INTRODUCTION

Rule 35(c) of this Court provides that:

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent. Alleged errors . . . in the facts of the case (including sufficient evidence), *or errors in the application of correct precedent to the facts of the case*, are matters for panel rehearing but not for rehearing en banc. (Emphasis added.)

Appellees' requests for en banc rehearing fail to satisfy this exacting standard and barely acknowledge that this standard exists. There is no conflict, not even an arguable one, with any holding of this Court or the Supreme Court. Nor is there any dispute that the panel applied correct precedent in this case – including the opinion in *Bush v. Gore*, 531 U.S. 98 (2000), as well as prior equal protection cases prohibiting severe inequalities in the treatment of voters in different counties. Slip op. 11-16 (applying analytic framework of *Reynolds v. Sims*, 377 U.S. 533 (1964), *Burdick v. Takushi*, 504 U.S. 428 (1992), and other constitutional cases). Appellees' argument for rehearing is that the panel misapplied this indisputably "correct precedent" to the facts of this case. They also disagree with the facts established by the evidence of record and described in the panel opinion – including the fact that voters using punch cards were more than *twice as likely* to have their votes rejected as those using more reliable voting technology. Slip op. 4, 7. Under this Court's rules, these arguments do not furnish a proper basis for granting en banc review.

Even if disputes over facts or the application of law to fact were an appropriate basis for en banc rehearing, such review would be manifestly inappropriate here. The evidence shows that Defendants' use of non-notice voting equipment discriminates against voters who must use it, thus warranting strict constitutional scrutiny. That evidence also shows that punch-card ballots result in the disproportionate denial of black citizens' votes, amply supporting the panel's decision to remand this claim.

I. Appellees' Argument for Rehearing Rests Upon Critical Mischaracterizations of the Panel's Opinion and the Facts of This Case.

Appellees repeatedly and resolutely deny the severe disparities arising from the use of non-notice voting equipment, thoroughly documented by statistical evidence in the record and acknowledged by experts on both sides. This error leads them to make another, far more serious error: namely, to exaggerate the breadth of the panel's opinion, falsely suggesting that *any* variations in election practices – however minor or insignificant – are subject to strict scrutiny. The panel's carefully written opinion stands for no such sweeping rule of law.

State Defendants seriously understate the magnitude of the voting rights violations demonstrated by the evidence in this case. In particular, they assert (without reference to any evidence) that punch cards resulted in a "slightly higher" rate of uncounted ballots than other types of voting equipment. State PFR 4.[1] In fact, the

[1] This brief refers to the State Defendants' Petition for Rehearing with Suggestion for Rehearing En Banc as "State PFR," to the Joint Petition for Re-Hearing En Banc Filed by the Hamilton, Montgomery, and Summit County Local Government

evidence of record – including that supplied by their own expert – paints a very different picture. As the district court found, and the panel restated, the rate of uncounted votes with non-notice systems is twice that of other systems that provide voters with notice and the opportunity to correct errors. Slip op. 4, 7 (citing expert evidence on combined overvotes and undervotes, with non-notice punch card and optical scan systems versus DRE and precinct-count optical scan). This is hardly a "slight" disparity, as Appellees contend. To the contrary, it resulted in approximately 55,000 lost votes in the 2000 presidential election alone. Slip op. 24.

The disparities in *overvotes* arising from the use of punch-card voting equipment are even more severe. Voters in the three defendant counties using punch cards (Hamilton, Summit, and Montgomery) experienced a combined 6,855 votes lost due to "overvotes" in 2000, compared to *none* in counties like Franklin that use notice voting technology. Slip op. 3; JA 276, 601-12. The Secretary of State has elsewhere acknowledged the severe disparities resulting from the use of non-notice voting equipment, admitting that "[i]n a study of 'over' and 'under' voting in Ohio, it was clearly demonstrated that punch-card voting was unreliable," and that "[t]he evidence is overwhelming that thousands of Ohio voters have been disenfranchised by antiquated voting equipment." Slip op. 5, 15; JA 658.

Defendants as "Joint PFR," and to the Petition for Panel Rehearing and Rehearing En Banc of Defendants-Appellees the Sandusky County Board of Election, *et al.*, as "Sandusky PFR," with the page number following for all cites.

State Defendants also mischaracterize the evidence, in suggesting that these lost votes are solely due to voters' mistakes. State PFR 5. As the evidence adduced at trial showed, the inherent fragility of punch card ballots causes overvotes and undervotes when those ballots are "handled or manipulated or sent through a reader." JA 415-17. It is therefore not just voter error but inherent problems with punch-card voting technology that results in the tens of thousands of lost votes in every election. To their credit, other Appellees acknowledge errors due to the "fragile nature of the ballot and the handling that occurs in the tabulation process." Joint PFR 6.

Appellees' factual errors infect their critique of the panel opinion. As a result of their failure to acknowledge the severe statistical disparities arising from the use of punch-card voting equipment, Appellees dramatically overstate the breadth of the panel's holding. State Defendants' petition repeatedly characterizes the panel as holding that "*any* difference in under-vote rates" violates the Equal Protection Clause. State PFR 1 (original emphasis); *see also id.* at 2 (interpreting opinion to impose a "statewide uniformity requirement" and as requiring strict scrutiny for any practice that "differentially impacts voters in different precincts"). One searches in vain for anything in the panel's opinion that would suggest such a sweeping holding.

Contrary to Appellees' contention, the panel has not opened the election litigation floodgates. Its opinion applies strict scrutiny only because of the enormous systemic disparities documented in the evidence. *See* slip op. 23-24 (explaining that

tens of thousands of lost votes were proven "mathematically and from the testimony of witnesses on both sides of the contests."). Cases presenting such compelling evidence of large inter-county disparities are few and far between – as evinced by the fact that so few such lawsuits have actually been brought, much less litigated to a successful conclusion, in the years since the 2000 election.[2]

II. The Panel Correctly Applied Supreme Court and Sixth Circuit Precedent, in Concluding that the Severe Inequalities Arising from the Use of Non-Notice Voting Equipment Demand Strict Constitutional Scrutiny.

It is settled law that the right to vote is fundamental and, therefore, that infringements of that right are subject to heightened scrutiny under the Equal Protection Clause. Although Appellees portray *Bush v. Gore* as an outlier case that should not be taken seriously as precedent, the equal protection principle upon which that case relies – "equal weight" to each vote and "equal dignity" to each voter – is hardly novel. As the Supreme Court stated four decades ago: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia*, 383 U.S. 663, 670 (1966). That basic

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[2]State Defendants thus attack a strawman in suggesting that the isolated disparity between Lucas and Ross County might be subject to strict scrutiny. State PFR 7. Plaintiffs' claim does not rest on an isolated discrepancy between one county and another, but instead on the substantial disparities arising from the use of non-notice equipment documented throughout Ohio – and, indeed, in other states that use equipment like the notorious punch-card. Slip op. 3-6, 24. As County Defendants acknowledge, these disparities are not isolated but "systemic." Joint PFR 6.

principle is the foundation of a long line of authority, including the "one person, one vote" cases, that subject inequalities in the treatment of voters to heightened scrutiny. *Reynolds*, 377 U.S. at 561; *see also Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999)(practices "grant[ing] the right to vote to some residents while denying the vote to others" are subject to "strict scrutiny").

The Supreme Court's repeated emphasis upon equal treatment in the realm of voting does not, of course, mean that *all* electoral practices affecting the vote are subject to strict scrutiny. But strict scrutiny does apply to practices that have a severe effect upon a discernable class of voters. In the "one person, one vote" cases, for example, the Court struck down electoral practices that had the effect of diminishing the voting strength of voters in certain counties compared to others. *Reynolds*, 377 U.S. at 550 (voters in some counties had less voting strength than those in others); *Gray v. Sanders*, 372 U.S. 368, 379 (1963)(county unit system gave greater weight to rural counties than urban ones); *see also Harper*, 383 U.S. at 668 (poll tax had the effect of discriminating based on economic status). The diminution of the vote based on "place of residence impairs basic constitutional rights under the Fourteenth Amendment." *Reynolds*, 377 U.S. at 566.[3]

Ohio's use of non-notice voting equipment effects just such an impairment of the

[3]It is no answer to assert that all voters within a county's boundaries are "treated exactly the same." Sandusky PFR 4. This disregards the severe *inter-county* disparities that form the basis of Plaintiffs' equal protection claim. By using unreliable equipment, each of the counties is participating in that violation.

right to vote. Under *Reynolds* and its progeny, such practices need not arise from *racial* discrimination (intentional or otherwise) to warrant heightened scrutiny. It is sufficient that plaintiffs demonstrate that the challenged practice results in substantial disparities, based on voters' place of residence, wealth, or other characteristics irrelevant to the right to vote. This was precisely the line of analysis upon which *Bush v. Gore* relied, in striking down the "arbitrary and disparate treatment to voters in [Florida's] different counties" during the recount process. 531 U.S. at 107.

This analysis accords with *Burdick,* the principal case on which Appellees seek to rely. State PFR 9, 12. On its facts, *Burdick* is quite far afield from this case, as it involved a state's prohibition on write-in votes. 504 U.S. at 430.[4] Still, the *Burdick* Court's analysis is instructive, in that the Court draws a clear line between two types of electoral practices. On one side are "reasonable, *nondiscriminatory* restrictions" like those at issue in *Burdick* itself, which are to be upheld if justified by the state's "important regulatory interests." *Id.* at 434. On the other are "severe" restrictions, which may only be upheld if they are "narrowly drawn to advance a state interest of compelling importance." *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Whether strict scrutiny applies thus depends upon whether the state's use of non-

[4] This law did not deny anyone the right to cast a vote or to have that vote counted, nor did it result in the differential treatment of voters across counties. Thus, the most voters could claim in *Burdick* is that their choice of candidates was limited, something that necessarily occurs whenever the state (as it must) regulates candidates' access to the ballot.

notice voting equipment imposes a "severe" impediment or, alternatively, a "reasonable, nondiscriminatory" one. The panel concluded that the state's use of non-notice voting equipment falls on the "severe" side of the line, because of its statistically proven severe impact on voters in those counties that use them.[5] This is the quintessential "application of correct precedent to the facts of the case," inappropriate for en banc review. The panel got the law right, and was correct in its application of this precedent to the overwhelming evidence presented.

As the dissenting opinion points out, this analytic framework does not yield a bright-line rule for all cases. In particular, it does not resolve the question of *how much inequality* must be shown in order to apply strict scrutiny. But this is a familiar problem in equal protection jurisprudence. In more then 40 years of "one person, one vote" cases, for example, the Court has not articulated a precise bright-line rule for how much inequality in the size of state legislative districts must be shown. *See e.g.,Cox v. Larios*, 542 U.S. 947 (2004); *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983). So too, in voting equipment or other areas of election administration, such a rule should not be expected. It is sufficient, for purposes of this case, that voting systems making voters in some counties more than twice as likely to have their votes rejected impose a severe burden, warranting strict scrutiny. Further definition of the standard must

[5]Appellees are thus flatly wrong to accuse the panel of "reject[ing] *Burdick*." State PFR 12. In fact, the panel faithfully applied *Burdick*'s analytic framework. Appellees only complaint is that the panel did not reach the result they desired.

await future cases. *See Bush v. Gore*, 531 U.S. at 109 (recognizing that "the problem of equal protection in election processes generally presents many complexities," and declining to rule on factual scenarios not presented).

At bottom, Appellees' argument for en banc review necessarily rests on the argument candidly made in the dissent: that *Bush v. Gore* has no precedential value. State PFR 10; slip op. at 37-39 (Gilman, J., dissenting).[6] There are two reasons why this contention neither undermines the panel opinion or supports rehearing. First, *Bush v. Gore* is only one of many cases to strike down electoral practices that, like the one in this case, result in severe disparities based on voters' place of residence. Second, even if *Bush v. Gore* were the *only* case that supported the panel opinion, determining whether that case should be taken seriously as precedent is, respectfully, not a judgment for this Court to make. That judgment lies exclusively with the Supreme Court itself.[7]

[6]It is noteworthy that the author of the law review article upon which the dissent relies has since responded: "When I wrote my article, I did not imagine that lower courts would say flatly that Bush v. Gore is not valid precedent." Richard Hasen, Election Law Blog, http://electionlawblog.org/archives/005460.html (4/21/06).

[7]Although conflict with other circuits is not a reason for taking a case en banc, the panel opinion in this case is in fact consistent with other courts that have ruled on the issue. Two district court cases have held that plaintiffs stated a claim under Bush v. Gore and other equal protection cases, based on a state's "use of different types of voting equipment with substantially different levels of accuracy." *Black v. McGuffage*, 209 F. Supp. 2d 889, 898 (2002); *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107, 1109-10 (C.D. Cal. 2001). The latter case was not overruled by *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003)(en banc), as Appellees wrongly contend. Joint PFR 11. That case found it improper to enjoin a pending election, but declined to rule on the merits. The court's four-sentence

III. Appellees' Disagreement with the Panel's Decision to Remand the Voting Rights Act Claim Does Not Warrant En Banc Review.

Appellees' halfhearted argument regarding the Voting Rights Act claim may swiftly be disposed of. That Act protects not only the right to cast a ballot, but also to "hav[e] such ballot counted properly and included in the appropriate totals of votes," 42 U.S.C. § 1973*l*(c). Section 2 prohibits any practice that "results in" the denial or abridgement of the vote on account of race. 42 U.S.C. § 1973. The evidence demonstrates just such a result, and the panel was correct to remand due to the district court's misapprehension of the proper legal standard. Slip op. 28-30.[8]

CONCLUSION

Because the petitions do not raise a precedent-setting error, but only the application of correct precedent to the facts, rehearing en banc should be denied.

____
PAUL MOKE
1252 Pyle Center
Wilmington, OH 45177
RICHARD SAPHIRE
300 College Park Drive
Dayton, OH 45469

____
MEREDITH E.B. BELL-PLATTS
LAUGHLIN MCDONALD
American Civil Liberties Union
2725 Harris Tower
233 Peachtree Street, NE
Atlanta, GA 30303

____
DANIEL P. TOKAJI
55 W. 12th Ave
Columbus, OH 43210

discussion of the equal protection issue recognized that it was "one over which reasonable jurists may differ." *Id.* at 918.

[8]State Defendants cite not a single case in support of their argument for rehearing of this claim, and County Defendants cite only one: *Johnson v. DeGrandy*, 512 U.S. 997, 1019 (1994)(rejecting the idea that vote dilution in one part of a jurisdiction may be compensated for elsewhere). While it is certainly true that *Johnson* was a vote dilution case, not a vote denial case like this one, they miss the point that vote denial is actually much *worse* than vote dilution. Black voters in this case did not simply have the strength of their votes weakened; they disproportionately *did not have their votes counted at all* due to the use of punch-card equipment.