

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

EFFIE STEWART, et al.	:	
	:	
Plaintiffs-Appellants,	:	Case No. 05-3856
	:	
v.	:	On Appeal from the United States
	:	District Court for the Northern
J. KENNETH BLACKWELL, et al.	:	District of Ohio, Eastern Division,
	:	Case No. 5:02 CV 2028
Defendants-Appellees.	:	
	:	
	:	
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**EN BANC BRIEF OF STATE DEFENDANTS-APPELLEES**

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## **JURISDICTIONAL STATEMENT**

The District Court had jurisdiction under 28 U.S.C. §1331. On appeal, this Court has jurisdiction under 28 U.S.C. §1291.

However, the State Defendants urge that the case is now moot, so that no case or controversy exists under Article III.

## **STATEMENT OF THE ISSUES**

1. Whether Plaintiffs' challenge to Ohio's former use of "non-notice" voting machines—i.e., machines (such as punch-card machines) that did not notify the voter of an "undervote" or "overvote"—is moot, as Ohio no longer uses any such machines, and as Ohio now uses machines that Plaintiffs themselves admit are acceptable?
2. Whether the District Court properly found that Ohio's use of non-notice voting machines did not violate the Equal Protection Clause or the Due Process Clause, where Plaintiffs alleged that certain machines with a "non-voted ballot" rate of 1.8 % are unconstitutional, while they admit that other machines with a 1% rate are constitutional, and where Plaintiffs produced no Ohio-specific evidence at all regarding whether even this minute difference was largely caused by variations in intentional non-voting?
3. Whether the District Court properly found that Plaintiffs failed to prove that Ohio's election machines violated the Voting Rights Act, where Plaintiffs' expert admitted that no racial gap in non-voting on such machines occurred in most election races in Ohio, and where the sole evidence of a racial gap in the 2000 presidential election depends upon accepting Plaintiffs' mistaken assertion that deliberate non-voting is uniform across all demographic and geographic groups with no variations whatsoever?
4. Whether the District Court properly denied class certification after trial, where the court had already found by then that Plaintiffs lost, and where, in any case, any injunctive relief that would run against the State would be the same regardless of whether a class was certified or not?

## INTRODUCTION

Both sides agree that this case concerns the machinery of democratic self-governance. Specifically, the case concerns which machines voters will use in performing the central act of democracy: voting. All agree that voting is the linchpin of democracy, and all agree that we want voting mechanisms that capture all validly-cast votes. We further agree that the inevitable machine-caused errors should be kept to a minimum, and that any such errors ought not be systemically correlated with a voter's race.

But we part ways over this critical issue: whether our commitment to self-governance includes room for us to democratically choose how we run elections, within reason, or whether we should instead turn over every detail of election machinery to the judiciary. The State of Ohio urges judicial restraint. We do not urge judicial abdication, as we fully accept that constitutional principles of equal protection and due process, as well as the statutory mandate of the Voting Rights Act, do govern our range of choices. But the choices we have made here are easily within reasonable bounds, and within those bounds, the Court should defer to our democratic decisions.

By contrast, Plaintiffs seek not only judicial micromanagement, but they demand standards that are both legally unwarranted and patently unworkable—and worse yet, they ask the Court to take this radical step in a case that is moot. The

case is moot because Ohio no longer uses any of the machines that Plaintiffs object to, and our polling places use machines that Plaintiffs bless. The only question regarding mootness is whether it is *reasonable* to suspect that Ohio will revert to the old technology. But that notion is not just unreasonable; it is not even plausible. Ohio has, pursuant to the federal Help America Vote Act, bought new equipment across the State, and the old machines have been junked and, in some cases, even shredded. Ohio simply will not throw out our new equipment, give back federal money, and go buy *new* older-generation equipment. Not only would we not want to do so, but doing so would require us to clear a series of financial, operational, and political hurdles. We will not do that, so the case is moot.

But if the Court reaches the merits, it should reject Plaintiffs' claims, as Plaintiffs can win only if the Court adopts a standard beyond strict scrutiny, and demands the impossible of the State and its counties. That is so because Plaintiffs' statistical case is such that even infinitesimal error rates, or barely-detectable variations, would amount to a violation under Plaintiffs' theory. Plaintiffs insist that Ohio has improperly used "error-prone voting equipment," and the heart of their case is that different types of voting machines had different rates of "undervotes" and "overvotes" in the 2000 presidential election. "Undervotes" are ballots on which no vote for president was recorded, whether because of machine error, voter error, or—and this is critical for this case—because the voter

intentionally did not vote in that contest. “Overvotes” occur when more than one candidate was chosen, for whatever voter- or machine-driven reason, so no vote is counted. The total of overvotes and undervotes—including intentional undervotes—is called a “residual vote rate.” Plaintiffs claim that a constitutional violation occurs when, on some machines that they attack, the total residual error rate is 1.8%. Yet they insist that other machines, which have a 1.0% residual rate, are fine. Surely such a narrow gap—a mere 0.8%—cannot be the difference between what is constitutional what is not.

Moreover, even those error rates are almost surely overstated, as Plaintiffs presented not one shred of Ohio-based evidence regarding the extent of intentional undervoting. Instead, they seek to impose upon Ohio a national average rate, as they insist on working from the truly impossible-to-believe notion that regional and local variations are zero. They stick to that one-size-fits-all assumption, insisting that fewer than one percent of voters ever skip a presidential race, even after the trial court pointed out to them that Ohio has pockets of known intentional undervoting, such as heavily-Amish Holmes County. That county’s total residual rate, driven largely by Amish voters who vote for issues but not for president, tops 8%—and it is surely likely that other variations exist in Ohio as well. And on top of that, in comparing machines, they did all of their statistical work from *one* electoral contest on *one* day—the 2000 presidential race. They do not contest the

fact that their own claimed error rates melt away to nothingness if one looks at other races or other years, as Defendants' experts did. Rather, they insist that they can cherry-pick one race, impose national formulae on *selected* Ohio locales, find resulting errors of less than half-a-percentage point—and use all that to have an entire election system invalidated.

Plaintiffs' Voting Rights Act claim is equally flawed, as it, too, rests on the most specious of statistical cherry-picking. They claim that black voters and white voters somehow work differently with certain machines, causing more black voters' votes to be improperly lost. Yet again, they look to one contest in one year. They admit that the gap melts away if one broadens the field of vision, and they further admit that any alleged racial gap should, if it truly exists, be expected to occur across many contests. This dooms their case. Their theory fails on the law and precedent of the VRA, too, but most important is that their statistical premise is so flawed that they cannot win on any legal theory.

In sum, Plaintiffs' statistical arguments reach into the microscopic to ask the Court to superintend our elections, and they do so even though the machines they attack are no longer in use and will not be brought back. The Court should tell them no, and dismiss the case as moot.

## STATEMENT OF FACTS

Before the 2006 primary election, punch cards were Ohio's predominant balloting system. R. 275 Opinion at Appendix I, p. 2 ¶14; Appx. 118. By the time of that election, however, Ohio had replaced all of its punch card systems. See Help America Vote Act, 42 U.S.C. §15301; 70 FR 17662. Before examining the specific facts of this case, however, it is first important to understand some basic information about voting machines and how they operate.

### **A. In 2000, Ohio voters used many different types of voting machines.**

In the 2000 Presidential election, Ohio used four different types of voting machines: punch cards, lever machines, optical scan machines and electronic machines. R. 275 Opinion at Appendix I, p. 2, ¶13; Appx. 118. These various machines can be grouped into two categories, "notice" or "non-notice" equipment. A machine falls in the notice category if it notifies the voter that he has undervoted, that is, not voted, in one or more contests. It would also notify the voter if he has "overvoted" by voting for more candidates than allowed. A machine that does not so notify the voter is called "non-notice" equipment.

Punch card machines, which are a non-notice system, rely on a ballot card with pre-scored, square perforations or "chads." *Id.* at p. 2, ¶19; Appx. 118. The names of the candidates are not on the card but each chad is assigned a number. *Id.* The ballot has a stub on one end with two holes that allow the card to be held in

place over pins when the card is inserted into the voting device. *Id.* The device is attached to a loose-leaf booklet with the names of the candidates or other items upon which the voter will vote. *Id.* The center of the booklet has a slot with holes. *Id.* The slot lines up with the columns in the ballot. *Id.* A voter casts his vote by placing the ballot card in the device and exerting pressure on a stylus to punch holes through the chad in the ballot card. *Id.* After voting, the voter removes the card from the device and places it in a ballot box. *Id.*

Lever machines, which are also non-notice, are large units that have levers next to each candidate's name. Transcript Day I (Walch) pp. 136-137. A voter selects a candidate by pulling on the candidate's lever and the machine records the vote. *Id.*

Optical scan voting equipment, which can be either notice or non-notice, is identical to a scantron machine widely used for such well known tests as the SAT. Transcript Day I (Walch) pp. 135-136. This system allows a voter to darken an oval next to his candidate's name in order to record his vote. *Id.* The ballot is then scanned and counted by a machine. *Id.* Optical scan machines are further subdivided into two types of machines, called precinct count or central count optical scan, depending on how and where the vote counting occurs. If the voter runs the completed ballot through the counting machine, this is called in-precinct optical scan system, as all counting is done directly at the precinct. R. 275 Opinion

at Appendix I, p. 3, ¶21; Appx. 119. With central count optical scan systems, by contrast, the voter simply places a completed ballot in the ballot box, and those ballots are returned to a central location where they are counted. *Id.* at p. 3, ¶21; Appx. 119. Precinct count optical scan machines are notice equipment, as the immediate on-site counting allows for notice to a voter of an overvote or an undervote. The central count optical scan machines are non-notice, because the overvote or undervote is not directly discovered until the count is done at headquarters, which is too late to notify the voter.

Finally, Direct Recording Electronic voting machines (“electronic voting machines” or “DREs”) look like bank automatic teller machines and are a form of notice equipment. Transcript Day I (Walch) p. 137. These voting systems are electronic and the voter directly records his preferences in the machine, which then tallies the votes. *Id.* These machines can be programmed to alert voters that they have not made a selection. R. 275 Opinion at Appendix I, p. 3, ¶23; Appx. 119.

**B. Non-voted ballots, whether “undervotes” or “overvotes,” may be intended by the voter, or may result from voter or machine error.**

For many reasons, a ballot may not record a legal vote for any candidate in any particular election contest. The ballots that do not record any legal vote will contain either an overvote or an undervote. An “overvote” occurs when a voter votes for more than the allowed number of candidates in a particular race. R. 275 Opinion p. 6, note 4; Appx. 89. An overvote disqualifies the vote for that particular

race. *Id.* at p. 26; Appx. 109. An “undervote” occurs when a voter does not mark a ballot for a particular race or votes for fewer than the allowed number of candidates. R. 275 Opinion p. 6, note 4; Appx. 89. The combined total of both overvotes and undervotes are called residual votes. *Id.*

Either overvotes or undervotes can be intentional or accidental. An intentional overvote occurs when a voter cannot decide which candidate he prefers, so he marks it for both candidates.<sup>1</sup> R. 275 Opinion at Appendix I, p. 4, ¶30; Appx. 120; R. 275 Opinion at 26; Appx. 109. An accidental overvote, by contrast, occurs whenever a voter selects the candidate he wants and somehow accidentally marks the card for another candidate as well. *Id.*

An intentional undervote occurs when a voter simply decides not to cast a legal vote for a particular office. *Id.* An accidental undervote occurs when a voter simply fails to cast his ballot for that office. *Id.*

There may be particularized reasons why residual votes exist. During the trial, the Court observed that Holmes County had a residual ballot rate of 8%. Transcript Day I (Kropf) at 229-232; Appx. 409. Dr. Martha Kropf, one of the Plaintiffs’ expert witnesses, testified about various post-election surveys that showed on average only between 0.23% and 0.75% of voters intentionally

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<sup>1</sup> Although this seems intuitively unlikely to ever occur, intentional overvotes are a documented phenomenon. In fact, Dr. Herb Asher, in his study of Ohio’s 1978 statewide elections, determined that 30% of the overvotes cast in the Governor’s election contained votes for at least three candidates. CITE

undervote. *Id.* at 231; Appx. 409. Based upon that residual rate, she testified that between 7.25 and 7.75% of the votes in Holmes County were unintentional residual votes. Transcript Day I (Kropf) at 229-232; Appx. 409. Judge Dowd, however, observed that Holmes County has a large Amish population, and their religious beliefs prevent them from casting votes in candidate elections but not issue elections. *Id.* This point demonstrates that there may be specific local reasons why residual ballot rates are either high or low in any particular county, notwithstanding post election surveys.

When casting a ballot, some machines, such as precinct count optical scan and electronic voting machines, can inform a voter that he has either overvoted or undervoted. R. 275 Opinion at Appendix I, p. 2, ¶16; Appx. 118. This reminder, commonly referred to as second chance voting, alerts the voter that he or she has not correctly completed the entire ballot. *Id.* Punch cards and central count optical scan balloting systems do not provide the voter with any type of notification that he has either overvoted or undervoted in a particular race, although the district court observed that punch cards can be reviewed by the voter. *Id.* at p. 2, ¶¶18, 21; Appx. 118, 119. Lever machines prohibit overvoting but do not give any reminder that the voter has undervoted in any particular race. Transcript Day I (Walch) pp. 136-137.

**C. In 2000, Ohioans voted with punch cards, optical scan machines, lever machines, and electronic machines.**

In 2000, Ohioans voted on many different types of machines. Depending on where they resided, voters might have used punch cards, lever machines, precinct count optical scan machines, central count optical scan machines, or electronic voting machines. The reason for such diversity is that the state mandates local control over most aspects of the elections system, including the selection of voting machines. R.C. §3506.06(B). As a result, each local board of elections selected the system that best suited its own unique local conditions from the choices of punch card, lever, optical scan, and electronic voting machines. Hamilton, Montgomery, and Summit Counties were among the 69 of 88 counties in the State of Ohio that used punch cards for the 2000 general election. R. 275 Opinion at Appendix I, p. 4, ¶32; Appx. 120. Counties that used punch cards in 2000 had the highest percentage of residual votes for President, while counties that used some type of second chance voting technology had the lowest residual ballot rate in the 2000 Presidential election. The 29 counties in Ohio with the highest residual vote percentages in the 2000 Presidential election were counties that used punch card ballots. The seven counties with the lowest residual vote percentages in 2000 were counties that did not use punch cards. The overall residual vote rate in Ohio's 2000 Presidential election was 1.88%. R. 275 Opinion at Appendix I, p. 4, ¶28; Appx. 120.

**D. Plaintiffs have alleged three distinct theories in their complaint: an equal protection and a due process claim based on alleged county-by-county variations in error rates, and a race-based claim under the Voting Rights Act.**

The Plaintiffs brought three separate claims against the State of Ohio and the four county defendants. The Plaintiffs' claims consist of a constitutional claim and a statutory claim. The Plaintiffs allege that the Fourteenth Amendment requires the State of Ohio and the four county defendants to use second chance voting technology. R. 275 Opinion, p. 5-6; Appx. 88-89. There is no racial component to this claim. Instead, the Plaintiffs allege that the disparity in non-voted ballot rates between punch cards and central count optical scan systems and electronic voting machines or precinct count optical scan systems is such that it violates their Fourteenth Amendment rights to Equal Protection and Due Process. *Id.*

The Plaintiffs' third claim is a vote denial claim brought under the Voting Rights Act against the State of Ohio as well as Hamilton, Montgomery, and Summit Counties. *Id.* at 6-7; Appx. 89-90. The Plaintiffs alleged that the use of punch card voting technology in those three counties denied them the right to vote because African-Americans had a higher incidence of non-voted ballots for President than whites in 2000. *Id.*

**E. The Court, after a five-day bench trial, made specific factual determinations.**

The district court issued detailed factual findings that included both stipulated facts (Appendix I to the Opinion) as well as specific factual determinations (Appendix II and III to the Opinion). R. 275 Opinion at Appendix I, II, and III; Appx. 84-141. Initially, the Court found that “punch card technology is neither confusing nor difficult to operate.” R. 275 Opinion at 25; Appx. 108. The Court found that some residual votes occur when voters intentionally choose not to cast a vote in a particular race. An examination of a cast ballot does not allow anyone to determine whether the residual vote was intentional or unintentional. R. 275 Opinion at Appendix I, p. 4, ¶30; Appx. 120. The Court made a specific finding based on the testimony of Dr. Martha Kropf, one of the Plaintiffs’ experts, that undervoting on purpose is rare. R. 275 Opinion at Appendix II, p. 1, ¶99; Appx. 129. The Court also specifically found that she relied on post-election national polls from two different organizations, the National Election Study (NES) and the Voters News Service (VNS) (R. 275 Opinion at Appendix II, p. 1 ¶99; Appx. 129), and that neither of these studies was specific to either the State of Ohio or any of its counties. R. 275 Opinion at Appendix II, p. 1, ¶103; Appx. 129.

The NES studies are not true exit polls because they do not start sampling voters until the day after the election and continue sampling through either December or January, depending upon the year of the survey. The Court found that

in 1988, the NES survey conducted quality control by trying to determine if those respondents who claimed they voted in the 1988 election had actually cast a ballot. R. 275 Opinion at Appendix II p. 3, ¶111; Appx. 131. The Court found that NES was unable to find any record of an actual vote cast by 3-5% of those surveyed claiming they had voted in the 1988 election. *Id.*

**1. Some of the evidence specifically dealt with the Plaintiffs' Fourteenth Amendment claim.**

The Court determined that in the 2000 Presidential race, lever machines had the lowest residual ballot rate at 0.5%, followed closely by electronic machines at 0.7%, and precinct count optical scan machines at 1.0%. R. 275 Opinion at Appendix III, pp. 2-4; Appx. 139-141. The Court found that central count optical scans had a residual ballot rate of 1.8%, and punch cards had the highest rate at 2.3%. *Id.* It also determined that if one examines the results from the 2000 Senatorial contest, central count optical scan had the lowest residual ballot rate at 4.9%, followed by electronic machines at 6.1%, precinct count optical scan machines at 7.3%, punch cards at 7.6%, and lever machines at 8.2%. *Id.*

The Court explicitly found that by examining the Presidential, Senatorial, Congressional, and Ohio legislative races for 1992, 1996, and 2000, punch cards tend to do relatively poorly in the Presidential races but improve relative to the

other voting machines as one moves down the ballot.<sup>2</sup> R. 275 Opinion at Appendix II, p. 9, ¶145; Appx. 137. The district court found also specifically that punch cards “do extremely well across all five races with a low number of nonvoted ballots.” *Id.* It also determined that one must look to other races besides the Presidential contest because “focusing only on presidential races does not produce a complete picture because other races have much higher rates of nonvoted ballots.” *Id.* at pp. 8-9, ¶144; Appx. 136-137. As a result, the district court made the factual determination that punch cards outperformed electronic machines in Congressional races concerning nonvoted ballot rates. *Id.* It also determined that “for the races of 1992, 1996, and 2000, punch cards produced fewer nonvoted ballots than either electronic voting machines or lever machines and produced virtually the same results as optical scan machines.” *Id.* at p. 9, ¶146; Appx. 137.

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<sup>2</sup> The Plaintiffs’ experts used precinct-level data for the 2000 Presidential election in Franklin, Hamilton, Montgomery, and Summit Counties. The Defendants expert used ward-level data for the entire State of Ohio for the 1992, 1996, and 2000 elections. While it is true that precinct-level data allows a statistician to examine the smallest geopolitical unit, it was impossible for the Defendants’ expert, Dr. John Lott, to look at precinct-level data for his study because precincts changed boundaries over time. His study, by examining the State over a period of time, was able to track changes in residual ballots as several jurisdictions switched the types of voting equipment they used between the 1992 and 2000 general elections. Furthermore, Dr. Lott’s study allows him to see if the results from the 2000 election are simply a one-time anomaly or something that is proven over time.

**2. Some of the evidence introduced at trial specifically concerned the Voting Rights Act claim.**

The parties stipulated that there is no evidence that any of the named Plaintiffs were in any way denied equal access to the polls, equal access to voter instructions, equal access to assistance from poll workers, or that the Plaintiffs were prevented from attempting to cast their vote in the 2000 general election. R. 275 Opinion at Appendix I, p. 10, ¶¶87; Appx. 126.

The Court found that in punch card precincts with a higher concentration of poverty, there was also an above-average residual ballot rate in the 2000 Presidential election. R. 275 Opinion at Appendix II, p. 4, ¶120; Appx. 132. It also found that factors such as education, race, and poverty are predictor variables and any one factor could never be the sole factor in the nonvoted ballot rate. *Id.* at p. 4, 6, ¶¶121, 133; Appx. 132, 134. The Court also made specific findings concerning some of Ohio's Appalachian counties. *Id.* at p. 4, ¶123; Appx. 132. The Court found that these counties all had a substantially higher percentage of Caucasians in their population than the State as a whole. *Id.* It determined that the African-American population of Adams County was 0.2% and its residual ballot rate for President in 2000 was 4.6%. *Id.* at p. 5, ¶124; Appx. 133. Jackson County had an African-American population of 0.6% and a residual ballot rate of 3.3%, while Gallia County had rates of 2.7% and 3.2%, respectively. *Id.* at p. 5, ¶¶125, 126; Appx. 133. Monroe County had an African-American population of 0.3% and a

residual ballot rate of 3.6%. *Id.* at p. 5, ¶127; Appx. 133. Pike County's African-American population was 0.9% with a residual ballot rate of 4.7%, while Vinton County's rates were 0.4% and 4.6%, respectively. *Id.* at p., 5 ¶¶128, 129; Appx. 133-134. Noble County had an African-American population of 0.7% and a non-voted ballot rate of 3.6%, while Meigs County's numbers were 0.7% and 4.2%, respectively. *Id.* at p. 6, ¶¶130, 131; Appx. 134. The Court determined that it is impossible for race to be the reason for the non-voted ballots in any of those counties. *Id.* at p. 6, ¶132; Appx. 134. Rather, other items such as education and income level were the reasons for the residual ballots. *Id.* The Court found that precincts with a higher concentration of poverty had a residual ballot rate higher than the State's average. *Id.* at p. 4, ¶120; Appx. 132.

Dr. Richard Engstrom, one of the Plaintiffs' experts, examined the residual ballot rate in various precincts in Franklin, Hamilton, Montgomery, and Summit Counties to see if there was a racial correlation between the use of punch card ballots and residual votes in the 2000 Presidential election. R. 275 Opinion at Appendix II, pp. 6-7, ¶134; Appx. 134-135. The Court recognized that Franklin County used electronic machines with second chance voting technology while the other three counties used punch cards. Engstrom testified that one cannot draw general conclusions from his study, but rather his data and conclusions are

necessarily limited to the 2000 Presidential election in those four counties. Transcript Day 2 (Engstrom) at 501.

The District Court found that the racial disparity in undervotes was four times higher in Franklin County than it was in Hamilton County even though Franklin County used electronic voting machines with second chance voting technology. R. 275 Opinion Appendix II, p. 7, ¶138; Appx. 135. In addition, African-Americans in Hamilton County had a lower residual ballot rate than whites in Summit County. R. 275 Opinion Appendix II, p. 7, ¶137; Appx. 135.

**F. Ohio has been working to modernize its voting technology.**

Shortly after the effective date of the Help America Vote Act (“HAVA”), Secretary of State Blackwell reconfigured his office in order to focus on implementing HAVA. R. 275 Opinion at Appendix I, p. 5, ¶44; Appx. 121. In May, 2003, the Secretary finalized the State’s HAVA plan and published it for review. *Id.* at p. 5, ¶45; Appx. 121. The Secretary, in September 2003, qualified four vendors to offer second chance voting devices in Ohio. *Id.* at p. 5, ¶46; Appx. 121. The Secretary commissioned a security review of their machines and found 57 potential security risks within the machines’ hardware and software. *Id.* at p. 5, ¶37; Appx. 121. In December of 2003, he ordered the qualified vendors to resolve the identified security concerns. *Id.*

House Bill 262, which required that by 2006 all electronic voting machines used in Ohio contain a Voter Verified Paper Audit Trail, was signed into law in May 2004. *Id.* at p. 6, ¶49; Appx. 122. Thus, the approved vendors needed to incorporate this technology into their voting machines.

At the time of the trial, no vendor offering electronic voting machines had passed its final security review. HAVA requires one machine in each polling location that will allow handicapped voters to vote unassisted. Ohio complies with this HAVA requirement through the use of electronic voting machines.

**G. Ohio's May 2006 primary was the first election in which voters no longer used punch card ballots.**

On May 2, 2006, Ohio conducted its first election completely devoid of punch cards. Every county used either precinct optical scan or electronic voting machines with second chance technology for its voters who voted at its polling places on election day. However, if a voter cast an absentee ballot in that election, he would not have used the second chance voting technology, because it is impossible to mail an electronic voting machine or optical scanner to a voter's residence. Thus, Ohio's election system now uses second chance technology on election day, but we still use non-notice technology for absentee voting.

**SUMMARY OF THE ARGUMENT**

First, Plaintiffs' attacks on Ohio's voting machines are moot, as Ohio has completely abandoned punch-card machines and all other forms of non-notice

technology for regular voters. A party's voluntary cessation of the complained-of conduct renders a claim moot unless the party can *reasonably* be expected to revert to that conduct. *Friends of the Earth, Inc. v. Laidlaw Env't. Servs.*, 528 U.S. 167, 189 (2000). Because Ohio has made such an enormous financial, political, and practical commitment to replacing punch-card machines and other non-notice technology at the polls, it is not plausible, let alone reasonable, to expect that Ohio might revive the voting methods that Plaintiffs attack.

Second, Plaintiffs have not shown an Equal Protection violation. First, *Burdick v. Takushi*, 504 U.S. 428 (1992), expressly rejects the idea that strict scrutiny applies to all challenges regarding state election regulations. Instead, *Burdick's* more flexible test means that Ohio's choice of voting-machine technology is subject to a lesser degree of scrutiny. Moreover, Plaintiffs' statistics do not establish an equal protection violation under any level of scrutiny. Plaintiffs find constitutional harm in the slightest numerical differences: for example, they insist a constitutional violation arises from deviations in error rates of less than 1% as between the machines that Plaintiffs consider acceptable and those whose use they attack as unconstitutional. And such small numbers are actually even smaller, but to an unknown degree, as Plaintiffs offered no Ohio-based evidence to separate out the undervotes that were deliberate rather than the result of machine error. Further, Plaintiffs failed to show that any alleged or demonstrated disparities are

systemic, as opposed to a one-time phenomenon. Indeed, Plaintiffs admit that they did not even try to establish that any county-to-county disparities in machine errors recur in multiple contests over a series of elections. Instead, they reached their “significant” disparity only by cherry-picking numbers from one race in one year.

Third, Plaintiffs have not proven a Due Process Clause violation. Due process is violated only by an extreme systemic denial of the right to vote, not by minor statistical deviations from perfection.

Fourth, Plaintiffs fail to state a claim for a violation of the Voting Rights Act because they have not proven a systemic violation that results in the denial or abridgment of the right of any citizen to vote on the basis of race.

Finally, because all of Plaintiffs’ claims lack merit, the Court did not err in failing to certify a class. Alternatively, if it did err, that error was harmless error.

### **STANDARD OF REVIEW**

After a five-day bench trial, the District Court granted judgment for Defendants, as it determined that Plaintiffs had failed to meet their evidentiary burden under either their constitutional or statutory claims. Thus, for Plaintiffs’ Fourteenth Amendment claims, this Court accepts the District Court’s factual determinations unless it finds them to be “clearly erroneous.” *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 341 (6th Cir. 1996). A factual finding is clearly

erroneous only when “a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Quang Ly Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006), quoting *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985).

The Court also reviews factfinding regarding Plaintiffs’ Voting Rights Act claim under the “clearly erroneous” standard. *Thornburg v. Gingles*, 478 U.S. 30 (1986). As long as the District Court used the correct legal standards, its determination must be upheld unless “its account was implausible based upon the entirety of the record or the reviewing court is left with the ‘definite and firm conviction that a mistake has been committed.’” *NAACP v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001), quoting *Magnolia Bar Ass’n Inc. v Lee*, 994 F.2d 1143, 1147 (5th Cir. 1993).

And of course all legal conclusions are reviewed de novo. *Kline*, 128 F.3d at 341.

## ARGUMENT

### **I. Plaintiffs’ claims are moot, as Ohio no longer uses punch-card machines or any other non-notice voting machines, leaving Plaintiffs’ attacks on such machines irrelevant.**

The Court need not and should not address the merits of Plaintiffs’ claims, for the case is moot. In Ohio’s latest election, the May 2006 primary, no regular Ohio voter walked into a polling place and used the machines that Plaintiffs attack.

(Absentee ballots may be different, as noted below.) Thus, no live controversy remains regarding our *former* use of such machines. As explained below, Plaintiffs cannot point to a *reasonable* expectation that Ohio will ever revive our use of the old machines, so this appeal is moot.

**A. All Ohio counties have retired the old machines, and we have invested heavily in the new equipment, so Plaintiffs can point to no reasonable expectation that Ohio will revive the use of punch-card machines.**

All sides agree that Ohio no longer uses any of the machines that Plaintiffs object to, so under well-settled mootness principles, this appeal is moot. Plaintiffs argue that Ohio's "voluntary cessation" does not moot the case, because, they say, we could revert to our old ways if the case is dropped. Plaintiffs' En Banc Br. at 60-61. But the danger of reversion must be a *reasonable* one, not just an allegation, as a case is truly moot if "subsequent events make it absolutely clear that the alleged wrong behavior could not *reasonably* be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt. Servs.*, 528 U.S. 167, 189 (2000) (emphasis added). As explained below, Ohio has invested millions in our new machines, and we have even started destroying the old machines, so the idea that we will revive old machines is not even plausible, let alone a reasonable expectation.

Ohio's recent primary election marked the first time in Ohio history that all regular voters who went to the polls cast their votes on notice equipment, and this change is a permanent one. To reach this point, every Ohio polling place that had

used such machinery had to make changes in its equipment and practices that must be considered permanent. We have committed not only significant financial resources in effecting this change, but we have also spend thousands of hours in training poll workers, in educating voters, and so on. Thus, changing course again would involve throwing away those investments, and that is just not a realistic possibility.

Notably, the confirmation provided by the May 2006 election, along with other events such as counties' disposal of old machines, are events that have happened since the panel first heard this case in December 2005, and indeed, occurred just after the panel issued its decision on April 21, 2006. The panel rejected a mootness claim at that time by noting that "Ohio has declared its *intentions* to comply with the [Help America Vote] Act and thereby *will receive* federal funding under the Act." *Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006) (emphasis added). But even if the case was not moot then, because our *intent* was all that had happened, the case has become moot since, as the more recent changes moved us from intent to reality. These newer changes are precisely the type of "subsequent event[]" that "make[s] it absolutely clear that the alleged wrong behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. Several specific aspects of the changeover demonstrate that Ohio has pounded the final nail in the punch-card coffin.

First, Ohio would undoubtedly have to repay the federal government the HAVA money that funded the changeover from non-notice methods, such as punch-card machines, to electronic voting. In return for \$132 million in HAVA funds from the federal government, Ohio agreed to return the money in proportion to the percentage of precincts that reverted to non-notice voting. 42 U.S.C. §15302(d). For example, if 10% of Ohio precincts violated the terms of the HAVA grant, 10% of the HAVA funds would have to be returned to the federal government. Ohio did the reasonable thing when it sought HAVA funds for the voting-machine upgrade—the federal grant allowed Ohio to acquire the new notice technology for free. But to go back to punch cards, Ohio would have to use public funds to pay the HAVA penalty, forfeiting taxpayer money on an expenditure that, like all penalties, brings nothing in return. And we would then have paid out of our own pocket for new machines that we would stop using. This would be patently *unreasonable*.

Second, in addition to money wasted on HAVA penalties for reverting to non-notice voting, backsliding counties would have to come up with the funds to acquire “new” punch-card equipment to replace the brand-new electronic equipment they got for free. They cannot take the old machines out of storage, because for the most part, they have discarded their old equipment, a sure indication that the change is permanent. As news articles have noted, counties have

been discarding the old punch-card machines, whether by sale or physical destruction. See, e.g., “Resell or Recycle? New Homes Sought for Old Voting Machines,” *Columbus Dispatch*, March 11, 2006, “What should election boards do with outdated machines?,” Associated Press article on CantonRep.com (a service of the *Canton Repository*), January 30, 2006.<sup>3</sup> Some minor exceptions existed, as Union County was reported to have held on to some of its punch-card machines in case it needed them in the future, but overall, according to the *Dispatch*, “Ohio’s 88 counties [were] working to dispose of the bulky remnants of a now useless system.” *Id.* Had Ohio’s counties intended to keep open the option of reverting to methods like punch-card machines, they would all have followed Union County’s example, rather than selling them for scrap and otherwise “try[ing] my darndest to find an outlet for them,” as the Pickaway County elections director put it. *Id.* It is not reasonable to expect that county boards of elections—having just disposed of non-notice machines—would choose not only to incur HAVA penalties for reverting to those methods, but would also (1) abandon their free, new equipment, and then (2) scavenge on the used-machine market to re-acquire the old punch-card

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<sup>3</sup> Although these events are not in the record, the Court may look to these news articles, as extrinsic evidence of mootness may be presented on appeal. See, e.g., *v. Zantop*, 394 F.2d 36, 40 (6<sup>th</sup> Cir 1968), citing *Mills v. Green*, 159 U.S. 651 (1895), and *Heitmuller v. Stokes*, 256 U.S. 359 (1921) (“[W]hen a fact not appearing in the record in the appellate record renders the issues on any appeal moot, such fact may be proved by extrinsic evidence.”). Moreover, we doubt that Plaintiffs will dispute that these events have indeed occurred; rather, they will at most dispute the legal impact of such events.

machines, assuming they could still find anyone with working machinery to sell it to them.

Third, if the financial costs and the hassle of re-buying old machines were not enough deterrent, Ohio and its political subdivisions would also have to devote time, effort, and money to poll-worker and voter education, or rather re-education, if they brought back punch-card machines, having just invested enormous efforts in familiarizing everyone with the use of the new voting technology. Along with that would come the enormous political cost of telling citizens that we wish to revert to machines that we had just declared outdated and not as effective as newer technology.

Finally, it is hard to imagine *why* Ohio or its counties would want to this, as all these costs and problems are certain, while we cannot imagine what the countervailing benefit would be. In short, the change is permanent, and Plaintiffs cannot point to a *reasonable* expectation to the contrary.

Against all this, Plaintiffs hang their entire danger-of-reversion argument on one point—that we have not formally “decertified” the old machines—but that issue is not enough to overcome mootness here. See Plaintiffs’ En Banc Br. at 60-61. The statutory decertification process is a sideshow, as it is designed to deal with machine malfunctions, not wholesale abandonment of one entire category of voting equipment that is replaced with equipment of an entirely different type. The

multi-step decertification process illustrates its irrelevance to the present context. As a threshold matter, under Ohio law, neither the Secretary of State nor the Board of Voting Machine Examiners has the power to unilaterally decertify any approved voting technology, even if it is no longer in use. If either the Secretary or the Board is notified of significant problems with specific equipment, the Secretary must first notify the vendors of the equipment that its certification may be withdrawn. Then the vendors must be given a chance to cure the deficiencies, and afforded a hearing on those deficiencies. R.C. §3506.05(F)-(G). This process is no longer pertinent to punch cards and other non-notice machinery now that Ohio has completely abandoned the use of that equipment. No citizens (including Plaintiffs) have come forward to seek decertification, and admittedly, neither the State nor the makers of the old equipment would have any interest in conducting a formal paperwork process concerning machines that are being junked. And of course, if Ohio *had* decertified this equipment, Plaintiffs might insist that Ohio could re-certify punch-card machines again. But any re-certification argument, just like the current decertification argument, does not meet the reasonableness test.

**B. The Court has held that equipment conversions show true mootness, as opposed to mere policy changes that can be easily reversed.**

The Court's cases further confirm that this case is moot, as the Court has found mootness through voluntary cessation when equipment changes have been

involved, as has happened here, while it has rejected mootness only where reverting to old ways would involve a simple policy or behavior change.

Our case here is strikingly similar to *Ailor v. City of Maynardville*, 368 F.3d 587 (6th Cir. 2004), in which the Court found that the city's substantial investment in new machinery and equipment rendered Plaintiffs' water-pollution claims moot. In *Ailor*, in response to the state's imposition of penalties for discharges of raw sewage, the city made a (literally) concrete and very expensive commitment to permanent change when it upgraded its wastewater treatment plant and fully complied with the state agency's order that it correct the problem. *Id.* at 591-592. The plant upgrade was completed, at the cost of \$1.7 million. *Id.* at 593. This Court held that these measures remedied the harm the plaintiffs complained of, and in fact had done so even before suit was filed. *Id.* at 600. In the same way, Ohio has invested huge sums in new machinery and equipment which would easily cost more than \$1.7 million to undo, taking into account the huge HAVA penalties attendant on reverting to the old voting methods like punch cards *en masse*.

In contrast, Plaintiffs rely on cases in which the defendants had not fully committed to a change, or where the change could be easily undone by simply flipping a policy switch to revert to the challenged practice. In *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2000), the challenged Michigan prison system rule could have been easily revived when the action terminated. Similarly, in *American*

*Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 543-544 (6th Cir. 2004), a still-incomplete renovation project was insufficient to moot the river-pollution claim. Likewise, the Court rejected mootness when a defendant city could offer only assurances that it no longer enforced the ordinance in question, an easily reversible position. *Johnson v. City of Cincinnati*, 310 F.3d 484, 490 (6th Cir. 2002).

Moreover, as this Court noted in *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990), the Court acknowledges a “difference in the way voluntary cessation of illegal activities is treated when the offending parties are government officials rather than private parties[.]” That is, “[a]ccording to one commentator, such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine.” *Id.*, quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988), referencing 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.7, at 353 (2d ed. 1984). Plaintiffs offer no basis to conclude that Ohio government officials’ self-correction is anything but genuine, especially in light of how much Ohio would lose if we reverted to punch cards. The changes can only be considered permanent, and Plaintiffs’ claims are moot.

In sum, the prospect of reversion here is not a reasonable expectation; in fact, it is not even plausible. Thus, as explained below, all of Plaintiffs’ claims, under both the Fourteenth Amendment and under the Voting Rights Act, are moot,

as all of their legal theories were aimed at the fact that punch-card machines (and other non-notice technology) were still being used.

**C. Ohio's permanent change in election machinery moots all of Plaintiffs claims, under both the Fourteenth Amendment and the Voting Rights Act.**

The mootness here pervades all of Plaintiffs' claims, so nothing of their case survives. Their Voting Rights Act claim was expressly premised on the use of punch-card machines in Hamilton, Montgomery, and Summit counties in the 2000 Presidential election. The apparent remedy would be a judicial order prohibiting any of those counties from continuing to use the punch-card ballot. Even if Plaintiffs could win on their claim, any violation has already been remedied, as we have already completely replaced punch-card machines with second-chance or notice voting technology, as implemented at the May 2006 primary election. Accordingly, Plaintiffs' Voting Rights Act claims are moot.

Plaintiffs' constitutional claims, at least to the extent that they concern voters who cast their ballots at the polling place on election day, are also moot. Beginning with the May 2006 primary election, the State of Ohio and its political subdivisions have used only second-chance voting technology at all polling locations. Thus, Ohio's abandonment of punch-card voting and its implementation of second-chance voting at the polls in every county renders the Fourteenth Amendment claims moot as they pertain to election-day voting.

At most, Plaintiffs' sole live claim would be an attack on absentee ballots, as absentee voters will continue to use non-notice voting technology similar to the central-count optical-scan voting equipment (but not punch-card ballots) that Plaintiffs challenged in their Second Amended Complaint. That Complaint does not indicate expressly that Plaintiffs meant to attack absentees, but their broad language regarding the alleged inadequacy of *all* non-notice ballots could be read to extend to absentee ballots, as such ballots do not include notice technology. See, e.g., ¶83. After all, no one mails an absentee voter a Direct Recording Electronic voting machine ("DRE") or an in-precinct counter for his or her optical scan ballot, so notice technology is simply impossible for absentee voters. But even if such an attack on absentees survives mootness, it is no longer a viable claim on appeal because Plaintiffs put on no evidence at trial regarding absentee ballots.

**II. Plaintiffs have not shown that Ohio violated the Equal Protection Clause by using punch-card machines or other non-notice equipment.**

**A. Strict scrutiny does not apply here: Ohio's reasonable choices regarding voting technology need only be reasonably related to important State interests.**

**1. *Burdick* calls for lesser scrutiny here, because Plaintiffs have not established a severe burden on the right to vote.**

Plaintiffs' equal protection challenge to voting technology should be evaluated, not for compliance with strict scrutiny, but upon the more deferential standard applied in *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, the Court

expressly rejected strict scrutiny as the test for all challenges regarding state election regulations and instead set forth a more flexible test. *Burdick* provides that the standard of review must be determined based upon “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” as well as “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.” *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Only severe restrictions must be narrowly tailored to advance a state interest of compelling importance. If restrictions are reasonable and nondiscriminatory, they are permissible so long as they are justified by the State’s important regulatory interests. *Id.* Under this test, this case does not warrant strict scrutiny.

Only State regulations that impose a severe burden on the right to vote warrant strict scrutiny. This is so because “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433. The Constitution does not, as indeed it cannot, guarantee that an election be free from all error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). If any alleged voting error

or irregularity is grounds for strict scrutiny, then the courts “would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Id.* at 86. By asking this Court to apply strict scrutiny to the State’s choice of voting technologies, Plaintiffs are asking the federal courts to set a standard fraught with difficulty and one that will require the federal courts to constantly review the state of voting machine technology based upon statistics that will be ever evolving. That this is true is easily demonstrated by the fact that while Ohio fends off a challenge to punch card ballots that it no longer uses, other States are already litigating challenges to electronic voting machines. See *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006) (challenge to Florida’s recount procedures regarding votes tabulated by electronic machines); *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003) (challenge to electronic machines without voter verifiable paper trail).

But this Court need not embark upon the perilous course Plaintiffs would set, for application of the well-established test from *Burdick* indicates that strict scrutiny is not warranted because Plaintiffs have not established a severe burden on the right to vote. Indeed, Plaintiffs do not establish any direct burden upon the right to vote. Plaintiffs stipulated that the choice of voting technology does not in any way deny them equal access to the polls, to voter instruction, to assistance from

pollworkers, or from attempting to cast their vote. R. 275 Opinion at Appendix I, p. 10-11, ¶86-89; Appx. 126-127. Instead, Plaintiffs assert that because two voting technologies, punch cards and central count optical scan, created higher rates of residual votes, they have established that strict scrutiny applies. They are wrong, because as set forth in greater detail below, the modest statistical differences here are both subject to differing interpretations and not of a magnitude that warrants strict scrutiny.

In considering these issues, this Court should follow the guidance of the Ninth Circuit, which has twice rejected equal protection claims similar to those here. First, in *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc), the en banc court, in an expedited decision, affirmed the district court's refusal to enjoin a recall election. The court found that Plaintiffs, who alleged that punch-card machines resulted in an overall residual vote rate of 2.23%, which was twice that of other voting technologies, had failed to demonstrate a likelihood of success on the merits of their equal protection claim. *Id.* at 918. Then, in *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the court refused to apply strict scrutiny to a claim that touchscreen voting may make some types of fraud more difficult to detect. The court determined that the allegations did not demonstrate that the use of the machines severely restricts the right to vote, after noting that all technologies suffer from certain drawbacks. The court

concluded that, as we urge here, those choices should be free from judicial second-guessing, as long as they are reasonable and neutral because “it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems.” *Id.* at 1107. See also *Wexler v. Anderson*, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (strict scrutiny did not apply to plaintiffs’ claim that Florida’s recount procedures were different for electronic machines than for optical scan counties).

**2. Plaintiffs’ arguments that strict scrutiny should apply are not supported by precedent.**

Plaintiffs argue that strict scrutiny is triggered because (1) different types of voting technologies result in “substantially different levels of accuracy,” Plaintiffs’ En Banc Brief at 24, 33, and (2) differences exist on a county to county basis that establish that Ohio discriminates based on residence. Plaintiffs’ En Banc Brief, at 25-27. Plaintiffs then assert, based on a series of apportionment cases and *Bush v. Gore*, 531 U.S. 98 (2000), that the existence of uncounted votes through voting error violates the principle that a State must accord equal weight to each vote. Lastly, Plaintiffs rely on a couple of district court decisions that hold no more than that allegations of substantial statistical differences survive a motion to dismiss. These arguments, however, are not well-taken.

The Court has expressly rejected strict scrutiny as the standard in all cases regarding election administration, *Burdick*, 504 U.S. at 433, and those cases that

have applied strict scrutiny are very different than this case. First, *Bush v. Gore*, although decided based on the Equal Protection Clause, does not support Plaintiffs' argument here. The decision in *Bush v. Gore* was expressly limited to the facts before the Court because "the problem of equal protection in election processes generally presents many complexities." *Id.* at 108. And the facts before the Court were very different than the facts here. The question presented was whether the recount procedures announced by the Florida Supreme Court were consistent with its obligation to avoid arbitrary and disparate treatment of the electorate. *Bush v. Gore*, 531 U.S. at 105. Essentially, the Court found that the State court that ordered the recounts failed to prescribe any meaningful standards at all for how those recounts were to occur. Thus, *Bush v. Gore* was not a case about local variation, but a case about a complete lack of standards. That *Bush v. Gore* does not control here could not be more clear, as the Court itself expressly noted that it was not addressing the question here: "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* For all of these reasons, *Bush v. Gore* presents no meaningful guidance as to how the U.S. Supreme Court would deal with the issues now facing this Court.

Nor do those precedents based on the concept of vote dilution (and accordingly discrimination based upon residence, see Plaintiffs' En Banc Brief at 30) apply here. The mere fact that different counties use different technology does

not establish violations of the Equal Protection Clause, as Plaintiffs admit. Plaintiffs' En Banc Brief at 24. Instead, such "local variety can be justified by concerns about cost, the potential value of innovation, and so on." *Bush v. Gore*, 531 U.S. at 134 (Souter, J., *dissenting*).

Plaintiffs primarily support their argument that strict scrutiny applies with vote dilution cases, beginning with *Gray v. Sanders*, 372 U.S. 368 (1963). See also *Reynolds v. Sims*, 377 U.S. 533 (1964); *Moore v. Ogilvie*, 394 U.S. 814 (1969). These cases, however, do not support a determination that strict scrutiny should apply based on a 1% difference in residual vote rates. These cases simply do not apply to the claim here, which is based on neither outright vote denial nor obvious vote dilution, but on relatively minor voting errors.

In each of these cases, the Court found that strict scrutiny applied and that the Equal Protection Clause had been violated for reasons that vary widely from those at issue here. None of these cases deal with the flaws inherent in the process of casting and counting votes. Instead, in each instance, there was some problem that devalued an individual's vote no matter how flawlessly the State's system worked.

First, in *Gray*, the Court found that Georgia's county unit system of counting votes, in which candidates who received the highest number of popular votes in a county carried the county, violated equal protection because it systematically

undervalued the votes of those in urban counties. *Gray v. Sanders*, 372 U.S. at 370. The Court found that units from the counties having only one-third of the State's population controlled a clear majority of the unit vote totals. *Id.* at 373.

Next, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that Alabama's failure to redistrict violated equal protection. *Id.* at 537-41. This failure to redistrict had resulted in the fact that a majority of the members of the Alabama legislature represented only 25% of the population and that population variance ratios of 41-1 existed in the Senate and 16-1 existed in the House. *Id.* at 545.

*Moore v. Ogilvie*, while not an apportionment case, follows logically from *Gray v. Sanders* and *Reynolds v. Sims*, and is likewise distinguishable. In *Moore*, the Court found that a requirement that a new political party must obtain at least 200 signatures from voters in each of at least 50 of the State's 102 counties discriminated against the residents of the populous counties in favor of rural counties. (At the time of the litigation, 93.4% of Illinois' population resided in the State's 49 most populous counties, while only 6.6% of the State's population resided in the remaining 53 counties. *Moore*, 394 U.S. at 817.) The overriding principle of *Moore*, like *Gray v. Sanders* and *Reynolds v. Sims*, is simply that a State may not devise an elections system that denies the will of the majority.

Thus, *Gray v. Sanders*, *Reynolds v. Sims*, and *Moore v. Ogilvie* are inapposite, both because they involve systems *designed* to create vote dilution and

because they concern statistical differences that far exceed the 1% difference in accuracy that Plaintiffs ascribe to punch card ballots in Ohio.<sup>4</sup>

Nor do *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) conclusively establish that either the standard of review or that the Equal Protection Clause has been violated. These two cases do not support Plaintiffs' claims in this case because they differ both factually and procedurally from this case. In *Black v. McGuffage*, the district court denied a defendants' motion to dismiss for failure to state a claim after it assumed, as it must for purposes of a Civil Rule 12(b)(6) motion, that the allegations in the complaint were true. Likewise, in *Common Cause v. Jones*, the district court assumed for purposes of a motion for judgment on the pleadings that plaintiffs' allegations that "punch card systems are less reliable than the other voting systems permitted by the secretary of state, [and] those individuals living in counties [using punch cards] are substantially less likely to have their votes counted" were true. 213 F. Supp.2d at 1108.<sup>5</sup> Finally, *Black* also

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<sup>4</sup> Plaintiffs also rely on *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), a poll tax case. *Harper* is one in a long line of cases striking poll taxes. Because this case most assuredly does not involve a poll tax, *Harper* is hence readily distinguishable.

<sup>5</sup> In *Black*, the case ultimately settled, and thus no proof was offered and the decision was never reviewed by a circuit court. In *Common Cause v. Jones*, the case was rendered moot after the California Secretary of State decertified punch cards. 213 F. Supp.2d at 1113.

included a challenge to butterfly ballots, which are not in use in Ohio. For these reasons, *Black* and *Common Cause* are not persuasive here.

Thus, none of the cases relied on by Plaintiffs support a determination that strict scrutiny applies to all, or indeed to any, cases challenging the residual vote rates of different voting technologies. To the contrary, the flexible standard set forth in *Burdick* applies, and strict scrutiny does not apply unless the evidence shows a substantial and sustained objective difference of such a magnitude to demonstrate that a voting technology severely burdens the rights of voters.

**B. Choice of voting technology does not create a severe burden on the right to vote and violate the Equal Protection Clause unless there is a substantial objective difference in error rates that exists across the board over time and that cannot be attributable to intentional undervotes.**

It cannot be that any difference in residual rates between two different types of voting machines or between two different counties establishes an equal protection violation. If this is so, then no form of voting technology could ever satisfy judicial scrutiny. Instead, a test is needed that can distinguish a serious pervasive problem from more minor or random fluctuations. Towards this end, this case, which was tried and thus presents a complete factual record, demonstrates all of the problems that could occur if the standard is overly stringent or subjective. Differences in residual rates vary from county to county, from machine type to

machine type, from race to race, and from year to year. No standard that allows Plaintiffs to cherrypick only the statistics that support their argument will work. Instead, the only workable standard is one that turns on a substantial objective difference in error rates that occurs on a sustained basis and that cannot be attributed to intentional undervotes. A voting technology that does not generate these types of significant, sustained problems survives scrutiny under the Equal Protection Clause, no matter what label the court places on the level of scrutiny.

**1. The difference in residual rates must be substantial and must be measured against an objective standard.**

This case in part turns on the need to determine when an error rate is constitutionally acceptable or unacceptable. And in this regard, rhetorically labeling punch-card machines as error-prone is not helpful, as every type of voting technology is susceptible to some form of error. A threshold question then becomes how to determine when an error rate is constitutionally acceptable, whether by an objective measure or a relative one.<sup>6</sup>

There are three possible ways to state an error rate for a voting technology (the following figures are all hypothetical): (1) punch cards had an error rate of

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<sup>6</sup> Note that for purposes of this section we are discussing the error rate of different technologies. Plaintiffs' evidence in this case is generally not about error rates, but about residual vote rates. A residual vote rate does not necessarily reflect the error rate, or rate of votes cast, but not counted, because residual rates include not only an error rate, but also intentional undervotes, which are not errors at all, but were never meant to be counted.

1.5% and precinct count optical scans had an error rate of .5%; (2) the difference between the rates for two different technologies, i.e., the error rate for punch card ballots is 1 point higher in this hypothetical than for precinct count optical scan; or (3) the ratio between two different error rates, i.e., the error rate for punch-card ballots (1.5%) was three times the rate for precinct count optical scan (.5%).

Of these three methodologies, the first, a consideration of the extent to which a particular voting technology has a baseline error rate that is unacceptable sounds more in due process than equal protection. If Ohio used only voting technology that had the same error rate, but that rate was unacceptably high by some objective measure, that fact arguably establishes a due process claim, not an equal protection claim. In other words, if 10% of all votes in Ohio were not counted that may not violate the Equal Protection Clause, but still may violate the Due Process Clause. Because the Equal Protection Clause is concerned not as much with fundamental fairness, but instead with differences between classifications, it is not the bottom line percentage of votes lost that is the relevant figure, but the differences between the error rates.

Accordingly, the relevant comparison for purposes of equal protection is whether the difference between the error rate for different machines is significant enough to establish an Equal Protection violation. That difference can be measured as either a range or a ratio. However, Plaintiffs cannot be correct that a relative

comparison of differences in rates matters. See Plaintiffs' En Banc Brief at 37, pointing out that the Cuyahoga County residual rate is four times the Franklin County rate. There must be some objective standard that is constitutionally acceptable, not a standard that will continually lead to the invalidation of whatever voting methodology comes out at the bottom of the statistical heap for one race or one county, or even for the whole State. If Franklin County has an error rate of .2% and Cuyahoga County has an error rate of .8%, then, under Plaintiffs' theory, these statistics would still prove a constitutional violation. Thus, if the constitutional standard is determined based upon a relative comparison of error rates, it becomes obvious that this standard could be impossible to achieve even if all error rates were within tolerances that Plaintiffs apparently find currently acceptable. Accordingly, the objective standard must be either a standard flat percentage (any error rate less than 3% is constitutionally acceptable or a range of difference (any error rate within 1.5 points of reasonable alternatives) is acceptable.

- 2. The relevant rate should reflect only unintentional residual votes, and thus must exclude intentional overvotes. Plaintiffs have not provided Ohio-specific evidence that would allow this Court to determine unintentional residual votes for Ohio counties.**

In this case, Plaintiffs use residual vote rate as a proxy for error rate, or votes cast, but not recorded. This is incorrect, however, because the residual vote rate includes some percentage of undervotes that are intentional, i.e., sometimes voters deliberately fail to record a vote in a particular race. Thus the rate of intentional

undervotes becomes important because it is only the remainder of the residual vote rate that reflects overvotes or unintentional undervotes.

Plaintiffs rely on the residual vote rate for the 2000 Presidential election to support their arguments. For this race, the statewide residual vote rate was 1.88%. R. 275 Opinion at Appendix I, p.4 ¶ 28; Appx. 120. That rate varied from county to county, ranging from .4% in Lucas County to 4.7% in Pike County.<sup>7</sup> R. 275 Opinion at Appendix III, Sorted Data Set Gathering of County Sums and Percentages 2000 Elections; Appx. 139. At the same time, the residual rate varied by voting technology. For the 2000 Presidential race, lever machines had the lowest residual ballot rate at 0.5%, followed closely by electronic machines at 0.7%, and precinct count optical scan machines at 1.0%. R. 275 Opinion at Appendix III, pp. 2-4; Appx. 139-141. Central count optical scans had a residual ballot rate of 1.8% and punch cards had the highest rate at 2.3%. *Id.* Accordingly, those technologies that Plaintiffs view as unacceptable, central count optical scans and punch cards, have a residual rate that is .8 to 1.3% different than those

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<sup>7</sup> One county, Holmes County, had a higher rate, 8%. Holmes County, however, is unique in that it has a high percentage of Amish and Mennonite voters who because of their religious beliefs vote only on issues and not for candidates. Transcript Day I [Kropf] at 229-232; Appx. 409.

technologies that these Plaintiffs view as the gold standard.<sup>8</sup> This difference has no significance at all, if it could be attributed to intentional voter behavior.

Plaintiffs' process for estimating intentional undervotes was fatally flawed. Plaintiffs' expert, Dr. Kropf, estimated that the percentage of intentional undervotes in presidential elections varies between 0.23% and 0.75%. Kropf Tr. 7/26/2004, Vol. 1 at 85; Appx. 356. See Plaintiffs' En Banc Brief at 14. However, there is no reason to accept that this intentional undervote rate is truly reflective of the overall rate of intentional undervotes in Ohio or to assume that the rate of intentional undervotes does not fluctuate more between counties.

Dr. Kropf's methodology was flawed in several important respects. First, as Dr. Kropf admitted, NES studies consistently over-report voter turnout and in fact evidence indicates that at least 3-5% of those reporting never actually voted. R. 275 Opinion at Appendix II, ¶¶107, 111; Appx. 130-131. Second, the studies she relied on were national, not Ohio-based. *Id.* at ¶¶101,102; Appx. 129. Third, while she concluded that differences in intentional undervoting across racial groups were insignificant, she concluded that "low income is associated with more

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<sup>8</sup> Interestingly, the machines perform differently in down-ticket races, which points out the difficulties inherent in making constitutional standards based upon small statistical differences. For example, for the 2000 Senatorial contest, central count optical scan had the lowest residual ballot rate at 4.9% followed by electronic machines at 6.1%, precinct count optical scan machines at 7.3%, punch cards at 7.6%, and lever machines at 8.2%. *Id.*

undervoting.” Exhibit 1, Kropf report at ¶13. At the same time, Dr. Kropf recognizes that voters may intentionally undervote either from alienation from the political process or because they came to the polls to vote for another office. R. 275 Opinion p. 26; Appx. 109.

Most telling in this respect is the fact that Dr. Kropf did find a significant difference in intentional undervoting in the Presidential race based on income. The intentional undervote percentage for those “with family income under \$15,000 is 1.54%, about double the rate of those with family incomes between \$15,000 and \$30,000,” and halves again for those with incomes above \$30,000.” Kropf report. In her report, she concludes that these results are “consistent with the possibility that lower-income voters are more likely than higher-income voters to be motivated to go to the polls by local issues that more directly affect their quality of life.” *Id.* It is not unreasonable to draw the conclusion that intentional undervotes would be higher in counties with lower incomes, which also tend, by Plaintiffs’ own evidence, to be the counties with punch card systems, and that the intentional undervote rate in some Ohio counties, like Holmes County, could be significantly higher than the national or State average, whatever that is. It also follows that the number of voters coming out to vote only for a specific candidate or issue is widely variable from location to location and year to year. Without the ability to truly measure the intentional undervote percentage on a county by county basis, the

county by county residual vote comparisons are virtually meaningless. Thus, Plaintiffs' conclusion that the differences in residual vote rates are explained primarily by voter error is unproven.

**3. In order to state a violation of equal protection, Plaintiffs must demonstrate an error rate that is sustained across races and over time, and they have failed to do so here.**

Again, Plaintiffs very selectively use data that supports their thesis without placing it in the appropriate context. First, Plaintiffs assert that the overall residual vote rate went down *only*, as they put it, to 1.84% for the 2004 Presidential race. Plaintiffs' En Banc Brief at 34. Plaintiffs support this statistic with information that is not in the website, but which appears on a website, at <http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-all.pdf> (last accessed on 9/26/06). See Plaintiffs' En Banc Brief at 34, n.11. The chart found there tells an interesting story about how residual rates fluctuate over time. When residual votes are calculated as a percentage of total ballots cast by machine type, which did not significantly vary from 2000, the overall residual rates were very different. Defense counsel's calculations indicate that the residual rate for punch-card ballots was 1.79%, for DREs was 1.25%, and combined optical scan was 1%. These percentages are significantly different than the 2000 residual rates, with a much narrower difference between the "best" and "worst" technologies, thus undermining Plaintiffs' case.

Second, Plaintiffs myopically look only at the Presidential race. As the trial court found, however, punch cards perform as well as any other voting technology in down-ticket races. R. 275 Opinion at Appendix II, pp.8-9, ¶¶143-146; Appx. 136-137. Indeed, when examining 1992, 1996, and 2000, punch cards produced fewer non-voted ballots than either electronic voting machines or lever machines and produced virtually the same results as optical scan machines. *Id.* at ¶146. In a more specific example, in the 2000 Senatorial race, punchcard ballots produced 7.6% residual votes, which is almost identical to the 7.3% produced by precinct count optical scan, and which is lower than the 8.2% residual rates for levers. R. 275 Opinion at Appendix III, p.1 Summary Report 3; Appx. 138. Once again this indicates the unworkability of the test Plaintiffs urge upon this Court. Apparently punch-card ballots can simultaneously violate Equal Protection when counting votes for President, while being constitutionally required when counting votes for Senator. Something more than the random, inconsistent statistics relied upon by Plaintiffs should be required before this Court takes the drastic step of interfering in the administration of State elections.

**4. Ohio's choices regarding voting technology are justified by important state interests.**

Ohio has valid justifications for its past use of punch cards and central count optical scan cards, justifications that have been recognized as valid by members of the Supreme Court. As Justices Souter and Breyer noted in *Bush v. Gore*, “the

Equal Protection Clause does not forbid the use of a variety of voting machines within a jurisdiction, even though different mechanisms will have different levels of effectiveness in reading voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on." *Bush v. Gore*, 531 U.S. 98, 134 (2000) (Souter, J., *dissenting*). Ohio's past use of punch-card ballots and central count optical scan are justified by both their past performance in the State, the fact that the expense of replacing election machines across the State counsels in favor of careful study prior to implementing any change, and because of security concerns.

Counties in Ohio have been using punch cards for many, many years. The use of optical scan cards, although more recent than punch cards, also goes back to the introduction of this technology quite some time ago. And generally these technologies have performed adequately, as found by the District Court. Accordingly, despite the recent availability of new technologies, Ohio had no reason to hastily abandon its long-standing voting methods.

At the same time, the expense of changing an entire State over to a new voting technology is obvious.<sup>9</sup> Ohio has now done so, using \$132 million in

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<sup>9</sup> Conservation of resources likewise justified the use of central count optical scans for some counties. Central count optical scans, because it does not involve on-site terminals, is less expensive. At the same time, some counties would have difficulty finding enough pollworkers who know how to operate on-site terminals or who are

HAVA funds, which covered 95% of the expense to convert the State's voting technology. The fact that a State cannot, for resource reasons, completely overhaul its voting technologies every time technology changes is obvious. Equally importantly, voting technology is constantly evolving.

Nor is it obvious that every change in technology should immediately be implemented. Every voting technology has its own unique features, which can create difficulties for either the voter or for the processing and counting of votes. Or even for the ability to re-count. Plaintiffs in other cases have sued because they distrust electronic machines and would prefer a system like punch cards, which creates a hard piece of evidence that can later be compared to vote totals. Indeed, Ohio's implementation of its new system had to be delayed in order to resolve security concerns with DREs. Transcript Day 4 (Walch) at 738, Appx. 523. Accordingly, the State of Ohio was justified in carefully considering the types of voting machines and features available before finally determining which features should be required and which machines met the Secretary's standards, before making the change-over. And, it was not until after the primary election in 2006 that any information was available to allow an attempted comparison of how voters in the former punch card counties interacted with electronic voting machines.

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able to lift and operate heavy pieces of machinery. Transcript Day 4 (Tuckerman) at 710-711; Appx. 510-511.

Thus, in the end, it is apparent that any voting technology results in residual votes or is subject to problems that, unfortunately, can result in votes not being counted. So long as the State's system is reasonable and nondiscriminatory, that system should satisfy the Equal Protection Clause. Otherwise, the federal courts and statisticians will end up with control over the process, instead of the State and its democratically-elected legislators and officials, as mandated by the Constitution.

### **III. Plaintiffs have failed to establish a violation of the Due Process Clause.**

Contrary to Plaintiffs' impossible expectations, no election system is perfect, and no balloting system will ever be free of error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). Since Ohio cannot have a perfect electoral system, the question is when a system is good enough. Here, the district court properly found that Ohio did not violate Plaintiffs' due process rights in using non-notice voting technology.<sup>10</sup>

Due process violations exist only where the actions of government officials "seriously undermine the fundamental fairness of the electoral process." *Duncan v. Poythress*, 657 F.2d 691, 700 (5<sup>th</sup> Cir. 1981). See also *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (holding that an elections system must reach a point of

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<sup>10</sup> The Panel decision issued April 21, 2006 did not address Plaintiffs' Due Process Clause claims. Panel Decision, footnote 27.

patent and fundamental unfairness before a § 1983 Due Process Clause violation has occurred); *Gamza v. Aguire*, 619 F.2d 449 (5th Cir. 1980).

The State of Ohio has not disenfranchised its citizens by allowing the use of non-notice voting technology. See *Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) (providing that only complete disenfranchisement rises to the level of a substantive Due Process Clause claim). The evidence, the trial court determined, demonstrates that no such complete disenfranchisement took place in Ohio's 2000 Presidential election. Rather, the difference in residual ballots between punch-card ballots and electronic voting machines was around 1 per 100 votes case. Such a minor difference shows neither a fundamentally unfair election system nor the complete and total disenfranchisement of Ohio's voters. If, by contrast, a voting machine failed to record, for example, 20 out of every 50 votes, then the use of such a machine could violate a voter's due process rights. But here, no such extreme problems exist, as the very small difference between the two technologies cannot make a constitutional difference.

Because Plaintiffs provide no practical benchmark, they apparently require that each and every voting machine hot off the market must be implemented if it seems that the newer machine offers the slightest improvement in error rates. For example, if a new machine could produce a 99% valid ballot rate, rather than a

98.5% valid ballot rate, Plaintiffs' theory seems to say that the Due Process Clause requires an immediate change.

But this view – that there is an ongoing constitutional mandate to trade up to the latest and greatest technology – cannot be right, for several reasons. First, error rates are not the sole criterion that elected officials can and should consider. Each machine must be judged by several factors, including ease of administration, ease of use by voters and election personnel, transparency and accountability to the public, and even costs. And of course, security is a vital concern, as no one should want the State of Ohio to use new technology before all security issues are properly addressed. Instead, the more prudent course is for Ohio to act as it did in 2005 and 2006, that is to upgrade its voting system quickly but deliberately, allowing enough time to ensure complete confidence that the new technology was ready for mass use.

Second, Plaintiffs' demand for the latest-and-greatest machines runs counter to their demands for perfect equality under the Equal Protection Clause. As explained above, contradiction arises because the best way to discover which new machines are best is to allow counties to try new things, allowing for a few counties to go first before imposing a new system statewide. But our ability to experiment locally would surely be chilled by a standard that allows virtually zero county-to-county variance. Thus the better view is to leave room under both the

Due Process and Equal Protection Clauses to allow room for democratic choices as we strive to continually improve our system.

Third, Plaintiffs have not proven a Due Process Clause violation. Due process is violated only an extreme systemic denial of the right-to-vote, not by minor statistical deviations from perfection. And this claim also fails for many of the same reasons that Plaintiffs' equal protection claim fails, i.e., that it is based upon a one-race, one-day snapshot, rather than any upon any showing of a systemic problem.

#### **IV. Plaintiffs have failed to prove a Voting Rights Act violation.**

Plaintiffs' Voting Rights Act claim fails as an evidentiary matter regardless of their particular legal theory. Plaintiffs' claim is that African-Americans are more likely than their white counterparts to cast residual ballots on punch card voting technology. Plaintiffs have attacked only punch card ballots; they have not attacked central count optical scanners.

The facts as determined by the trial court show that consistent racial gaps disfavoring African-Americans do not exist for punch card voting technology. Because Plaintiffs were unable to sustain their evidentiary burden of proof, the district court properly determined that Plaintiffs failed to establish a Voting Rights Act violation and its decision should be affirmed.

**A. Plaintiffs have failed to prove a systemic racial gap attributable to punch card machines in different elections.**

Plaintiffs have failed to prove that a consistent racial gap disfavoring African-Americans exists. If Plaintiffs were correct and this were a systemic problem attributable to the interaction African-Americans had with punch card voting machines, one should see a racial gap regardless of the election year or the office for which the voter has cast his ballot. Yet, even though there may well be a significant increase in the number of intentional residual ballots as one completes a ballot from President to State Representative, the racial gap should remain constant.

For example, assuming that 1 voter out of every 100 intentionally failed to cast a ballot for President, if a racial gap existed, the evidence should show that only 97 African-American ballots cast for President properly recorded a vote while 99 white ballots cast for President properly recorded a vote. Plaintiffs theorize that the 2 vote difference in this example has to be due to the racial interaction between African-Americans and the punch card ballot. Yet, if 20 out of 100 voters intentionally failed to cast a ballot in the Senatorial contest, we still should see that 79 white voters' ballots were properly tabulated by the punch card voting machinery and only 77 African-American ballots were tabulated. This racial gap should remain constant throughout the elections for Congress as well as the

Statehouse even though the total number of intentional residual votes cast will continue to increase.

Plaintiffs simply cannot espouse a plausible theory that punch cards violate the Voting Rights Act unless they are able to produce evidence showing a racial gap exists from the top of the ticket to the bottom of the ticket over several election cycles. Yet, no such evidence exists.

Dr. John Lott, the Defendants' expert, examined the Presidential, Senatorial, Congressional, and Statehouse races in Ohio for 1992, 1996, and 2000. Plaintiffs stipulated to the accuracy of his results. R. 275 Opinion at Appendix I, p. 3, ¶26; Appx. 119. Dr. Lott discovered that the wards with the highest concentration of African-American voters had a slightly lower residual ballot rate for Presidential ballots than the wards with the highest concentration of white voters.<sup>11</sup> *Id.*; Lott Report Table 4; Appx. 1021. Dr. Lott further found that in comparing those African-American wards to wards that were exclusively white, the racial gap expanded and more whites than African-Americans cast residual ballots. Likewise, Dr. Lott found that the African-American wards had fewer residual ballots cast for Congress than their counterpart white wards. *Id.* Dr. Lott found, however, that the African-American wards cast more residual ballots for Senate and the Statehouse

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<sup>11</sup> In doing this comparison, Dr. Lott looked at the top 10% of wards with the highest African-American population and compared them to wards at the top 10% concentration of white voters.

elections than their counterpart white wards. *Id.* As a result of this finding, Dr. Lott summarized that “overall, areas with relatively more African-Americans and Hispanics experience fewer non-voted ballots than whites.” *Id.* at p. 1.

Dr. Martha Kropf, Plaintiffs’ expert, collaborated Dr. Lott’s data. Transcript Day 5 (Kropf) at 944; Appx. 599. Dr. Kropf testified as follows during the trial:

Q. As a social scientist, if a voting machine causes a specific problem for someone of a certain race to vote for one office, shouldn’t that be true for all offices?

A. Yes.

Transcript Day 5 (Kropf) at 944.

Both Dr. Lott’s data and Dr. Kropf’s admission show the fallacy in Plaintiffs’ approach of examining the data for the election of one specific office or solely looking at the voting results from one specific county in a claim that a voting machine violates the Voting Rights Act. Dr. Kropf understands that if there were systemic problems with punch card voting machines, the same racial disparity would exist in the votes for each office. Dr. Lott’s data shows that in elections for some offices African-Americans cast fewer residual ballots than whites while in elections for other offices, the opposite is true. Since Plaintiffs have not produced evidence showing African-Americans always have higher residual rates than whites, there is insufficient evidence of a Voting Rights Act violation.

**B. Although they focused on only a handful of precincts in select counties, Plaintiffs have failed to produce sufficient evidence to show that punch card machines violate the Voting Rights Act.**

Plaintiffs refused to examine the State of Ohio as a whole for their Voting Rights Act claim. Instead, they hand-picked Hamilton, Montgomery, and Summit counties. Likewise, Plaintiffs refused to examine elections for anything except President. Most interestingly, Plaintiffs examined only the 2000 election. They ignored the results for 1992 and 1996.

While Dr. Lott examined over 2,700 wards over three elections to see if punch card machines had a negative relationship to race (Lott Report p. 5; Appx. 1002), Plaintiffs only examined 15 precincts in Summit County and fifty-five precincts in both Hamilton and Montgomery Counties.<sup>12</sup> Transcript Day 5 (Kropf) at 937-938. In trying to determine whether African-Americans were denied the right to vote due to the use of punch card ballots, the district court made a factual determination that the racial gap in undervotes was four times higher in Franklin County than it was in Hamilton County. R. 275 Opinion Appendix II, p. 7 ¶138; Appx. 135. This is significant because Franklin County used electronic voting

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<sup>12</sup> In Ohio, the average precinct has between 550 and 600 voters. The average ward is made up of five precincts. In Dr. Engstrom's study, he looked at approximately 8,250-9,000 voters in Summit County. Assuming that the Plaintiffs are correct in their claim that 0.75% of all voters intentionally cast residual ballots for President, that means that Dr. Engstrom's testimony concerned approximately 128 to 139 unintentional residual ballots for Summit County. If one were to further break that number down into overvotes or undervotes, it would shrink correspondingly.

machines with second chance voting technology while Hamilton County used punch cards. In addition to this disparity, the district court found that African-Americans in Hamilton County undervoted at a rate lower than whites in Summit County. Once again, if only 0.75% of voters intentionally cast residual ballots for President and there were a racial component to the use of the punch card ballot, one should expect that African-Americans cast more residual ballots than whites regardless of where they lived.

Surely, Plaintiffs do not mean to suggest a theory that would find the use of electronic voting machines to be illegal simply because a racial gap exists in residual ballots between African-American and white voters in Franklin County. Plaintiffs will, no doubt, inform this Court that they do not seek a ruling that electronic voting machines violate the Voting Rights Act because of the racial disparity that exists in Franklin County. As has been previously mentioned in this brief, however, there are others who have sued States with the hope of decertifying electronic voting machines. While a victory for Plaintiffs would prohibit punch card machines, it would also validate a legal theory that could end the use of electronic voting machines. See Equal Protection Clause argument at Section II.

This evidence, taken as a whole, shows the folly of Plaintiffs' approach. They have managed to examine only a few precincts in handpicked counties in one election. They have refused to examine, for example, Cuyahoga County, even

though that county is home to more than one-quarter of the State's African-American population and has more African-American residents than the total population of 83 of Ohio's 88 counties. R. 275 Opinion at Appendix I, p. 5, ¶41; Appx. 121. This selective use of statistics fails to show that punch card ballots violate the Voting Rights Act. When one examines the entire State in a non-selective manner, the evidence shows that for some specific offices more African-Americans cast residual ballots than whites but for other specific offices more whites cast residual ballots than African-Americans.

Not only did the district court properly reach factual conclusions that prohibit Plaintiffs from prevailing on their Voting Rights Act claim, the court also properly analyzed the legal principles involved in Plaintiffs' claim. As a result, this Court should affirm the district court's decision.

**C. Plaintiffs have failed to meet the legal requirements for a Voting Rights Act violation.**

Plaintiffs failed to establish a Voting Rights Act violation because they were simply unable to prove that either the State of Ohio or its political subdivisions denied them equal opportunity to participate in the political process and to elect representatives of their choice. The Voting Rights Act prohibits any voting practice or procedure that results in "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 42 U.S.C. §1973(a). In

order to prove a violation of this Act, a minority group must demonstrate that *as a result of the challenged practice or procedure*:

[B]ased on the totality of the circumstances, . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. §1973(b).

Plaintiffs are correct that the Voting Rights Act protections apply to obtaining a ballot, casting that ballot, and having that ballot properly counted. Plaintiffs' En Banc Br. at 47. The disagreement between the parties, however, arises when one examines the parameters of the claim itself. Regardless of whether Plaintiffs have brought a vote dilution, vote denial, or as yet unrecognized Voting Rights Act claim, they must show based upon the totality of the circumstances that they cannot participate equally in the political process or elect representatives of their choice. See, *e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999) (vote denial case); *Mallory v. State of Ohio*, 173 F.3d 377, 382 (6th Cir. 1999) (vote dilution case).

- 1. Plaintiffs have failed to show based upon the totality of the circumstances that they were denied an equal opportunity to elect representatives of their choice.**

When using the vote denial theory under Section 2 of the Voting Rights Act, a plaintiff must show that based upon the totality of the circumstances he was

denied an equal opportunity to participate in the electoral system and to elect representatives of his choice. Likewise, under a vote dilution theory, a plaintiff must also meet the totality of circumstances test. The totality of the circumstances test comes from the typical factors identified in a 1982 Senate Judiciary Committee report. S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. Those factors are:

- The extent of any history of official discrimination concerning voting;
- The extent to which voting in elections is racially polarized;
- The extent to which the State has practices that may enhance the opportunity for discrimination;
- Whether minorities have access to candidate slating processes;
- Whether minorities bear the effects of discrimination in such areas as education, employment, and health, hindering their ability to participate effectively in the political process;
- Whether political campaigns use overt or subtle racial appeals;
- The extent to which minorities have been elected to public office;
- Whether there is a significant lack of responsiveness by elected officials to members of the minority group;
- Whether the policy underlying the use of the voting practice is tenuous.

*Id.*

The only totality factor that Plaintiffs addressed was minority income and education levels. Yet, this is insufficient to support a finding of “totality of the

circumstances.” See, e.g., *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3rd Cir. 1994). Plaintiffs in *Ortiz* challenged Pennsylvania’s voter purge statute, alleging that it was discriminatory because statistically more African-Americans than whites were purged from the voter rolls. Plaintiffs showed that African-Americans had lower educational attainment and lower income than their white counterparts. The Third Circuit rejected the plaintiffs’ claim, finding that African-Americans had been able to overcome these limitations when they registered to vote the first time. *Id.* at 315-16. Much like the *Ortiz* plaintiffs, our Plaintiffs were able to overcome any disadvantages in education and income by properly casting their punch card ballots for numerous officeholders. They were able to statistically do so at rates higher than their white counterparts for certain offices. Therefore, much like the *Ortiz* case, Plaintiffs have been unable to prove they have met the totality of circumstances test.

**2. Plaintiffs rely on inapplicable case law in order to argue their Voting Rights Act claim.**

Plaintiffs, in trying to prove their claim, rely on inapplicable case law. As an initial matter, Plaintiffs attempt to use *Rural West Tennessee African American Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000) for their proposition that this Court can only compare intra-county residual ballot rates for African-Americans and whites. (Plaintiffs’ En Banc Br. at 55.) In *West Tennessee*, the State attempted to justify its refusal to create a majority-minority voting district because