

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

American Civil Liberties Union of Ohio, et al.;)
)
Plaintiffs,)
)
v.)
)
Jennifer Brunner, et al.;)
)
Defendants.)

Case No.: 1:08-cv-145

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR A PRELIMINARY INJUNCTION**

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STATEMENT OF THE ISSUES

Whether Plaintiffs are entitled to a preliminary injunction under Fed. R. Civ. P. 65(a)(2), enjoining the use of a central count optical scan system or any other voting system in which ballots are counted at a central location because the use of such “non-notice” technology violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

SUMMARY OF THE ARGUMENT

In this action, Plaintiffs seek declaratory and injunctive relief from Defendants’ decision to adopt voting equipment that will deny Cuyahoga County voters equality in the counting of their votes. By approving and using an unreliable system of voting in a single county, the Defendants are violating the Equal Protection Clause of the Fourteenth Amendment.

In the March 2008 primary election, Cuyahoga County voters – in contrast to those in other Ohio counties – will be denied the benefits of voting technology that provides notice of and the opportunity to correct errors. The predictable result of this step backward is that more Cuyahoga County residents will have their votes rejected in comparison with voters elsewhere in the state. This violates Plaintiffs’ fundamental right to have their votes count on an equal basis with those cast by other citizens. To be clear, Plaintiffs’ claim is not that the central count optical scan (CCOS) system violates equal protection *per se*; nor is it that Ohio voters have a constitutional right to vote on any particular kind of equipment. Rather, Plaintiffs contend that Defendants, by certifying and employing “notice” voting systems in some counties and “non-notice” systems in others, are illegally denying equal treatment to voters based on where they

happen to live. Plaintiffs also contend that Defendants violate Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to have access to and use of a rational and non-arbitrary system for recording and tabulating their votes.

Finally, Plaintiff Montgomery, an African American voter in Cuyahoga County, further alleges that there is a racial disparity in whose votes are not counted due to the inherent flaws of non-notice voting technology. Therefore, the certification and use of this technology by the State of Ohio and Cuyahoga County – the county with the largest African American population in the state – violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (“VRA”).

Plaintiffs ask the Court to require the Defendants to provide Cuyahoga County voters an opportunity to vote with election equipment that eliminates these disparities, and hereby seek a preliminary injunction under Fed. R. Civ. P. 65(a)(2) enjoining Defendants, their agents, employees and attorneys, and all other persons in active concert or participation with them from conducting any election in Cuyahoga County, Ohio on a CCOS system or any other voting system in which ballots are counted at a central location where it is not physically possible for a ballot to be placed in the vote counting machine while the voter is present, pending a final trial on the merits of Plaintiffs' application for a permanent injunction or further Order of this Court.

A preliminary injunction should issue where Plaintiffs show: (1) a substantial likelihood of prevailing on the merits of at least one of their claims; (2) that Plaintiffs and other Ohio voters will suffer irreparable harm to their rights as voters unless injunctive relief is granted; (3) that the threatened injury to the rights of Plaintiffs and other Ohio voters outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the grant of an injunction would not adversely affect the public interest. *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). As explained below, all of these

criteria are satisfied in this case where Plaintiffs¹ who are voters and residents of Cuyahoga County seek to continue to vote on technology that will afford them the opportunity to know whether their ballots contain errors that will prevent their votes from being accurately counted and included in the final tally.

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THEIR CLAIM THAT DEFENDANTS' RETURN TO A DISCRIMINATORY DUAL VOTING SYSTEM VIOLATES THE FOURTEENTH AMENDMENT.

A. THE EVIDENCE UNEQUIVOCALLY DEMONSTRATES THAT THE VOTING EQUIPMENT CUYAHOGA COUNTY PLANS TO USE IN MARCH 2008 WILL RESULT IN MANY MORE LOST VOTES THAN THE "NOTICE" VOTING SYSTEMS USED ELSEWHERE IN OHIO.

Since the 2000 election, the fundamental flaws of non-notice voting technology have become common knowledge. The most crucial problem of non-notice technology involves the incidence of unintentional "residual votes" – *i.e.*, ballots for which no vote can be tallied in a particular electoral contest. There are two types of residual votes: overvotes and undervotes. "Overvoting" occurs when the voting system determines that more votes have been cast in a particular race than permitted in that race. In optical scan systems, this results from more marks made by the voter (or some other means) on the ballot than permitted. "Undervoting" occurs when the voting system determines that the voter has cast no vote in a particular race, or fewer votes than permitted for the office in question. When ballots containing overvotes and/or undervotes are taken to the tabulating machines after the polls have been closed, it is often impossible for the machines or officials to determine for which candidate the intended vote was cast. Therefore, *unbeknownst to the voter*, no vote is tabulated for that ballot.

Thus, the use of non-notice voting systems, such as the CCOS systems at issue in this matter, produces three disturbing results: (1) when compared to counties that use notice voting

¹ See Appendix A (declarations of Plaintiffs Amanda Shaffer and Michael Montgomery).

equipment (currently well over 80 other counties in the state), jurisdictions that use non-notice technology experience higher rates of residual voting, especially in electoral contests at the top of the ballot; (2) voters who are forced to use non-notice technology face a statistically significant greater risk of their ballots being spoiled than persons in neighboring counties who vote on notice technology; and (3) African American voters using non-notice technology are more likely to be disfranchised by residual balloting than are their non-black counterparts.

Ohio and Cuyahoga County have had a roller coaster experience with voting technology. If a CCOS system is implemented for the 2008 election, Cuyahoga County voters will have voted on three different types of election technology in as many federal election cycles. Despite widespread condemnation of punch cards and central count optical scans, a majority of counties and Ohio voters in 2000 and 2004 cast their ballots using antiquated, error-fraught punch card and central count optical scan voting equipment. In the 2000 presidential elections, 81 out of Ohio's 88 counties used either punch card or central count optical scan (CCOS) voting technology; such equipment resulted in roughly 96,000 residual votes that were not counted. In Cuyahoga County alone, 15,691 voters went to the polls, received a ballot, yet no vote for president was recorded. *See Changing the Election Landscape in the State of Ohio: A State Plan to implement the Help America Vote Act of 2002 in accordance with Public Law 107-252, §253(b), (May 13, 2003) ("State HAVA Plan"), p. 14.* In the 2000 presidential race, the election results reported by the Secretary of State showed that non-notice technology, and more relevant for this discussion, CCOS technology, fared considerably worse than all other types of notice voting equipment except punch cards.

TABLE 1
Residual Vote Rate in 2000 Presidential Election in Ohio
By Type of Voting Equipment²

Type of Voting Equipment	Number of Ballots Cast	Presidential Residual Vote Rate (With Number of Non-Voted Ballots)
AVM/Lever	176,467	0.5% (825)
Electronic	537,474	0.7% (3,564)
Punch Card	3,593,958	2.3% (81,767)
Votomatic	3,555,712	2.3% (80,639)
Datavote	38,246	2.9% (1,128)
Optical Scan	492,102	1.7% (8,264)
Central-Count	433,914	1.8% (7,688)
Precinct-Count	58,188	1.0% (576)

After four years and the accumulation of much information nationally and statewide about the effects of voting technology in election outcomes, change was promised in Ohio, yet still unfulfilled in 2004. Then Secretary of State Kenneth Blackwell had requested federal and state funds to provide voters with better voting technology. Secretary Blackwell's minimum requirements for new technology recognized the danger of non-notice technology and required that any replacement voting system:

- [g]uarantees voters will be able to verify their ballot before it is cast and counted. This means the system must include features that allow voters to vote, review their ballot choices and decisions, and correct errors or omissions before submitting their vote for final tabulation.
- As part of the review and correction process, if a voter selects more than the permissible number of candidates for a single office, the system will alert the voter of the selection and its impact, or prevent over-voting. Additionally, the system must give the voter an opportunity to correct the ballot before it is processed and counted.

² See Appendix B (Summary Report of 2000 Election Data provided by the Office of the Secretary of State for use in *Stewart v. Blackwell*).

- In addition to providing equipment, hardware and applicable software to accomplish these features, vendors will be required to include, as a supplement to the system, information materials clearly explaining the operations and functions of the voting equipment, the effect of casting multiple votes for one office, and corrective procedures and processes available to voters. The system also must alert voters when they have failed to vote for a candidate or issue. We envision a simple pamphlet or brochure that will be available to every voter written in clear language with amplifying graphics. ...

State HAVA Plan, pp. 26-7.³ However, even with more attention to problems with non-notice voting, most Ohioans voted on precisely the same equipment as the 2000 election; this resulted in roughly 96,000 of 5.7 million votes cast (1.7%) registering no vote for president in 2004. *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. Times, Dec. 24, 2004 (available online at http://www.nytimes.com/2004/12/24/national/24vote.html?_r=1&pagewanted=print&position=&oref=slogin).

Nationwide, the use of notice technology has shown a remarkable decrease in the number of uncounted ballots. See Appendix C (declaration of Michael I. Shamos, Ph.D., J.D.), ¶¶ 23; Appendix D (declaration of David C. Kimball), ¶¶ 10, 12, tables 1, 2.

³ See also Appendix C (declaration of Michael I Shamos, Ph.D., J.D.), ¶¶25-33 discussing how the Help America Vote Act addresses when non-notice technology is permitted.

TABLE 2⁴
Residual Vote Rates by Type of Voting Technology

Technology	Description	Residual Vote Rate in:		
		2000	2002	2004
Punch Card – Votomatic	Punch card is inserted behind booklet with ballot choices – voter uses stylus to punch out holes in card. Ballots counted by card reader machine.	2.8%	3.5%	1.8%
Lever Machine	Candidates listed by levers on a machine – voter pulls down the lever next to chosen candidate. Machine records and counts votes.	1.7%	2.2%	1.0%
Paper Ballot	Candidates are listed on a sheet of paper – voter marks box next to chosen candidate. Ballots counted by hand.	1.8%	2.3%	1.7%
Scrolling DRE	Candidates listed on a scrolling computer screen – voter touches screen next to chosen candidate. Machine records and counts votes.		1.2%	1.0%
Optical Scan – Central Count	Voter darkens an oval or arrow next to chosen candidate on paper ballot. Ballots counted by computer scanner at a central location.	1.8%	2.0%	1.7%
Optical Scan – Precinct Count	Voter darkens an oval or arrow next to chosen candidate on paper ballot. Ballots scanned at the precinct, allowing voter to find and fix errors.	0.9%	1.3%	0.7%
Nationwide Residual Vote Rate		1.8%	2.0%	1.1%

The 2006 election brought better technology for a majority of Ohioans. Many counties successfully transitioned from older lever, punch card, and CCOS technology to PCOS and DREs that gave voters the ability to verify their selections before submitting their ballots. Cuyahoga County had selected the Diebold (now Premier) Accu-vote TSX touchscreens with voter verifiable paper audit trails (VVPAT). As a result, the residual vote rates in counties that had previously used non-notice technology were expected to drop significantly. Such was the

⁴ Appendix D (declaration of David C. Kimball), Table 1. Residual vote rates were calculated as the percentage of ballots cast that failed to record a valid vote for president (in 2000 and 2004) or governor (in 2002). 2897 counties were analyzed in 2000, 1847 counties analyzed in 2002, and 3034 counties analyzed in 2004. It bears emphasis that some residual votes are intentional because people do decide not to cast a ballot in some races on the ballot. *See, e.g.*, Appendix C (declaration of Michael I. Shamos, Ph.D., J.D.), ¶ 22. The residual votes were higher in 2002 generally because there was no presidential race on the ballot, and more people intentionally undervote when there is only a gubernatorial or senatorial race at the top of the ballot.

case in Cuyahoga County which saw a drop in both the rate and raw number of residual ballots despite a sizeable increase in the number of ballots cast:

TABLE 3⁵
Residual Votes and Rates
Cuyahoga County Elections

Year	President	Senate	Governor
2000	15,696 2.66%	94,938 16.08%	n/a
2002	n/a	n/a	16113 4.08%
2004	13,531 1.97%	49,971 7.27%	n/a
2006	n/a	14,850 2.19%	13,592 2.00%

The reason for the difference in the residual vote rates based on technology perhaps is best explained by the stark differences in how voters encounter a non-notice system compared to the notice systems now used throughout most of the state of Ohio. In elections prior to 2006, Cuyahoga County voters used the much maligned Votomatic punch cards. With a punch card voting system, a voter places his or her punch card ballot in a vote recording device, presses a stylus detaching a chad and leaving a hole that corresponds to her preferred candidate. The voter then submits her ballot and leaves the polls. If there was some malfunction in the ballot marking process or if the voter inadvertently dislodged too many (overvote) or too few (undervote) chads for a given office or issue, there was no way for her to know that the ballot as marked might not accurately reflect her intentions. Later the punch card ballot would be placed in a vote counting

⁵ Based on election results from the Cuyahoga County Board of Elections webpage, <http://boe.cuyahogacounty.us/results/history.htm> (last accessed January 24, 2008). According to the results, 590,473 total votes were cast in 2000; 395,050 total votes were cast in 2002; 687,260 total votes were cast in 2004; and 676,880 total votes were cast in 2006.

machine, which reads the ballot based on the passage of light through the spaces in the punch card created by the detached chads.

The central count optical scan system, which has been used mostly for casting absentee ballots after 2004, contains very similar flaws. *See* Appendix C (declaration of Michael I. Shamos, Ph.D., J.D.), ¶20. Optical scan systems resemble answer sheets used in standardized examinations. The voter is given a ballot that lists the names of all candidates and ballot initiatives and either uses a pencil to darken the circle next to the preferred candidate or draws a straight line connecting two parts of an arrow. In optical scan systems, an overvote results when more marks are located on the ballot than are permitted. When ballots containing overvotes and/or undervotes are taken to the tabulating machines after the polls have closed, it is often impossible for the machines or officials to determine for which candidate the vote was intended. Therefore, unbeknownst to the voter, no vote is tabulated for that contest.

Optical scan voting systems are available with in-precinct counting features that provide error notification to voters. Such systems are used in several Ohio counties, including neighboring Geauga and Summit Counties. As Dr. Shamos explains:

The ballot is marked by, and can be reviewed by, the voter. The voter then personally feeds the ballot into a machine which “reads” the ballot in the presence of the voter. “Reads” is a colloquialism for “attempts to determine which spaces on the ballot have been marked.” The machine does not “read” a ballot in the same way a human would. It ignores, for example, all text printed on the ballot and looks only at the spaces where marks are expected to be placed. Certain errors and anomalous conditions can be detected by the scanning machine at this point. For example, if the voter has selected more candidates in a race than the allowed number (overvoting), the machine can return the ballot to the voter uncounted, along with an indication that a race was overvoted. The voter can then correct the ballot or obtain a new one and try again. The machine can also detect undervoted races, that is, contests in which the voter may not have selected the maximum possible number of persons to be voted for. The machine can also detect a blank ballot – one that has no vote markings. If the ballot is not abnormal, the machine “counts” it, that is, adds one to each of its internal counters keeping track of the total number of votes cast so far for each candidate or on

each issue. The ballot is then dropped into a box or bag inside the machine, where it will remain until the polls are closed.

Id., ¶18. This error notification substantially reduces the risk that a voter will not have his vote counted.

The Accu-vote TSX (“TSX”) used by Cuyahoga County in the 2006 federal election operates very differently. When a voter appears at a polling location to vote, the voter receives a Voter Access Card, which allows the voter to cast a single ballot. Upon reaching the TSX, the voter inserts the card into the machine and follows the onscreen instructions to cast a ballot. Before the voter finally casts his ballot, he has the opportunity to review a screen that shows each of his selections and the VVPAT to verify those selections.⁶ The DRE system results in far fewer residual votes than either the CCOS or the punch card systems because, *prior to final casting of the ballot*, notice is given to the voter when no vote was recorded and because a voter cannot record more votes than are permitted for any given contest. See Appendix C (declaration of Michael I. Shamos, Ph.D., J.D.), ¶21.

Cuyahoga County’s latest voting technology switch, which is the subject of this suit, started when Secretary Brunner placed the Cuyahoga County Board of Elections under administrative oversight, pursuant to OHIO REV. CODE §3501.05(M), not because of problems with voting technology, but because of the resignations and removal of board members. See Letter of Secretary of State Jennifer Brunner to Robert T. Bennett and Jane Platten (April 2, 2007) located at <http://www.sos.state.oh.us/sos/mediaServices/ccboe.pdf>. The new board was sworn in on May 8, 2007. By means of administrative oversight, Secretary Brunner may assert decision-making authority regarding the operation of elections in Cuyahoga County, including the selection of equipment. In December 2007, Secretary Brunner told the Board of Elections

⁶ See Cuyahoga County Board of Elections instructional video on how to use their touch screen device at <http://boe.cuyahogacounty.us/electronicvoting.htm> (last visited on Jan. 26, 2008).

that she had concerns with the TSX machinery and wished the county to start voting on a CCOS system. Further memorializing her plans for Cuyahoga County and the rest of the State of Ohio as well, Secretary Brunner released the “Evaluation & Validation of Election-Related Equipment, Standards & Testing” (“EVEREST”) report, located at <http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf>, which recommended the elimination of all precinct count optical scan and DRE machines throughout Ohio. EVEREST, pp. 76-77. The EVEREST report also recommended Cuyahoga County move to a CCOS system for the March 4, 2008 primary. *Id.* at 82.

The new Secretary may have been unaware of the problems that Ohio voters – and indeed voters throughout the United States – had with non-notice technology and its propensity to result in unnecessary lost ballots; but the release of the EVEREST report and her recommendations were met publicly with great concern by voting rights advocates, scholars, citizens groups, county election officials, and local newspapers. *See, e.g.*, Appendix F (letters to Secretary Brunner); Appendix G (Statement of Positions, Principles and Recommendations of the Ohio Association of Election Officials in response to the EVEREST report and recommendations); *Recall the Overvote*, Akron Beacon Journal, Jan. 4, 2008 (located at <http://www.ohio.com/editorial/opinions/13033592.html>); *Officials: Brunner shaking voter trust*, Columbus Dispatch, Jan. 27, 2008 (located at http://www.dispatchpolitics.com/live/content/local_news/stories/2008/01/27/voting_confidence_ART_ART_01-27-08_B1_P4963GI.html?adsec=politics&sid=101); *Brunner Plan Spells Trouble*, Mahoning Valley Tribune Chronicle, Jan. 24, 2008 (located at <http://www.tribune-chronicle.com/page/content.detail/id/500438.html?nav=5004>). Plaintiff, the ACLU of Ohio, and its attorneys repeatedly voiced their concerns both to Secretary Brunner and the County

Defendants. *See* Appendix E. As a practical matter, there is consensus among the community of local election officials and election experts that moving to a non-notice CCOS system is a bad idea because it will result in more lost votes.

The Cuyahoga Board of Elections began considering whether to keep its Accu-Vote TSX equipment. On December 20, 2007, the Board of Elections members reached a 2-2 impasse on whether to replace its TSX system with a CCOS system. On December 21, 2007, Secretary Brunner ordered the Cuyahoga County Board of Elections to adopt a CCOS system, thereby forcing Ohio's most populous county and the county with the largest number of African American voters to use equipment that has been shown repeatedly to needlessly result in lost votes and disproportionately disfranchise African American voters.

Dr. David C. Kimball has studied the effects of different voting technology on the residual ballot rates nationwide. Because to his knowledge no county has decided to switch from notice based technology to CCOS, *see* Appendix D, ¶13, he compared the residual vote rates when counties switched from CCOS to notice based technology. He concludes that:

...changing from central-count optical scan to touch-screen DREs or precinct-count optical scan reduced residual votes too, with average reductions of 0.92% and 1.00% respectively. These results indicate that central-count optical scan systems produce higher residual vote rates in presidential contests than touch-screen DREs or precinct-count optical scan systems. They suggest that an average county switching from DREs to a central-count optical scan system (as proposed for Cuyahoga County) can expect residual votes to increase 0.92%.

Id., ¶16. Mahoning County is the only county in Ohio to switch from a central-count optical scan system in 2000 to a DRE system in 2004. The residual vote rate for the presidential election dropped in Mahoning County from 2.4% in 2000 to 1.0% in 2004, which further supports Dr. Kimball's conclusions based on nationwide data. *See id.*, ¶13.

B. THE DEFENDANTS' CERTIFICATION AND USE OF ERROR-PRONE VOTING EQUIPMENT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. The Continuing Use of Error-Prone Voting Equipment Violates the Equal Protection Clause of the Fourteenth Amendment by Denying the Votes of Plaintiffs and Other Citizens Who Must Use that Equipment.

The right to vote is a fundamental one and includes not only the right to cast a ballot, but also the right to have the full weight of the ballot included in the final tally. The Supreme Court has long held that: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 2, 17 (1964). It is also settled law that at the core of the right to vote is “the right of qualified voters within a state to cast their ballots and have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941). Long before *Bush v. Gore*, the Supreme Court has affirmed the core principle of equal weight to each vote and equal dignity for each voter. 531 U.S. at 104, 107 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), *Gray v. Sanders*, 372 U.S. 368 (1962), and *Moore v. Ogilvie*, 394 U.S. 814 (1969)). For example, in *Reynolds*, the Court struck down a legislative apportionment scheme that gave some voters less representation than others, based solely on the jurisdiction within which they lived. The Court held that “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment.” 377 U.S. at 566. The *Reynolds* Court favorably cited Justice Douglas's dissent in *South v. Peters*, 339 U.S. 276, (1950), where he stated that:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount.

Id. at 279 (citations omitted); *see also Reynolds*, 377 U.S. at 562 (“And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.”).

Election practices that discriminate as to the fundamental right to vote are subject to strict scrutiny, and are unconstitutional unless “the State can demonstrate that such laws are necessary to promote a compelling governmental interest” *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (internal citations and quotations omitted). As the Supreme Court held in *Dunn*:

[T]he State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision . . . and must be tailored to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Id., at 342-43 (internal citations and quotations omitted). There are clear distinctions between laws and practices that discriminate against some citizens, which are subject to strict scrutiny, and those that impose minor non-discriminatory burdens on *all* citizens that are subject to less rigorous scrutiny. *Compare Dunn*, 405 U.S. at 342 (durational residence laws subject to strict scrutiny); *Reynolds*, 377 U.S. at 560 (redistricting plan discriminating against voters based upon their place of residence “must be carefully and meticulously scrutinized.”); *Harper*, 383 U.S. at 670 (applying strict scrutiny to a statute that required voters to pay poll tax: “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”); *with Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (election practices must be “narrowly drawn to advance a state interest of compelling importance” if they impose a severe or unequal burden on voting rights but upholding state prohibition on write-in voting,

concluding that it did not impose severe restriction on the right to vote, but only “reasonable, nondiscriminatory restriction[.]”⁷.

Where a state uses different types of voting equipment with substantially different levels of accuracy, it denies the equal treatment that the Fourteenth Amendment commands. *Black v. McGuffage*, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002); *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001). In this case, people of all races residing and casting ballots in Cuyahoga County on non-notice technology are significantly less likely to have their votes counted than voters in counties using more reliable equipment.

To be perfectly clear, Plaintiffs do *not* assert that all Ohio voters must use the same equipment. Instead, they challenge the use of substandard equipment that results in “substantially different levels of accuracy.” *Black*, 209 F. Supp. 2d at 898. More specifically, Plaintiffs’ equal protection claim rests on the evidence of statewide disparities arising from the use of two types of voting equipment that have been implemented throughout the state: 1) notice equipment, which includes DREs (such as the Accu-vote TSX that had been used in the past two elections in Cuyahoga County) and *precinct count* optical scans (currently used in 30 counties, and 2) non-notice systems, which include CCOS systems that lack error notification (which Defendants plan to use in Cuyahoga County). The CCOS equipment is substantially inferior to the others in the propensity accurately to record the votes of those who use them.

Cuyahoga County voters who must use this inferior voting equipment are thus disadvantaged in the meaningful exercise of the franchise when compared to those individuals

⁷ Even if a less rigorous standard were applied, however, Defendants’ conduct would still be unconstitutional. In *Burdick*, the Supreme Court held that “reasonable, nondiscriminatory restrictions” on voting rights are subject to constitutional scrutiny. While discriminatory laws and practices – like those in this case – must satisfy strict scrutiny, “the State’s important regulatory interests are generally sufficient to justify” nondiscriminatory restrictions. 504 U.S. at 434. Thus, even if the use of this equipment were deemed “nondiscriminatory,” an important interest would still be required to uphold it. This the Defendants cannot show.

who live and vote in counties that have adopted the more reliable and accurate voting equipment that incorporates “second chance” technology. As set forth above, the Supreme Court has long held election practices are subject to strict scrutiny if they diminish voting rights based upon the happenstance of where one lives. If the use of non-notice voting systems, such as the CCOS system that Defendant Brunner has insisted that Cuyahoga County impose on its voters, has a differential impact on the fundamental right to vote, then the certification and use of such systems is subject to strict scrutiny and may only be upheld if “necessary to promote a compelling state interest.” *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999).

2. The Continuing Use of Error-Prone Voting Equipment Cannot Survive Strict Scrutiny Because it is Not Narrowly Tailored to Serve a Compelling State Interest.

Election practices that have an impact on the fundamental right to vote are subject to strict scrutiny, and may only be upheld if the Defendants can establish that they are “necessary to promote a compelling state interest.” *Reynolds*, 377 U.S. at 560; *Harper*, 383 U.S. at 670, *Mixon*, 193 F.3d at 402. Any assertion that Defendants’ continuing use of error-prone voting technology is needed to serve a compelling state interest would be refuted by the record of its operation.

One possible justification Defendants may assert for their decision to use non-notice equipment in Cuyahoga County is that it would cost money to change to a system that treats all voters equally. Cost savings is not a valid justification for an ongoing constitutional violation, particularly where the fundamental right to vote is at issue. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) (“[W]hen we enter the realm of ‘strict judicial scrutiny’ there can be no doubt that ‘administrative convenience’ is no shibboleth, the mere recitation of which dictates constitutionality.”); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)

(the savings of “costs cannot justify an otherwise invidious classification”); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (cost savings cannot justify classifications affecting a fundamental interest); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 646-47 (3d Cir. 2003) (state interest in costs savings was not compelling and could not justify state election regulation); *Stone v. City and County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (“[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.”) (citing cases). Furthermore, Defendants already possess and have used notice voting equipment – the Accu-Vote TSX. Accordingly, any cost-based argument is insufficient.

Defendants’ publicly stated concern for eliminating notice based technology in Cuyahoga County – and indeed a desire to do so statewide – is that there are alleged security concerns with both PCOS and DRE technology. *See*, EVEREST, pp. 76-77, 82 (recommending “eliminat[ing] points of entry creating unnecessary voting system risk by moving to central counting of ballots”; “eliminat[ing] DREs and precinct-based optical scan voting machines that tabulate votes at polling locations; and recommending Cuyahoga County move to CCOS for the March 2008 primary) ⁸ The EVEREST study and Defendants’ proposed actions were met by the manifest critiques raised by Plaintiffs, various civil rights and voting rights organizations, leading scholars on the issues of voting technology and voting security, and editorial boards

⁸ In contrast to the recent DRE criticism voiced by Defendants over the EVEREST study, Defendant Cuyahoga County Board of Elections’ own website proudly proclaims that their TSX DREs are secure, easy to use, less costly, and do not run the risk of disenfranchising voters by failing to allow second chance voting. “Electronic voting devices are easy to use, secure and accessible to all of our voters. The touch screen machines are similar to using an ATM machine at your local bank. Although you will not get a ‘receipt’, you will be able to review your selections on the enclosed verifiable paper audit trail before casting your ballot.” *Electronic Voting*, Cuyahoga County Board of Elections, <http://boe.cuyahogacounty.us/electronicvoting.htm> (last visited on Jan. 26, 2008). Additionally, their “Electronic Voting Fact Sheet & Analysis” states the DREs cost less than optical scan and *that electronic voting complies with HAVA requirements for second chance voting such that “[l]ess voters are disenfranchised.”* Electronic Voting Fact Sheet & Analysis, Cuyahoga County Board of Elections, <http://boe.cuyahogacounty.us/electronicvotingfacts.htm> (last visited on Jan. 26, 2008).

debunking the security issues. *See* Appendix F (letters to Secretary Brunner); Appendix E (letters to Secretary Brunner from ACLU, Testimony of ACLU before Board of Elections, and letter from ACLU to Board of County Commissioners). The paucity of evidence that non-notice technology somehow cures security concerns stands in striking contrast to the overwhelming amount of research and support for the proposition that notice technology reduces the residual ballots and eliminates racial and socio-economic disparities of residual ballots. *See* Appendix C (declaration of Michael I. Shamos, Ph.D., J.D.), ¶¶ 23, 34-8; Appendix D (declaration of David C. Kimball). Dr. Michael I. Shamos states that despite DREs’ long history nationwide, there is no evidence of tampering that resulted in votes being altered in any actual election; however, he provides several examples of tampering and fraud with CCOS systems. *See* Appendix C, ¶¶34-7.

Furthermore, state law requires tabulating equipment be able to “examine ballots and to count votes accurately for each candidate, question, and issue, excluding any ballots punched or marked contrary to the instructions printed on such ballots...” OHIO REV. CODE §3506.07. As stated above, the lack of notice that comprises the critical difference between the CCOS and PCOS (and DREs) voting systems results in inaccurate recording and tabulating of votes. The Defendants can have no interest in implementing and running inaccurate and discriminatory voting systems. Moreover, Plaintiffs do not argue that the Defendants are compelled to keep their touchscreens or any other particular type of equipment, but simply that they must avoid the massive inter-county disparities that arise from the use of non-notice systems in some but not all counties. Nothing in Plaintiffs’ arguments, for example, would preclude Defendants from moving to a precinct count optical scan system in Cuyahoga County.

The Defendants, therefore, are not justified in authorizing and implementing a dual voting system in Ohio. There is no important – let alone compelling – interest for using inaccurate and unequal equipment.

3. The Use of Error-Prone Voting Equipment Deprives Ohio Voters of the Opportunity to Have Their Votes Counted Without Any Rational Justification in Violation of the Due Process Clause of the Fourteenth Amendment.

As the Supreme Court stated in *Bush v. Gore*, 531 U.S. at 105, the Constitution embodies a “minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.” When a state extends the right to vote to its citizens, it must not only comply with the Equal Protection Clause, but must also assure the Due Process Clause’s “rudimentary requirements...of fundamental fairness” are satisfied. *Id.* at 109. In *Black v. McGuffage*, the court addressed an Illinois voting system that, much like Ohio’s, relied extensively on equipment (in that case punch cards) that produces significant numbers of residual votes. Noting that “the right of suffrage is a fundamental matter in a free and democratic society,” 209 F. Supp. 2d at 900, the court concluded that a system for registering and tabulating votes that resulted in a situation where “the votes cast in some districts will have a significantly greater chance of being counted than votes cast in neighboring election districts” would be “irrational” and would give rise to a due process violation. *Id.* at 900-01.

In this case, Defendants are implementing a system that uses error-prone voting equipment, a system that would subject hundreds of thousands of voters, including the Plaintiffs, to a significant and unreasonable risk that their votes would not be counted. Such a system arbitrarily deprives the Plaintiffs of one of their most cherished of constitutional liberties, the right to vote. This system cannot be justified by any legitimate government interest and therefore violates due process.

C. DEFENDANTS’ CERTIFICATION, ADOPTION, AND USE OF NON-NOTICE CCOS VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

The VRA defines the right to vote protected by Section 2 as follows:

(1) The terms "vote" or "voting" shall include *all action necessary* to make a vote *effective* in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and *having such ballot counted properly* and *included in the appropriate totals of votes cast* with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C. §1973l(c) (emphases added). While the courts and Congress have long recognized that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise,” *Reynolds*, 377 U.S. at 555, a core aspect of the right to vote protected by the Voting Rights Act includes, at a minimum, the proper counting and totaling of votes cast. Protection against racially disparate exclusion of votes cast in the tallying of those votes falls squarely within the scope of the right to vote that Section 2 protects.

Section 2 of the VRA provides:

(a) No voting qualification or prerequisite to voting or **standard, practice, or procedure** shall be imposed or applied by any State or political subdivision in a manner which **results in a denial or abridgement** of the right of any citizen of the United States to vote **on account of race or color**, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphases added).

It is well recognized that Congress intended to address “subtle, as well as the obvious state regulations that have the effect of denying citizens their right to vote because of their race.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). Even prior to its amendment in 1982, Congress intended to make Section 2 “broad enough to cover various practices that might effectively be employed to deny citizens the right to vote.” *Allen*, 393 U.S. at 566-67. The 1982 amendments make clear that rather than limiting the statute’s prohibitions to tactics of discrimination used in the past or limiting the application to certain enumerated practices, Congress intended Section 2 to prohibit any standard, practice, or procedure that denied or diluted minority voting strength. 42 U.S.C. §1973(a).

To the extent that the 1982 amendments changed the elements of a vote denial claim, they made it easier to demonstrate causation by enabling the electoral practice to interact with the totality of circumstances to cause the racial disparity. *See Chisom v. Roemer*, 501 U.S. 380, 384-6 (1991) (“[T]he coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982....” If anything, Congress wanted to “expand the coverage of § 2 by enacting the 1982 amendment.”); *compare id.* at 408 (Scalia, J., dissenting) (“nothing was lost from the prior coverage; *all* of the new “results” protection was add-on. The issue is not, therefore, ... whether Congress has cut back on coverage of the Voting Rights Act; the issue is how far it has extended it.”).

In *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986), the Supreme Court insisted that courts perform a “searching practical evaluation of the ‘past and present reality’ when analyzing a § 2

violation.” *Id.* at 45.¹⁰ This is a vote denial or abridgment claim. *Any practice that prevents access to the ballot or counting ballots cast, by definition, is causally responsible for diminished ability to participate in the political process and elect candidates of choice. See Chisom, 501 U.S. at 397 (“[A]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.”).* The inability to cast a ballot or to have it counted is a clear abridgment of the opportunity to participate in the political process which inevitably impairs the ability to influence election outcomes and establishes a vote denial claim.¹¹ While a variety of factors may buttress a vote denial claim, Plaintiffs should succeed in proving a Section 2 claim when they show that state involvement in an electoral practice has led to racial disparities in the recording or counting of votes.

Ohio certifies non-notice equipment such as CCOS systems as an acceptable voting technology. Cuyahoga County and Secretary Brunner selected and plan to operate this flawed system. Defendants’ certification, selection, and use of CCOS technology are clearly an election “standard, practice, or procedure.”

Cuyahoga County is the state’s largest county and the county that has the greatest number of African American voters. According to the U. S. Census, African Americans comprise almost 30% of the population in Cuyahoga County. *See*

¹⁰ In the context of a dilution claim, this searching practical evaluation involves a preliminary finding of the so-called *Gingles* preconditions (numerosity/compactness, minority political cohesion, and white bloc voting) in order to ensure that the suspect electoral practice is causally responsible for the minority’s diminished ability “to participate in the political processes and to elect candidates of their choice.” *Id.* at 44 (*quoting* S.Rep. 97-417 at 27, 29). These preconditions are not necessary to determine whether an electoral practice that prevents access to the ballot or counting of ballots cast is causally responsible for diminished ability to participate in the political process and elect candidates of choice.

¹¹ No court has ever held that any of the *Gingles* preconditions are necessary to establish a vote denial claim. For the completeness of the factual record, some district courts have analyzed the *Gingles* preconditions without deciding that they are necessary to denial claims. *E.g., Roberts v. Warmser*, 679 F. Supp. 1513, 1530 (E.D. Mo. 1987), reversed on other grounds, 883 F.2d 617 (8th Cir. 1989).

<http://quickfacts.census.gov/qfd/states/39/39035.html>. This population is concentrated largely in racially segregated neighborhoods throughout the county. *See, e.g.,* http://nodis.csuohio.edu/nodis/2000reports/maps/7c_pct_black00.jpg (map showing concentration of black population); *see also* U. S. Census Bureau, “Residential Segregation of Blacks or African Americans: 1980-2000 (located at <http://www.census.gov/hhes/www/housing/resseg/ch5.html>); “Cleveland among the most segregated cities,” *The Plain Dealer*, Nov. 28, 2002 (located at <http://www.cleveland.com/census/index.ssf?/census/more/103847947729530.html>).

Furthermore, African Americans in Cuyahoga County suffer the lingering effects of discrimination and rank lower than their white neighbors in every socioeconomic and educational indicator reported by the U. S. Census. *See, e.g.,* Appendix H (socioeconomic charts by race for Cuyahoga County). Though this is the largest concentration of African Americans in the state, these socioeconomic disparities between blacks and whites are present in other counties with similar demographics throughout Ohio and the nation.

Case after case and many political science studies¹² clearly demonstrate that though both black and white voters are given the same ballot, non-notice technology results in greater spoiled ballot rates based upon the race of the voter. Dr. David C. Kimball compared the residual ballot

¹² *See, e.g.,* Michael Tomz and Robert Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, *American Journal of Political Science* 47:46-60 (2003); Michael C. Herron and Jasjeet S. Sekhon, *Overvoting and Representation: An Examination of Overvoted Presidential Ballots in Broward and Miami-Dade Counties*, *Electoral Studies* 22: 21-47 (2003); David C. Kimball and Martha Kropf, *Ballot Design and Unrecorded Votes on Paper-Based Ballots*, *Public Opinion Quarterly* 69:508-529(2005); Stephen Knack and Martha Kropf, *Invalidated Ballots in the 1996 Presidential Election: A County-Level Analysis*, *Journal of Politics* 65:881-897(2003); Stephen M. Nichols, *State Referendum Voting, Ballot Roll-off, and the Effect of New Electoral Technology*, *State and Local Government Review* 30:106-117 (1998); David C. Kimball, Chris T. Owens, and Katherine M. Keeney, *Unrecorded Votes and Political Representation*, in *Counting Votes: Lessons from the 2000 Presidential Election in Florida* (Robert P. Watson, ed., 2004), pp. 135-150; R. Darcy and Anne Schneider, *Confusing Ballots, Roll-Off, and The Black Vote*. *Western Political Quarterly* 42:347-364 (1989); Justin Buchler, Matthew Jarvis, and John E. McNulty, *Punch Card Technology and the Racial Gap in Residual Votes*, *Perspectives on Politics* 2:517-524 (2004); Paul Moke and Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 *Hastings L. J.* 1 (2006)..

rates of thousands of counties nationwide using various types of technology in the 2000 and 2004 elections. Appendix D, tables 4 & 5. His research shows that PCOS and DRE technology reduces, if not completely eliminates, racial disparities in the rates of residual ballots. According to Dr. Kimball:

... systems without an error-prevention feature (punch card ballots and central-count optical scan ballots) produce a more dramatic increase in residual votes in counties with low median incomes and large percentages of African-American residents. By comparison, systems with an error-prevention feature (DRE voting machines and precinct-count optical scan ballots) do not yield such a dramatic increase in residual votes in counties with low median incomes or large African-American populations. ... Furthermore, this indicates that if Cuyahoga County switches from DREs to a central-count optical scan system, residual votes will increase more than the average county since Cuyahoga is well above average in the percentage of African-American residents and below the national average in median household income. Previous studies and this analysis suggest that switching from DREs to a voting system without an error-notification feature (such as central-count optical scan balloting) will disproportionately increase residual votes for African-American and low-income voters.

Id., ¶17.

There is nothing substantively unique about African Americans residing in Cuyahoga County that would suggest a different result for them upon the implementation of a new non-notice CCOS system. These disparities may also widen because poll workers are likewise less familiar with the new technology. Therefore, given the socioeconomic disparities and the propensity to cast disproportionately more residual ballots on non-notice technology than white voters, African American voters in Cuyahoga County face disproportionate disfranchisement by Defendants' actions and decisions. *See id.*, ¶ 19. Plaintiffs therefore will likely prevail on their Section 2 claim as well.

II. PLAINTIFFS WILL BE IRREPARABLY INJURED ABSENT AN INJUNCTION.

The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. at 554 (1964). For that reason, the loss of the constitutionally

protected right to vote “for even minimal periods of time, constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs will suffer irreparable injury if forced to vote on equipment that subjects them to a greater risk of disfranchisement because of their residence and disproportionately disfranchises them on account of race.

III. THE THREATENED INJURY OUTWEIGHS ANY DAMAGE TO DEFENDANTS.

The threatened injury to Plaintiffs outweighs any damage that an injunction might cause Defendants. Plaintiffs are well aware that elections do not just occur on Election Day and require many weeks, if not months, of advance preparation. However, the damage here is of *Defendants’ own doing*. Defendant Brunner waited until December 14, 2007 to release her report documenting her concerns; the County Defendants waited until late December to take up this issue and begin considering new vendors and contracts. Defendants have moved forward despite the rapidly approaching primary, having no contract in place for the acquisition and performance of the CCOS equipment, and no answer to how the new equipment will be funded. Furthermore, Plaintiffs and Plaintiffs’ counsel repeatedly voiced their concerns to Secretary Brunner, members of the Board of Elections and members of the Board of County Commissioners. *See* Appendix E (letters to Secretary Brunner from ACLU, Testimony of ACLU before Board of Elections, and letter from ACLU to Board of County Commissioners). When it became clear that Defendants were beginning to abandon notice technology and haphazardly replace it with the CCOS for the March elections,¹³ Plaintiffs were left with no other recourse and brought this action.

¹³ It is also noteworthy that prior to mid January 2008, certain members of the Cuyahoga County Board of Elections were considering placing precinct tabulators for optical scans in some of the Cuyahoga County precincts. Furthermore, news reports suggested that the Cuyahoga County Board of Commissioners would be discussing a contract for the new equipment.

The Defendants have equipment in storage that eliminated the disparities that violate the Constitution and Voting Rights Act. They choose instead to wait until the eve of federal elections that are expected to produce a record turnout to abandon this technology and rush implementation of a brand new technology that has been maligned by voting scholars, experts, and other jurisdictions. Should Defendants elect to use their Accu-vote TSX machinery, their only harm would be the expense in educating election officials to resume the prior method. Should the Defendants be so dissatisfied with the security of their DRE system that they maintain that optical scans are the only salvation, they have the option of using *precinct count* optical scans that provide voters with notice of errors that will insure the successful reading and tabulation of voters' ballots. In any event, the purported expense or administrative inconvenience of their own creation is outweighed by the loss of the equal right to vote that will be suffered by Plaintiffs. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify a state practice that impinges upon a fundamental right). State law requires tabulating equipment be able to "examine ballots and to count votes accurately for each candidate, question, and issue, excluding any ballots punched or marked contrary to the instructions printed on such ballots..." OHIO REV. CODE §3506.07. There is no state interest in inaccurate voting technology or in conducting elections that violate voters' constitutional and statutory rights. Given the absence of evidence that fraudulent manipulation of PCOS or DRE machines has occurred, Defendants cannot seriously argue that their interests would be harmed by an injunction requiring the use of voting systems that would accurately read and tabulate voters' intentions.

IV. AN INJUNCTION WOULD BE IN THE PUBLIC INTEREST.

The public has a broad interest in the integrity of elections, to have faith that the ballots that they attempt to cast will be counted and included in the final tally on election night, and seeing election practices applied in a non-discriminatory manner. Subjecting qualified Ohio voters to unconstitutionally discriminatory procedures and to unnecessary risks that their ballots will be spoiled would be adverse to the public interest. Under the circumstances, an injunction would promote the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be granted.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 28th day of January, 2008.

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