

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

|                                      |   |                                |
|--------------------------------------|---|--------------------------------|
| <b>Effie Stewart, et al.,</b>        | ) |                                |
| <b>Plaintiffs</b>                    | ) | <b>CASE NO. 5:02CV2028</b>     |
|                                      | ) |                                |
| <b>v.</b>                            | ) | <b>Judge Dowd</b>              |
|                                      | ) |                                |
| <b>J. Kenneth Blackwell, et al.,</b> | ) | <b>Magistrate Judge Gallas</b> |
|                                      | ) |                                |
| <b>Defendants</b>                    | ) |                                |

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**PLAINTIFFS' RESPONSE TO HAMILTON COUNTY DEFENDANTS'  
ALLEGATIONS OF UNDISPUTED FACT**

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In its Order of May 6, 2004, the Court directed the parties to respond to the supplemental brief of the opposing party, either agreeing or disagreeing with the statements of undisputed facts contained therein. In response to the Court's Order, Plaintiffs submit this list of disputed facts, together with designations concerning where in the record the Court will find evidence that negates Hamilton County Defendants' proposed factual findings (Doc. 208). In addition, pursuant to this Court's May 6 order, Plaintiffs briefly explain why Defendants' asserted facts, even if true, are insufficient to justify summary judgment in Defendants' favor.

**I. VOTING EQUIPMENT AND PROCEDURES**

**A. Voting Equipment**

1. Plaintiffs agree with the allegations of ¶ 1.

2. Plaintiffs agree with the allegations of ¶ 2.
3. Plaintiffs disagree with the allegations of ¶ 3. Official tabulations of voting results from Hamilton County in the 1996 and 2000 presidential elections, as well as the mayoral and city council elections of 1999 and 2001, indicate substantial percentages of overvotes and undervotes in Hamilton County elections. In addition, the Chairman of the Hamilton County Board of Election has himself indicated on numerous occasions that voters in poor, minority precincts in Hamilton County are at disproportionate risk of casting overvotes. Report of the Hamilton County Board of Elections on the 1996 election (Doc. 211-1); Report of Hamilton County Board of Elections on the 2000 election (Doc. 206-4); Report of Election Results in City of Cincinnati Election of 2001 (Doc. 211-2); Report of Residual Votes in City of Cincinnati Election of 2001 (Doc. 211-3); Letter of Timothy Burke to Congresswoman Stephanie Tubbs Jones of July 18, 2001 (Doc. 171-40-7c).
- 4-5. Plaintiffs agree with the allegations of ¶¶ 4 and 5, but submit that maintenance of Hamilton County's equipment does not support Defendants' summary judgment motion and is irrelevant to Plaintiffs' claims.

#### **B. Poll Worker Training**

- 6 – 10. Plaintiffs agree with the allegations of ¶¶ 6 – 10, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

#### **C. Voting Instructions**

- 11 – 16. Plaintiffs agree with the allegations of ¶¶ 11 – 16, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

#### **D. Procedures Regarding Torn, Soiled, Defaced, and Erroneously Marked Ballots**

- 17 – 21. Plaintiffs agree with the allegations of ¶¶ 17 – 21, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

### **II. PLAINTIFFS' VOTING EXPERIENCE**

#### **A. Howard Tolley Jr.**

22 – 24. Plaintiffs agree with the allegations of ¶¶ 22 – 24, but submit that these facts do not support Defendants’ summary judgment motion and are irrelevant to Plaintiffs’ claims.

25. While Plaintiffs agree with the allegations of ¶ 25 as written, they disagree with any inference that Howard Tolley Jr. has successfully assured himself that his voting preferences on the punch card are consistent with his intent. In fact, when Dr. Tolley’s remarks are examined in full, he indicates that he is unsure if his efforts to check his ballot carefully in fact eliminate all errors. He continued:

A. ... I don’t have confidence that I’m catching any possible errors that I might have made.

Q. But you just described the process that you go through in checking. Correct?

A. Mm-hmm.

Q. So you should have confidence in the errors that you yourself may have made.

A. I tell you, that card is so small in its print and the chads are not immediately clearly related to a particular number, I’m never sure if it’s the one above or the one below.

Tolley Depo. (Doc. 171-4) at 15:5-16.

#### **B. Arthur Slater**

26 – 27. Plaintiffs agree with the allegations of ¶¶ 26-27, but submit that these facts do not support Defendants’ summary judgment motion and are irrelevant to Plaintiffs’ claims.

28. Plaintiffs disagree with the allegations of ¶ 28 on the basis that no voter using punch card equipment can know definitively whether his or her ballot is tabulated accurately, reflecting his or her intent. Expert Report of Roy Saltman (Doc. 171-28) at 16 (Fifth Conclusion); Saltman Depo. (171-33) at 37:16-21, 41:22-25, 42:1-16, and 141:8-15.

29. Plaintiffs agree with the allegations of ¶ 29, but submit that this fact does not support Defendants’ summary judgment motion and is irrelevant to Plaintiffs’ claims.

30. Although Plaintiffs agree with the allegations of ¶ 30, they disagree with any inference that Arthur Slater can know definitively whether his ballot is

tabulated accurately, reflecting his intent. This fact therefore does not support Defendants' summary judgment motion and is irrelevant to Plaintiffs' claims

31 - 34. Plaintiffs agree with the allegations of ¶¶ 31-34, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

**C. Relevant to Named Plaintiffs and Other Hamilton County Voters**

35 – 40. Plaintiffs agree with the allegations of ¶¶ 35-40, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

41. Plaintiffs disagree with the allegations of ¶ 41. Inasmuch as the right to vote includes the right to have one's vote counted, and none of the Plaintiffs knows that the Defendants' tabulating equipment properly recorded his punch card ballot, this allegation cannot be accepted as true. A total of 6,437 voters in Hamilton County cast residual ballots in the 2000 presidential election, and their specific identity is not known. Expert Report of Roy Saltman (Doc. 171-28) at 1, 15-16 (First, Second, Third, and Fifth Conclusions); State of Ohio HAVA State Action Plan (Doc. 115-1) at 15. See also Saltman Depo. (Doc. 171-33) at 37: 16-21, 41: 22-5, and 42: 10-16.

42. Plaintiffs disagree with the allegations of ¶ 42. Inasmuch as the right to vote includes the right to have one's vote counted and none of the voters in Hamilton County knows that the Defendants' tabulating equipment properly recorded his or her punch card ballot, this allegation cannot be accepted as true. A total of 6,437 voters in Hamilton County cast residual ballots in the 2000 presidential election, and their specific identity is not known. Expert Report of Roy Saltman (Doc. 171-28) at 1 and 15-16 (First, Second, Third, and Fifth Conclusions); State of Ohio HAVA State Action Plan (Doc. 115-1) at 15; see also Saltman Depo. (Doc. 171-33) at 37: 16-21, 41:22-25, and 42: 10-16.

43. For the reasons that are set forth in ¶ 41, Plaintiffs disagree with the allegations of ¶ 43. See references in ¶ 41, *supra*.

44. For the reasons that are set forth in ¶ 42, Plaintiffs disagree with the allegations of ¶ 44. See references in ¶ 42, *supra*.

45. Plaintiffs disagree with the allegations of ¶ 45. Plaintiffs do not know if they had the opportunity to vote for the representatives of their choice because they do not know if the Defendants' tabulating equipment properly counted their punch card ballots. See references in ¶ 41, *supra*.

46. Plaintiffs disagree with the allegations of ¶ 46. None of the voters in Hamilton County can know if she had the opportunity to vote for the candidates of her choice. This is because she does not know if the Defendants' tabulating equipment properly counted her punch card ballot. See references in ¶ 42, *supra*.

### **III. ELECTIONS IN HAMILTON COUNTY**

#### **a. Mayoral Election – City of Cincinnati, 2001**

47 – 48. Plaintiffs agree with the allegations of ¶¶ 47 and 48, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

#### **b. County Commissioner Election – Republican Primary, 2004**

49– 50. Plaintiffs agree with the allegations of ¶¶ 49-50, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

### **IV. VOTING GENERALLY**

50– 59. Plaintiffs agree with the allegations of ¶¶ 51 – 59, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Defendants' Motion for Summary Judgment and grant instead Plaintiffs' Motion for Summary Judgment on all counts.

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 4th day of June, 2004.

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