

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION - AKRON

EFFIE STEWART, <i>et al.</i> ,	:	Case No.5:02CV2028
	:	
Plaintiffs	:	(Hon. David D. Dowd)
	:	
v.	:	
	:	
J. KENNETH BLACKWELL, <i>et al.</i> ,	:	
	:	
Defendants	:	

SUPPLEMENTAL BRIEF OF HAMILTON COUNTY DEFENDANTS
REGARDING THE SEVERAL MOTIONS FOR SUMMARY JUDGMENT
AND ASSOCIATED RESPONSES AND REPLIES FILED HEREIN

**UNDISPUTED FACTS RELEVANT TO CLAIMS
AGAINST HAMILTON COUNTY**

The Hamilton County Defendants join in, adopt, and incorporate by reference herein the Supplemental Brief filed by the State of Ohio and the Montgomery and Summit County Defendants (Doc. ____). In addition, they offer the following in support of the several motions for summary judgment and corresponding responses and replies filed by all defendants in this matter (Docs. 172, 173, 184, 189, 190,198, and 199):

I. VOTING EQUIPMENT AND PROCEDURES

a. Voting Equipment

1. At all times relevant to Plaintiffs' claims herein, the Hamilton County Board of Elections utilized punch card balloting equipment manufactured by VOTOMATIC to conduct national, state, and local elections within Hamilton County Ohio. (Stautberg ¹ deposition at pp 13-14).
2. For all times relevant to Plaintiffs' claims herein, the use of VOTOMATIC punch card balloting equipment was sanctioned and approved by the Board of Voting Machine Examiners and certified by the Ohio Secretary of State. (Wolfe ² deposition at pp 37-40).
3. Hamilton County's current punch card system produces generally accurate results. (Burke ³ deposition, at 11, ln 9-10).
4. The equipment is maintained on an ongoing basis and it is cleaned at least annually by having the displaced chad removed from the interior tray through the use of an air device. (Stautberg deposition at p 17, ln 19 - p. 18 ln. 13).

¹ Julia Stautberg served as the Director of the Hamilton County Board of Elections from January 2000 until January of 2004.

² Patricia Wolfe is the Director of Elections for the Secretary of State (appointed 1/03). She has also served as Election Administrator and Assistant Election Administrator for the Secretary of State.

³ Timothy M. Burke is the Chairman of the Hamilton County Board of Elections.

5. The styluses are sharpened in advance of every election. (Burke deposition at 12, ln 1-2).

b. Poll Worker Training

6. Hamilton County poll workers are trained on how to set up the precinct polling location, how to conduct the election, and what to do when the polls close. (Stautberg deposition at pp 22- 25).

7. Hamilton County poll workers are instructed to ask every voter if they require assistance or would like a demonstration on how to cast a valid vote. (Stautberg deposition at p 23 Ln. 17 - p 24 Ln. 3).

8. All Hamilton County polling locations have a demonstrator voting machine so that voters may practice prior to voting. (Stautberg deposition at 15, Ln. 17-21).

9. Hamilton County poll workers are trained on provisional balloting .(Stautberg deposition at 24, Ln. 9-10).

10. Hamilton County poll workers are trained on what to do with a soiled or defaced ballot. (Stautberg deposition at 24, Ln. 20-21).

c. Voting Instructions

11. There are voting instructions permanently affixed to all individual voting booths in Hamilton County, further instructions are included on the ballots themselves, and handouts of the instructions are available to the voter. (Stautberg deposition at pp 31 34; see also exhibits H10, H11, and H12).

12. The instructions in the booths and on the ballots in Hamilton County are mandated by the Secretary of State. (Stautberg deposition at 32, Ln. 23-24, exhibits H11 and H12).

13. The voting instructions placed in each booth provide a written description of the six step process involved in casting a valid ballot and a visual diagram on how it is to be accomplished. The voter is instructed as follows:

- Step 1 - Using both hands, insert the ballot card PROPER SIDE UP all the way into the vote recorder.
- Step 2- make sure the two slots in the end of your card fit down over the two red pins.
- Step 3- To vote, hold the voting instrument straight up. Punch straight down through the ballot card for the candidates or issues of our choice.

DO NOT USE PEN OR PENCIL.

- Step 4- To vote for a VALID write-in candidate, write the name of the candidate and the office on the lines indicated on the top of the ballot card.
- Step 5- After voting, remove the ballot card from the vote recorder, examine the back of the ballot card making sure all the holes have been cleanly punched. Pull off any partially punched "Chad" that may be hanging.
- If your punched votes have made circular holes, return your ballot to the Election Official and request a new one.
- Step 6- Fold the top portion of the ballot card over to provide secrecy return it to the election official. DO NOT REMOVE THE TOP PORTION.

(Stautberg deposition exhibit H11)(Emphasis original).

14. The voting instructions placed in each booth also advise the voter: 1] what to do if they require assistance due to blindness, disability, or inability to read or write; and, 2] that may return a torn, soiled, defaced, or erroneously marked ballot to the precinct election official and have a new ballot issued to them. (Stautberg deposition exhibit H11).

15. The voting instructions included on each ballot advise the voter to:

- INSERT YOUR BALLOT CARD WITH BOTH HANDS
- BE SURE THE RED PINS ARE THROUGH THE TWO HOLES
- USE ONLY THE PUNCHING TOOL ATTACHED TO THE VOTOMATIC.
- IF YOU MAKE A MISTAKE, RETURN YOUR BALLOT CARD TO THE PRECINCT OFFICIAL AND RECEIVE A NEW ONE.
- TO WRITE-IN A CANDIDATE NAME, WRITE THE CANDIDATE NAME AND OFFICE ON THE TOP OF THE BALLOT CARD.

(Stautberg deposition exhibit H12)(Emphasis original).

16. The voting instructions posted in each booth and included on each ballot as shown in Stautberg deposition exhibits H11 and H12 were in use for the November 2000 general election. (Stautberg deposition, at p 33 Ln. 19 - p 34 Ln. 16).

d. Procedures Regarding Torn, Soiled, Defaced, Erroneously Marked Ballots

17. The Hamilton County Board of Elections has procedures for re-making ballots that are defaced, ripped, or put in backwards. (Burke deposition at 13. Ln. 12-21).

18. Ballots that are defaced, ripped or may have some problems with it, or where a ballot was placed in backwards in the machine, are identified and, where it is possible to determine what the voter intended, the Ballot is remade and then counted. (Burke deposition at 12, Ln. 17-22).

19. The ballots are remade by a bipartisan team comprised of staff members of the Board of Elections. If there is a dispute regarding remade ballots, it is brought to the members of the board. (Burke deposition at 13. Ln. 12-21).

20. The Chairman of the Hamilton County Board of Elections is unaware of any specific instance in which the Board has been unable to agree on if, or how, a ballot should be remade. (Burke deposition at 14. Ln. 7-14).

21. In the event, a ballot is remade, both the original ballot and the remade ballot are retained by the Board of Elections. (Stautberg deposition at 31, Ln 4-7).

II. PLAINTIFFS' VOTING EXPERIENCE

a. Howard Tolley, Jr.

22. Howard Tolley, Jr. is a resident of, and votes in, Hamilton County, Ohio. (Tolley deposition, generally).

23. Howard Tolley, Jr. is Caucasian. (Plaintiffs' Response to Hamilton County Defendants' Requests for Admissions Directed to Plaintiffs at ¶4).

24. Howard Tolley, Jr. uses punch card ballots when voting in Hamilton County. (Tolley deposition, at 14, ln.21 to 25).

25. Howard Tolley, Jr. makes a habit of checking individual votes as he is voting to ensure that the proper chad on the punch card has been dislodged. (Tolley deposition at 14, ln. 25; at 15, ln. 1).

b. Arthur Slater

26. Arthur Slater is an African-American resident of, and votes in, Hamilton County, Ohio. (Second Amended Complaint, Doc. 119),(Slater deposition, generally).

27. Arthur Slater votes in every election for which he has an opportunity to vote in. (Slater deposition at 15, ln. 16-19).
28. Arthur Slater has never had any problem using the punch card ballots. (Slater deposition at 16, ln. 8-10).
29. Arthur Slater is aware of the written instructions provided on the inside of every voting booth in Hamilton County to assist the voter. (Slater deposition at 22, ln. 2-7).
30. Arthur Slater has never had any trouble understanding the written instructions provided to assist the voter inside every voting booth in Hamilton County. (Slater deposition at 22, ln. 8-11).
31. Arthur Slater knows what to do if he makes a mistake on a punch card ballot. (Slater deposition at 16, ln. 11-13).
32. Arthur Slater knows voters can inform election monitors if they make a mistake using a punch card ballot. (Slater deposition at 16, ln. 15-18).
33. Arthur Slater has sometimes, over the years, seen seniors who tried to vote in a Hamilton County election who became confused with the ballot or other matters related to their attempts to vote in the election. (Slater deposition at 21, ln. 19-21).
34. Arthur Slater has never seen a voting official in Hamilton County refuse to assist a voter who asked for help with voting. (Slater deposition at 21, ln. 22-24).

c. Relevant to Named Plaintiffs and Other Hamilton County Voters

35. There is no evidence in the record of these proceedings that the Hamilton County Plaintiffs were denied in any way equal access to the polls.
36. There is no evidence in the record of these proceedings that any voter in Hamilton County was denied in any way equal access to the polls.
37. There is no evidence in the record of these proceedings that the Hamilton County Plaintiffs were denied in any way equal access to the voter instructions placed in each voting booth, on each ballot, and available at the polling location.
38. There is no evidence in the record of these proceedings that any voter in Hamilton County was denied in any way equal access to the voter instructions placed in each voting booth, on each ballot, and available at the polling location.

39. There is no evidence in the record of these proceedings that the Hamilton County Plaintiffs were denied in any way equal access to assistance from poll workers in casting a ballot, if they required it.

40. There is no evidence in the record of these proceedings Court that any voter in Hamilton County was denied in any way equal access to assistance from poll workers in casting a ballot, if they required it.

41. There is no evidence in the record of these proceedings Court that the Hamilton County Plaintiffs were denied in any way an equal opportunity to vote in every election appearing on the ballot.

42. There is no evidence in the record of these proceedings that any voter in Hamilton County was denied in any way an equal opportunity to vote in every election appearing on the ballot.

43. There is no evidence in the record of these proceedings that any vote cast by the Hamilton County Plaintiffs was ignored, uncounted, or counted at any less than full value.

44. There is no evidence in the record of these proceedings that any vote cast by any voter in Hamilton County was ignored, uncounted, or counted at any less than full value.

45. There is no evidence in the record of these proceedings that the Hamilton County Plaintiffs were in anyway denied the opportunity to elect representatives of their choice.

46. There is no evidence in the record of these proceedings that any voter in Hamilton County was in anyway denied the opportunity to elect representatives of their choice.

III. ELECTIONS IN HAMILTON COUNTY

a. Mayoral Election - City of Cincinnati, 2001

47. In the 2001 Cincinnati mayoral election, a Hamilton County election, 89,000 votes were cast, of which 113 votes were overvotes - a citywide rate of slightly more than one-tenth of one percent.⁴ (Exhibits in Support of Response of Hamilton County Defendants to Plaintiffs' Motion for Summary Judgment (Doc.192); Williams⁵ affidavit at ¶2, exhibit 1).

⁴ Percentages were obtained by dividing the overvote by the ballots cast.

⁵ John Williams replaced Ms. Stautberg as the Director of the Hamilton County Board of Elections in January, 2004.

48. In the 2001 Cincinnati mayoral election, no ward had a percentage rate of overvotes greater than four-tenths of one percent. Twenty-five precincts had more than one overvote while no precinct had more than three overvotes. The range of overvotes of all precincts where more than one overvote occurred was 0.34 to 1.6 percent ⁶ with six of these precincts falling within the range of equal to or greater than one percent. (Exhibits in Support of Response of Hamilton County Defendants to Plaintiffs' Motion for Summary Judgment (Doc. 192), Williams affidavit at ¶2, with attached exhibits).

b. County Commissioner Election - Republican Primary, 2004

49. In the Republican Party Primary for Hamilton County Commissioner which was held on March 2, 2004, overvoting occurred within the townships with largely white populations at a higher rate than the rate of overvoting which occurred in the 2001 Cincinnati mayoral election. All but one of these townships had rates over one percent, with a range of 0.7 to 2.0 percent ⁷ (Exhibits in Support of Response of Hamilton County Defendants to Plaintiffs' Motion for Summary Judgment (Doc. 192), Williams, affidavit ¶2, exhibits 2, 3).

50. The percentage of white residents within Hamilton County Townships together with the percentage of overvoting occurring in the 2004 Republican Party Primary for Hamilton County Commissioner are as follows:

TOWNSHIP	% WHITE POPULATION 2000 CENSUS	% OVERVOTE (NEAREST 1/10 %)
ANDERSON	96.57	1.5
COLERAIN	87.77	1.1
COLUMBIA	61.74	1.3
CROSBY	97.89	0.7
DELHI	97.65	1.8
GREEN	97.53	2.0
HARRISON	98.23	1.5
MIAMI	98.71	1.7
SPRINGFIELD	67.06	1.5

⁶ See fn 4 regarding percentage calculations.

⁷ See fn 4 regarding percentage calculations.

SYCAMORE	89.94	1.9
SYMMES	86.87	1.5
WHITEWATER	98.29	1.4

(Exhibits in Support of Response of Hamilton County Defendants to Plaintiffs' Motion for Summary Judgment (Doc. 192), Williams affidavit, exhibits 2, 3).

IV. VOTING, GENERALLY

51. Overvotes can be intentional and unintentional. (Burke deposition at 19, ln 19-22).

52. The Chairman of the Board of Elections in Hamilton County has been made aware of instances when a voter cast a ballot on which every hole in every race has been punched. (Burke deposition at 19, ln 23-25).

53. Casting an invalid write-in vote for a non-candidate or a non-person is a common phenomenon. (Asher⁸ deposition at p 94 ln 10 - p 96, ln 19).

54. In the mayoral election in the city of Columbus, Ohio in 2003, there 74,635⁹ votes cast for recognized candidates. (Asher deposition at 96, ln 6-7).

55. In the mayoral election in the city of Columbus, Ohio in 2003, there were 194 invalid write-in votes cast – 79 for “anybody else,” 47 for Buck Rinehart, 24 for Jim Tressel, 21 for Greg Lashutka, 9 for Daffy Duck, and lesser amounts for Archie Griffin, Matt Damschroder, “a head of lettuce,” Captain Kangaroo, Dr. Who, Mr. Ed, “a pig,” “my dog,” and “Sam the cat.” (Asher deposition at 96, ln. 8-16).

56. In preparing his report on the 1978 Ohio gubernatorial election (released in 1982), Herbert Asher performed a physical examination of approximately 175,000 punch card ballots. (Asher, Schussler, Rosenfield Study at p 7 and Table 3).¹⁰

⁸ Herbert B. Asher, is a Professor Emeritus of Political Science at the Ohio State University and appears as an expert witness for Plaintiffs.

⁹ This figure arrived at by adding the votes for Mayor Coleman and the recognized write-in candidate.

¹⁰ Paragraphs 56-59 all refer to the Asher, Schussler, and Rosenfield Study released April 28, 1982.

57. Of the approximately 175,000 punch card ballots examined by Asher in preparing his 1982 report, 14,584 contained either an undervote or an overvote. (Asher, Schussler, Rosenfield Study at p 7 and Table 3).

58. Of the overvoted ballots identified in Asher's 1982 report, 2,756 or approximately 29% of those ballots identified as an overvote, had three or more valid holes punched. (Asher, Schussler, Rosenfield Study at p 7 and Table 3).¹¹

59. Of the overvoted ballots identified by Asher in 1982 report, 963 had at least two holes with at least one invalid hole. (Asher, Schussler, Rosenfield Study at p 7 and Table 3).

Respectfully submitted,

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¹¹ Asher's table three is stated in terms of percentages, not raw votes. The raw figures in paragraphs 58 and 59 was force by using his percentage of 18.9 % x N(14,584).

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ David T.Stevenson
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