count optical scan systems, both of which substantially reduce the lost votes inherent in punch card and central-count optical scans.<sup>8</sup>

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<sup>8</sup> **Error! Main Document Only.** An important point must be made in this regard. Nothing in the Plaintiffs' argument here is meant to suggest that the existence of this Court's power to order a remedy for violations of the United States Constitution is dependent on a state's explicit authorization of the remedy in question. Were this the case, the Supremacy Clause of Article VI of the United States Constitution would be stood on its head. Thus, even if

Defendants proceed to argue that this Court cannot grant Plaintiffs a “viable remedy” on their claims without the presence of the 84 Ohio counties which have not been named as defendants in this case – or at least those counties which use non-notice punch card and optical scan equipment. Response Brief at 14. With respect to Plaintiffs’ Section 2 Voting Rights Act claim, this is clearly false. As Plaintiffs have maintained in their summary judgment motion and in their memorandum in opposition to the Defendants’ summary judgment motion, the Plaintiffs’ Voting Rights Act claim is based upon intra-county racial disparities within the three subject counties (Summit, Hamilton and Montgomery). Any remedial order directed to these Defendants cannot possibly, as the Defendants put it, “impact the rights of [any] absent counties” in a way that would deprive them of any interest they might have a legal stake in defending. To the contrary, an order directed to Hamilton County and the State, requiring the replacement of punch card voting machines within the county would completely remedy the Section 2 violation within that county.

Defendants’ argument is no more plausible with respect to the Plaintiffs’ Fourteenth Amendment claims. Plaintiffs’ Second Amended Complaint asks this Court to declare that the named Defendants have violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and to enjoin Defendants from: (1) certifying, approving, selecting or using punch card voting systems, *id.* at 29, ¶I; (2) certifying, approving, selecting or using other voting systems that lack effective error notification, *id.* at ¶J; and (3) certifying, approving, selecting or using punch card balloting technology without notice technology while continuing to permit

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Ohio law did not explicitly authorize the state Defendants to decertify punch card or any other voting equipment – which, of course, it does here – the Court would have the power to order such a remedy.

other voters to use such technology, *id.* at ¶K. There is no question – and Hamilton County Defendants do not contest – that relief sought against them would provide complete relief with respect to the Fourteenth Amendment violations suffered by Plaintiffs and all other voters in Hamilton County. So too, an order requiring the State Defendants to decertify the challenged voting equipment would effectively relieve the Fourteenth Amendment violation suffered by voters throughout the state who now vote on error-prone equipment.

It bears emphasis that the Plaintiffs have *not* asked this Court to issue any remedial order against any person or entity that is not named as a Defendant. The orders identified above will fully remedy their injuries under the Voting Rights Act and Equal Protection Clause. In particular, they expect that the order requiring the State Defendants to decertify the challenged voting machines, along with orders directed to the four named counties, will effectuate the removal of the challenged voting machines statewide. That is precisely what happened in Common Cause v. Jones, in which the district court's ordered that punch cards be decertified effective March 1, 2004, causing counties using those machines (none of whom were named as defendants) to procure new voting systems. See 235 F. Supp. 2d 1076, 1080-81 (C.D. Cal. 2002) (describing course of proceedings and granting attorney's fees). While Plaintiffs have moved the Court to certify this case as a class action, that *does not* change the fact that the remedial orders sought would directed solely at the named State and County Defendants.

To be clear, the Plaintiffs have not asked the Court to issue any order against any “absent” counties. What the Plaintiffs have asked the Court to do is to issue an order against the *State Defendants*, who have the power, responsibility and the duty under Ohio law, see ORC §§ 3506.03 to 3506.15, to ensure equality among counties – initially through examination and

certification and ultimately, through ongoing inspection, and if necessary through decertification, see ORC § 3506(F) (charging the Secretary of State and the Board of Voting Machine examiners with the power and duty to “withdraw” certification of voting machines that are not working according to legal and, including by necessary implication, constitutional requirements.). Plaintiffs believe that this order, along with an order against the four named counties, will be sufficient to remedy the violations complained of (as it was in Common Cause v. Jones).<sup>9</sup>

For these reasons, Plaintiffs submit that none of the “absent” counties is indispensable – either in the sense contemplated by the Federal Rules of Civil Procedure or in a purely logical and practical sense – to the relief Plaintiffs have requested.<sup>10</sup> The Defendants try to obfuscate this fact by pointing to and, in the Plaintiffs’ view, grossly mischaracterizing what this Court did and said in its order of March 22, 2004. Defendants argue that in that Order the Court “made clear

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<sup>9</sup> There can be no question that were the State Defendants to conclude on their own that voting equipment in any county, or that voting equipment throughout the state, operated in such a manner as to violate the constitutional rights of Ohio voters, they would have the power and the duty to remedy the problem. If necessary, they clearly have the power to require any, or even every, county to replace any and all equipment that led to the sort of inter-county discrimination that the Plaintiffs have shown to exist in Ohio. Defendants cannot seriously argue that there is any principle of federal law that deprives a federal court of the power to order a state official to do what he or she is charged by state law to do in a case like this, particularly where the state officials have approved and ratified a voting system that operates in an unconstitutional manner. State Defendants power is not altered by the fact that the Plaintiffs have asked this Court to order such action in the context of a law suit, where not all of the counties that might in some way be affected by the state Defendants’ exercise of their legal duties have been joined as defendants.

<sup>10</sup> Indeed, Plaintiffs submit that the Court would have the power to order the state Defendants to decertify existing voting equipment that was found to operate unconstitutionally *even if no county had been named as a defendant*. The ultimate authority and responsibility to see that Ohio’s election system complies with the law lies with the state Defendants’ themselves, not anywhere else. Thus, to the extent that any counties might argue that their interests have in some way been adversely affected by the exercise of the Court’s orders directed to the state Defendants, that possibility is already inherent in the powers that the state Defendants already have under state law. The fact that a federal court has ordered the state Defendants to exercise the power to decertify does not somehow compound or exacerbate any inconvenience that a county might experience.

that it interprets Ohio law to require the [so-called “absent”] counties’ inclusion in order to effectuate the relief Plaintiffs’ [sic] seek.” Response Brief at 18. Plaintiffs, of course, hope that this is not the Court’s position, but it is certainly not a fair interpretation of what the Order actually states. That Order rejected the Defendant Counties motion to drop *them* as parties to this case. The Plaintiffs understand the language from that Order italicized by the Defendants at page 18 of their Brief to refer to the need to include *the Defendant Counties themselves*.

In any event, none of the other counties are necessary parties, in order for the Plaintiffs to obtain the relief they seek – and certainly not to obtain relief for voters in Hamilton County. Defendants are therefore incorrect to assert that Plaintiffs have failed to join any indispensable party, and this argument furnishes no basis for denying Plaintiffs’ motion for summary judgment as to Hamilton County Defendants.

### III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that the Court should grant the Plaintiffs’ Motion for Summary Judgment as to the Hamilton County Defendants.

Respectfully submitted,

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**Certificate of Service**

This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 30th day of April, 2004.

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