

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES	)	CASE NO. 1:08 CV 0145
UNION OF OHIO, <i>et al.</i> ,	)	
	)	JUDGE KATHLEEN O'MALLEY
Plaintiffs,	)	
	)	
vs.	)	<b><u>CUYAHOGA COUNTY DEFENDANTS'</u></b>
	)	<b><u>BRIEF IN OPPOSITION TO</u></b>
	)	<b><u>PLAINTIFFS' MOTION FOR A</u></b>
JENNIFER BRUNNER, SECRETARY OF	)	<b><u>PRELIMINARY INJUNCTION</u></b>
STATE OF THE STATE OF OHIO, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**STATEMENT OF FACTS AND PROCEEDINGS**

This matter is before the Court on the plaintiffs' motion for a preliminary injunction that seeks to prevent the defendants from using a Central Count Optical Scan (CCOS) voting system in Cuyahoga County, Ohio, for the March 4, 2008 Presidential primary election.

While the Cuyahoga County defendants will have much more to say about the plaintiffs' claims when they have the luxury of time, the most pressing concern here is to address the plaintiffs' request for an injunction that threatens to wreak havoc on the conduct of this election that is a mere four (4) weeks away. Because time is of the essence, this brief will quickly review the material facts and then proceed directly to the address the issues that are of paramount concern.

For many years, Cuyahoga County conducted its elections without serious incident utilizing a punch card voting system. The 2000 Presidential Election and the problems encountered by the State of Florida in that election prompted the passage of the Help America Vote Act of 2002, Public Law 107-252, 42 USC §§ 15301 – 15545 (“HAVA”), which provided funding to States upon condition that the States replace their punch card voting systems with newer technology in time for the May 2006 Primary Election.

Pursuant to a procurement process overseen by the Ohio Secretary of State, Cuyahoga County elected to utilize its share of HAVA funds to purchase a Direct Recording Electronic (DRE) voting system for the conduct of all of its elections starting with the May, 2006 primary. This system was used most recently in the November 6, 2007 election. See “Affidavit of Jane Platten” (hereafter “Platten Affidavit”) at paras. 7-9. Cuyahoga County’s experience with DREs manufactured by Diebold Election Systems has been miserable. Most recently, during the November 6, 2007 election, the Board of Elections experienced numerous problems with the DRE system, including repeated election night server crashes that forced a system shutdown during the vote tabulation in an election that saw less than 20% of the registered voters vote. See Platten Affidavit para. 9. In addition, numerous memory cards utilized to record votes cast at the polling locations registered no data when tabulated at the Board of Election’s central tabulations center on Election night, thereby necessitating the laborious process of retrieving the corresponding TSX machines, “reburning” such memory cards from the flash memory contained in the TSX devices, and uploading them again. See Platten Affidavit at para. 9. An investigation of the November 2007 DRE system failures has failed as of yet to provide any adequate explanation for said failures. More importantly, Diebold could not provide any assurance that

the same or additional failures would not occur in future elections. See Platten Affidavit at para. 10.

On December 14, 2007, Ohio Secretary of State Jennifer Brunner issued the Project EVEREST Report that, aside from identifying numerous security flaws in the various electronic voting systems, specifically recommended that Cuyahoga County replace its DRE system with high speed optical scanners for use in the March 4, 2008 primary election. See Platten Affidavit at paras. 11-12. Brunner strongly recommended that Cuyahoga County switch to an optical scan system and indicated that if they failed to do so, she would order them to make such the switch.

On December 20, 2007, the Cuyahoga County Board of Election considered Secretary Brunner's recommendation. Two (2) members of the Cuyahoga County Board of Elections voted to replace Cuyahoga County's DRE system with a CCOS system for the March 4, 2008 primary election, while the other two (2) board members voted against that measure. See Platten Affidavit at para. 14.

On December 21, 2007, Secretary of State Brunner cast the tie-breaking vote by which it was determined that Cuyahoga County would replace its DRE system with a CCOS system for the March 4, 2008 primary election (except for voters with disabilities). See Platten Affidavit at para. 15 and Platten Affidavit Exhibit L.

This decision placed an enormous burden on the Executive Director and her staff. Beginning on December 22, 2007 and continuing to the present, the Cuyahoga County Board of Elections and its staff have undertaken extraordinary efforts to prepare for the March 4, 2008 primary election and the use of the CCOS voting system. Those preparations include the following:

- Preparing the approximately 4,326 different ballots that will be used in 1,436 voting precincts for the approximately 650 candidates and 47 issues to be voted upon in a Presidential primary election that is projected to have a voter turnout rate of between 30% to 40% of the registered voters, which approximates to between 314,000 and 420,000 expected voters, see Platten Affidavit at paras. 16-21, 25;
- Removing over 5,100 DRE machines and the electrical work necessary for their use from warehousing while taking delivery of and readying fifteen (15) high speed central count optical scanners, see Platten Affidavit at paras. 22-23;
- Readyng 6,000 voting booths that will be used in the election, see Platten Affidavit at para. 24;
- Training 2,200 poll workers, and preparing to train approximately 4,800 more poll workers, for the use of CCOS, see Platten Affidavit at para. 29;
- Implementing a comprehensive voter education initiative that explains how to properly mark the paper ballot, notifies voters not to cast multiple votes for an office except when indicated, instructs voters on how to correct an improperly marked ballot before it is cast and counted, and informs voters that a replacement ballot will be available to correct an erroneous vote, with this information being distributed by (1) mailing understandable brochures to every registered voter, (2) distributing similar handouts to every voter who appears at a voting location, and (3) disseminating public service announcements through print and electronic media outlets with the largest audience, including the Plain Dealer, Sun, and Call and Post newspapers, local radio stations, and all local television stations, at an approximate cost of \$300,000, see Platten Affidavit at paras. 30-35 and Platten Affidavit Exhibits D through J;
- Simultaneously, the Board of Elections and its legal counsel began the process of negotiating a contract with Election System & Software (ES & S) for the lease of fifteen (15) high speed central count optical scanners for the March 4, 2008 primary election, at a public cost of \$1,467,346.00. (See “ES&S Voter Tabulation System and Services Agreement,” Platten Affidavit Exhibit M.

Needless to say, preparations for the March 4, 2008 primary election continue not only as of this writing but indeed as of this reading.

Plaintiff American Civil Liberties Union of Ohio (ACLU) understood as early as December 10, 2007 that Cuyahoga County was considering whether to replace its DRE system

with a CCOS system. On that date, Meredith Bell-Platts of the ACLU wrote to both Brunner and the Board of Elections stating as follows:

We understand that a review of Cuyahoga County's direct record electronic voting system has been undertaken and that recommendations may be imminent. We further understand that one option under consideration is eliminate the current system and move to a central-count optical scan system.

\* \* \*

Accordingly, we strongly urge that Cuyahoga County avoid moving to a non-notice optical scan voting system. We respectfully request a response within one week of this letter, by the close of business on Monday, December 17, 2007.

On December 27, 2007, the ACLU acknowledged Secretary of State Brunner's December 21, 2007 decision that caused Cuyahoga County to replace its DRE system with a CCOS system.

On January 17, 2008, the ACLU and plaintiffs Amanda Shaffer and Michael Montgomery filed this lawsuit. Although the complaint specifically requests injunctive relief, the plaintiffs failed to move for any provisional relief. Instead, the Court of its own initiative, scheduled a January 24, 2008 telephonic status conference during which the Court noted the impending election, and inquired whether the plaintiffs were going to file a motion seeking injunctive relief. The plaintiffs were given until twelve o'clock midnight on January 28, 2008 to move for a preliminary injunction, with the defendants given until twelve o'clock noon on February 4, 2008 to respond, so that the Court could hear and consider the matter on February 5, 2008.

On January 28, 2008, the plaintiffs filed their motion for a preliminary injunction.

The Cuyahoga County defendants respectfully urge this Court to deny the plaintiffs' motion for a preliminary injunction.

## ARGUMENT AND LAW

### **I. IT WILL NOT BE POSSIBLE TO CONDUCT THE MARCH 4, 2008 PRIMARY ELECTION IN THE MANNER NOW DEMANDED BY THE PLAINTIFFS.**

The plaintiffs have asked this Court to enjoin Cuyahoga County from conducting any election, including the impending March 4, 2008 Presidential primary election, by using the CCOS voting system or any other “non-notice” 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. The upshot of the plaintiffs’ motion for a preliminary injunction is that the plaintiffs want the Court to stop the March 4, 2008 primary election from occurring in Cuyahoga County unless Cuyahoga County uses a “notice” voting system such as a DRE system or a Precinct Count Optical Scan (PCOS) system.

Deferring for the moment any discussion of the merits of the plaintiffs’ claim, the reality here is that it will not be factually possible for Cuyahoga County to use either a DRE or a PCOS system for the March 4, 2008 primary election. Because the plaintiffs did not act sooner, election day is now just four (4) weeks away. The timing of the plaintiffs’ request for an injunction does not leave sufficient time to transition from CCOS to either DRE or PCOS, even if the steps necessary to make a change were to occur without a single glitch. Because the relief they seek is not practically feasible, the plaintiffs’ request for a preliminary injunction should be denied.

With regard to the use of a DRE voting system, certain actions must occur before such a system can be operational. The minimum steps necessary for Cuyahoga County to use of a DRE system include the following:

- Retrieve 5,100 DREs from storage and modify warehouse electrical configuration 2 weeks
- Conduct pre-diagnostic testing to ensure that DREs are operable 2 weeks
- Discharge and charge 5,100 DREs 3 weeks
- Conduct DRE logic and accuracy testing 2 weeks
- Deliver 5,700 DREs to 576 voting locations 2 weeks

See Platten Affidavit at paras. 36-41 and Exhibit B.

Assuming that Cuyahoga County began immediately on February 5, 2008 to convert from the CCOS system to the DRE system, and assuming that the necessary minimum actions described above occurred flawlessly, the earliest date on which the Presidential primary election could occur using a DRE system in Cuyahoga County would be *April 22, 2008*. See Platten Affidavit at paras. 36, 42. And this does not even take into account the time necessary to produce a re-formatted absentee ballot. See Platten Affidavit at para. 43. Nor does it take into consideration the minimum one (1) month period of time necessary to train poll workers, who vary from election to election, on the DRE system. See Platten Affidavit at para. 44.

Thus under even the best of circumstances, it is not practically feasible for Cuyahoga County to conduct a Presidential primary election on March 4, 2008 with a DRE system. It should also be recalled that when Cuyahoga County last used its DRE system in the November 6, 2007, it experienced repeated server crashes that shut the system down for reasons that remain unknown. And that was for an off-year election that had a less than 20% voter turnout. See Platten Affidavit at para. 9. The March 4, 2008 Presidential primary election is currently projected to have a voter turnout rate of between 30% to 40%, or about between 314,000 and 420,000 registered Cuyahoga County voters. See Platten Affidavit at para. 16. National news

reports, moreover, have indicated that voter turnout in this current election cycle is already exceeding previous records. The plaintiffs' attempt to have this Court order the election to be conducted by use of a dubious DRE system is at best ill-advised.

It likewise is not practically feasible for Cuyahoga County to conduct this election by using a PCOS system. Apart from the security vulnerabilities identified by Secretary of State Brunner that caused her to prefer CCOS over PCOS, and even without regard to the time and work that would be necessary just to obtain and prep such devices for use, ES & S has indicated that it does not have enough PCOS devices in inventory for Cuyahoga County to use in any event. See "Declaration of Todd Urosevich," Exhibit 2.

In particular, ES & S has indicated that the actual number of unallocated machines available in December 2007 was approximately 550 units. See "Declaration of Todd Urosevich" at para. 11. But Cuyahoga County has 1,436 voting precincts, voting at 576 voting locations. See Platten Affidavit at para. 17. At present, ES & S could not provide Cuyahoga County with a quantity of Model 100 PCOS equal to the number of Cuyahoga County's 576 voting locations. See "Declaration of Todd Urosevich" at para. 12. And even if Cuyahoga County were able to lease, at additional public expense, all available PCOS devices for use in Cuyahoga County's 576 voting locations, see Platten Affidavit at para. 17, that would at best put one (1) PCOS device in most, but not all, voting locations. Furthermore, because each voting location obviously covers numerous individual voting precincts, that single device would have to service all voters from all precincts at that location. One can easily imagine the long lines that will result when voters, who have marked their ballots at the private voting booth, must then wait single-file to run the ballot through the PCOS device in order to check for errors before finally casting the ballot. if the Cuyahoga County Board of Elections is anticipating a voter turnout for the March

4, 2008 election of 314,000 to 420,000 voters, and if it is correct that over 100 voting locations serve four or more precincts, ES & S believes that having only one Model 100 in each voting location would be inadequate. See “Declaration of Todd Urosevich” at para. 13. And that is to say nothing of the task of training 7,000 poll workers on the use of this system.

In short, it is not practically feasible for Cuyahoga County to use either a DRE or a PCOS voting system in the March 4, 2008 primary election. Because of the timing of their request for a sweeping change in voting systems, there really is no effectual remedy available to the plaintiffs at this time. Nor would the extraordinary remedy of injunction be prudent here when the plaintiffs justify their demand largely on speculation with no reason to think that a fundamental change in voting systems now would result in any appreciable or statistically significant improvement in residual votes and instead would likely result in mass chaos and confusion. The harm wrought by this untimely request for injunctive relief will far exceed any marginal benefit that the plaintiffs might hope to attain.

In *Lucas County Democratic Party v. Blackwell*, 341 F.Supp.2d 861 (N.D. Ohio 2004), the court denied a motion for a preliminary injunction filed eighteen (18) days before the election because, “[s]imply put, there is no appropriate remedy available to the plaintiffs at this time.” *Id.* at 864. In that case, the plaintiffs contested the policy of not processing incomplete voter registration applications. Observing that there was not enough time to develop the evidentiary record necessary to determine whether the plaintiffs were likely to succeed on the merits and that the untimely request for an injunction suggested that any supposed irreparable harm was slight, the court said:

[I]t would be entirely improper, and substantially disruptive of the election process and its orderly administration for me to order Ohio’s County Boards to re-open in-person registration from now until election day. Doing so would require me to override the requirement of Ohio’s election law that an individual

be registered to vote for thirty days before an election. O.R.C. § 3503.06. That requirement serves and promotes orderly administration of elections. In addition, it enables election officials to verify information, including the driver's license and social security number of persons who have registered, thereby avoiding fraud.

The public interest would be ill-served by an injunction at this time.

*Id.* at 864-865.

As disruptive as the rushed registration may have been in *Lucas County*, that disruption pales in comparison to the chaos that would ensue from a wholesale switch in voting systems that the plaintiffs have asked this Court to order a mere four (4) weeks before election day. The Court should refuse the plaintiffs' request because Cuyahoga County is prepared to conduct the election using CCOS with measures in place to specifically target residual votes and it is not practically feasible to conduct this election by using either of the "notice" systems that the plaintiffs appear to prefer.

The plaintiffs' failure to act with the promptness necessary to obtain effective relief is grounds to deny them an injunction at this late date. In *Kay v. Austin*, 621 F.2d 809 (6<sup>th</sup> Cir. 1980), the court held that a candidate for President was not entitled to equitable relief as a result of laches:

Those courts which have considered comparable claims have in effect balanced the interest of the parties and required that any claims against the state procedure be pressed expeditiously. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S.Ct. 5, 12, 21 L.Ed.2d 24 (1968). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights. In this case, Kay waited until nearly two weeks after he knew the choice of the candidates would be made and further delayed eleven days before filing suit. During this time, the state proceeded with election preparations. \*\*\* On the basis of these facts before it, it is the conclusion of this Court that the failure of the appellant to press his case when he should have known that an injury had occurred is fatal to his receiving any relief.

*Kay*, 621 F.2d at 813.

Similarly, the plaintiffs here were plainly aware of the December 21, 2007 decision by which Cuyahoga County was to use CCOS in the March 4, 2008 primary election. Yet the plaintiffs waited until January 17, 2008 to file suit, and then waited until January 28, 2008 – at the Court’s grace – before asking this Court to issue an injunction that will disrupt an election that is now just four (4) weeks away. The plaintiffs’ failure to act with the requisite diligence has effectively precluded any effective relief in this case and should accordingly preclude their request for a preliminary injunction at this late date.

**II. IT IS IN THE PUBLIC INTEREST TO CONDUCT THE MARCH 4, 2008 PRIMARY ELECTION AS CURRENTLY SCHEDULED.**

There is to be sure a strong public interest in the smooth and effective conduct of public elections that militates against significant changes when the election is imminent. *See Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 551 (6<sup>th</sup> Cir. 2004).

Acknowledging in *Purcell v. Gonzalez*, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006), that “[a] State indisputably has a compelling interest in preserving the integrity of its election process,” the United States Supreme Court directed that courts faced with applications to enjoin a State’s election procedures just weeks before an election must

weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

*Purcell v. Gonzalez*, 127 S.Ct. at 7, 166 L.Ed.2d 1.

In the matter at hand, the Presidential primary election is just four (4) weeks away. But as heavily as the proximity of this election may weigh, a consideration of equal if not greater

significance here is the fact that in preparing to use CCOS for this election, Cuyahoga County was mindful of the potential for voter error that is the very basis for the plaintiffs' lawsuit and, most importantly, has taken affirmative action to implement a far-reaching voter education initiative designed to reduce if not substantially eliminate the potential for voter error. This voter education initiative is at least consistent with that which the United States Congress sanctioned under § 15481(a)(1)(B) of HAVA.

In particular, 42 U.S.C. § 15481(a) provides as follows:

Each voting system used in an election for Federal office shall meet the following requirements:

(1) In general

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office—

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

**(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by—**

**(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and**

**(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).**

C. The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

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42 U.S.C. § 15481(a) (emphasis added).

As it relates to the instant case, Cuyahoga County has already prepared a comprehensive voter education initiative designed specifically to (1) educate voters as to how to properly mark the paper ballot; (2) notify voters not to cast multiple votes for an office except when indicated; (3) instruct voters on how to correct an improperly marked ballot before it is cast and counted; and (4) inform voters about the availability of a replacement ballot to correct an erroneous vote.

This voter education initiative is being accomplished in multiple ways intended to ensure that the information reaches each and every voter by one or more of the following means:

- Mailing understandable brochures to every registered voter;
- Distributing similar handouts to every voter who appears at a voting location; and
- Disseminating public service announcements through print and electronic media outlets with the largest audience, including the Plain Dealer, Sun, and Call and Post newspapers, local radio stations, and all local television stations.

See Platten Affidavit at paras. 30-35 and Platten Affidavit Exhibits D through J. The Cuyahoga County Board of Elections expects to spend approximately \$300,000 just on voter education.

See Platten Affidavit at para. 30.

Cuyahoga County's voter education initiative readily satisfies the standards prescribed under § 15481(a)(1)(B).<sup>1</sup> Nothing in the plaintiffs' filings here suggests that a voter education program undertaken pursuant to § 15481(a)(1)(B) would be constitutionally deficient. The plaintiffs assuredly have not challenged the constitutionality of § 15481(a)(1)(B). Because Cuyahoga County has already taken appropriate steps to address the very issue about which the plaintiffs have sought extraordinary judicial relief, there is no compelling need for this Court to issue an injunction that would ill serve the strong public interest in conducting public elections.

In the landmark decision of *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court noted that "it would be the unusual case" for a court to refrain from taking appropriate action to ensure that future elections are not conducted under an unconstitutional legislative apportionment scheme, but even then, the Court said this:

However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make

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<sup>1</sup> Plaintiffs' expert, Dr. Shamos, asserts that "[s]ubparagraph B is a grandfather clause that permitted jurisdictions that had already adopted CCOS systems to continue using them" so long as those jurisdictions instructed voters about over-voting and that subparagraph B "clearly deprecates CCOS systems and was not intended to provide a future exemption for jurisdictions which, as of the effective date of HAVA, were not using them." See Shamos Declaration at ¶27. Neither Dr. Shamos nor the plaintiffs provide any legal authority whatsoever for this pronouncement. Nothing in 42 U.S.C. § 15481 or any other provision of HAVA suggests that Congress intended to outlaw CCOS systems or restrict their use to jurisdictions already using them. Dr. Shamos's assertion should be rejected.

unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

*Reynolds v. Sims*, 377 U.S. at 585.

In the instant case, the public interest would be better served by permitting Cuyahoga County to continue the preparations necessary to conduct the March 4, 2008 Presidential primary election using CCOS in conjunction with the prepared comprehensive voter education initiative. The Cuyahoga County defendants respectfully urge this Court to deny the plaintiffs' motion for a preliminary injunction that would likely cause more harm than good.

**III. PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED.**

When deciding whether to grant a preliminary injunction, a district court must consider and balance the following four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) whether the public interest would be served by granting the injunction. *See Tucker v. City of Fairfield, Ohio*, 398 F.3d 457 (6<sup>th</sup> Cir. 2005); *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6<sup>th</sup> Cir. 2004).

For purposes of this discussion, the Cuyahoga County defendants will address the last three factors first. For the reasons that follow, the plaintiffs' motion for a preliminary injunction should be denied.<sup>2</sup>

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<sup>2</sup> Because it is likely that many of the reasons advanced by defendant Brunner in opposition to the plaintiffs' motion for preliminary injunction will be shared by the Cuyahoga County defendants, this brief respectfully adopts and incorporates Secretary Brunner's discussion by reference herein to avoid an unnecessary duplication of argument.

**A. Cuyahoga County's use of CCOS in the March 4, 2008 primary election will not cause irreparable injury.**

Cuyahoga County's use of CCOS in the March 4, 2008 primary election will not cause irreparable injury for the following reasons.

First, the claimed "injury" that is said to be irreparable here is that the plaintiffs may be denied their right to vote because the CCOS system itself will not give the plaintiffs notice of a residual vote. But the CCOS system does not truly cause the alleged injury. That is, unlike a voting system that arguably causes an over-vote or an under-vote so that the ballot does not reflect accurately the voter's actual intent, the CCOS itself does not cause either an over-vote or an under-vote. In the CCOS, the voter receives a paper ballot and a pen. The voter uses the pen to mark on the paper ballot the voter's selection for the various candidates and issues. The ability to have the paper ballot reflect accurately the voter's true intent is wholly within the power of the voter. No other instrumentality or technology associated with the CCOS can cause the voter to either over-vote or under-vote on the paper ballot. Regardless of whether some other voting system may perform additional functions, the reality is that any residual vote that occurs on an optically scanned paper ballot is solely the result of voter error, not voting system error.

Second, a residual vote will not of itself present an "irreparable" injury because, as has been noted, Cuyahoga County has prepared a comprehensive voter education initiative that will provide voters with notice and instructions that will enable voters to avoid residual votes and cast ballots that reflect the voters' true intent, in accordance with 42 U.S.C. § 15481(a)(1)(B). Thus any potential "injury" here really is not "irreparable" because the voters will have received information explaining how to mark the ballot properly, not to cast multiple votes for an office except when indicated, how to correct an improperly marked ballot before it is cast and counted, and that a replacement ballot is available to correct an erroneous vote. This information should

enable voters to cast their ballot so that their vote will be counted accurately. Any theoretical injury thus is not irreparable and may be reduced if not eliminated by an informed citizenry, which of course is the very foundation upon which self-governance must depend.

In short, the plaintiffs have not made a strong showing that they will suffer irreparable injury unless an injunction issues.

**B. Requiring Cuyahoga County to change voting systems at this time will cause substantial harm to others.**

The plaintiffs fail to give due consideration to the harm that will ensue if Cuyahoga County were ordered to change from the CCOS to some other voting system.

To begin, a change in election voting systems a mere four (4) weeks before the March 4, 2008 primary election date would likely jeopardize Cuyahoga County's very ability to conduct that election effectively. As has been discussed previously, the conduct of an election requires comprehensive preparation under even the best of circumstances. Ballots must be prepared. Voting systems must be tested and re-tested. Elections workers must be trained. If Cuyahoga County were directed to change voting systems at this late date, there simply is not sufficient time to do those things that would be necessary to conduct that election effectively. Any attempt to rush imposition of a different voting system at this late date is a recipe for disaster.

A change in voting systems at this time would additionally impose an onerous if not impossible burden on Cuyahoga County elections officials and workers. No matter how much additional effort these workers could muster to switch systems now, it is unrealistic to expect that the *months* of preparation that is ordinarily necessary to prepare for an election could be accomplished effectively in mere *weeks* for a *Presidential primary election*.

Most importantly, a change in voting systems now would ultimately cause substantial harm to the public. "Confidence in the integrity of our electoral processes is essential to the

functioning of our participatory democracy.” *Purcell v. Gonzalez, supra*, 127 S.Ct. at 7, 166 L.Ed.2d 1. Voters reasonably expect their elections to be conducted fairly and efficiently. An order that requires a voting system change when there is insufficient time to ensure that the change can be accomplished effectively would likely undermine public confidence in the conduct of public elections. The precipitous order sought by the plaintiffs here would itself inflict irreparable injury on Cuyahoga County voters and the democratic process far beyond that which the plaintiffs can plausibly claim.

In short, the substantial harm to others that the requested injunction would cause dramatically outweighs the speculative benefit the plaintiffs would hope to attain by the injunction.

C. **The public interest would not be served by requiring Cuyahoga County to change voting systems again.**

Beyond the public harm that would likely ensue if a voting system change were ordered at this time, there would not be any appreciable public interest served by requiring Cuyahoga County to change its voting system now.

First, the plaintiffs insist that any voting system must enable the voter to correct a ballot that contains over-votes or under-votes that do not accurately reflect the voter’s intent. But voters using the paper ballot themselves have the ability to control their ballot selections and, coupled with Cuyahoga County’s comprehensive voter education initiative, the voters will be fully equipped to cast an accurate vote and to have that vote counted. There is no reason to presume that another voting system having some different functions will necessarily be appreciably superior to a voting system that relies upon an informed electorate exercising the franchise.

Second, the public interest assuredly would not be served by requiring Cuyahoga County to stop the ongoing preparations necessary to conduct this primary election with CCOS and switch over to another voting system just four (4) weeks before election day. There is not sufficient time to prepare and implement a different voting system. There is not sufficient time to prepare and train elections workers to utilize a different voting system. There simply is not sufficient time to ensure that a different voting system will operate effectively under these circumstances.

**D. The plaintiffs do not have a strong likelihood of success on the merits.**

So as not to consume this Court's time with duplicative argument, the Cuyahoga County defendants adopt and incorporate by reference the argument ably set forth by defendant Secretary Brunner which demonstrates that plaintiffs have not demonstrated a strong likelihood of success on the merits. The Cuyahoga County defendants would nevertheless offer four (4) particular points for the Court's consideration.

First, the burden placed upon a voter by the mere possibility of over-voting in a race with multiple candidates is not a severe burden that requires a compelling state interest. As set forth in defendant Secretary Brunner's Memorandum Contra to plaintiff's motion for preliminary injunction, the United States Supreme Court has held in *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) that this Court should apply a "flexible standard" in cases in which state election laws are challenged. Specifically, this Court must:

weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

*Id.* at 43 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

In this case, subjecting voters to the possibility that their over-vote error on a particular race will disqualify only that vote (and not the voter's entire ballot) is not the type of "severe" restriction which must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). Instead, it is a "reasonable, nondiscriminatory restriction" upon the First and Fourteenth Amendment rights of voters, and "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788.

In this case, the restrictions placed upon voters by the decision to utilize central count optical scan are nondiscriminatory, since all voters in Cuyahoga County will be subjected to the same processes and rules regarding the handling and tabulation of their ballots. As explained in the Affidavits of both Christopher Nance and Jane Platten, the utilization of central count optical scan technology was a reasonable, if not absolutely necessary, response to a crisis in confidence that occurred as a result of both the failure of Diebold DRE technology to perform adequately during the November 2007 election and the subsequent failure of Diebold to adequately address such failures.

Second, and despite the plaintiffs' contention that a CCOS system does not provide residual vote notification that some other systems may provide, the indisputable fact is that the CCOS system itself does not *cause* the residual vote. The CCOS system additionally does not deny anyone of the opportunity to vote, nor does it deny anyone of the right to have their vote counted.

Third, there are no unequal or disparate standards used to count votes with CCOS. All ballots are counted in the same manner using the same optical scanning methodology.

Fourth, the plaintiffs' argument would effectively prohibit Cuyahoga County, and presumably every other voting jurisdiction in the United States, from using absentee or early voting because that system likewise does not provide notification of a residual vote. Plaintiffs allege in their complaint that: "Ohio Maintains a Non-Uniform and Unequal System of Voting." (Complaint, p. 6) That claim is based upon the fact that some counties (those that utilize Diebold DREs and ES&S precinct-based optical scan machines) utilize voting systems with so called "error notification," while others (those who use ES&S central count optical scan) do not. Plaintiffs allege that this lack of uniformity in voting violates the constitutional rights of those who vote without the benefit of "error notification." They seek an order enjoining the defendants: "from selecting or using, other voting systems that lack effective error notification." Complaint, Prayer for Relief, para. C. The fallacy of plaintiff's claim is that even voting systems that provide error notification do so only for voters who vote at polling places; *such systems do not provide error notification to absentee voters.* (Platten Affidavit para. 46).

All states recognize some form of absentee voting, whereby a voter fills out a paper ballot and mails it to the election authorities for processing. None of the voting systems currently in use in the United States provides for error notification of absentee ballots that are returned by mail. In Ohio, every county in the State provides absentee voting whereby the voter receives a paper ballot by mail, fills in the paper ballot and returns it to the Board of Elections in an identification envelope. The identification envelope is examined and then the ballot is separated from the envelope before it is scanned. After that point in time, the ballot is no longer associated with the voter's name. Accordingly, even assuming the utilization of a scanning system that provides error notification, there is no way to identify the voter with the ballot and thus should an

over-vote be detected, there is no way to query the voter so as to enable the voter to correct the error.

While Ohio law formerly required a voter to be either: (1) absent from the State on election day, or (2) infirm to be entitled to vote absentee, recent legislation has liberalized the utilization of absentee voting. Under Ohio's current "no-fault" absentee law, any registered voter may choose to vote absentee. Once an absentee ballot is received by the Board of Elections, the ballot and the identification envelope are separated to preserve the privacy of the voter. The absentee ballots are then scanned or otherwise processed without any indication of who the voter is. This process renders it impossible the ability to notify the voter of any under-vote or over-vote on his or her absentee ballot. Even assuming the utilization of a scanning system that provides error notification, there is no way to query the voter as to his or her perceived error to enable the voter to correct the error.

The just described absentee voting procedure is, to the best of the undersigned's knowledge, universal throughout the United States. That is, no matter what the voting system, no matter whether the system provides over-vote or under-vote protection, such protection does not and cannot extend to that portion of the electorate that utilizes mail-in absentee voting.<sup>3</sup>

The unavoidable fact renders impossible the relief sought by plaintiff's in this case, since there is no way to provide "second chance" voting to absentee voters. Thus, to that extent, even if one accepts plaintiffs' premises, and even if this court ordered that all boards of election be required to go to a technology that contained error notification, there will always be an "unequal system of voting" in which some voters will not use that technology when voting absentee. If, as plaintiffs claim, the Equal Protection Clause forbids the maintenance of any system in which some voters benefit from error notification while others do not, then virtually every State's

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<sup>3</sup> An extreme example of the foregoing is the State of Oregon, which utilizes 100% mail-in voting.

voting system must be deemed unconstitutional. Moreover, any remedy of such an unconstitutional system would have to forbid the utilization of absentee voting as it is know in the United States today, or devise a completely novel system of error notification for absentee voters.

In short, Cuyahoga County had rational if not compelling reasons to use the CCOS system in the March 4, 2008 primary election. That system will not deny voters of Equal Protection or Due Process of Law and will not violate voters' rights under the Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a).

### **CONCLUSION**

When the public interest is properly considered and balanced here, that interest would be better served by denying the injunction and permitting Cuyahoga County to conduct the election using CCOS. Plaintiffs' motion for a preliminary injunction should accordingly be denied.

Respectfully submitted,

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ATTORNEYS FOR CUYAHOGA COUNTY  
DEFENDANTS

**CERTIFICATE OF SERVICE**

I certify that on the 4<sup>th</sup> day of February 2008, the foregoing Cuyahoga County Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ David G. Lambert  
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