

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

**EFFIE STEWART, et al.,** :

**Plaintiffs,** : **Case No.: 5:02CV2028**

**vs.** : **Judge David Dowd, Jr.**

**BLACKWELL, et al.** :

**Defendants.** :

**SANDUSKY COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants, the Sandusky County Board of Elections, Harry Heyman, Thomas Younker, John Rettig, Sandusky County Board of Commissioners, Brad Smith, Daniel Liskai, and Terry Thatcher (collectively "Sandusky County Defendants" or "Sandusky County"), by and through counsel, and pursuant to Federal Rule Civil Procedure 56(b), now move this Court to grant them summary judgment on all of Plaintiff Linda See's claims for the following compelling reasons:

- 1) she can come forward with no legal authority to support her claim that she has a constitutional right to vote on a system with error notification technology (i.e. an optical scan ballot with in precinct tabulation or on a touch screen ballot);

- 2) even if she did have such legal authority, the undisputed evidence is that, as long as she 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 cannot use 42 U.S. § 1983 in order to force Sandusky County to immediately implement the requirements of the Help America Vote Act.

The reasons for granting this motion are more fully set forth in the attached memorandum in support.

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**MEMORANDUM IN SUPPORT**

**I. Facts.**

**A. Sandusky County's Use Of Optical Scan Ballots.**

The method of voting currently utilized in Sandusky County is simple. Sandusky County uses an optical scan paper ballot. Barbara Tuckerman, who is the Deputy Director of the Sandusky County Board of Elections, explained that when a Sandusky County voter receives his or her optical scan ballot, a poll worker gives personal instructions to that voter, including to use only the pencil provided (the voter is told a pen will not work) in the voting booth and to look at the instructions printed on the top of the ballot (which sets forth in writing the same directions that the poll worker is orally giving them). Additionally, the voter is shown the candidates and issues and is also shown the corresponding ovals, and is also told to color in the oval to the left of their choice. Finally, the same instructions are written and posted in the voting booth right in front of the voter's eyes. (Tuckerman Depo. at 8, 16, 80-82, Tuckerman Depo. Exhibit 6).

The simplicity of voting on an optical scan ballot in Sandusky County is most amply demonstrated by viewing a sample ballot from the November 5, 2002 general election.<sup>1</sup> The front side of this ballot is set forth on page four of this motion. The back side of this ballot is set forth on page five. This ballot was scanned and reduced down in size from its actual size of eight and one half inches by fourteen inches, to the standard eight and one half inches by eleven inches required by this Court's local rules (thus, the font on the ballot set forth below is smaller than it is when presented to a Sandusky County voter).

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<sup>1</sup> This exhibit was provided to all parties through Defendant Sandusky County's Responses to First Set of Requests For Production of Documents Propounded by Plaintiffs which was served on May 16, 2003.

**GENERAL ELECTION BALLOT - NOVEMBER 5, 2002  
SANDUSKY COUNTY OHIO**

A	B	C
<p><b>INSTRUCTIONS TO VOTER</b></p> <p>To vote, blacken the OVAL to the left of your choice with the pencil provided.</p>	<p><b>For Representative to Congress 5th. District</b> (Vote for not more than ONE)</p>	<p><b>For Judge of the Court of Appeals 6th. District</b> Full Term Commencing 2/9/03 (Vote for not more than ONE)</p>
<p><b>OFFICIAL OFFICE TYPE BALLOT</b></p>	<p><input type="radio"/> JOHN F. GREEN Independent</p>	<p><input type="radio"/> JUDITH ANN LANZINGER</p>
<p><b>For Governor and Lieutenant Governor</b> (Vote not more than ONCE)</p>	<p><input type="radio"/> ROGER C. ANDERSON Democratic</p>	<p><input type="radio"/> CHARLES S. WITTENBERG</p>
<p><input type="radio"/> BOB TAFT and JENNETTE BRADLEY Republican</p>	<p><input type="radio"/> PAUL E. GILLMOR Republican</p>	<p><b>For Judge of The Court of Appeals 6th District</b> Full Term Commencing 2/10/03 (Vote for not more than ONE)</p>
<p><input type="radio"/> JOHN A. EASTMAN and SADIE M. STEWART Independent</p>	<p><b>For State Representative 81st. District</b> (Vote for not more than ONE)</p>	<p><input type="radio"/> ROBERT C. POLLEX</p>
<p><input type="radio"/> TIMOTHY F. HAGAN and CHARLETA B TAVARES Democratic</p>	<p><input type="radio"/> JAMES MELLE Democratic</p>	<p><input type="radio"/> ARLENE SINGER</p>
<p><input type="radio"/> Write-in</p>	<p><input type="radio"/> JEFF WAGNER Republican</p>	<p><b>For Judge of the Court of Common Pleas</b> Full Term Commencing 1/1/03 (Vote for not more than ONE)</p>
<p><b>For Attorney General</b> (Vote for not more than ONE)</p>	<p><b>For County Commissioner</b> (Vote for not more than ONE)</p>	<p><input type="radio"/> HARRY A. JR. SARGEANT</p>
<p><input type="radio"/> LEIGH HERINGTON Democratic</p>	<p><input type="radio"/> KENNETH E. SCHNEIDER Democratic</p>	<p><input type="radio"/> NORMAN SOLZE</p>
<p><input type="radio"/> JIM PETRO Republican</p>	<p><input type="radio"/> BRAD SMITH Republican</p>	<p><b>For Judge of the Court of Common Pleas</b> Full Term Commencing 2/10/03 (Vote for not more than ONE)</p>
<p><b>For Auditor of State</b> (Vote for not more than ONE)</p>	<p><b>For County Auditor</b> (Vote for not more than ONE)</p>	<p><input type="radio"/> JAMES SHERCK</p>
<p><input type="radio"/> BETTY MONTGOMERY Republican</p>	<p><input type="radio"/> WILLIAM L. FARRELL Democratic</p>	<p><b>For Judge of the Court of Common Pleas Juvenile/Probate</b> Full Term Commencing 2/8/03 (Vote for not more than ONE)</p>
<p><input type="radio"/> HELEN KNIPE SMITH Democratic</p>	<p><b>For County Recorder</b> Unexpired Term ending 1/2/2005 (Vote for not more than ONE)</p>	<p><input type="radio"/> BRAD CULBERT</p>
<p><b>For Secretary of State</b> (Vote for not more than ONE)</p>	<p><input type="radio"/> COLLEEN CARMACK Republican</p>	
<p><input type="radio"/> J. KENNETH BLACKWELL Republican</p>	<p><input type="radio"/> SANDRA L. WISE Democratic</p>	
<p><input type="radio"/> BRYAN FLANNERY Democratic</p>	<p><b>OFFICIAL NON-PARTISAN BALLOT</b></p>	
<p><b>For Treasurer of State</b> (Vote for not more than ONE)</p>	<p><b>For Justice of the Supreme Court</b> Full Term commencing 1/1/03 (Vote for not more than ONE)</p>	
<p><input type="radio"/> MARY O. BOYLE Democratic</p>	<p><input type="radio"/> TIM BLACK</p>	
<p><input type="radio"/> JOSEPH T. DETERS Republican</p>	<p><input type="radio"/> MAUREEN O'CONNOR</p>	
<p><input type="radio"/> Write-in</p>	<p><b>For Justice of the Supreme Court</b> Full term commencing 1/2/03 (Vote for not more than ONE)</p>	<p><input type="radio"/> JANET R. BURNSIDE</p>
	<p><input type="radio"/> EVELYN L. STRATTON</p>	<p>TURN OVER TO CONTINUE VOTING</p>

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D	E	F
<b>OFFICIAL QUESTIONS AND ISSUES BALLOT</b>		
<p style="text-align: center;"><b>PROPOSED CONSTITUTIONAL AMENDMENT</b> (Proposed by Initiative Petition)</p> <p><b>1 To adopt Section 24 of Article IV of the Constitution of the State of Ohio.</b></p> <p>In order to provide for persons charged with or convicted of illegal possession or use of a drug, in certain circumstances, to choose treatment instead of incarceration, to require the state to spend two hundred forty-seven million dollars (\$247,000,000) over seven (7) fiscal years to pay for the drug treatment programs, to allow the applicable records of offenders who complete treatment instead of incarceration for illegal drug use and possession to be sealed and kept confidential for most purposes, and to limit the maximum sentence to ninety (90) days incarceration that eligible first-time, second-time, and certain repeat illegal drug possession or use offenders could serve, this amendment would:</p> <p>1. Require a court to order treatment instead of incarceration for first-time or second-time offenders charged with or convicted of illegal possession or use of a drug who request treatment, have not been convicted of or imprisoned for a violent felony within five years of committing the current offense, have not been sentenced to a term of incarceration that would interfere with participation in treatment, and in the same proceeding have not been convicted of or charged with other drug-related offenses or misdemeanors involving theft, violence or the threat of violence.</p> <p>2. Allow a court to order treatment instead of incarceration for eligible repeat offenders charged with or convicted of illegal possession or use of a drug who request treatment, and for offenders charged with or convicted of illegal possession or use of a drug who are also charged with or convicted of other nonviolent offenses resulting from drug abuse or addiction and who request treatment.</p> <p>3. Create a Substance Abuse Treatment Fund and require the state to spend a total of two hundred forty-seven million dollars (\$247,000,000) to pay for the treatment, breaking down to nineteen million dollars (\$19,000,000) for the remainder of the 2003 fiscal year and thirty-eight million dollars (\$38,000,000) annually through fiscal year 2006, in addition to requiring the state to maintain its current spending to fund existing substance abuse treatment programs through fiscal year 2006, and to require the state to continue to provide adequate resources for these purposes after fiscal year 2006.</p> <p>4. Limit the period of treatment a court may impose to not more than twelve (12)</p>	<p>months, allow an extension of the treatment period for not more than six (6) more months, and allow court supervision of an offender for up to ninety (90) days after treatment.</p> <p>5. Limit the sentencing of first-time, second-time, and certain repeat offenders who are eligible for treatment but who either do not request treatment or do not meet the terms of the treatment to a maximum of ninety (90) days incarceration for illegal possession or use of a drug.</p> <p>6. Limit the authority of judges who place eligible offenders into treatment to remove those offenders from the programs.</p> <p>7. Require a court to dismiss legal proceedings against an offender without a finding of guilt if the offender completes the treatment.</p> <p>8. Allow an offender who successfully completes the treatment to have applicable records sealed and to have the conviction that prompted the request for treatment expunged, and required that the sealed or expunged records be kept confidential except for specified law enforcement and court related purposes.</p> <p>If adopted, provision of this amendment related to funding for the remainder of fiscal year 2003 will be effective immediately; otherwise this amendment will be effective July 1, 2003, and will apply to all qualifying charges, convictions and criminal sentences pending before the court from that day forward.</p> <p style="text-align: center;">A majority yes vote is necessary for passage</p> <p style="text-align: center;"><b>SHALL THE PROPOSED AMENDMENT BE ADOPTED?</b></p> <p><input type="radio"/> YES</p> <p><input type="radio"/> NO</p> <hr/> <p style="text-align: center;"><b>OFFICIAL QUESTIONS AND ISSUES BALLOT</b></p> <p style="text-align: center;"><b>PROPOSED CHARTER CITY OF BELLEVUE</b></p> <p style="text-align: center;">A majority affirmative vote is necessary for passage</p> <p style="text-align: center;">Shall the proposed charter, as reported by the Charter Commission of the City of Bellevue be adopted?</p> <p><input type="radio"/> YES</p> <p><input type="radio"/> NO</p>	<p style="text-align: right;"> <i>Harvey C. Coffey</i>  <i>Robert S. Geller</i>  <i>Thomas L. Gundersen</i>  <i>Alan Ketting</i> </p>
D	E	F

Thus, in order to cast his or her vote on the optical scan ballot, the voter simply blackens in the oval to the left of their choice with the pencil provided. If a voter makes a mistake on their optical scan ballot, they are informed that they should return the ballot to the presiding poll judge so that they can receive a new ballot. (Tuckerman Depo. Exhibit 6). When the voter has completed voting on the optical scan ballot, he or she takes it and places it into the ballot box. (Tuckerman Depo. at 82).

After the polls are closed, the ballot boxes are locked and brought back to the office of the Sandusky County Board of Elections. (Tuckerman Depo. at 87). These boxes are then opened and several employees examine the ballots to make sure that they are all facing the correct way. The ballots are then passed on to a board member who brings them up to the tabulating machine (a.k.a. tabulator), puts the ballots into the tabulating machine, and then runs the ballots through the tabulating machine. The tabulating machine is operated by either a clerk or by the Director of the Board of Elections. If a ballot is rejected by the tabulating machine, the machine stops and a digital read-out on the machine states what the problem is. The problem is either that an overvote, an undervote, or a blank ballot was detected. When this occurs, two board members then look at the ballot, and, according the guidelines given by the Ohio Secretary of State, they determine what to do with the ballot. (Tuckerman Depo. at 89-91).

When a ballot is rejected, for example, because a voter did not fill in the oval enough, and it is clear that the voter didn't intend to vote for someone else, than that oval is filled in completely. (Tuckerman Depo. at 97). Ms. Tuckerman also explained what happens if a voter inadvertently casts an overvote (which she explained can only happen if the voter fails to follow the directions):

- A. . . . We do have functions on the tabulators which will pull a ballot out if it's an overvote, undervote or a blank ballot and see if they can determine

according to guidelines the same with punch cards, whether or not that can be altered or not altered. The voter's intent can be determined and they can correct that ballot.

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 a 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 Depo. at 70-72).<sup>2</sup> Additionally, Ms. Tuckerman stated that while Sandusky County has had stray pencil marks on an optical scan ballot caught by the tabulation machine, 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 oval with a totally colored oval. In that case, the board members then decide that the choice with the totally colored oval is the one the voter intended to vote for, and they put a little white circle over the stray mark. (Tuckerman Depo. at 85, 91).<sup>3</sup>

Ms. Tuckerman also testified that some people mark an oval with "X's," instead of coloring in the oval as instructed. However, she stated that when that occurs, the tabulating machine picks up the vote and the ballot is *not* rejected. (Tuckerman Depo. at 96). Ms. Tuckerman also added that if a voter in Sandusky County deliberately chooses to cast an undervote, that voter's ballot would still register, as the ballot must be completely blank in order to be rejected by the tabulation machine. (Tuckerman Depo. at 124-125).

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<sup>2</sup> Ms. Tuckerman testified that in the last election, there were only three overvotes cast that were rejected by the tabulation machine. (Tuckerman Depo. at 102).

<sup>3</sup> Two of the four Board members (two of whom are Republicans, two of whom are Democrats) must agree to make a decision as to the voter's intent. If they don't agree, all four Board members vote. If there is a tie (which Ms. Tuckerman does not recall ever happening), the tie can be broken by the Ohio Secretary of State. (Tuckerman Depo. at 97-98).

Ms. Tuckerman testified that with the optical scan ballot system currently used, like the punch card ballot system before it, the Director of the Sandusky County Board of Elections and she hand count at least two precincts after every election in order to double check that the machines are accurately counting the votes cast. She explained that the reason behind this hand counting is because *any* machine will make mistakes. All though, to date, none of the hand counts that she has participated in has demonstrated a discrepancy. Nevertheless, she will continue to do a hand count no mater how long and how many absolutely perfect elections are conducted in Sandusky County. (Tuckerman Depo. at 57). Ms. Tuckerman testified that she will do this even when touch screen ballots are utilized (which she has concerns about, since it does not produce a tangible piece of paper that can be counted by hand). (Tuckerman Depo. at 53-56).

**B. The Claims of Sandusky County Plaintiff Linda See.**

Sandusky County Plaintiff Linda See (the only plaintiff challenging Sandusky County's voting method) has a bachelors degree in sociology and a masters degree in rehabilitation counseling from Bowling Green State University.<sup>4</sup> She also has done postgraduate work in Dayton and at the University of Toledo. For twenty-nine years, Ms. See was a full professor who taught behavioral sciences, sociology, anthropology, psychology, women's studies, marriage, and family at Owens Community College. (See Depo. at 5-6, 31). For approximately the past twenty three years, Ms. See has been a member of the Northwestern Ohio American Civil Liberties Union board. (See Depo. at 17).

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<sup>4</sup> Should this Court grant the Plaintiffs' motion for class certification, Sandusky County respectfully requests that this Court apply this motion to the class of Sandusky County voters that is certified.

Ms. See testified that she chose to bring this lawsuit because she learned from the American Civil Liberties Union (“ACLU”), who are also her attorneys, that Sandusky County was regularly discarding about twenty to thirty percent of the ballots cast because of the punch card ballot system that Sandusky County previously used. All though she admitted that she had never had a problem using the punch card ballot system, it was her understanding from the ACLU that other people were having problems punching all the way through the chad, thus resulting in “pregnant and partial chads.” (See Depo. at 14-16).

First and foremost, at the time that Ms. See brought this suit, Sandusky County was *not* using punch card ballots (the Second Amended Complaint does not even allege as much). Even if Sandusky County was still using punch card ballots, Ms. See can come forward with no admissible evidence to support her outrageous allegation that twenty to thirty percent of all ballots cast were not being tabulated. See *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999)(inadmissible hearsay cannot be considered on summary judgment). Moreover, Ms. See has admitted that *she has never had a problem voting with a paper and pencil (a.k.a. voting on an optical scan ballot)*. (See Depo. at 15, 26).<sup>5</sup> Since Ms. See has had no problem voting on the method currently used by Sandusky County, this Court should grant Sandusky County summary judgment on all of her claims.

While Ms. See may not have a problem with Sandusky County’s current voting method, her attorneys do. Specifically, they are claiming that the following problems with optical scan voting exist:

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<sup>5</sup> For approximately the last fifteen years of her teaching career, Ms. See administered “scantron” tests to her students, which involve filling in ovals or circles with a pencil. She then would run these tests through a machine which would score the students’ answers for her. As described by Ms. See, this testing method is practically identical to the optical scan ballot with central location tabulation currently utilized by Sandusky County. Ms. See did not utilize any error notification system for her students after they completed their tests. (See Depo. at 7-8, 10-11, 13).

- 1) Voters may make a mark within the oval or may “complete the arrow” on the ballot in a manner that is not sufficiently large to be read by the vote counting machine. For example, voters may draw an “x” rather than fill in the entire area;
- 2) Voters may use their own marking implements rather than the official ones supplied for their use;
- 3) Voters may mark the wrong area of their paper ballot sheets. For example, voters may draw a circle around the oval or their preferred candidate’s name, or draw a line through the non-preferred candidate’s name; and
- 4) Voters may properly mark the oval or arrow for their preferred candidate, and also write in the name of their preferred candidate. The vote counting machine may identify stray marks as votes, which would lead to the rejection of the intended vote as an overvote.

(Second Amended Complaint at ¶ 82). Ms. See’s attorneys contend that Sandusky County must have in-precinct tabulation, as opposed to the central location tabulation that it currently has, since in-precinct tabulation provides error notification to the voters and “*substantially reduces the risk*” that a voter will not have his or her vote counted. (Second Amended Complaint at ¶¶ 83-84)(emphasis added).

As demonstrated below, Ms. See (or her attorneys) can come forward with no legal authority for her contention that error notification is constitutionally required. Even if she could, the undisputed evidence is that as long as she follows directions, every intentional vote that she casts will be counted.

## **II. Law and Argument**

As an initial matter, Sandusky County hereby adopts and incorporates by reference all of the arguments set forth in the other defendants’ motion for summary judgment. The only reason that Sandusky County did not simply join in the other motion for summary judgment, and refrain from filing their own motion, is because: 1) they are the only defendant who currently uses an

optical scan ballot, and 2) they are the only defendant that has *not* had a race discrimination claim made against it under § 2 of the Voting Rights Act.

**A. Standard of Review**

This Court must enter summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party who “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient “simply [to] show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) “requires the nonmoving party to go beyond the pleadings” and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324.

In deciding the motion for summary judgment, a district court will assume the truth of the evidence of the non-moving party, resolve all doubts against the moving party, construe all evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-moving party’s favor. *Eastman Kodak Co. v. Technical Servs. Inc.*, 504 U.S. 451, 456 (1992). Summary Judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Federal Rule of Civil Procedure 56(c).

**B. Ms. See Can Come Forward With No Legal Authority To Support Her Claim That She Has A Constitutional Right To Vote On A System With Error Notification Technology.**

Although there is no constitutional right to cast a vote for Presidential electors, once a State legislature grants its citizens the right to vote for President, the State needs to accord equal weight and equal dignity to each voter. *Bush v. Gore*, 531 U.S. 98, 105 (2000). If the State practice at issue “does not infringe on the right to vote, we examine the challenged statute under the rational basis standard.” *Mixon v. NAACP*, 193 F.3d 389, 402 (6th Cir. 1999). Since the selection of voting technology does not infringe directly upon the right to vote, Sandusky County merely needs to have a rational basis for not requiring error notification in the voting technology is presently uses.

No court in the country has ever determined that the Constitution of the United States requires that voter error notification technology be employed in elections. As the Second Circuit recognized long ago, the Constitution contains no guarantee that an election be free from error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). After rejecting the concept of perfect elections, the *Powell* court noted that “[w]ere we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Id.* at 86.

If error-free elections are not constitutionally mandated, it stands to reason that error-free voting technology also is not subject to a constitutional requirement. Yet, Ms. See in this case actually seeks an error-free election with complete federal court oversight.

The *Bush* Court was faced with a very narrow issue: “Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush*, 531 U.S. at 105. The Florida Supreme Court had allowed a recount to occur in which:

- 1) Three members of the county canvassing board applied different standards in defining a vote;
- 2) One county changed its evaluating standards for a legal vote several different times during the recount;
- 3) Some counties that not completed recounts until after the certification date had their totals included in the certified vote total; and
- 4) Some counties examined ballots with both under and overvotes while other counties did not.

*Id.* at 107-08.

Based upon the complete lack of any standard for the legal definition of a vote, the *Bush* Court determined that whenever “a court orders a *statewide* remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.* at 109. (emphasis added). The Supreme Court further discounted any idea that it was announcing a constitutional standard that required a State to adopt a uniform voting system. “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.” *Id.* Thus, it is clear from the *Bush* opinion that the Supreme Court was not attempting to announce a new constitutional standard or to imply that all voting systems across a State must be identical. Instead, the Supreme Court merely decided that

a State has to have a uniform set of rules in place during a recount to make sure that every ballot is treated equally.

Although Ms. See may be asking this Court to order Sandusky County to implement the most technologically up to date voting system, she has no constitutional right to such system. When dealing with Congressional elections, the Constitution grants to the States the power to decide the “Times, Places, and Manner of holding Elections for Senators and Representatives....” U.S. Const. Art. I. Sec. IV. The only limitation it places upon this power is that “Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.” *Id.* Likewise, for Presidential elections, the Constitution grants the States the right to select Presidential electors without any popular vote. U.S. Const. Art. II Sec. I.

Thus, so long as the States, or in this case, a county of one of the States, do not engage in invidious discrimination in violation of the Fourteenth or Fifteenth Amendment, the Constitution affords the States (and their counties) great leeway in implementing the way elections are conducted. Likewise, as long as States, or their counties, follow the mandate of “one man, one vote,” it is beyond debate that the right to vote in any manner is not an absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

The Sixth Circuit has recognized that while any legislation that grants some residents the right to vote while denies that right to others is subject to strict scrutiny analysis, if the state practice does not infringe on the right to vote itself, it is subject to rational basis review. *Mixon*, 193 F.3d at 402. The Supreme Court, in examining whether a challenged practice should be subject to strict scrutiny or rational basis, typically examines whether the challenged practice “has an impact on appellants’ ability to exercise the fundamental right to vote.” *McDonald v. Board of Election Comm’rs of Chicago*, 394 U.S. 804, 807 (1969). Thus, so long as the

regulation does not impact directly the right to vote, but rather a claimed right to vote in a particular manner, such a regulation is subject to rational basis review. *Id.* (using rational basis review on an Illinois regulation that allowed certain people to receive absentee ballots but refusing to give absentee ballots to unsentenced inmates).

The State of Ohio has certified, pursuant to State law, several different types of voting machines for the local Boards of Elections to use. Each Board of Elections, then, has a choice as to which voting technology it will use. Sandusky County has rational reasons for choosing to utilize an optical scan ballot with central location tabulation.

During her deposition, Ms. Tuckerman discussed the decision by the Sandusky County Board of Elections to switch from a punch card to an optical scan ballot:

- A. The decision was made in 2000, but the conversation began before that. Our software provider was getting out of the elections business and he had given us sufficient time to look for something else and so for at least three conventions, we looked at software, we looked at hardware and different voting systems and it was the -- decision was made in December 2000.

\* \* \*

- Q. Why didn't you elect just to get another software vendor and stick with the punch card system in place?

- A. Number one reason was the card reader. There was no one around that would repair those. You couldn't buy a new one so we had to have -- having shipped the one we had out to Texas just to have the interface put in, we realized any kind of maintenance to be done on that, we would be hard pressed to find someone to do it, and because we had board members who felt a paper ballot is so much more direct to a voter, they can pick it up and they can actually see the name, and in a punch card, no doubt, when you look at it, you see numbers.

We had several board members who felt that it's far better for the voter to see those names and see when they're finished, see what they've done.

\* \* \*

- Q. What were other reasons?

- A. The other reason was the tabulators could not -- if something broke down on one, you aren't pressed to find someone to fix it. They were becoming sort of obsolete. Punch cards were becoming obsolete.

(Tuckerman Depo. at 21, 51, 66-67).

Ms. Tuckerman explained the difference between optical scan ballot systems with central location tabulation versus optical scan ballot systems with in-precinct tabulation:

Central is what is in our office. All the ballots are returned to our office on election night and they are run through those machines and they are tabulated there. Precinct tabulators are huge gigantic boxes with little computers set up on top where the ballot is inserted there [by the voter at the precinct].

(Tuckerman Depo. at 59). She also explained why the decision was made to use an optical scan system with central location tabulation, as opposed to an optical scan system with in-precinct tabulation:

First of all, it was the money question. It was so much more expensive, and secondly, it's a very cumbersome piece of equipment for each precinct that required additional storage. It would have required poll workers who couldn't have gotten it, first of all, in their cars.

The wouldn't fit. They don't break down. They come down. Those two pieces probably sit higher than this table and that was a big concern that, first of all, our poll workers would not have been able to handle that machine. They were not machines, but they're big boxes basically.

(Tuckerman Depo. at 60, 66-67).

Sandusky County's concern about the added cost of having in-precinct tabulation, and therefore, their desire to preserve the taxpayers' money, naturally, is a rational basis for Sandusky County to purchase and maintain an optical scan ballot system with central location tabulation. Similarly, Sandusky County's desire to refrain from using a system that is too cumbersome to be operated by its poll workers is likewise a rational reason for using an optical scan ballot system with central location tabulation.

Furthermore, the State of Ohio and the County Defendants (including, of course, Sandusky County) have very rational reasons for properly examining voting technology and making absolutely sure such new equipment is safe and secure. The Ohio Secretary of State's Office has already produced a massive report detailing different security problems with the new voting technologies that contain error notification. *See* Report, previously filed. The State's General Assembly is also conducting hearings to see whether the new technology will be safe to use. On Wednesday March 17, 2004 for instance, one security expert testified to a committee of the Ohio General Assembly that "his technicians were able to insert computer viruses into the equipment and modify the database." *Experts disagree on security of voting machines, Paper backup could help prevent possible fraud, state panel members told, The Columbus Dispatch*, March 18, 2004, at B4. Obviously, no government official wants to introduce an unsafe or unproven voting system on the voters of Ohio or Sandusky County. Such a system would only lead to more litigation as, no doubt, the plaintiffs' lawyers would immediately file yet another lawsuit against these same defendants for introducing the very technology they are asking for here. The State and County Defendants would then be responsible for turning around and spending millions more dollars to further "upgrade" their voting machines in order to remedy those problems.

Finally, if Ms. See and the other plaintiffs do have a constitutional right to the "more modern voting technology equipment with error notification," that would mean that federal courts would be continually deciding litigation whenever a "new" voting machine was introduced. No doubt each such machine would have somebody serve as its champion in litigation (most notably, the company who is marketing new voting machines), claiming that the constitution required the State and or its counties to upgrade to this "new and improved"

technology. Such changes are not required by the Constitution and should not be entertained by this Court.

**C. The Undisputed Evidence Is That, As Long As Ms. See Follows Directions, Every Intentional Vote That She Casts Will Be Counted.**

The undisputed evidence is that, as long as Ms. See follows directions, every intentional vote that she casts will be counted. As Plaintiffs' expert witness Roy G. Saltman testified:

Q. So I am going to ask you the question again. If a voter properly and fully follows the directions set forth on the optical scan ballot --

A. Oh, you follow the directions and you do it right, there is, as far as I can see, there is no possibility that except for a machine malfunction there would be no possibility that the voter would be reported as not having voted for the office. I am sorry, I didn't fully comprehend the intent of your question.

Q. No, that is okay. Thank you. It is just so that the record is clear. If a voter follows the directions completely and fully on an optical scan ballot there is no risk that you know of that voter unintentionally casting a nonvote?

A. Except for a machine malfunction.

Q. So the answer is yes, except for a machine malfunction?

A. Yes.

Q. And would that answer change based upon whether or not in-precinct or central counting is done with that optical scan ballot?

A. No, unless we consider what might be the differences between maintenance of precinct machines versus central count machines, there is no inherent difference.

(Saltman Depo. at 189). This testimony is supported by the testimony of Plaintiffs' expert witness Dr. Herb Asher, who also confirmed that as long as a voter who uses an optical scan

ballot follows and understands the directions for voting on that ballot, they will not unintentionally cast a nonvote. (Asher Depo. at 122-124).<sup>6</sup>

Ms. See can come forward with no evidence to suggest that she (or any other Sandusky County voter) has had difficulty following the directions given by Sandusky County for voting with their optical scan ballot system. In fact, since utilizing the optical scan ballots, Ms. Tuckerman stated that the response of voters in Sandusky County has been great. Many voters have expressed that they prefer optical scan ballots to punch card ballots because they can “actually look at that piece of paper and see what they’ve done.” Moreover, the *only* complaints that Ms. Tuckerman has received is that some voters think that the poll workers have gone overboard by giving unnecessary instructions to voters who claim to already know how to use the optical scan ballots without being told. (Tuckerman Depo. at 99-100). Thus, if anything, Sandusky County has gone above and beyond what can reasonably be required to insure that their voters’ are able to have their votes properly tabulated.

Therefore, and because Ms. See can come forward with no legal authority to support her claim that she ought to be able to disregard the directions given by Sandusky County (for example, by choosing to use her own “marking implement” as opposed to following the explicit

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<sup>6</sup> Dr. Asher even conceded that the only error notification found in the electronic voting equipment currently used in Franklin County (which is apparently equipment that plaintiffs are asking this Court to impose upon the defendants) is that Franklin County voters must look at the lights on their ballots prior to casting their ballot. If a light is still flashing, the voter should know that they have not cast a vote for the corresponding race. However, the fact that Franklin County voters have to examine their ballots for the flashing lights to make sure they have voted in every contest that they intended to prior to submission is no different from the fact that Sandusky County voters have to examine their optical scan ballots to make sure they filled in an oval for every race they wanted to vote in prior to submission. (Asher Depo. at 104, 109-113). While it is not possible to cast an overvote in Franklin County (if one does not follow directions, Sandusky County concedes that it is possible to case an overvote with their optical scan ballot system), it is still possible in Franklin County to cast a mistakenly valid vote (cast a valid vote, but only for someone other than who the voter intended to vote for). (Asher Depo. at 112-114).

directions given to use only the pencil provided in the voting booth)<sup>7</sup>, this Court must grant Sandusky County summary judgment on all of Ms. See's claims.

**D. Ms. See Cannot Use 42 U.S.C. § 1983 In Order To Force Sandusky County To Immediately Implement The Requirements Of The Help America Vote Act.**

Congress has already directed the States to improve their voting technologies for the 2006 elections. *See* Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.* As part of the requirements under HAVA, each lever, optical scan, or direct recording electronic voting system used in a federal election must:

- 1) Permit the voter to verify the votes he has selected before his ballot is cast and counted;
- 2) Provide the voter with an opportunity to change his ballot or correct any error before the vote is cast and counted; and
- 3) Notify the voter that he has either over or under voted in a particular race.

42 U.S.C. § 15481(a)(1)(A).

If the State (or one of its counties) chooses to retain a paper or punch card voting system for federal elections after January 1, 2006, that State (or one of its counties) must:

- 1) Establish a voter education program specific to the voting system that notifies the voter of the effect of casting multiple votes for an office; and
- 2) Provides the voter with instructions on how to correct the ballot before it is cast and counted.

42 U.S.C. § 15481(a)(1)(B).

A plaintiff cannot use § 1983 in order to require a State to implement overnight all changes the plaintiff would like to see in a State's voting regime. *McDonald*, 394 U.S. at 810-

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<sup>7</sup> This blatant disregard for an explicit direction is what Ms. See specifically wants this Court to allow and provide extra protection for. (Second Amended Complaint at ¶ 82).

11; *see also Bush v. Viterna*, 795 F.2d. 1203, 1210 (5<sup>th</sup> Cir. 1986)<sup>8</sup>. Ohio, as well as Sandusky County, by implementing the requirements of HAVA, will in an appropriate manner, at an appropriate time, and with the appropriate security arrangements, continue to maintain a constitutional and efficient voting system. As the Supreme Court recognized in *McDonald*, the lawsuit did not disclose that the State had acted in an arbitrary and unconstitutional manner in thwarting the rights of its citizens to vote. Rather, the State had a “consistent and laudable” policy of adding rights to its citizens for over fifty years. *Id.* at 811. “That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, ‘strike at all evils at the same time.’” *Id. quoting Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935).

Ms. Tuckerman testified that in order to comply with the HAVA, Sandusky County will need to either have an optical scan ballot with in-precinct tabulation or it will have to utilize touch screen ballots. The Sandusky County Board of Elections has chosen to utilize the touch screen ballots, the purchase of which will cost approximately 1.2 million. (Tuckerman Depo. at 109). Touch screen ballots were selected because HAVA requires that at least one be used in each precinct for the handicap anyway, and because they are smaller and easier to store than are the optical scan ballots with in-precinct tabulation. (Tuckerman Depo. at 111-112). Ms. Tuckerman has been told by the Ohio Secretary of State’s Office that while Sandusky County will receive money under HAVA for this purchase, it will not receive the money until after all of the counties that still use punch card ballots receive money to replace that equipment. (Tuckerman Depo. at 106-107).

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<sup>8</sup> Although *Bush* involved the failure of a state actor to effect a state-imposed duty, the principle here is no different. A federal court has no authority under Art. III to entertain an action under § 1983 to institute a federal reform that is not yet required.

Accordingly, Sandusky County must be granted summary judgment because Ms. See cannot bring her suit to compel Sandusky County to do that what it was, and is, already in the process of doing pursuant to the requirements of HAVA.<sup>9</sup>

### **III. Conclusion.**

For all of the above reasons, Sandusky County respectfully requests that it be granted summary judgment on all of the claims that are made against it.

Respectfully submitted,

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<sup>9</sup> Of course, the changes that Sandusky County will make as required by HAVA are exactly those changes that Ms. See is asking this Court to order (the use of a voting system that includes error notification). Therefore, to the extent that Sandusky County's actions, consistent with HAVA, provide Ms. See with the relief she requests, her claims are moot. See *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) ("Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief."). Also, to the extent that the parties' interests are not adverse, no case or controversy would exist. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 19, 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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