

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

American Civil Liberties Union of Ohio, *et al.*,

Plaintiffs,

vs.

Case No. 1:08-CV-00145

Jennifer Brunner, Secretary of State, *et al.*,

Judge Kathleen M. O'Malley

Defendants.

**DEFENDANT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S
MEMORANDUM CONTRA TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The right to vote is the single most important right of any citizen of a free society. It is the springboard from which all other rights flow and are guaranteed. Naturally, the right to vote includes the right to receive a ballot and to cast it for the candidates of one's own choice. It also includes the right to have a vote tabulation system that is safe, secure, and accurate.

Cuyahoga County experienced major problems during the vote tabulation from the November 2007 general election. The Diebold Direct Recording Electronic ("DRE") voting system and its GEMS Server which counts ballots from the individual DREs crashed twice on election night. Precinct results that had been previously uploaded into the GEMS Server disappeared from the screen when the system was finally restored. Although these results were eventually recovered, this delayed the vote counting process in Cuyahoga County. Furthermore, risks identified in the Secretary's Project EVEREST Report on the safety and security of Ohio's various voting systems showed that there were issues that needed to be addressed by the manufacturer but could not be corrected before the March 2008 primary election.

Secretary of State Brunner, who serves as the State's chief elections officer and is responsible for implementing the requirements of Ohio's Elections Code, made specific recommendations to Cuyahoga County about addressing its voting system for the March 2008 primary election. It had become readily apparent that Cuyahoga County could not safely, accurately, securely continue to use the Diebold DRE system for March 2008. Diebold was not able to correct the problems its system encountered in time for the primary. Thus, the Secretary recommended that the county adopt a central count optical scan ("CCOS") voting system for the March 2008 primary election. While the Secretary understands the benefits of error notification in voting systems, the CCOS voting system was the most reliable system that could be

implemented in such a tight deadline. This is a system that is currently used by all 88 Ohio counties to count absentee ballots, and is also specifically permitted under federal law. Secretary Brunner proposed this system primarily because it was a solution in which elections administrators and the public could have confidence. It was a solution that could be implemented by the Cuyahoga County Board of Elections in time for the March 2008 vote and it was a system that reduced the chances for a failure similar to the one experienced in Cuyahoga County in November 2007 when only approximately 15% of the electorate cast a ballot. Thus, Secretary of State Brunner eventually broke the tie vote of the Cuyahoga County Board of Elections and adopted a central count optical scan balloting system for Cuyahoga County since it was the most reasonable alternative available.

Instead of recognizing the extraordinary efforts of the employees of the Cuyahoga County Board of Elections who have been working, in some cases, twelve hour shifts, seven days a week, in order to prepare for this election, the Plaintiffs in this case simply sat back and did nothing. They waited 37 days to file a preliminary injunction motion against the central count optical scan voting system. Now, only 29 days before the election and only four days before absentee ballots can be mailed out, the Plaintiffs attempt to test the constitutionality of a federal statute on the backs of Cuyahoga County's voters. While the elections professionals in both the Secretary's office and the Cuyahoga County Board of Elections have been working hard to make sure these very voters do not experience the same problems they have experienced in the past, the Plaintiffs have sought to change the rules of the March 2008 primary in the eleventh hour. This would disrupt all of the work and training that has already occurred, and force the county board of elections to resort to a voting system that currently is not adequate to handle a county as large and complex as Cuyahoga County.

Furthermore, the Plaintiffs seek to challenge the use of the CCOS despite the fact that such a system does not violate their constitutional rights or the rights of any voter in Cuyahoga County. The Plaintiffs unwisely ask this Court to hold that it is unconstitutional to employ a voting system that fails to provide a technological signal to each voter of a possibly unintended residual vote. However, voters cast their votes throughout the United States using multiple methods that fail to provide electronic error notification, including absentee voting, provisional voting, vote by mail voting, and curbside voting (in the case of disabled voters). If the Court adopts Plaintiffs' position that electronic error notification is constitutionally required, the Court will be effectively ruling that the constitutional rights of every American who votes in any of these ways have been deprived. Rather than increasing the exercise of the electoral franchise, the unfortunate effect of adopting Plaintiffs' contentions would be to decrease the availability of that franchise by invalidating voting systems throughout the nation. Such a holding would be unfortunate at best. This Court should reject that invitation and the Plaintiffs' request for emergency relief.

STATEMENT OF FACTS

The State of Ohio in general and Cuyahoga County in particular have undergone a tremendous change in the way in which electors cast ballots. Through the 2004 election cycle, Ohio was predominantly a punch card state. With the introduction of federal and state money under the Help America Vote Act, 42 U.S.C. § 15301, *et seq.*, that began to change. In order to provide a frame of reference for both the factual and legal arguments for this case, however, it is necessary to examine the manner, scope, and reasons for changes to the election administration process in Cuyahoga County specifically.

During the 2004 Presidential election, Cuyahoga County, like most of the rest of the State of Ohio, used punch card ballots. Several precincts in the county had problems such as long lines of voters at polling locations or polling locations that failed to include some registered voters in their poll books. Exh. A, Nance Aff. at ¶ 7. As a result of the problems in Cuyahoga County and elsewhere in the State of Ohio, Representative Stephanie Tubbs-Jones sponsored a challenge to Ohio's Electoral College votes during the opening of those votes on January 6, 2005. *Id.* at ¶ 8.

Michael Vu had started as the Director of the Cuyahoga County Board of Elections in August 2003 and had made a number of organizational changes to the board including reducing the overall number of board of elections employees by approximately one-third. *Id.* at ¶¶ 11-12. After the 2004 Presidential election, Cuyahoga County experienced an uneventful 2005 prior to the implementation of Cuyahoga County's new DRE voting system. *Id.* at ¶ 13.

But, the May 2006 primary election was the first election in Cuyahoga County that used a DRE system instead of a punch card system as the main voting system for the county. *Id.* at ¶ 14. In addition to DRE's, during the May 2006 primary election, Cuyahoga County also used a Diebold optical scan balloting system to process absentee ballots. *Id.* at ¶ 15. Cuyahoga County had a 100% failure rate in the counting of the absentee optical scan ballots. Because of poor communication between the board, Diebold, and the printing company, the specifications for the absentee ballots were incorrect and the scanner could not read them. *Id.* at ¶ 16. In order to count the absentee ballots, a team of one Democrat and one Republican board employee had to vote each absentee ballot on a DRE. This delayed the overall state count by five days. *Id.* at ¶ 17.

In addition to the problems with absentee ballots, Cuyahoga County had problems with their DRE voting system in the May 2006 primary election. It experienced intermittent failures of voting machines, a high number of poll workers failed to show up for work on election day, some precincts did not open on time, and other precincts did not have the appropriate electrical equipment to be able to plug the DREs into the wall sockets. *Id.* at ¶¶ 18-19.

As a result of these failures, the Board of Elections and the County Commissioners established the Cuyahoga Election Review Panel in order to review all aspects of the elections administration system and to make recommendations about the ways that system can be improved. *Id.* at ¶¶ 20-21. After interviewing numerous individuals including board members, staff, poll workers, and others, the panel issued its report. *Id.* at ¶¶ 22-23.

In addition to these administrative problems, three Cuyahoga County Board of Elections employees were indicted and two of the employees were convicted on felony counts concerning the manner in which the Board conducted the 2004 presidential recount. The convictions were eventually overturned on appeal and the two employees eventually pled guilty on reduced charges. In addition to this problem, the Cuyahoga Election Review Panel made a comprehensive set of recommendations to improve elections administration in the county. *Id.* at ¶ 26.

In February 2007, the Board accepted the resignation of the Director and Deputy Director. After that, all four members of the Board resigned and were replaced by Secretary of State Brunner who placed the Cuyahoga County Board of Elections under administrative oversight. The Board also hired a new Director and Deputy Director, updated many of their procedures, and improved communication between themselves and the Secretary of State's office. *Id.* at ¶¶ 27-29.

At the same time that these changes were occurring at the Cuyahoga County Board of Elections, Secretary of State Brunner authorized Project EVEREST in order to study all voting systems used in the State of Ohio. The purpose of the study was to examine the risks and vulnerabilities of each system while also examining the reliability and safety of each system. *Id.* at ¶ 32. On December 7, 2007, Secretary of State Brunner received the final reports from all three testing entities that participated in Project EVEREST. Starting that day, she and other members of her office began reviewing those unredacted reports and she began formulating recommendations based upon the results of the study. *Id.* at ¶¶ 39-40. She also started working with a bipartisan group of 12 elections officials who reviewed the Project EVEREST Report. *Id.* at ¶ 41. On December 14, 2007, Secretary Brunner released the Project EVEREST Report and her recommendations. *Id.* at ¶ 42.

Prior to the release of the Project EVEREST report, Cuyahoga County experienced another problem during the November 2007 election. During the vote tabulation, the Diebold GEMS server, which is responsible for counting ballots, crashed twice. After Cuyahoga County had uploaded around 300 memory cards, the computer screen simply read “GEMS ERROR” and then went blank. After the server came back online, several of the precincts which had previously uploaded their results were missing from the displayed results. These crashes caused a substantial delay in processing the unofficial canvass. *Id.* at ¶¶ 49-57.

Cuyahoga County is the largest election jurisdiction in the State of Ohio and one of the top twenty voting jurisdictions in the United States. It has 1,436 precincts and will have approximately 4,300 permutations of the ballot for the March 2008 primary election. *Id.* at ¶¶ 59-60. Because of the complexity of the Cuyahoga County ballot, the county’s prior experiences with Diebold DREs and the Project EVEREST Report, Secretary of State Brunner encouraged

the Cuyahoga County Board of Elections to consider whether the Diebold DRE system could perform adequately during the 2008 Presidential election cycle. *Id.* at ¶ 61. As the State's chief elections official charged with the duty of administering Ohio's elections laws, Secretary Brunner believes that for March 2008 in Cuyahoga County, a central count optical scan voting system provides the most beneficial balance of fairness, safety, security, and is a solution that could be implemented by the Board. *Id.* at ¶ 64.

It was not practical for Cuyahoga County to use a central count optical scan system for the March 2008 primary. Similarly, the Diebold DRE and GEMS server have proven themselves unreliable and inappropriate for use in Cuyahoga County for the March 2008 primary. *Id.* at ¶ 67. Because Cuyahoga County has switched to an optical scan ballot system for the March 2008 election, the board has undertaken a massive public education campaign. Each registered voter in the county will be mailed a pamphlet detailing the proper way to vote an optical scan ballot. In addition, the poll workers will also give each voter on election day a card explaining the proper way to cast an optical scan ballot. Each voting booth will also contain instructions and the ballot box itself will contain a final reminder about the proper way to cast an absentee ballot. *Id.* at ¶¶ 71-78. Finally, based upon the extensive work that must go into getting ready to hold an election, Cuyahoga County could not hold an election on March 4, 2008 if this Court were to enjoin the use of a central count optical scan balloting system in Cuyahoga County. *Id.* at ¶¶ 79-80.

Cuyahoga County is not alone in the use of a central count optical scan system. Van Wert County has also voted to use a central count optical scan voting system as its primary voting system for the March 2008 primary. In addition, all 88 Ohio counties use a central count optical scan voting system as their main voting system for absentee ballots, provisional ballots,

emergency ballots, and for curbside voting as well as for the individuals who feed in voting on a DRE. To date, over 185,000 Ohioans have requested absentee ballots for the March 2008 primary. *See*, Exh. B, Rothschuh Aff. at B. Furthermore, central count optical scan ballots are used as the primary voting system in a number of other states. For example, the State of Oregon uses a central count optical scan balloting system as its sole voting system because the entire state uses a vote by mail system for all elections. It does not have any precinct based voting. *Id.* at A). The same is true in 34 of the 39 counties in Washington State. *Id.* Counties in States as diverse as Arkansas, Kansas, Massachusetts, Montana, Nebraska, Pennsylvania, Texas, West Virginia, and Wisconsin also use central count optical scan systems in some of their counties as their primary voting system. *Id.* Finally, counties or jurisdictions in States as diverse as Alaska, Idaho, Massachusetts, Montana, West Virginia, and Wisconsin also use non-notice voting systems whether it is punch cards or hand counted paper ballots. *Id.*

LAW AND ARGUMENT

A. Plaintiffs' claims are barred by laches because they were not timely asserted.

Due to Plaintiffs' failure to bring their claims in a practicable time period, their motion should be denied. The defense of laches is available whenever there is a lack of diligence on behalf of the party against whom the defense is asserted and there is prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (1961); *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publ'g. Co.*, 839 F.2d 1147, 1154 (6th Cir. 1988). Laches applies with particular force in the context of elections, where "any claims against the state procedure [must] be pressed expeditiously." *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980). The Supreme Court has overturned an injunction against a State election law, in part, on the basis of proximity to elections. *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). In his concurrence, Justice

Stevens noted that by allowing the election to proceed without any injunction provided all courts with a better factual record under which to judge the challenged statute. *Id.* at 8 (Stevens, J., *concurring*). “Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.” *Id.*

This approach has been consistently followed by the various circuit courts. As the Ninth Circuit observed in *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003), “[i]nterference with impending elections is extraordinary,” and Plaintiffs here have lacked diligence in bringing this case. *Id.* at 919. Likewise, the Sixth Circuit found in *Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004), that “there is a strong public interest in smooth and effective administration of the voting laws that mitigates against changing the rules in the hours immediately preceding the election.” *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980); *Nader v. Blackwell*, 230 F.3d 83, 835 (6th Cir. 2000). Indeed that has occurred even in the face of undisputed constitutional violations. *Reynolds v. Sims*, 377 U.S. 533, 585-6, 84 S. Ct. 1362 (1964); *Chisolm v. Roemer*, 853 F.2d 1190 (5th Cir. 1988); *French v. Boner*, 771 F.Supp 896, 902 (M.D. Tenn. 1991).

The facts concerning laches are uncontroverted. The Secretary of State released the Project EVEREST report on December 14, 2007. Compliant, ¶ 37. On December 17, 2007, the Cuyahoga County Board of Elections met to discuss what type of voting system the county would use for the upcoming election. *See* Transcript of Proceedings attached as Exhibit C. On December 20, 2007, the Cuyahoga County Board of Elections tied 2-2 on whether to move to a central count optical scan voting system for the March 2008 primary election. Complaint, ¶ 29. On December 21, 2007, Secretary of State Brunner, pursuant to State law and her role as chief

elections officer, broke that tie vote and voted to move the county to a central count optical scan voting system for the March 2008 primary. *See* O.R.C. § 3501.05; Complaint, ¶ 40.

The Plaintiffs, however, failed to act with the requisite haste and file a lawsuit. This is despite the fact that some of their lawyers testified at the Cuyahoga County Board of Elections against the voting system at issue in this case. Rather, Plaintiffs waited until January 17, 2008—a full twenty-six days after the Secretary of State issued her tie-breaking vote—to file this litigation. And, instead of including a motion for preliminary injunction with the complaint, the Plaintiffs continued to sit on their hands. This Court *sua sponte* held a scheduling conference on January 24, 2008, to determine whether the Plaintiffs in fact still sought emergency injunctive relief prior to the March primary. The Court ordered the Plaintiffs to file a motion for preliminary injunction by midnight on January 28, 2008. Finally, thirty-seven days after the Secretary of State broke the tie vote of the Cuyahoga County Board of Elections, Plaintiffs filed their Motion for Preliminary Injunction. The hearing in this case will occur only twenty-eight days before the March primary election, and only three days before absentee ballots must be ready.

Without providing any answer as to why they waited thirty-seven days to file their Motion for Preliminary Injunction, the Plaintiffs ask this Court to disrupt all of the preparation necessary for the March election. Based upon the clear dictate of the Supreme Court and the Sixth Circuit Court of Appeals, the Plaintiffs have waited too long to bring their motion and this Court should reject their prayer for emergency relief. This delay, coupled with the harm to the public and all the Defendants from the relief requested by Plaintiffs, shows conclusively that laches applies.

B. Plaintiffs have failed to show that they are entitled to a preliminary injunction.

Before issuing a motion for preliminary injunction, the Court must examine four separate factors:

- (1) Whether the movant has a “strong” likelihood of success on the merits;
- (2) Whether the movant would otherwise suffer irreparable injury;
- (3) Whether issuance of a preliminary injunction would cause harm to others; and
- (4) Whether the public interest would be served by the issuance of a preliminary injunction.¹

McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting a preliminary injunction is more “stringent” than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because “the preliminary injunction is an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted).

None of the above factors is supported by Plaintiffs’ motion, therefore Plaintiffs have not shown any legitimate basis upon which they are entitled to a court order enjoining the use of the CCOS system in Cuyahoga County and directing the implementation of an alternate system.

¹ Secretary of State Brunner expressly reserves the right during the preliminary injunction hearing and also in a separately filed motion to dismiss and/or motion for summary judgment to expand the scope of both her legal and factual arguments. Secretary of State Brunner files this memorandum contra on an expedited basis to place on record relevant arguments, both factual and legal, as to why the Plaintiffs’ motion for emergency relief should be rejected.

1. The issuance of a preliminary injunction would be contrary to the public interest and would significantly harm the voters in Cuyahoga County, the voters throughout the State, and the Defendants.

An injunction would prevent voters in Cuyahoga County from participating in Ohio's 2008 primary election and would also destroy the absentee, provisional, and emergency ballot voting systems currently in place in all 88 Ohio counties. In addition, the State of Ohio would be harmed by the issuance of a preliminary injunction because it would result in the loss of sovereignty over its own election system. For all of these reasons, Plaintiffs motion for a preliminary injunction should be denied.

a. Voters in Cuyahoga County would be significantly harmed by the issuance of Plaintiffs' requested injunction

It is simply too late for the Cuyahoga County Board of Elections to change voting systems in time to conduct the March 4, 2008 primary election. Cuyahoga County is Ohio's largest voting district and in the top twenty largest voting districts in the United States. The sheer volume of voters, districts, and precincts in Cuyahoga County make it a district more complicated than any other county within the state. For example, there will be 4,326 permutations of the 598 different ballots that will be voted on in 1,436 different precincts in the 2008 primary. Asking the Cuyahoga County Board of Elections to abandon the planning, training and implementation of the CCOS voting system less than four weeks before the 2008 primary election would have disastrous consequences.

Nor could Cuyahoga County possibly switch to a DRE voting system in time for the March 4, 2008 election. An election using DREs requires programming DREs, performing necessary pre-election maintenance work on the DREs discharging and charging of each DREs battery, delivery of the DREs to the various polling locations, and the training of poll workers.

Exh. A, Nance Aff. at ¶ 79. It would be impossible for the Cuyahoga County Board to complete all of these tasks in less than four weeks. *Id.* Participating in the upcoming primary is certainly in the best interests of the voters in Cuyahoga County, and conversely, an injunction that would prevent this participation would clearly be harmful.

Even if it were possible for Cuyahoga County to switch its voting system in time for the upcoming primary, an order mandating it to switch to a DRE voting system is not in the interest of the voters in Cuyahoga County because this system has proved to be unreliable and problematic in the past. *See* Exh. D, CUYAHOGA ELECTION REVIEW PANEL, FINAL REPORT (July 20, 2006) (hereinafter “ELECTION REVIEW PANEL REPORT”); Nance Aff. at ¶¶ 14-58. For example, in the May 2006 primary election, an “unknown number” of DRE machines crashed or froze; memory cards had “disappeared altogether or were found weeks after the election;” full memory cards storing votes were subject to being overwritten automatically by DREs; voter access cards could be encoded with the wrong ballot without forewarning; and, voter verified paper audit trails were difficult to view and access, causing confusion. ELECTION REVIEW PANEL REPORT at 44-51. Additionally, during the November 6, 2007, general election the computer server used to tally votes recorded on DREs’ memory cards crashed twice, grinding counting to a halt. Nance Aff. ¶¶ 46-58.

Even if it were physically possible for the Cuyahoga County Board of Elections to switch back to its DRE system, the public interest is best served by using the CCOS system. The public has an interest in using systems that are reliable. The DRE voting system as implemented in the past in Cuyahoga County proved highly unreliable. For all of these reasons, Plaintiffs’ motion for a preliminary injunction should be denied.

b. Voters throughout the State would be significantly harmed by the issuance of Plaintiffs' requested injunction

Plaintiffs ask this court to declare all voting systems that lack electronic error notification to be unconstitutional and to enjoin the Secretary of State and from certifying or approving any such systems. Complaint, Prayer for Relief at ¶¶ B-D. This would harm voters throughout the state in ways that the Plaintiffs may not have contemplated. First, absentee, emergency, and provisional balloting in Ohio (all of Ohio's "alternative" voting methods) would be outlawed because they are CCOS voting systems that lack electronic error notification. Second, voters in DRE counties would no longer have the option of casting paper ballots that lack electronic error notification in the upcoming election.²

The vast majority of all voters casting absentee ballots do so using paper optical scan ballots that they then mail in to their respective county board of elections. For obvious reasons, there is no way for these voters to receive electronic notice of an over-voting error (although they may still review their ballot before mailing it in). Similarly, all provisional ballots cast in the State are cast on paper ballots that are only processed after a determination is made regarding the validity of that ballot. Finally, optical scan paper ballots are used in emergency situations in Ohio. For example, if there is an electrical failure at the polls on Election Day, a voter could still cast his or her vote by filling out a paper optical scan ballot. These ballots would then be collected and scanned altogether at a central location at a later time. Issuing the injunction

² If the Plaintiffs claim the Fourteenth Amendment only prohibits the use of a central count voting system, they need to explain to the Court why voters who vote absentee, provisional, emergency, or curbside ballots, or those voters who use a paper ballot in a DRE county are not afforded the same constitutional protections. They further need to explain how that system would not violate the Fourteenth Amendment if it is unconstitutional for Cuyahoga County to use a central count optical scan system as its main voting system. Finally, they need to explain how a person can cast an absentee ballot if a CCOS system is ordered decertified.

sought by Plaintiffs would render each of these voting alternatives unusable and would harm all of the voters who otherwise would have used these alternative voting methods.

Additionally, the issuance of this injunction would undermine the public's confidence in Ohio's election systems. On January 2, 2008, Secretary of State Brunner issued Directive 2008-01. Ohio Sec'y of State Directive 2008-01, Optical Scan Ballots for Voters in Counties Using DREs (January 2, 2008), Attached as Exhibit E. This directive required all counties using DREs to provide non-notice optical scan ballots to any voter who requests it at his or her polling place on election day. The Secretary of State issued this directive to assuage voters who have concerns about electronic voting machines and would therefore prefer to cast a paper ballot. This directive was intended to help prevent a loss of confidence by voters concerned about the ability of electronic voting machines to accurately record and count their ballots. The injunction sought by Plaintiffs would prevent these voters from casting a paper ballot.

A court order prohibiting the use of a CCOS will obliterate Ohio's system of absentee, provisional, emergency and voter-choice optical scan voting. The issuance of such an injunction would seriously harm all Ohio voters.

C. The State of Ohio would be significantly harmed by the issuance of Plaintiffs' requested injunction.

Finally, the State would suffer irreparable injury in the loss of a central aspect of its own sovereignty. Plaintiffs seek to divest the State of Ohio of its ability to decide how elections should be managed. Plaintiffs' logic leads to one end—any time new, different, or “better” voting machines make it possible to reduce, to whatever infinitesimal degree, the amount of residual votes that *could* be cast in an election, the State would be forced, without pause, to adopt such machines wholesale. This is absent any consideration of cost, unforeseeable risks, or the

detrimental effects on voter confidence. As an added consequence, Plaintiffs, and those in a like position, would be put in charge of making election policy for the State of Ohio via a combination of persistent, litigation and pervasive judicial micromanaging. This Court should not allow Plaintiffs to achieve that end.

1. Plaintiffs have failed to demonstrate that they will suffer irreparable injury.

It is settled law that, regardless of its showing on the other factors considered in connection with injunctive relief “[a] Plaintiff must *always* demonstrate some irreparable injury before a preliminary injunction may issue.” *Friendship Materials, Inc. v. Michigan Brick, Inc.* 679 F.2d 100, 104 (6th Cir. 1982) (emphasis added). Two sets of undisputable facts indicate that no such showing can be made here.

Plaintiffs have failed to allege or establish that any voter will be denied the right to vote or that voters in Cuyahoga County will have less of an opportunity than other members of the electorate to participate fully in the electoral process. While the CCOS system does not provide electronic in-precinct over-vote notification, this, in and of itself, does not demonstrate irreparable injury on the part of the Plaintiffs. The Secretary of State and the Cuyahoga County Board of Elections are taking dynamic steps to ensure that every voter understands how to properly fill out the ballot; how to check for errors that may have been made when filling out the ballot; and how to correct the ballot if errors are made. In addition, Plaintiffs have failed to establish that voting systems that do not provide electronic error notification actually result in more residual votes than voting systems which do provide electronic error notification. Because Plaintiffs have failed to demonstrate an irreparable injury, their motion for a preliminary injunction should be denied.

a. Defendants are taking considerable steps to educate voters on how to properly cast votes using the CCOS system and on identifying and correcting ballot errors, such as over-votes.

The Secretary of State and the Cuyahoga County Board of Elections are implementing strong measures to ensure that unintentional residual votes will not be cast on the CCOS system in the upcoming primary election. These steps include a comprehensive plan to educate voters on voting on a CCOS system. As a result of these efforts, Plaintiffs cannot show irreparable harm, because the actions of the Secretary of State and County will reduce, if not statistically eliminate, the number of unintentional provisional ballots that will be cast in Cuyahoga County.

The Cuyahoga County Board of Elections has developed a comprehensive program for educating its voters about CCOS voting. It has prepared a pamphlet that will be mailed to every registered voter in Cuyahoga County, informing them on how to properly fill out their ballots and how to recognize and correct any mistakes. Exh. A, Nance Aff. at ¶ 71. The Board of Elections has also planned 80-100 public outreach programs to present information to community and civic organizations about the proper manner of filling out an optical scan ballot and the negative consequences of over-voting. *Id.* at ¶¶ 72-73. The Board of Elections will pass out informational brochures and postcards at these events as well. *Id.* at ¶ 74. Upon their arrival at the polling place, every voter will be handed a postcard explaining how to properly fill out their ballots and how to correct mistakes that they may make. Additionally, every polling booth will contain literature instructing the individual voter about the proper method of filing out an optical scan ballot, the problems of over-voting, and the method of correcting any mistakes that may be made while filing out the ballot. *Id.* at ¶ 77. Finally, the Cuyahoga County Board of Elections plans to place instructions on the top of the ballot box where voters return their ballot reminding the voter to check their ballot for errors. *Id.* at ¶ 78.

The Secretary of State and the Cuyahoga County Board also are committed to ensuring that pollworkers are well trained on the CCOS voting system. Consequently, pollworkers are being trained and prepared to provide support and guidance to voters to prevent unintentional under-voting or over-voting. Although a foreign language ballot is not required, the Board of Elections has hired poll workers who are fluent in Spanish, Russian, and Arabic, the three foreign languages most predominantly spoken in Cuyahoga County. *Id.* at ¶ 75. The County also plans to translate the instruction brochure into Spanish so that it is available at community outreach programs attended by Spanish-speaking citizens. *Id.* at ¶ 76.

The Defendants' efforts will substantially reduce or statistically eliminate residual voting on the CCOS system. For that reason, Plaintiffs cannot show that they will be irreparably harmed by the voting system that Cuyahoga County intends to employ in the March 4, 2008 primary election. Accordingly, Plaintiffs motion for a preliminary injunction should be denied.

b. Plaintiffs' claims rest on the faulty premise that voting systems that do not provide electronic error notification result in more residual votes than voting systems that do provide electronic error notification.

Before issuing an injunction based on Plaintiffs' constitutional claims, the Court must first accept the underlying assumption that a system that does not provide electronic error notification, such as the CCOS, will produce more unintentional residual votes than a system which provides electronic error notification. Plaintiffs have failed in their attempts to establish this for two reasons.

First, the limited sample-data set offered by the Plaintiffs cannot reflect an accurate correlation between residual votes and the type of voting system employed. Plaintiffs' data attempts to show that non-electronic error notification voting technology produces fewer non-

voted ballots than electronic error notification voting technology. To support this proposition, the Plaintiffs rely only on data from the 2004 presidential elections, that showed a slightly higher residual rate (of 0.7%-1.0%) for votes cast for President on CCOS voting systems, when compared with two other voting systems. Yet the Plaintiffs' own data also shows that lever machines had the lowest nonvoted ballot rate for President in 2000. These lever machines do not contain electronic error notification and this voting technology has been prohibited in any state that has accepted HAVA funds. 42 U.S.C. §15481. Further, the Plaintiffs own data also shows that CCOS actually had the *best* non-voted ballot rate for the 2000 Ohio Senatorial contest. *See* Doc. No 8-3 attached to Plaintiffs' Motion. DREs produced almost 25% more non-voted ballots, while PCOS produced almost 50% more non-voted ballots than CCOS. *Id.* Thus, Plaintiffs have failed to show a correlation between CCOS voting systems and residual votes.

Second, under-voting and over-voting may be intentional, and the poll-data will not or cannot accurately capture this dynamic. For example, in 2000, Holmes County had a non-voted ballot rate of 8% for President. Yet the demographics of that county easily explain why people intentionally chose not to cast a ballot for President, because the unusually large Amish population will vote for issues, but cannot—according to their faith—vote for candidates, thereby intentionally under-voting. *See* Transcript of Trial Testimony of Dr. Kropf, pp. 218-232, *Stewart v. Blackwell*, No. 02-CV-2028 (N.D. Ohio July 26, 2004), excerpt attached as Exhibit F. Furthermore, cultural beliefs might cause a person to claim that she had voted when asked, rather than admitting that she simply refused to cast a vote in a particular contest.

Plaintiffs have failed to introduce any reliable evidence showing that *any* of the residual ballots in Ohio were anything other than intentional. Concordantly, an expert for Plaintiffs has written “[w]hile new voting technology is likely to help [unrecorded votes], *voting equipment is*

not the only source of voting error.” David C. Kimball and Martha Kropf, *Ballot Design and Unrecorded Votes on Paper-Based Ballots*, PUB. OPINION QUARTERLY, Vol. 69, No. 4, Winter 2005, 508-529 (emphasis added). Because Plaintiffs have failed to demonstrate that they will be irreparably harmed by the voting system that Cuyahoga County intends to employ in the March 4, 2008 primary election, this Court should deny their motion for preliminary injunction.

D. Plaintiffs have not demonstrated a strong likelihood of success on the merits.

Because the Plaintiffs have focused their legal theories on an incorrect reading of the constitutional requirements for a voting system as well as a novel, yet, unrecognized legal theory under the Voting Rights Act, they have failed to show a likelihood of success on the merits. Further, the standard for granting a preliminary injunction is more —“stringent”— than the requirement for summary judgment, making it even less likely that Plaintiffs can prevail on their motion. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

Plaintiffs’ constitutional claims fail because implementation of the CCOS system is supported by a rational basis. For the March 2008 primary election, Cuyahoga County made a rational decision to replace the Diebold Elections Solutions DRE voting system with a CCOS system. That decision was based upon the historic experience Cuyahoga County had in dealing with the Diebold system, the size of the election jurisdiction, the varying needs for ballot rotation and the necessary requirements of fairness, safety, security, and the feasibility of implementation.

Likewise, the Plaintiffs have failed to meet the stringent requirements of showing a likelihood of success on the merits under their Voting Rights Act claim. Although they attempt to couch their claim as a vote denial claim (Motion for Preliminary Injunction at 24-25), they simply cannot show Plaintiff Montgomery or any other African American voter will be denied

the right to vote when appearing for a ballot in the upcoming primary election.³ Furthermore, they cannot show any interaction between historic considerations and race. Rather, they can only show that it might be possible that there is a higher chance that a ballot cast by African Americans will not contain a vote for President. Yet, Plaintiffs' own expert writes that any possible racial disparity in the use of optical scan ballots appears to be a function of ballot design, not a function of CCOS voting systems *per se*. Finally, the Plaintiffs have failed to show under the totality of the circumstances that they meet the factors that are required for a Voting Rights Act claim.

1. The Plaintiffs have failed to show Cuyahoga County's use of a central count optical scan system violates their constitutional rights because the choice of such a system is a rational and non-discriminatory choice.

Every election law or regulation imposes some burden upon the voter. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This is true if the regulation at issue concerns registration, the qualifications of electors, the selection of candidates, or the voting process itself. *Id. citing Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Subjecting every election regulation to strict scrutiny, as the Plaintiffs suggest, "would tie the hands of the States seeking to assure that elections are operated equitably and efficiently." *Id.* Therefore, a State election regulation that creates some barriers to the election process does not automatically trigger a strict scrutiny approach. *Id.* at 433-34 *citing Bullock v. Carter*, 405 U.S. 134, 143 (1972). Instead, the Supreme Court has found that a flexible standard must apply in cases challenging State election laws. The court

must weight '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

³ Interestingly, Plaintiffs Montgomery and Shaffer do not claim that they will be voters in the March 2008 primary. Both affidavits only mention voting in 2007.

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 434 (quoting *Anderson*, 460 U.S. at 789).

Based upon this standard, if a State law or regulation “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* quoting *Anderson*, 460 U.S. at 788. The choice of which voting system a jurisdiction uses is the very definition of a “reasonable, nondiscriminatory restriction” and is appropriate so long as the State and county had a rational basis for its decision.

The Ninth Circuit applied this reasoning in *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), in an attack against a California county’s decision to use a particular voting system. The court noted that no voting system is perfect and has both advantages and disadvantages. *Id.* at 1106. “However, it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing.” *Id.* at 1107. Interestingly, the Plaintiffs chose to simply ignore the *Weber* decision in their brief. Instead, they focused upon two easily distinguishable and inapplicable cases—*Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002) and *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001). In *Black*, the district court denied the Defendants’ motion to dismiss the Plaintiffs’ claim that the use of punch card ballots violated their constitutional rights. The court simply relied upon the allegations in the complaint of arbitrary treatment of voters based upon the use of voting systems that have “substantially different levels of accuracy” as being enough to survive a motion to dismiss. *Black*, 209 F. Supp. 2d at 898-99. Likewise, in *Common Cause*, the district court noted that the Plaintiff

alleged that the use of a punch card voting system “is unreasonable and discriminatory” due to claims that the voting system is “substantially less likely” to count votes. *Common Cause*, 213 F. Supp.2d at 1107. The district court held that these mere allegations are sufficient to survive a motion for judgment on the pleadings and directed the parties to put forth appropriate evidentiary submissions addressing these allegations in their summary judgment motions. *Id.* at 1109-1110.

Cuyahoga County’s decision to use a central count optical scan voting system for the March 2008 primary is a reasonable and non-discriminatory decision under *Weber*. Cuyahoga County first used its new Diebold voting system in the May 2006 primary election. Nance Aff. at ¶ 14. The county experienced problems during that election concerning the use of both DREs and absentee ballots. Exh. A, Nance Aff. at ¶¶ 15-19. These problems included poll workers who failed to show up to work on election day and voting locations that were not adequately adapted for the use of DRE equipment. This problem led the Cuyahoga County Board of Elections to appoint the Cuyahoga Election Review Board (“CERP”) which examined all aspects of election administration in the county. *Id.* at ¶¶ 20-21. Finally, in November, 2007, Cuyahoga County experienced a complete breakdown in the ability of its DRE system. On November 6, 2007, the GEMS Server, which is responsible for tabulating votes countywide, suffered several crashes. *Id.* at ¶¶ 49-58. While uploading results from individual DREs into the GEMS Server, the computer screen for the server displayed an error message and then went completely blank. *Id.* at ¶ 52. When the server was finally restored, the display of votes in several precincts that had previously been uploaded had simply vanished. *Id.* at ¶ 53. The server then crashed a second time. *Id.* at ¶ 54. This resulted in a substantial delay in Cuyahoga County being able to process its unofficial canvass and announce its election results. *Id.* at ¶ 57.

Based upon the problems of using the Diebold DRE in a large and highly complex election jurisdiction and the findings rendered in the Project EVEREST study, Secretary of State Brunner encouraged the Cuyahoga County Board of Elections to switch voting systems to a central count optical scan voting system for the March 2008 primary. *Id.* at ¶ 61. In making her recommendation, the Secretary relied predominantly upon fairness in the system itself, the accuracy of the system, and the ability of the Cuyahoga County Board of Elections to implement a solution. *Id.* at ¶ 65. This recommendation was also based upon the fact that it was not practical for Cuyahoga County to use a precinct count optical scan voting system for March 2008. The Secretary of State's decision was further based upon the fact that the DRE system previously in place in Cuyahoga County had proven itself to be unworkable and inappropriate for use in March of 2008. *Id.* at ¶ 67. Based upon these reasons, it was reasonable for the Cuyahoga County Board of Elections to move to a central count optical scan voting system for the March 2008 primary election and such a choice satisfies the constitutional requirements of *Burdick*, 504 U.S. at 428, and *Weber*, 347 F.3d at 1101.

However, even if this Court were to apply a heightened standard upon the State, the decision to move to a central count optical scan voting system for the March 2008 primary election was an appropriate decision.

2. The decision to use a central count optical scan voting system for the March 2008 primary election is constitutional under a heightened scrutiny requirement.

As demonstrated above, Cuyahoga County simply could not hold the March 2008 primary election using its old Diebold DRE voting system due to the various GEMS Server problems. *Nance Aff.* at ¶ 67. Likewise, it was impractical for Cuyahoga County to use a precinct based optical scan system for the March 2008 primary election. *Id.* In fact, at this point

in time, the only way that Cuyahoga County can actually hold an election on March 4, 2008 is with the use of the ES&S central count optical scan voting system. Nance Aff. at ¶ 80.

The March 2008 primary election will elect delegates to the Democratic and Republican National Conventions who will be responsible for helping to nominate the Presidential and Vice Presidential candidates for those two parties. It will also nominate the Democratic and Republican nominees for the United States Congress and the Ohio General Assembly. The election in Cuyahoga County will affect races in that county and elections statewide. Both the Democratic and Republican Presidential Primary will elect their national delegates on the basis of Congressional District. Ohio's 13th and 14th Congressional Districts contain portions of Cuyahoga County as well as neighboring counties. Thus, in order for delegates from those districts to be elected, the results from Cuyahoga County must be combined with the results from their neighboring counties. The Republican Party also elects some of its National Convention delegates by means of an at-large statewide vote. Because Cuyahoga County could not use any voting system for March 2008 except the central count optical scan voting system and hold an election on March 4, 2008, the State would not be able to determine who was elected as a Presidential delegate in the 13th and 14th District for either party, nor would it be able to determine who would be elected as statewide delegates for the Republican convention. Likewise, a portion of Cuyahoga County is in the State's 18th Senate District. This election also would not be able to be certified unless Cuyahoga County could hold its election on the same day with the rest of the State.

Based upon the need to hold elections for the 13th and 14th Congressional districts, the Republican at-large delegates to their national convention, and the Ohio 18th Senate district, the State and County have a compelling interest in implementing a voting system that would allow

the county to conduct a primary election on the same day as the rest of the state. As such, the decision to use a central count optical scan voting system in Cuyahoga County is constitutional even if this Court were to adopt a heightened level of scrutiny.

Although Secretary of State Brunner believes that *Burdick* is the proper constitutional test for this case, she would also prevail were this Court to analyze this case under *Bush v. Gore*, 531 U.S. 98 (2000).

3. Cuyahoga County's use of a central count optical scan voting system for the March 2008 primary election does not violate the Supreme Court's holding in *Bush v. Gore*.

The Plaintiffs have incorrectly concluded that the Supreme Court's decision in *Bush v. Gore* shows they have a substantial likelihood of success on the merits. In a brief high in rhetoric and hyperbole, but short on facts and legal analysis, the Plaintiffs continue to claim that voting technology that lacks electronic error notification violates their constitutional rights under the "one man, one vote" line of cases because, they claim, such technology produces "substantially" more uncounted ballots. Yet, their factual allegations are undercut by the very evidence they submit and their legal argument is gutted by the very same line of cases they cite as support. As a result, they do not have a substantial likelihood of success on the merits and this Court should reject their emergency request for an injunction for the March 2008 primary election.

The Plaintiffs begin their argument by saying that the right to vote is fundamental, is the vanguard of all other rights and liberties, and that a State must accord equal weight and equal dignity to each voter. Motion for Preliminary Injunction at 16. Secretary of State Brunner firmly believes in each of these statements. The right to vote is the most precious right of citizenship. It must be protected and defended. The franchise has been purchased in each

generation through countless struggles both at home and abroad and is something that no one should take for granted. While recognizing the importance of the right to vote, it is also important for this Court to recognize the proper reading of Supreme Court precedent, especially in light of the decision of *Bush v. Gore*.

The Supreme Court was faced with a very different factual situation in *Bush v. Gore* than this Court faces with this litigation. The Supreme Court specifically stated that “[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Bush*, 531 U.S. at 109. Instead, the question in *Bush* was “whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Id.* at 105. The Court noted that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to the other.” *Id.* at 106. The factual record showed that one observer testified that three members of a county canvassing board applied different standards to define a legal vote and that a second county changed its evaluation standards during the counting process. *Id.* Palm Beach County “began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal.” *Id.* “[E]ach of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.” *Id.* at 107. Since two identically marked ballots cast in the same county and reviewed by the same team

might be counted differently, the Court held that such a scenario violated the Equal Protection Clause. *Id.* at 103.⁴ The Court even noted that “[n]ationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot.” *Id.* at 103. Yet, the Court did not find that fact, or the fact that Florida as a State used punch card ballots, central count optical scan ballots, precinct count optical scan ballots, *and* DREs unconstitutional. Instead, the Court simply stated that the legal definition of a vote on any particular balloting system must be consistent.

The State of Ohio fully complies with *Bush v. Gore*'s consistency requirement. Pursuant to her authority as the State's chief elections official under R.C. § 3501.05, Secretary of State Brunner has issued Directive 2007-31 concerning the remaking of optical scan ballots. Ohio Sec'y of State Directive 2007-31, Remake of Optical Scan Ballots (November 16, 2007), Attached as Exh. H. The purpose of this Directive is to “ensure that all valid ballots that have been cast are properly counted” and to provide “instructions to Boards of Elections on the proper procedure to remake optical scan ballots that cannot be accurately read by automatic tabulating equipment.” Under Ohio law, a board of elections is empowered to remake a ballot according to voter intent. O.R.C. § 3506.21(B)(1). If the voter properly followed instructions on marking a portion of the ballot, the Board cannot remake the ballot. O.R.C. § 3506.21(B)(2), Directive 2007-31 (emphasis added). However, “if a voter did *not* mark any of the ballot according to the ballot marking instructions contained on the ballot, the Board of Elections, by majority vote in public session, must *determine* voter intent prior to remaking the optical scan ballot.” Directive

⁴ The Court noted that “Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy.” *Bush*, 531 U.S. at 111.

2007-31. This intent is determined by examining the ballot for consistently made marks contrary to voting instructions. *Id.* In that situation, if the Board were able to determine voter intent, the Board must remake the ballot as instructed by O.R.C. § 3506.21(B)(1) and Directive 2007-31. This provision applies not only to Cuyahoga County, which will use a central count optical scan voting system for the 2008 primary election, but to all 180,000 voters who have requested absentee ballots throughout the State for that same election. This is sufficient to meet the requirements of *Bush v. Gore*, because all residual votes receive the same treatment, under the same standards.

This understanding of the scope and limit of *Bush v. Gore* is further strengthened by both the concurring and dissenting opinions. Former Chief Justice Rehnquist noted that “[n]o reasonable person would call it ‘an error in the vote tabulation’ or a ‘rejection of legal votes’ when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.”⁵ *Bush*, 531 U.S. at 119 (Rehnquist, C.J., *concurring*). Likewise, Justice Souter recognized that “[i]t is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, *even though different mechanisms will have different levels of effectiveness in recording voters’ intentions*; local variety can be justified by concerns about cost, the potential value of innovation, and so on.” *Bush*, 531 U.S. at 134 (Souter, J., *dissenting*) (emphasis added). Justice Souter’s concern revolved around the disparity not in voting systems, but rather in the disparity in “determining a

⁵ The Plaintiffs’ brief has confused tabulating equipment and ballots. On Page 21 of their motion for a preliminary injunction, they argue that state law requires tabulating equipment be able to examine ballots and count votes accurately. This statement is correct. Under Ohio law, tabulating equipment is a defined term and in the Cuyahoga County situation would simply be using the machines that count the ballots. R.C. § 3506.01(C). The tabulating equipment is properly reading the ballots and the Plaintiffs have offered no evidence, much as Chief Justice Rehnquist notes, that the machines themselves have malfunctioned.

voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). *Id.* Based upon his determination that different voting systems do not violate the Fourteenth Amendment but different legal standards in the counting of votes do, Justice Souter would have remanded the case "with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order." *Id.* at 134-35.

Ohio has not applied any different legal definition to what constitutes a vote on any optical scan ballot. The same standards that apply in Cuyahoga County apply in all other jurisdictions using a precinct based optical scan system. These same standards will also apply in all 88 counties for the counting of absentee ballots, provisional ballots, emergency ballots, or ballots cast pursuant to Directive 2008-01 by individuals in DRE counties who prefer to cast a paper ballot. *Bush v. Gore* is inapplicable to this case, and even if it did apply, the Plaintiffs have failed to demonstrate a constitutional violation under *Bush v. Gore's* holding.

4. The Plaintiffs have failed to produce factual evidence that shows they are likely to succeed on the merits of their claim.

The Plaintiffs have failed to present any evidence that shows that a central count optical scan voting system violates their constitutional rights. They have simply shown that in 2000, there was a slightly higher nonvoted ballot rate for President using central count optical scan ballots than using precinct counted optical scan ballots—1.8% versus 1.0%. Motion for Preliminary Injunction at 8. Yet, they have not shown that any of the residual votes on either

central count optical scan or precinct count optical scan ballots were unintentional.⁶ Counties in Ohio have successfully used central count optical scan ballots as both a primary voting system and also as an absentee voting system. In 2000, Geauga County, which used a central based optical scan voting system as its primary voting system, had a non-voted ballot rate for President of 1.08%—identical to the statewide average for precinct count optical scan systems. Furthermore, these rates for 2000 do not account for the massive voter education that Cuyahoga County will undertake for the 2008 Presidential primary.

Even if this Court were to assume that the 1% difference between central count optical scan and precinct count optical scan was the result of unintentional behavior, this difference is *de minimis*. In *Brown v. Thomson*, 462 U.S. 835, (1983), the Supreme Court noted that for purposes of legislative apportionment, minor population deviations between districts are insufficient to show a violation of the Fourteenth Amendment. The Court held that “an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.” *Id.* at 842. If a ten percent difference in legislative districts meets constitutional requirements, a one percent difference in nonvoted ballots likewise would be sufficient to meet the same constitutional requirement.

If the Plaintiffs seek voting equipment with the lowest nonvoted ballot rates, their own evidence shows that lever machines would be constitutionally required. *See* Doc. No. 8-4, attached to the Plaintiffs motion. Lever machines had the lowest nonvoted ballot rate for President with 0.5%. Unfortunately, the Help America Vote Act required States to replace lever machine systems in order to qualify for federal funding. 42 U.S.C. § 15302. Likewise, the data

⁶ The Court can take judicial notice of the testimony of Dr. Martha Kropf during the *Stewart v. Blackwell* trial. During that trial, Dr. Kropf noted that Holmes County had a nonvoted ballot rate of 8% using punch cards. She was unaware, however, that there is a substantial Amish population in Holmes County which refuses to vote in candidate races due to their religious beliefs but will vote in issue races. This material is attached as Exhibit F.

supplied by the Plaintiffs shows that CCOS ballots produced the fewest nonvoted ballots of any system including precinct count ballots and DREs in the 2000 US Senate contest. Thus, if their argument is correct, the CCOS system would be constitutionally mandated for Senatorial elections.

Finally, the Plaintiffs have failed to establish the requisite factual basis for emergency injunctive relief. As a result, they have failed to show a substantial likelihood of success on the merits and this Court should reject their request for a preliminary injunction.

E. Plaintiffs have failed to show that they are substantially likely to prevail on the merits of their Voting Rights Act claim.

Plaintiffs cannot succeed on a Voting Rights Act claim. The central purpose of Section 2 of the Voting Rights Act “was designated as a means of eradicating voting practices that ‘minimize or cancel out the voting strength and political effectiveness of minority groups.’” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (quoting S. Rep. No. 97-417, 2d Sess., p. 28 (1982)). Under Section 2, two different types of discriminatory practices and procedures are prohibited: (1) those that lead to “vote denial” and (2) those that result in “vote dilution.” *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). Plaintiff Montgomery cannot show that he has been denied the right to vote as he alleged in his Memorandum in Support of a Preliminary Injunction.

1. The Plaintiffs have failed to allege a valid vote denial claim.

Although the Plaintiffs have alleged that they are bringing a “vote denial” claim under the Voting Rights Act, the fact is that Plaintiff Montgomery has not been denied the right to vote as that term is used in Voting Rights Act cases. Plaintiffs’ Motion at 24-25.

In order to state a “vote denial” claim, the Plaintiffs must prove that they will be denied the right to vote on the basis of race. 42 U.S.C. § 1973(a). The basic, underlying flaw in the Plaintiffs argument is that they will not be denied the right to vote. African Americans in Cuyahoga County will be given the right to vote on CCOS ballots in the March 2008 primary election the same as every other voter in that county and every absentee voter in the State of Ohio. Furthermore, race has no demonstrated correlation to Plaintiffs’ ability to cast a vote. Plaintiffs’ own expert notes that “while the significant relationship between race and unrecorded votes is strongest in counties with poorly designed ballots ... the relationship between race and unrecorded votes is statistically insignificant in counties with [properly designed ballots]. This result is consistent with other studies that indicate that voting procedures designed to help voters tend to minimize the relationship between race and unrecorded votes.” David C. Kimball and Martha Kropf, *Ballot Design and Unrecorded Votes on Paper-Based Ballots*, PUBLIC OPINION QUARTERLY, VOL. 69, No. 4, Winter 2005, 508, Attached as Exh. G. Based upon that finding by the Plaintiffs’ own expert, there is simply no prohibited vote denial claim as a result of using CCOS ballots. The balloting system itself does not deny African Americans the opportunity to vote on an equal basis with other citizens. Rather, an election jurisdiction must pay particular attention to ballot design and provide educational opportunities to its citizens about the proper way to use the system. Fortunately, Cuyahoga County has planned an extensive voter education program with community outreach, mailings to all registered voters, handouts at every polling location, instructions in each voting booth, and even a final warning on the ballot box before the ballot is submitted.

The Plaintiffs have also incorrectly identified *Thornburg v. Gingles*, 478 U.S. 30 (1986), as a vote denial case. See Plaintiffs Motion at 24-25. Although the quote that they list from

Gingles does not occur on page 45 of the opinion, *Gingles* itself is a vote dilution case. *See, e.g., Gingles*, 478 U.S. at 42 (reviewing “Section 2 and Vote Dilution through use of multimember districts”); *Id.* at 46 (“Vote dilution through the use of multimember districts”); *Id.* at 77 (“Ultimate determination of vote dilution”). Based upon this, the Plaintiffs have failed to establish a legal theory sufficient to support their vote denial claim.

2. The Plaintiffs cannot prove the necessary prerequisites for a vote dilution claim.

In order to properly state a vote dilution claim under Section 2 of the Voting Rights Act, the Plaintiffs must establish certain facts about the minority group at issue, including:

- (1) It is sufficiently large and geographically compact to constitute a majority in a single-member district [in the case of Presidential elections, this would be the entire State];
- (2) It is politically cohesive; and
- (3) The white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate.

Gingles, 478 U.S. at 50-51. After successfully establishing these elements, the Plaintiffs must then go on to show that, under the totality of circumstances, the challenged electoral scheme deprives them of “an equal measure of political and electoral opportunity” to participate in the political process and to elect representatives of their choosing. *Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

The glaring problem that the Plaintiffs have in this case is that African Americans in Cuyahoga County are *not* a sufficiently large population in order to constitute a majority necessary to elect a President or the State’s Presidential electors. Plaintiffs have also failed to produce evidence of any of the other prerequisites. The Plaintiffs in this case have not demonstrated whether the African American voters in Ohio are politically cohesive, whether the

white community in Ohio votes sufficiently as a block in order to be able to defeat the African Americans' preferred candidate, or whether the use of CCOS in Cuyahoga County deprives African Americans of an equal opportunity to participate in Ohio's political process. Thus, the Plaintiffs have failed to produce any evidence of a vote dilution case and are not entitled to a preliminary injunction.

3. Under either theory, the Plaintiffs have failed to prove a Section 2 claim because they failed to provide evidence under the “totality of circumstances” test.

A plaintiff asserting a Voting Rights Act violation based on a vote denial claim must demonstrate that he or she was denied the right to vote based on the totality of the circumstances.⁷ *See, e.g., Johnson v. Governor of Florida*, 353 F.3d 1287, 1304 n. 22 (11th Cir. 2003) (citing *Farrakhan v. Washington*, 338 F.3d 1009, 1015 n.11 (9th Cir. 2003) (applying the totality of circumstances to a vote denial claim for felon disenfranchisement)) and *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987) (applying the totality of the circumstances test to a vote denial claim for dual registration for voting that had been specifically designed to disenfranchise African Americans). However, Plaintiffs failed to demonstrate that their claim meets the totality of the circumstances indicative of a violation of Section 2. Instead, they merely claim that African Americans in Cuyahoga County do not have access to error notification and as a result, the current voting technology violates the Voting Rights Act.

The central issue in the totality of the circumstances surrounding any § 2 claim is that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred

⁷ “Typical factors” for such a claim are as outlined in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act. *See*, S. Rep. 97-417, *supra* at 28-29.

representatives.” *Gingles*, 478 U.S. at 47 (1986) (citing S. Rep. 97-417 at 28-29) (noting that the first of the “typical factors” in the totality of the circumstances is a historical pattern of discrimination). However, Plaintiffs have failed to demonstrate that a recent history of racial discrimination exists. In fact, Plaintiffs failed to even allege a recent history of racial discrimination in elections and prior Voting Rights Act litigation against the State of Ohio.

In the past, Section 2 Voting Rights Act cases against the State of Ohio have been unsuccessful because there is no recent history of racial discrimination. For example, in *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997), *aff’d* 173 F.3d 377 (6th Cir. 1999), the Plaintiffs claimed that Ohio’s system of “at large” elections for judicial candidates diluted African American voting strength in violation of Section 2 of the Voting Rights Act. In its opinion, the Sixth Circuit adopted the District Court’s “carefully written, solidly reasoned, and extremely comprehensive opinion” as its own. *Mallory*, 173 F.3d at 380.

The District Court noted that the *Mallory* Plaintiffs failed to allege any recent history of voting-related discrimination in Ohio and that “there was, in fact, no such recent history of voting-related discrimination.” *Mallory*, 38 F. Supp. 2d at 541. Further, the State of Ohio prevailed in litigation over its 1990 redistricting plan, in part, because “*the United States Supreme Court found no legally significant racial bloc voting in Ohio legislative elections and, therefore, no Voting Rights Act violation in the reapportionment of Ohio’s legislative districts.*” *Id.* (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993)) (emphasis added). Moreover, the City of Cincinnati did not violate the Voting Rights Act by electing its City Council members in at-large elections. *Id.* (citing *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995)). And finally, the Ohio Supreme Court rejected a Voting Rights Act and Fifteenth Amendment claim to the at-large election of judges and county commissioners in

Mahoning County. *Id.* (citing *State, ex rel. Rogers v. Taft*, 64 Ohio St. 3d 193 (1992)). This Court, like numerous others before it, should reject the notion that the State of Ohio has violated Section 2 of the Voting Rights Act in the manner in which it conducts elections.

Furthermore, Plaintiffs offer no evidence to show that African American voters in Ohio have not been able to elect their chosen candidate in the past. As noted above, Section 2 of the Voting Rights Act requires a covered minority to demonstrate that the State has enacted a voting practice or procedure that results in a denial or abridgement of the right to vote because its members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Plaintiffs have not shown how their votes will be denied under the required standard—the totality of the circumstances. The result is that the Plaintiffs cannot prove the necessary elements of a vote denial case. This failure begins with their inability to show they will actually be denied the ability to vote and continues with their failure to show factors under the totality of the circumstance that are to be examined in a Section 2 Voting Rights Act case. Because of these failures, Plaintiff cannot successfully bring a Section 2 Voting Rights Act claim.

As has been previously demonstrated, the Plaintiffs bear the burden of proving, through statistical evidence, that they have been denied the right to vote by the State and its political subdivisions. They cannot succeed in this endeavor and this Court should deny their request for extraordinary relief.

F. Plaintiff cannot demonstrate a likelihood of success on the merits, because individual plaintiffs and the ACLU lack standing to bring these claims.

Plaintiffs lack standing to bring these claims and therefore cannot show likelihood of success on the merits. Without standing, the ACLU and the individual Plaintiffs are not entitled

to the relief sought in the complaint. To satisfy Article III standing requirements, the individual plaintiffs must show, among other elements, that they suffered an “injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180 (2000)(citations omitted). However, Plaintiffs have suffered no harm. As outlined in the Complaint, the individual Plaintiffs voted in the last election and are registered to vote in future elections. They were never denied the right to vote. Their alleged injury resembles a generalized harm that might be suffered by all rather than a specific harm to these particular individuals. Thus, there is no “actual or imminent” harm that is “concrete or particularized.”

Further, the ACLU does not allege that it has standing in its own right; it claims associational standing and bring suit on behalf of its members to press this case. However, in order to demonstrate standing, an organization must show that its members would have standing. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1010 (6th 2006)(citing *Friends of the Earth*, 528 U.S. 167, 181). However, as outlined above, none of the individual member plaintiffs have suffered an “injury in fact.” Accordingly, the ACLU has not established that it has standing.

The ACLU also lacks organizational standing because a potential violation of the Voting Rights Act is not germane to its purpose. An association claiming standing on behalf of its members must show that “the interests at stake are germane to the organization’s purpose.” *Northeast Ohio Coalition for the Homeless*, 467 F.3d at 1010 (citations omitted). In the Complaint, the ACLU states that its “mission is to protect and defend civil liberties” and that the members of the ACLU have a “strong interest in voting and efficient, fair elections.” (Compl. at ¶ 7.) This allegation is not sufficient to provide standing under either of Plaintiffs’ claims. As a

result, the ACLU and the individual plaintiffs lack standing and are therefore not entitled to the relief sought in the Complaint.

G. Plaintiffs cannot show a likelihood of success on the merits because they have failed to join necessary parties.

Plaintiffs have failed to join necessary parties, and therefore, cannot show likelihood of success on the merits. Without these necessary parties, the Plaintiffs are not entitled to the relief sought in the complaint.

Under Rule 19, a party is deemed necessary when one of the following three elements is satisfied: 1) “complete relief cannot be accorded among those already parties” in that party’s absence; 2) the absentee has an “interest relating to the subject of the action;” or, 3) nonjoinder leaves “any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Civil Rule 19(a). Based on these elements, Plaintiffs have failed to join several necessary parties.

First, Plaintiffs have failed to join the Board of Voting Machine Examiners (BVME). Plaintiffs ask this Court to enjoin the Secretary of State from *approving* and certifying other voting systems that lack effective error notification. While the Secretary of State is statutorily responsible for certifying voting machines, she can only do so after these machines have been approved by the BVME. Ohio Rev. Code § 3506.05(B). Without the Board of Voting Machine Examiners, the relief requested by Plaintiffs cannot be accorded. Similarly, because the BVME is statutorily required to “examine and approve [voting] equipment and its related manual and support arrangements,” it clearly has an interest relating to the subject of the action.

Second, Plaintiffs have failed to join the other 87 Ohio counties that use non-notice voting equipment to process absentee, provisional and/or emergency ballots. Plaintiffs

underlying assertion is that non-notice voting technology employed in Ohio violates the Voting Rights Act and the U.S. Constitution. However, as explained earlier in this memorandum such a ruling would dramatically impact the other 87 Ohio counties that also use this equipment. Each of these counties have an interest relating to the subject of this action. Further, at least one of these counties, Van Wert, plans to utilize the CCOS system that Defendant Cuyahoga County will use in the 2008 primary election.

Because Plaintiffs have failed to join these necessary parties, they are not entitled to the relief sought in the complaint and they have failed to show likelihood of success on the merits.

CONCLUSION

For the foregoing reasons, this Court should reject the Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing was served by means of the court's electronic filing system on February 5, 2008 to:

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