

**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' SUPPLEMENTAL BRIEF  
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Pursuant to this Court's Order issued May 6, 2004, the Sandusky County Defendants now submit this Supplemental Brief in Support of Their Motion for Summary Judgment. Additionally, the Sandusky County Defendants hereby adopt and incorporate by reference the other Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment. Sandusky County now identifies the following undisputed facts:

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

¶ 1) Sandusky County uses an optical scan paper ballot. 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). These written instructions give an example of how to "[f]ill in the

**OVAL** to the **LEFT** of your choice," which is a *completely blackened oval*. (Tuckerman Depo. Exhibit 6).

¶ 2) 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).

¶ 3) 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).

¶ 4) 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). Barbara Tuckerman, the Deputy Director of the

Sandusky County Board of Elections, 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).

¶ 5) The discretionary problems encountered in determining what was a vote in Florida in 2000 will not occur in Ohio because Ohio has standards as to what constitutes a vote. (Asher Depo. at 128-129).

¶ 6) 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>1</sup>

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<sup>1</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).

¶ 7) Some people do mark an oval with “X’s,” instead of coloring in the oval as instructed. However, when that occurs, the tabulating machine picks up the vote and the ballot is *not* rejected. (Tuckerman Depo. at 96). 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).

¶ 8) A voter might use an unauthorized device, such as an ink pen, to fill out their ballots. However, this only will occur if the voter ignores one explicit oral instruction from a poll worker not to do that, as well as two written instructions (one handed to the voter and one posted in the voting booth right in front of the voter's eyes), which again explicitly instruct the voter not to do such a thing. (Tuckerman Depo. at 8, 16, 80-82, Tuckerman Depo. Exhibit 6).

¶ 9) With the optical scan ballot system currently used by Sandusky County, like the punch card ballot system before it, the Director of the Sandusky County Board of Elections and the Deputy Director hand count at least two precincts after every election in order to double check that the machines are accurately counting the votes cast. The reason behind this hand counting is because *any* machine will make mistakes. All though, to date, none of the hand counts has demonstrated a discrepancy. Nevertheless, the Director and Deputy Director will continue to do a hand count no matter how long and how many absolutely perfect elections are conducted in Sandusky County. (Tuckerman Depo. at 57). This will continue to occur even when touch screen ballots are utilized (which Sandusky County is concerned 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.**

¶ 10) Sandusky County Plaintiff Linda See 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). 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>2</sup>

**C. Sandusky County’s Rational Reasons For Using An Optical Scan Ballot.**

¶ 11) 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 --

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<sup>2</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).

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).

¶ 12) 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).

¶ 13) Ms. Tuckerman 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).

¶ 14) There is no dispute that Sandusky County has and continues to uniformly administer the optical scan ballot with central location tabulation to all of its voters. (Tuckerman Depo. at 18).

**D. As Long As Ms. See Follows Directions, Every Intentional Vote That She Casts Will Be Counted.**

¶ 15) 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. 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).

¶ 16) Since utilizing the optical scan ballots, 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 Sandusky County 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).

**E. The So Called “Error Notification” Machines Advocated By The Plaintiffs Still Allow For Voter’s To Make Mistakes.**

¶ 17) 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).

¶ 18) While it is not possible to cast an overvote in Franklin County, 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).

¶ 19) In Franklin County, a serious kind of voter error occurs when a voter fails to press the “vote” button, or a voter-parent takes a child into the booth with them and the child presses the “vote” button before the voter-parent has completed the voting. Nothing can be done to remedy these errors. (Asher Depo. at 110, 142).

**F. The Evidence Presented Demonstrates That There Is No Problem Whatsoever With The Optical Scan, With Central Location Tabulation, Method Of Voting Used By Sandusky County.**

¶ 20) Voters do report that they *intentionally* undervoted, or did not cast a vote, in presidential elections. (Kropf Depo. at 25-26).

¶ 21) Short of violating voters' privacy rights, asking voters if they voted in a particular race or not (through an exit poll) is the only way to figure out if an undervote is intentional or accidental. (Kropf Depo. at 33).

¶ 22) Exit polls tend to have a higher non-response rate than do traditional forms of polling. (Engstrom Depo. at 131).

¶ 23) One example of the inaccurate responses often given by voters during exit polls is that voters often come out of the polls in Louisiana and inform the exit pollers that they did not vote for a frequent candidate named David Duke. However, when the votes for David Duke are actually counted, it becomes clear that the exit polling under reflected David Duke's vote. (Engstrom Depo. at 134).

¶ 24) The issues of the honesty of responses given during exit polls has also occurred in elections with black candidates, where white voters lied and said they voted for the black candidate. (Engstrom Depo. at 134).

¶ 25) Some people do not vote in the presidential election because they do not know enough about the presidency (Kropf Depo. at 32-33).

¶ 26) The design of a particular ballot, including what grade level the instructions are written in and how cluttered together the choices are, can effect the rate of non-votes in an election using that particular ballot. (Kropf Depo. at 39-44).

¶ 27) The higher the number of high school graduates in a particular county correlates with a lower number of non-votes in a presidential race. (Kropf Depo. at 70).

¶ 28) Older voters are more likely to intentionally undervote than are younger voters. (Kropf Depo. at 71-72).

¶ 29) Intentional undervoting is somewhat related to income and independents are more likely to intentionally undervote in a Presidential race. (Kropf Depo. at 81-82).

¶ 30) Sandusky County *did not use an optical scan ballot in 2000*, but instead used a punch card ballot. (Tuckerman Depo. at 21).

¶ 31) In the last election before Ms. Tuckerman's deposition (which was taken on June 24, 2003) there were only three overvotes cast that were rejected by the tabulation machine. (Tuckerman Depo. at 102).

¶ 32) Every single county that used an optical scan ballot with central tabulation had a *lower* residual vote rate for the race for U.S. Senate in the 2000 General Election than did Allen County, which used an optical scan ballot with in precinct tabulation. (Appendix G to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County).

¶ 33) In the 2000 General Election in Ohio, a 0.93% residual vote rate occurred in Allen County (which used optical scan with in precinct tabulation) and 2.4% residual vote rate occurred in Mahoning County (which used optical scan with central tabulation). The only other county that used an optical scan ballot with in precinct tabulation in the 2000 Presidential election was Hancock County, which had a residual vote rate of 1.2%. The following Counties, *all of which used optical scan ballots with central tabulation in that election*, had the same or a lower residual vote rate than did Hancock County:

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

(Appendix G to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County ("Appendix G")). Additionally, Coshocton County only had a residual vote rate of 1.5% in that race, and Lucas County only had a residual vote rate of 1.4%. Both of these counties used an optical scan ballot with central tabulation. *Id.*

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

¶ 35) The following problems that are found in punch card ballots *are not* found in optical scan ballots, *regardless* of whether or not those optical scan ballots are tabulated at the precinct or at a central location: 1) hanging chads can become removed during a recount, (Saltman Depo. at 164-165), 2) a "dimpled" or "pregnant" chad may not be read by the machine as a vote (Saltman Depo. at 165-166), 3) a hanging chad could also be pushed back up during the reading process, and thus not counted as a vote (Saltman Depo. at 166-167), 4) a recount may not replicate the actual results of the election, since the condition of a punch card ballot can be harmed during the recount process (Saltman Depo. at 168-170), 5) voters have problems correctly transferring their choices to corresponding holes on ballots (Saltman Depo. at 171), 6)

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<sup>3</sup> Hancock County apparently used optical scan ballots with both in precinct and central tabulation.

the presentation of alternate choices on an instruction booklet to guide voters to the card location to be punched out can be too confusing sometimes (Saltman Depo. at 171-173), 7) the size of the ballot is limited to the size of the IBM punch card (Saltman Depo. at 185), and 8) several states have deliberately abandoned punch card systems due to their dissatisfaction with that system. (Saltman Depo. at 196-198).

¶ 36) An optical scan ballot system with in precinct count will not completely eliminate the possibility of unintentional non-votes. In fact, no system will eliminate this possibility. (Saltman Depo. at 193).

**G. The Requirements of The Help America Vote Act And H.B. 262 Moot Ms. See's Claims.**

¶ 37) 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).

¶ 38) 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).

¶ 39) As part of H.B. 262, all 88 counties in Ohio will have new voting devices with paper verified receipts by 2006 unless the Help America Vote Act requires even swifter action. (Section 3(E)(1)(a) of H.B. 262).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 21, 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  
Jeffrey A. Stankunas  
Isaac, Brant, Ledman & Teetor, LLP