
No. 05-3044

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Effie Stewart, et al.,
Plaintiffs/Appellants,
v.
Kenneth Blackwell, et al.,
Defendants/Appellees

Appeal from the United States District Court
for the Northern District of Ohio (Akron)

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INTRODUCTION

The core question presented in this litigation is whether Ohio elections officials, in determining what voting equipment voters must use, have met their constitutional and statutory obligations to treat all voters equally. The unequivocal answer to this question is no. Historically, Ohio officials have required voters to use voting equipment with substantially different levels of accuracy. Based on official reports of error rates in the 2000 Presidential election, non-notice counties have uncounted vote rates two to three times that of counties using more reliable equipment. R. 234, Pretrial Stip. Of Fact, ¶¶ 17, 18, 25, J.A. 274-275. These are not isolated discrepancies as Defendants seek to portray them, but the systemic consequences of Ohio's failure to get rid of voting equipment that has proven unreliable wherever it has been used. Furthermore, due to the effects of overvoting, the non-notice voting systems that the County Defendants have used in Summit, Montgomery, and Hamilton Counties ("Section 2 County Defendants") also have the effect of disfranchising substantially more African American voters than white voters. Engstrom, Tr. 7/27/2004, Vol. II, p. 438:8-15, J.A. 447.

This lawsuit asks nothing more than that Ohio officials conduct elections in a manner that does not discriminate on the basis of residency or race. Plaintiffs do not seek absolute uniformity, but only the decertification

of the worst-performing voting equipment – specifically non-notice punch card and optical scan systems. They seek this relief based on the Fourteenth Amendment’s prohibition of discrimination based on place of residence, which is precisely the result when voters in some counties must use voting equipment with substantially different levels of accuracy than that used elsewhere. Plaintiffs also seek relief against the Section 2 County Defendants under Section 2 of the Voting Rights Act, because African American voters have been deprived of their right to vote for the candidates of their choice due to the racially disparate effects of the punch card voting system.

Notwithstanding the reforms that Defendants claim to have made, they have failed to address two central issues that are at the heart of this case: (1) state officials have not de-certified the punch card ballot; and (2) state and county officials remain free, at their option, to conduct elections using a mixture of notice and non-notice equipment. Any allegation that counties now must use notice equipment arises out of the discretionary policy decisions of the Secretary of State who will leave office in January 2007, and these decisions can be reversed with the flip of a policy switch. At the end of the day, the two fundamental conditions of Ohio’s voting

system that Plaintiffs challenge remain as they were when this case began in the fall of 2002.

Contrary to Defendants' contention, this case is not moot. The applicable test for mootness is whether it is "*absolutely clear* that the alleged wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Env't. Servs., 528 U.S. 167, 189 (2000) (emphasis added). This rigorous test and the heavy burden of proof that accompanies it have not been met here.

STATEMENT OF FACTS

Plaintiffs rely on their principal brief for a recitation of the relevant facts and will confine their remarks to a rejoinder of the points raised in the Defendants' briefs. Defendants make several assertions that either do not square with the factual findings of the district court or are highly misleading. These include challenges to the methodology used by Plaintiffs' experts and the statistical evidence upon which Plaintiffs have relied. Each of these points is addressed below, first with respect to the evidence of inter-county disparities that form the basis of Plaintiffs' Fourteenth Amendment claims and then with respect to the evidence of intra-county racial disparities that form the basis of Plaintiffs' Voting Rights Act claims.

I. The Evidence in This Case Demonstrates Stark Inter-County Disparities in Uncounted Votes Attributable to the Use of Non-Notice Punch Card and Optical Scan Technology in Some Counties But Not Others.

A. The District Court accepted Plaintiffs' evidence concerning the estimated level of unintentional residual voting in the 2000 Presidential election, and it based its factual findings on this evidence.

As explained at length in Plaintiffs' opening brief, there are stark discrepancies in the number of votes lost due to the use of "non-notice" voting equipment as opposed to "notice" voting equipment. Appellants' En Banc Br., pp. 5-13, 16-20. By the district court's estimate, approximately 50,000 to 72,000 votes were lost in the 2000 presidential election with the punch card system used by the substantial majority of Ohio counties and voters. Id. at 25 (citing R. 275, Mem. Op., p. 27, J.A. 110). African Americans in the three Defendant counties were especially hard hit by punch cards, losing votes due to overvoting at a rate seven times that of other voters in Hamilton County and nine times as high in Montgomery County. Id. at 18.

Contrary to Defendants' assertions, the evidence in this case shows that these severe discrepancies are the result of the equipment used, rather than intentional non-voting. Because voters are entitled to privacy as they cast their ballots, it is not possible to determine with precision the percentage

of voters who purposefully abstain from voting. R. 275, Mem. Op. at Appendix I, p. 4, ¶ 30, J.A. 120. Therefore, Plaintiffs estimated accidental and intentional residual votes using the only two methods open to them. First, they conducted separate tabulations of overvotes and undervotes for the only urban counties in the state whose Board of Elections gathered this data. With this information, Plaintiffs distinguished the level of overvoting from the level of undervoting by precinct in each of these Defendant counties. As Plaintiffs' experts testified, overvotes are virtually always unintentional, especially at the top of the ballot. Tr. Exh. 11, Report of Dr. Richard Engstrom, p. 6-7, J.A. 606-07. On the other hand, undervotes are the by-product of both unintentional and intentional voter behavior and equipment error. Saltman, Tr. 7/27/2004, Vol. II, p. 268:9–272:22, J.A. 415-18.

The second method Plaintiffs used involved a set of estimation techniques that Dr. Martha Kropf used in her published research on intentional undervoting in presidential elections. In contrast to the Defendants' approach, Dr. Kropf's methodology screens out "noise" that arises when voting equipment is measured from down ballot contests, where many voters deliberately "roll off" the ballot and do not vote. Kropf, Tr. 10/01/2004, Vol. V, p. 890:2-17, J.A. 590. Dr. Kropf estimated the level of

intentional undervoting at the top of the ballot using exit poll data from multiple presidential elections. Kropf, Tr. 7/26/2004, Vol. I, pp. 237:12 – 238:11, J.A. 410-11. The district court’s factual findings concerning the level of intentional and unintentional residual votes in the 2000 presidential election in Ohio are based directly on her testimony and report.

The district court specifically accepted as accurate key portions of Dr. Kropf’s expert report and testimony in this case. R. 275, Mem. Op. at Appendix I, ¶¶ 25-26, J.A. 119-20. Included in these factual findings are the following:

- “Invalidated votes occur as a result of undervotes (where voters intentionally or unintentionally record no selection) and overvotes (where voters select too many candidates, thus spoiling the ballot).” R. 275, Mem. Op., p. 26, J.A. 109.
- “Differences across racial groups in intentional undervoting are insignificant, controlling for other factors, and differences associated with income, while statistically significant, are relatively small. This evidence suggests that accidental undervoting and overvoting account for most of the invalidated presidential ballots in poor and minority precincts.” *Id.* at 25-26, J.A. 108-09.
- “Voter self-reports represent the only systematic way to estimate the incidence of intentional undervoting. Survey questions from the National Election Studies over a period of 20 years (NES) and from the Voter Research and Surveys exit polls (VRS, more familiarly known as Voter News Services – VNS – as it was known until 2002) are used here to estimate the number of intentional undervoters. Based on responses to these surveys, we found that a minimum of one-ninth, but no more than two-fifths of

invalidated presidential votes are accounted for by intentional undervoting.” Id. at 26, J.A. 109.

Based on these factual determinations, the district court concluded that between 7 and 13 voters out of 1,000 using punch card technology accidentally failed to record a vote in the 2000 presidential election. These determinations are not clearly erroneous and have not been challenged.

B. The empirical evidence shows that inter-county variations in the uncounted voters are both statistically significant and substantively important.

In their critique of Plaintiffs’ equal protection and due process arguments, Defendants assert that differences in the incidence of residual votes across Ohio counties are “barely detectable” and that such small differences cannot form the basis for a determination of what is constitutional and what is not. State En Banc Br., pp. 20, 44. Defendants’ arguments overlook the obvious point that even relatively small differences in error rates, when multiplied by the large number of voters who participate in general elections in Ohio on various forms of voting equipment, translate into significant numbers of lost votes. Statewide, 4,705,457 voters cast votes in the 2000 Presidential election. <http://www.sos.state.oh.us/Electionsvoter/Results2000.aspx>. Of these, 3,593,958 votes were cast on punch card equipment. R.275, Mem. Op. at Appendix III (Summary of Residual Votes by Voting Type and Race), J.A.

138-141. As the Panel below correctly realized, the District Court’s finding that “between 7 and 13 voters out of 1,000 using punch card technology accidentally failed to record a vote in the year 2000 in the presidential election” means that of the 81,767 residual votes cast statewide, 26,955 are arguably explained by intentionally undervoting, and 54,812 lost residual votes were due to error.” Stewart v. Blackwell, 444 F.3d 843, 871 n. 20 (6th Cir. 2006). To characterize this outcome as “barely detectable” is to treat cavalierly what some have described as the “sacred right” to vote.

Defendants next contend that local factors, not national research and data, are the best ways to study the phenomenon of residual voting. Relying on what is purportedly a relatively high level of residual voting among Amish voters in Holmes County, Defendants contend that residual votes often are intentional, such that the accuracy of voting equipment cannot be measured by examining residual vote rates alone. There are two flaws in Defendants’ factual assertions concerning Holmes County. First, assuming the data are available (which was not the case for the Section 2 portion of this lawsuit), the best test of voting behavior *among all Ohioans* is to examine data from all counties in the state, weighing it as necessary to reflect county population as a percentage of the total votes cast. To rely solely on Holmes County as the basis for judgments about statewide voting

behavior is to over-rely on an outlier population, which is not representative of the whole. A few simple facts are sufficient to illustrate why Holmes County should not be extrapolated to the whole state. According to the U.S. Census Bureau, in the year 2000, the number of residents of Holmes County, Ohio who were eligible to vote was 25,086, and, overall, Holmes County is 99% white. <http://quickfacts.census.gov/qfd/states/39/39073.html>. In contrast, Ohio is 11.9% black, the total number of ballots cast statewide in the 2000 presidential election was 4,705,457, and of these, only 9,145 were cast in Holmes County. Id. Valid inferences for a racially and geographically diverse population of over 4.7 million voters cannot be drawn from a rural, nearly entirely white population of 9,145 voters.

The second flaw in Defendants' Holmes County argument concerns their use of all residual votes as a means of testing the reliability of voting equipment, both among all voters in the state and among racial minorities. That voters intentionally refrain from participating in certain electoral contests means that the accuracy of the voting system is best assessed at the top of the ballot where nearly all voters participate, and not in down-ballot contests, where substantial numbers of voters may choose not to participate. Plaintiffs' expert, Dr. Martha Kropf, properly criticized Defendants' expert's reliance on down-ballot contests as a measure of the performance of voting

equipment. Kropf, Tr. 9/30/2004, Vol. IV, p. 863:16 - 864:4, J.A. 584-85. These deficiencies highlight the importance of separating overvotes from undervotes, which Plaintiffs' experts did for the three counties that are the basis for the Section 2 portion of this lawsuit. Defendants' expert did not do this.

Finally, Defendants' factual allegations concerning the performance of voting equipment fly in the face of official data from the 2000 Presidential election, including information from the Secretary of State's office and county boards of election. This evidence shows that the 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. It also shows that the seven counties with the lowest residual vote percentages in 2000 were counties that did not use punch cards. R. 275, Mem. Op. at Appendix I, p. 4, ¶ 25, J.A. 119. In Summit County, which used punch cards, the rate was 3.19% and in Montgomery County, it was 2.78%. Likewise, in Sandusky County, which used central count optical scan equipment, the residual vote rate was 2.64%. Within each of these counties, certain precincts had even higher residual voting rates: Akron City Precinct 3-F had a 15% residual vote rate, and

Dayton City 14th Ward Precinct C had a 17% residual vote rate. Stewart v. Blackwell, 444 F.3d at 853 n. 5.

II. The Evidence Shows Start Intra-County Disparities Based on Race with African Americans' Votes Being Discarded at a Much Higher Rate Than Other Voters in Hamilton, Montgomery, and Summit Counties.

A. The empirical evidence of overvotes and undervotes in Hamilton, Montgomery, and Summit Counties is derived from all precincts in the only urban counties in Ohio that gathered these statistics in the 2000 general election.

As this Court is aware, Plaintiffs' claim under the Voting Rights Act arises from *intra*-county disparities within Hamilton, Montgomery, and Summit counties. Defendants accuse Plaintiffs of focusing on "only a handful of precincts in select counties" rather than on all 88 counties, thereby engaging in "statistical cherry picking". State En Banc Br., pp. 5, 59. This claim is disingenuous.

Plaintiffs' Voting Rights Act claim relies principally on disparities arising from overvotes and undervotes in the subject counties. County election officials alone decided whether to gather separate data on overvotes and undervotes. Most counties did not do so, but four of the larger counties did – Hamilton, Montgomery, Summit, and (through inference) Franklin. Plaintiffs have presented their claims utilizing the only existing data in the State of Ohio. They cannot be faulted for failing to use non-existent data

from other counties in the state, when state and local officials are the ones who deliberately decided not to conduct separate tabulations of overvotes and undervotes in these jurisdictions. Likewise, because elections officials in Montgomery County reported separate statistics on overvotes and undervotes only for the county as a whole and not for individual precincts, Plaintiffs were unable to run separate analysis of overvoting and undervoting by precinct in this County. Simply put, Plaintiffs do not run the Boards of Election in Ohio, and they cannot present evidence that does not exist. Instead of “cherry picking,” Plaintiffs in good faith have presented the only available evidence to support their claims.

Defendants’ assertion that “Plaintiffs rely on only a handful of precincts” also is utterly without foundation. Defendants contend that “Plaintiffs examined only 15 precincts in Summit County and 55 precincts in both Hamilton and Montgomery Counties.” State En Banc Br., p. 59. In fact, in order to conduct two of the three methodologies that Dr. Engstrom used to analyze the evidence for the Section 2 portions of this case (ecological regression and ecological inference), *all* of the precincts in these counties were included. Tr. Exh. 11, Report of Dr. Richard Engstrom, p. 4, J.A. 604. Thus, instead of relying on 15 precincts in Summit County, as Defendants assert, Plaintiffs relied upon all 624 of that county’s precincts;

similarly in Hamilton County, Plaintiffs relied upon all 1025 precincts, and in Montgomery County they relied upon all 643 precincts.

Defendants have misrepresented the methodologies upon which Plaintiffs' evidence is based. The criticisms that Defendants attempt to marshal against Plaintiffs' methods are more properly directed against their own expert. By relying exclusively on the "Top Ten Percent of Wards by Percentage of Black Population," Defendants have ignored the vast majority of wards throughout Ohio that are more racially integrated or that are predominately or exclusively white.

B. The record shows clear evidence of disparities between African American and white voters in Hamilton, Montgomery, and Summit Counties.

The record in this case includes evidence of large racial disparities in the percentages of overvotes and undervotes in Hamilton, Montgomery, and Summit Counties. As Plaintiffs' expert, Dr. Richard Engstrom testified, the correlation between overvoting and the percentage of black voters in a precinct in Hamilton and Summit County ranges from .517 to .682, rates that Plaintiffs' experts testified were "strong." Salling, Tr. 7/27/2004, Vol. II, p. 388:17-390:23, J.A. 442-444. In Montgomery County, where the Board of Election did not collect over voter and undervotes by precinct, the

correlation between residual votes and race was a “strong” .440.¹ *Id.* at 389:15–20, 393:13–18, J.A. 443, 446. All of these findings are statistically significant.²

Plaintiffs introduced census data to show that stark differences in income, employment, educational attainment, and housing divide the races in each of these counties. Salling, Tr. 7/27/2004, Vol. II, p. 336:12–345:13, J.A. 432-441; Tr. Exhs. 32-34, J.A. 870-965. This evidence shows that minorities in these counties “bear the effects of discrimination in such areas as education, employment, and health, hindering their ability to participate effectively in the political process,” which is identified as one of the so-called Senate Factors that can be used to establish a violation of the Voting Rights Act under the totality of the circumstances test. S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

The evidence shows that where state and county officials use notice voting equipment, as in Franklin County, there are no overvotes. Tr. Exh.

¹ Regression coefficients measure the strength of association between two variables. They range between + 1.0 (a perfect relationship), through 0 (no relationship), to – 1.0 (a perfectly inverse relationship). Hubert M. Blalock, Jr., *Social Statistics*, at 396-97 (2nd ed. 1979).

² Statistical significance tests whether the relationship between two variables is due to chance. If a measure of statistical significance exceeds .05, this means that the likelihood that the relationship is due to chance occurs more frequently than 5 times out of 100, a level that most statisticians regard as being too excessive to be reliable. Blalock, *id.* at 154-65. These findings are all statistically significant at .05.

11, p. 2-3, J.A. 602-603. The equipment made it impossible to have a racial disparity. Simply put, but for the fact that Summit, Montgomery, and Hamilton County election officials decided to use punch card equipment instead of notice voting equipment, overvoting in these jurisdictions would have been impossible, and the disparity between black and white voters in the number of overvotes would not exist.³ In this sense, voting equipment is an indispensable cause of the failure of African American voters to have their ballots count on a basis equal to that of white voters.

Defendants make three mistaken factual assertions in attempt to counter this evidence. First, they claim that residual voting rates among white voters in the Appalachian parts of Ohio likewise are high. From this they contend that income, education, and poverty are the cause of lost votes, not the interaction of voting equipment and race. This argument overlooks the fact that Plaintiffs' Section 2 argument is based on overvotes, not simply residual votes. Defendants have presented no evidence that white voters in these Appalachian counties *overvote* at the same rate as blacks in Hamilton, Montgomery, and Summit Counties. Moreover, to the extent that economic and educational factors are the cause of undervoting and overvoting, the

³ In the 2000 Presidential election, there were 2,916 overvotes in Hamilton County, 1,470 overvotes in Summit County, and 2,469 overvotes in Montgomery County. Kropf, Tr. 9/30/2004, Vol. IV, p. 862:18–863:14, J.A. 583-84.

impact of these factors is *magnified* when they are coupled with race. The presence of race as a causal factor cannot be measured in rural Ohio, where few African Americans reside. But the overwhelming evidence Plaintiffs have presented from these three urban counties, coupled with the data showing the importance of education and income in residual voting in Appalachian Ohio, only reinforces Plaintiffs' point that when African Americans bear the brunt of discrimination in employment, education, and income, their statutory right to equal participation in electoral politics is hampered by the use of punch card voting equipment.

Defendants' second argument arises out of the factual allegation that Plaintiffs "were able to overcome any disadvantages in education and income by properly casting their punch card ballots for numerous officeholders." State En Banc Br., p. 64. No factual evidence in the record supports this assertion, either in general or with specific reference to African American voters in Hamilton, Montgomery, and Summit Counties, and it is significant that Defendants are unable to point to any.

Defendants' third assertion, based on the report of their expert, is that African American voters allegedly cast fewer residual votes in down-ballot elections on punch card equipment than do non-African Americans. State En Banc Br., p. 57. As Plaintiffs' experts repeatedly pointed out,

Defendants used improper geographical techniques to estimate voter behavior by race. Salling, Tr. 7/ 27/2004, Vol. II, p. 332:11–333:24. Instead of relying on the smallest possible units of geography (precincts), they relied upon wards. State En Banc Br., p. 15, n. 2. As a result, their measure of what constitutes an “African American ward” is imprecise and misleading. Salling, Tr. 7/ 27/2004, Vol. II, p. 332:11–333:24. Likewise, by examining down-ballot electoral contests, they include races in which voters intentionally do not participate, races in which only one candidate is running, and races that are not uniform across the entire state. Kropf, Tr. 7/26/2004, Vol. I, p. 105:11–25, J.A. 362; Kropf, Tr. 9/30/2004, Vol. IV, p. 863:16–864:4, J.A. 584-85; Lott, Tr. 9/30/2004, Vol. IV. p. 625:4–13, J.A. 477. For this reason, Defendants’ suggestion that punch cards actually *decrease* uncounted votes in uncounted races is not supported by the evidence.

ARGUMENT

- I. The Evidence Before the Court Does Not Satisfy Defendants’ “Heavy Burden” of Demonstrating That this Case is Moot.**
 - A. Defendants’ Have Failed to Meet Their Burden of Showing That It Is “Absolutely Clear” That the Challenged Conduct Cannot Reasonably Be Expected to Recur.**

Defendants agree with Plaintiffs’ statement of the legal standard

governing mootness. State En Banc Br., p. 23.⁴ For a case to be moot, it must be “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” Friends of the Earth, 528 U.S. at 189 (quoting United States v. Concentrated Phosphate Export Ass’n, 393 U.S. 199, 203 (1968))(emphasis added). What they do not mention is that defendants bear a “heavy burden” where – as in this case – they assert that their voluntary cessation of the challenged conduct moots the case. Friends of the Earth, 528 U.S. at 189. In general, a defendant’s voluntary cessation of the challenged conduct cannot moot a case since the defendant would be left free to resume its old ways. Id. Accordingly, defendants bear a “‘heavy burden of persuading’ the court that the challenged conduct cannot reasonably be expected to start up again.” Id. (quoting Concentrated Phosphate Ass’n, 393 U.S. at 203).

State Defendants’ brief reveals two distinct reasons why this case is not moot. The first is that Defendants have failed to identify any evidence to support their assertion that the challenged voting equipment – non-notice

⁴ State Defendants thus appear to have abandoned the argument made before the panel that a lower standard for proving mootness applies where the defendant is a government entity. Notice of Filing Supplemental Authority (filed by State Defendants on Dec. 5, 2005). That position was in conflict with the settled precedent of this circuit. Golden v. City of Columbus, 404 F.3d 950, 962 n. 10 (6th Cir. 2005); American Canoe Ass’n v. City of Louisa Water & Sewer Comm’n, 389 F.3d 536, 543 (6th Cir. 2004).

optical scan and punch card ballots – is no longer used anywhere in the state. There is nothing in the record to support this assertion since the challenged equipment was still in use at the time of trial. While Plaintiffs do not dispute that this Court may take judicial notice of evidence outside the record in considering whether a case is moot, Defendants have tendered no such evidence. Defendants do not cite anything – inside or outside the record – to support their apparent contention that *all* Ohio precincts are using notice equipment (either precinct-count optical scan or electronic). State En Banc Br., p. 19.⁵ The only documents that they cite are two newspaper stories, which have to do with the efforts of *five* of Ohio’s 88 counties to sell their old voting machines. State En Banc Br., p. 26. Three of the five counties mentioned were using old-model electronic voting systems, not the punch-card and optical-scan equipment challenged in this case.⁶ In any event, these

⁵ Plaintiffs’ argument against mootness does not rest on the use of non-notice equipment for absentee voting. See State En Banc Br., p. 32. Plaintiffs concede that it is impracticable to provide notice voting for all those voters who choose to vote by mail-in absentee ballot, since election officials obviously cannot transport the precinct-count scanners or electronic equipment to each person’s home. The key point, however, is that those who vote by mail have chosen to forego the use of notice equipment; thus, they cannot plausibly claim that their voting rights have been violated for this reason. By contrast, those who are compelled to vote in non-notice counties have no choice in the matter. They must vote on such error-prone equipment or not vote at all.

⁶ The articles mention Franklin, Lake, and Pickaway counties which were using electronic voting equipment at their precincts in 2000, J.A. 139, but

press clippings fall far short of establishing that non-notice equipment is no longer used anywhere in Ohio. By failing to identify any evidence to support their claim of voluntary cessation, State Defendants have failed to meet their heavy burden to establish mootness.

The second reason why this case is not moot is that Defendants have, at most, shown voluntary cessation of the challenged conduct. They have not shown that it is “absolutely clear” that this conduct will not recur. Even if Defendants could produce evidence that there is not a single precinct in Ohio presently using non-notice voting equipment – something that is unsupported by any evidence they cite – this case would still not be moot. Because State Defendants have not decertified punch card equipment, there is no barrier to it being used in a future election.

Defendants’ explanation for why they have failed to decertify the challenged equipment is puzzling, to put it mildly. They assert that they lack the power to “unilaterally” decertify voting equipment. This is disingenuous, however, as Defendants do not dispute that OHIO REV. CODE § 3506.05(F) empowers them to initiate decertification proceedings if they are notified of “any significant problem with the equipment,” and Defendants have failed to take that step. Defendants were notified several years ago of

are reportedly switching to newer electronic equipment to accommodate people with disabilities.

the significant problems with non-notice punch card and optical scan voting equipment. In fact, Defendant Blackwell himself has long acknowledged those problems, as noted in Plaintiffs' opening brief. Appellants' En Banc Br., pp. 10-12.

Defendants' suggestion that no one notified them of the problems with non-notice voting equipment and sought decertification is disingenuous, given that Plaintiffs in this case filed a lawsuit seeking exactly that more than four years ago. To be sure, vendors must be accorded due process in decertification proceedings, as provided by Ohio law. OHIO REV. CODE § 3506.05(G). But Defendants cannot hide from their duties under Ohio law – much less the U.S. Constitution and Voting Rights Act – by pretending that they lacked notice of the problems with non-notice voting equipment, or were unaware of Plaintiffs' demand that this equipment be decertified. Nor is their expressed desire to avoid “paperwork” a good reason for failing to decertify unsatisfactory equipment. State En Banc Br., p. 28. Finally, even if state law left Defendants' powerless to decertify the challenged equipment, that cannot be used an excuse for tolerating the violations of federal voting rights of which Plaintiffs' complain.

Given their conspicuous and inexplicable failure to decertify the challenged equipment and their strenuous defense of that faulty equipment,

Defendants are left to speculate that it is unlikely that any of Ohio's counties will choose to use non-notice punch card or optical scan equipment in the future. They first cite a provision of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15302(d), which requires states to pay back monies received under Title I of the statute, to the extent that some of their precinct's fail to meet HAVA's 2006 deadline for replacing punch card and lever voting machines. State En Banc Br., p. 25. As an initial matter, it should be noted that HAVA does *not* require replacement of the non-notice *optical scan* equipment that Plaintiffs have challenged in this litigation. As to punch cards, it is not at all clear from the statute what is supposed to happen if a county replaces that equipment, and subsequently decides to use it again in a future election. Even if such a penalty were required, it is far from clear that no county would do so – particularly since, under the statute, it is the *state* and not individual counties that would be responsible for reimbursing the federal government. In short, HAVA does not make it “absolutely clear” that non-notice equipment will not be used in future Ohio elections.

Given that HAVA does not moot this case, Defendants are left to argue that counties are unlikely for practical reasons to use non-notice equipment in future elections. They assert that counties have “for the most

part discarded their old equipment,” even though there is no evidence to support this contention. Even assuming the truth of the facts asserted in the two news stories they cite, those stories only show that a few counties in the state were attempting to get rid of their punch card equipment – not that all of Ohio’s 78 counties using non-notice equipment in 2000 have gotten rid of that equipment. They proceed to speculate, again without any evidence, that it would be a “hassle” for counties to resume the use of non-notice equipment and ask why they would want to do so. Defendants’ speculation does not satisfy their “heavy burden” of showing that it is “absolutely clear” that the challenged conduct cannot reasonably be expected to recur. There are, moreover, some conceivable reasons why counties would want to revert back to their old equipment. That is particularly true, given the well-publicized problems that Cuyahoga County recently experienced with its new electronic “paper trail” system. See Mark Niquette & Joe Hallett, “Cleveland Study Questions Accuracy of Diebold Voting Machines,” Columbus Dispatch, Aug. 16, 2006 (“A three-month review of Diebold electronic voting machines used in Cuyahoga County during the May primary concluded that the votes recorded electronically and on paper receipts did not always match.”).

To be clear, Plaintiffs do not favor a switch back to non-notice voting

equipment if counties decide to get rid of the electronic technology that some are now using. There is, however, no legal bar to those counties resuming the use of non-notice voting equipment. The most Defendants can plausibly claim is that the State of Ohio might have to repay some of the federal monies it received if the counties chose to do so.

Defendants attempt to align this case with Ailor v. City of Maynardville, 368 F.3d 587 (6th Cir. 2004), in which this court found an environmental case moot after a city built a wastewater treatment plan that solved the problem. In that case, however: “The City presented undisputed evidence that the City had remedied the deficiencies in the operation of its wastewater treatment plant.” Id. at 600. Here, by contrast, State Defendants have not presented *any* evidence to show what equipment is now in use or what may happen in the future. Defendants have not met their heavy burden of showing that it is “absolutely clear” that the challenged conduct cannot reasonably be expected to recur. Accordingly, this case is not moot.

B. Alternatively, If This Court Believes That This Case is Moot, The Proper Course Is to Vacate and Remand Rather Than Engage in Appellate Factfinding Without the Benefit of Evidence.

For the reasons set forth above, this case is not moot even if Defendants’ factual assertions that they have gotten rid of all non-notice voting equipment were assumed accurate. This Court should not, however,

accept this factual claim based solely on Defendants' assertions about what has happened since the trial of this case. Nor should it accept at face value Defendants' speculation about what is likely to happen in the event that this case is dismissed. These are factual questions that the record does not answer given that they hinge on post-trial developments.

In a footnote, Defendants cite a case from this Circuit, which states that appellate courts "may take judicial notice where necessary to affirm or show the impropriety of the decision of the lower court," including on questions of mootness. International Brotherhood of Teamsters v. Zantrop Air Transport Corp., 394 F.3d 36, 40 (6th Cir. 1968)(citations omitted), cited in State En Banc Br., p. 26 n.3. In this case, however, Defendants have not yet produced extrinsic evidence which would qualify for judicial notice that would establish that this case is moot. The evidence to support their mootness argument is not just paltry; it is nonexistent.

Given the state of the record, this Court should not engage in appellate factfinding on either the equipment presently in use or the likelihood of counties resuming the use of this equipment. If this Court believes that mootness turns on post-trial developments, the proper course would be to vacate the district court's rulings with instructions for it to make findings of fact relating to mootness. On remand, Defendants would be free to

introduce evidence supporting their claim that non-notice equipment is no longer used and not likely to be used in the future, and Plaintiffs would have the opportunity to challenge Defendants' evidence.

C. If This Court Concludes That This Case Is Moot Based on the Present Record, It Should Vacate the District Court's Judgment and Remand with Instructions to Dismiss the Case on This Ground.

Because Defendants' have failed to meet the heavy burden required to establish mootness, this Court should proceed to the merits. However, if this Court disagrees and concludes that the case is moot based on the existing record, the proper course is for it to vacate the district court's judgment and remand with instructions to dismiss on this ground.

The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with directions to dismiss.... That procedure clears the path for future relitigation of the issues between the parties and eliminates the judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 39-40 (1950); see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 22-23 (1994)(quoting Munsingwear and citing parties' agreement that "vacatur must be granted where mootness from the unilateral action of the party who prevailed in lower court"). Thus, if this Court were to find this case moot on the existing record, vacatur of the district court opinion with instructions to

dismiss would be the appropriate course.

II. The Non-Notice Equipment Challenged in this Case Systemically Disadvantages Voters in the Counties Using It Violating their Fundamental Right to Vote Under the Fourteenth Amendment.

Much of Defendants' brief is an effort to muddy the stark and uncontested facts in this case. Most significant among those facts is that Ohio voters using punch card voting equipment are substantially more than twice as likely to have their votes rejected as voters using notice equipment. Non-notice optical scan equipment performed only slightly better – voters using that equipment were almost twice as likely to have their votes rejected as those using notice optical scan equipment, and more than twice as likely as those using electronic equipment.⁷ As explained in the Statement of Facts above, Defendants' brief does nothing to alter these facts, which remain uncontested.

Where Defendants err is in their application of the law to these facts. Because Plaintiffs' have produced statistical evidence of an election practice that systematically discriminates against some voters based on their "place of residence," Reynolds v. Sims, 377 U.S. 533, 566 (1964), strict scrutiny applies. See also Mixon v. Ohio, 193 F.3d 389, 402 (6th Cir. 1999) ("If the

⁷ As set forth in the table reproduced in the Appellants' En Banc Brief (at p. 13), the uncounted vote rate with punch cards was 2.3% and with non-notice optical scan 1.8%, compared to 1.0% and 0.7% with electronic and notice optical scan equipment respectively.

challenged legislation grants the right to vote to some residents while denying the vote to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest.”). Defendants cannot show that their challenged practice is narrowly tailored to serve a compelling interest, and do not seriously attempt to make such a showing. Moreover, even under the lesser standard that Defendants advocate, the use of non-notice equipment in some counties but not others still cannot satisfy constitutional scrutiny. Defendants have failed to show that these disparities are justified by “important regulatory interests” as their alternative standard demands. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

A. Defendants’ Use of Non-Notice Equipment in Some Counties But Not Others Warrants Strict Scrutiny, Because It Results in the Systematic Denial of Votes Based on Voters’ Place of Residence.

Bush v. Gore and the line of equal protection precedent upon which it rests establish the core principle that the right to vote is fundamental. As Bush holds, a core component of the fundamental character of the right to vote is that “equal weight” must be accorded to each vote and “equal dignity” to each voter. 531 U.S. 98, 104 (2000). Although Bush itself did not specify the level of scrutiny it was applying, its reassertion of the basic principle of electoral equality cited prior decisions of the Court which

subject inequalities in the realm of voting to strict scrutiny. Id. at 105 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) and Reynolds, 377 U.S. 533, 555). Of particular note is Reynolds, which established the basic rule of “one person, one vote” in state legislative elections, holding that redistricting plans that diminish the voting strength of those in some counties compared to others must be “carefully and meticulously scrutinized.” 377 U.S. at 562.

The Bush court therefore did not break any new ground in affirming the principle of equal weight to each vote and equal dignity to each voter. Nor did it make new law in striking down an electoral practice disadvantaging voters based on place of residence – and specifically based on the county within which they happen to live. The only novel aspect of Bush v. Gore, aside from the circumstances in which the decision was issued, is its clarification that the principle of the “one person, one vote” cases applies to the state’s method for counting votes. Specifically, the Court found unconstitutional the unequal standards for recounts being applied from county to county within the State of Florida. After describing the different ways in which ballots were being counted, the Court declared: “This is not a process with sufficient guarantees of equal treatment.” 531 U.S. at 107.

The difference between this case and Bush v. Gore is that the evidence of inter-county disparities is much stronger here. In Bush, there was no statistical evidence showing that the disparate methods of conducting recounts diluted the votes of some counties compared to others. By contrast, the systematic disparities are stark and uncontested. There simply is no question that those using non-notice voting systems are much more likely to have their votes rejected, as compared with those using notice voting systems. State Defendants concede, as they must, that the 29 counties with the highest uncounted vote rates in 2000 were *all* counties that used non-notice punch card equipment. State En Banc Br., p. 11. The most they can claim is that some punch card counties had lower residual vote rates in down-ballot races, such as those for Ohio General Assembly. That is an apples-to-oranges comparison, however, since Ohio voters across the state are voting for different candidates in these down-ballot races, and Defendants have made no attempt to control for factors (such as the competitiveness of the race or the popularity of the candidates involved) that may affect participation in those contests.

By contrast, there is no serious question that the higher uncounted vote rates with non-notice voting equipment are caused by that equipment. This is evident not only from the systemic statistical disparities observed in

Ohio elections, but also from the experience of other states. As the uncontested evidence shows, Ohio is just one of many states in which non-notice equipment results in more uncounted votes. Saltman, Tr. 7/27/2004, Vol. II, 255:24-256:25, 272:19-273:1, J.A. 413-14, 418-19. This is a fact that no serious expert disputes, and that the Secretary of State's office has repeatedly conceded. See, e.g., Walch, Tr. 7/26/2004, Vol. I, 180:3-5, J.A. 398; id. at 201:21-202:3, J.A. 401-402; Tr. Exh. 17, J.A. 626, 658.

The cases cited by State Defendants only confirm that strict scrutiny is the appropriate legal standard applicable when a state systematically discriminates against voters in some counties compared to others. Foremost among them is the Eleventh Circuit's recent decision in Wexler v. LePore, 452 F.3d 1226 (11th Cir. 2006). In that case, plaintiffs brought a challenge to the state's use of electronic voting equipment. In considering that challenge, the Eleventh Circuit applied the exact legal test that the Plaintiffs urge this Court to adopt. Specifically, it defined the operative constitutional question as whether voters in some counties were "less likely to cast an effective vote" than those in other counties. Id. at 1231. Such an inter-county inequality, the Court went on to explain, would violate the Fourteenth Amendment's guarantee of voting equality, thus requiring the application of strict scrutiny. Id. at 1232-33.

The Wexler court thus framed the constitutional question exactly right – and it is noteworthy that the Defendants fail to mention the language that the Court used to define the legal standard. In Wexler, the plaintiffs had failed to prove (or even to allege) that voters in touchscreen counties were “less likely to cast effective votes” than those in other counties. Id. at 1232. In this case, by contrast, the evidence of record clearly establishes that voters in non-notice counties are less likely to cast effective votes than those in notice counties. The Secretary of State himself conceded this very fact in public statements, though not in this litigation. See Appellants’ En Banc Br., pp. 11-12.

The legal standard articulated and applied in Wexler is consistent with that applied by other lower courts since Bush v. Gore. In Black v. McGuffage, for example, the court defined the operative constitutional question as whether the use of equipment with “substantially different levels of accuracy” in different counties violates the Equal Protection Clause. 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002). The court answered the question in the affirmative. So too, in Common Cause v. Jones, the Court held allegations of inter-county disparities arising from disparate voting equipment sufficient to make out an equal protection claim. 213 F. Supp.

2d. 1106, 1008-10 (C.D. Cal. 2001).⁸ State Defendants miss the point, in arguing that these cases are distinguishable because they arise at the pleading stage. The critical point is that the legal standard they apply is consistent with that urged by Plaintiffs here.⁹

Defendants attempt to marginalize Bush and the voting equality cases on which it relies, placing primary reliance on Burdick v. Takushi, 504 U.S. 428 (1992). Additionally, the legal standard that the Burdick Court articulates is fully consistent with that which Plaintiffs urge. As Burdick states, the level of scrutiny applicable to electoral practices depends upon the degree to which they burden voting rights. While “reasonable,

⁸ It is noteworthy that, in Common Cause, the state entered into a consent judgment that included decertification of the challenged equipment by a date certain, 235 F. Supp. 2d 1076, 1078 (C.D. Cal. 2002), something that Defendants in this case have stubbornly refused to do.

⁹ Contrary to Defendants’ suggestion, the Ninth Circuit’s en banc opinion in the California recall case, Southwest Voter Registration Education Project v. Shelley, 344 F.3d 914 (2003)(en banc), does not stand for a different legal rule. The en banc court expressly avoided a definitive ruling on the merits and did not define the applicable legal standard. Recognizing that the equal protection claim was one over which “reasonable jurists may differ,” the unanimous court’s ruling on the merits is carefully and expressly limited to the conclusion that “the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim.” Id. at 918. This falls far short of the rejection of Plaintiffs’ legal standard, for which State Defendants argue. The Ninth Circuit placed primary reliance not on the merits, but on the impropriety of enjoining a pending election – something that is not at issue in this case – finding that the “state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election’s proceeding on the announced date.” Id. at 919.

nondiscriminatory” rules may be upheld if justified by the state’s “important regulatory interests,” strict scrutiny applies to those which impose more severe restrictions. Id. at 434. Factually Burdick is quite dissimilar from this case, involving a prohibition on write-in voting in Hawaii elections. Thus, no one could claim that they were prevented from voting or having their votes counted in Burdick, only that their choice of candidate was limited – something that necessarily results from any rule limiting ballot access.

The electoral practice challenged in this case cannot plausibly be characterized as “nondiscriminatory,” since it discriminates against voters based upon their place of residence. Any regulation that discriminates based on the county within which voters happen to live is by definition “severe,” under the Burdick standard, and subject to strict scrutiny. For similar reasons, Defendants’ attempt to rely on the Ninth Circuit’s opinion in Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003), is unavailing. Citing Burdick, the Ninth Circuit rejected a challenge to a California county’s use of electronic voting equipment. In so doing, the court emphasized that the decision to allow this decision was “non-discriminatory,” given the plaintiffs’ failure to demonstrate more than “hypothetical” concerns that vote tampering might occur. Id. at 1106-07. By contrast, in this case, Plaintiffs

do not rest their argument on hypotheticals, but on real evidence of real disparities that inevitably result from the use of non-notice equipment.

The most that State Defendants can plausibly claim is that striking down Ohio's non-notice voting equipment will give rise to a line-drawing problem, raising the question of how much statistical inequality is necessary to trigger strict scrutiny. This is a familiar problem. In the "one person, one vote" cases, for example, the Court has never articulated a bright-line rule for assessing how great a departure from the general rule of equipopulous districts is too much. As Bush v. Gore recognized, "the problem of equal protection in election processes generally presents many complexities," 531 U.S. at 109, and it is neither necessary nor appropriate to rule on factual scenarios not presented. It is sufficient, for purposes of this case, that an electoral practice making voters in some counties more than twice as likely to have their votes rejected constitutes discrimination based on place of residence, warranting strict scrutiny.

B. Whatever Level of Scrutiny Applies to Plaintiffs' Equal Protection Claim, Defendants' Justifications for This Practice Are Insufficient.

Defendants do not seriously attempt to argue that the use of non-notice voting equipment in some counties but not others satisfies strict scrutiny, nor is such an argument plausible. Rather they argue for a lower

level of scrutiny under Burdick. In particular, they assert that Ohio’s use of non-notice voting equipment in some counties is “justified by important state interests.” State En Banc Br., p. 49. See Burdick, 504 U.S. at 434 (“reasonable, nondiscriminatory” electoral rules may be justified by the state’s “important regulatory interests”).

In relying on the “important state interests” standards, State Defendants implicitly concede that the district court in this case got the law wrong. In a footnote, the district court inexplicably asserted that “rational basis” was the proper level of scrutiny – a level less rigorous than Burdick allows. R. 275, Mem. Op., p. 23 n. 19, J.A. 106 By contrast, Defendants acknowledge that the challenged voting practice must at least be justified by an “important” interest, a standard more akin to intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 198 (1976) (sex-based classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

Even under this lesser level of scrutiny, Defendants’ use of non-notice equipment in some counties but not others cannot be sustained. The most Defendants can claim is that punch cards have been used for “many, many years” and that this equipment has “generally ... performed adequately.” State En Banc Br., p. 50. While this can best be deemed damnation with

faint praise, even this modest attempt to justify punch-card voting equipment cannot withstand scrutiny. At least by 2000, the State of Ohio was aware of the severe problems with non-notice voting technology, and the state's HAVA plan promised to rid the state of this unreliable technology by the 2004 election. As we all know, that did not happen. Nor can Defendants' excuses based on cost justify the failure to replace this technology, since the federal money to replace this equipment had long been in the state's bank account at the time this case was tried in the summer of 2004. Walch, Tr. 7/26/2004, Vol. I, 166:18-25, J.A. 387. The security concerns cited are similarly unavailing. The Secretary of State's designated witness acknowledged that mechanisms to ensure security were in place by 2004 and, in any event, Plaintiffs have never insisted that electronic voting technology – or any other particular technology – be implemented. Defendants could have provided the relief sought in this case by implementing precinct-count optical scan equipment, which would have ensured voting equality without compromising security.

In the end, Defendants' cost-saving and security concerns are nothing more than a smokescreen for their failure to replace non-notice voting equipment, despite their acknowledgement of the need to do so. Under any level of scrutiny, Defendants' use of non-notice equipment cannot pass

constitutional muster.

C. The Use of Error Prone Non-Notice Voting Equipment Violates the Due Process Clause of the Fourteenth Amendment.

Plaintiffs agree with the State Defendants that the Due Process Clause is implicated where the electoral process operates in a way that “seriously undermines the fundamental fairness of the electoral process,” State En Banc Br., p. 52. But the Defendants further assertion that this principle can apply only in instances of “complete and total disenfranchisement of Ohio’s voters,” *id.* at 53, is simply wrong.¹⁰ See, e.g., Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995), aff’d 68 F.3d 404 (11th Cir. 1995)(holding that due process applied to state election procedures that did not entail complete disenfranchisement of plaintiffs); Black v. McGuffage, 209 F. Supp. 2d 889, 900 (N.D. Ill. 2002)(concluding that voting system that resulted in significant numbers of uncounted votes would give rise to due process violation). While Plaintiffs do not dispute the notion that a “perfect” system, in which no voters ballot went uncounted may not be possible, Plaintiffs do not claim that fundamental fairness requires such a system. But Ohio’s dual voting system is *far* from “perfect.” Defendants have long operated a

¹⁰ As a practical matter, even if due process did require complete disenfranchisement, from the point of view of the voter whose vote has not been counted as a result of the operation of non-notice voting equipment, that requirement has been satisfied.

system that uses error-prone equipment that has unnecessarily disfranchised *tens of thousands* of voters and subjected millions of voters to an unreasonable risk that their votes would not be counted. Plaintiffs submit that such a system arbitrarily deprives them of what the Due Process Clause minimally requires: fundamental fairness in the exercise of their right to vote

D. County Defendants Attempt to Escape Liability Under the Fourteenth Amendment Are Unavailing

County Defendants argue, in various ways, that their systems for administering the vote do not implicate the Fourteenth Amendment. For example, Sandusky County argues that they are not engaging in “any sort of classification within their jurisdiction.” Sandusky En Banc Br., p. 5. Similarly, Defendant Hamilton County claims that Appellants’ equal protection arguments “appear to apply exclusively to acts of the State of Ohio,” Hamilton En Banc Br., p. 18, and Defendant Montgomery County contends that their system involves no “unequal application of the law and no improper classification.” Montgomery En Banc Br., p. 30. Each of these arguments is based upon a mistaken understanding of well-established equal protection analysis and of the framework for voting administration established by Ohio law.

First, Ohio law prescribes standards and processes for the selection, purchase, and administration of voting equipment. Ohio law provides for,

and has resulted in, a system wherein voters in different counties are required to vote on different equipment – some with notice features and some without. See R. 275, Mem. Op. at Appendix I, p. 2, ¶¶ 12, 13, J.A. 118; OHIO REV. CODE §§ 3506.01 *et seq.* This system would not be possible without the active participation of Ohio counties, including the Defendants. When the Defendant Counties decided to adopt non-notice voting equipment that was subsequently required to be certified by the Defendant Secretary of State, pursuant to OHIO REV. CODE § 3506.05, they played an official and indispensable role in the establishment of a system in which the voters who are required to use that equipment are subjected to a higher error rate than are voters who vote in counties that have adopted notice equipment. Thus, the Defendant Counties’ policy choices are just as responsible for the creation of a voting system that classifies – that is, that treats some voters differently than others – as are the actions of the State Defendants who are required to approve those policy choices (and whom, it might be added, have never claimed that their part in the creation of Ohio’s dual voting system is not accountable to the requirements of the Equal Protection Clause). The fact that all voters in each county vote on the same equipment does not insulate that county from its share of the responsibility for the creation of a statewide system in which their citizens’ votes are less likely to be counted

than the votes of citizens in those counties that have adopted the more reliable notice equipment.

III. The Use of Punch Cards in Three Ohio Counties Results in the Disproportionate Denial of African American Votes in Violation of Section 2 of the Voting Rights Act.

A. A Section 2 Vote Denial Claim Lies Where a Disproportionate Number of Black Citizens' Votes are Not Counted as the Result of Voting Equipment.

When a ballot is not counted based on operation of the punch card technology, citizens' votes have clearly been "refused and rejected" under the meaning of Section 2. While Plaintiffs appreciate definitions from Random House American College Dictionary and Black's Law Dictionary (Hamilton En Banc Br., p. 24) of the word "denial," the statute itself is perfectly clear. Defendants repeat the district court's legal error in departing from the actual language of the statute and inserting new requirements for a Section 2 vote denial claim. See Appellants' En Banc Br., pp.45-48; Hamilton En Banc Br., pp. 26-27.

Where Congress has clearly defined a term, that definition governs the application of the statute. E.g., United States v. Blackwell, 946 F.2d 1049, 1052-53 (4th Cir. 1991). Congress did so when defining the right to vote. 42 U.S.C. §1973l(c); Appellants' En Banc Br., 45-47 (discussing broad definition of the right to vote). When punch card technology fails to count

the ballot properly and cannot include these votes in the appropriate totals of votes cast, it denies the right to vote within the plain meaning of the statute.

The district court's unsupported requirement of an "actual denial" (R. 275, Mem. Op., p. 30, J.A. 113) and Defendants' arguments that Plaintiffs have "stipulated" that they were not denied the right to vote (R. 275, Mem. Op. at Appendix I, ¶¶ 86-89, J.A. 126-127) are based on a misunderstanding of this very definition. State En Banc Br., p. 16. Any review of the factual stipulations cited by Defendants indicates that Plaintiffs stipulated to no such thing. Plaintiffs agree that they were not denied access to the polls, nor were they prevented from attempting to cast their ballots. However, under the express statutory provisions, the right to vote includes the right to have the vote counted, not just entering a precinct, receiving a ballot, and marking it. Contrary to the district court's and certain Defendants' limited definition of the right,¹¹ voters may still be deprived of the right to vote if they go to the polls, use the requisite marking devices, and place their ballots in the ballot box. Allowing black voters to go through such meaningless processes to mark ballots that will not be counted very clearly violates the Act.

¹¹ It appears that the State concedes that a claim can arise under Section 2 elsewhere in the process even though a voter has received his or her ballot. State En Banc Br., p. 62.

The issue before the Court is whether African American residents in each of these counties have an equal ability to participate in the electoral process as non-African Americans in that county. The allegation that non-African Americans in another county may engage in similar behavior is simply not a defense. Plaintiffs' unrebutted testimony shows that African Americans in the three defendant counties were seven to nine times more likely than non-African Americans to be disfranchised through overvoting. Defendants point to smoke and mirrors by seeking refuge in residual vote rates in overwhelmingly white counties. No case cited by the Defendants makes it a defense for a defendant to justify discrimination that is taking place in its own physical territory by contending that greater levels of discrimination are occurring elsewhere. Indeed such an analysis cannot be deemed to be an intensely local appraisal that even the defendants concede must be conducted. See Hamilton En Banc Br., p. 29; Montgomery En Banc Br., p. 13. Hamilton County states that their position has always been "that factors other than race explain the existence of residual voting in punch-card counties." Hamilton En Banc Br., p. 32. However, Hamilton County has yet to articulate what these other factors are,¹² much less present evidence

¹² To the extent that Hamilton County is arguing that its laundry list of purported "race-neutral explanations" discussed on pages 30-31 of its en banc brief are the culprit for residual votes in its jurisdiction, it presented no

that those factors explain the racial disparities that manifest themselves within its own county, or in any other way disprove the racial disparities between white and black voters using punch-card equipment. Defendants' theory is a red herring, providing no defense to these intra-county claims.

B. The Totality of Circumstances Test Does Not Require Voting Rights Act Plaintiffs to Produce Circumstantial Evidence That Minority Voting Strength Has Been Diminished Where There Is Direct Evidence of Vote Denial.

Defendants continue to erroneously argue that Plaintiffs do not present a valid cause of action under Section 2 because they allegedly did not address the “results” language of Section 2(b) by showing that under the totality of the circumstances, an electoral practice results in a diminution of the opportunity for African American voters to participate in the political process and elect candidates of their choice. The Senate Judiciary Committee’s Report makes clear that the Senate factors that are generally probative of vote dilution do not apply straightforwardly or at all to cases of vote denial. S.REP. NO. 97-417, at 30. The effect of ballot rejection on the basis of accidental nonvoting is direct and apparent. A person whose vote is not counted has a meaningless opportunity to participate in the political

such evidence of their presence in Hamilton County elections. Nor do these behaviors explain or mitigate the racial disparities of the residual vote rates between black and white voters. If race-neutral explanations were the sole or main cause of residual ballots, no racial disparity would be present.

process and *no* ability to elect anyone. Thus, Plaintiffs submit that additional indirect, circumstantial evidence of inequality by means of the Senate factors is not required.

A mechanical recitation of the Senate factors has never been a part of vote denial jurisprudence. Indeed, the Senate Report clearly has stated that “[t]o establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question” S. REP. NO. 97-417, at 28. More importantly, no court has ever found any particular Senate factor (or group thereof) necessary to the disposition of a vote denial claim. In fact, some courts that have considered the Senate factors explicitly disclaimed that those factors formed part of their holding. E.g., Roberts v. Wamser, 679 F. Supp. 1513, 1530 (E.D. Mo. 1987). Others considered the Senate factors and found them decidedly irrelevant. E.g., PUSH v. Allain, 674 F. Supp. 1245, 1264-1268 (N.D. Miss. 1987) (polarized voting, suspect practices, candidate slating, and racial appeals are all irrelevant to vote denial; but a history of official discrimination, current discriminatory effects, lack of electoral success, representative unresponsiveness, and tenuous policies *buttress* a denial claim). Instead of mechanically marching through the nine Senate factors in check-list fashion, the courts apply a practical, context-sensitive, fact-intensive inquiry when

considering which, if any, of the Senate factors help illuminate the totality of circumstances that allow the challenged electoral practice to cause discriminatory results.¹³

Here, the continued effects of past discrimination and the tenuousness of the policy supporting the suspect practice are the only factors that are arguably relevant to Plaintiffs' denial claim. Neither a history free of official discrimination, racially polarized voting, other suspect electoral practices, racial appeals in campaigns, and electoral successes of minority candidates, nor responsiveness by officials to minority concerns will help ensure that African American voters, including Plaintiffs, will cast ballots on punch card machines in Section 2 Defendant Counties that will be included in the vote tallies. Since none of those factors are probative of the likelihood that punch card ballots will be counted, none are relevant to Plaintiffs' Section 2 vote denial claim.

However, Plaintiffs presented substantial evidence of socioeconomic disparities between blacks and whites within each county. Plaintiffs evidenced the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate

¹³ The Senate factors are not to be used as "a mechanical 'point counting' device." S. REP. NO. 97-417 at 29, fn. 118.

effectively in the political process. S. REP. NO. 97-417 at 29 (Senate factor 5). The Court heard extensive evidence showing that blacks in each of the Section 2 counties lag behind their white neighbors in every socioeconomic indicator reported in the 2000 Census. See Appellants' En Banc Br., pp. 16, 51-52; Salling, Tr. 7/27/2004, Vol. II, p. 336-345, J.A. 432-41 (testimony regarding socioeconomic indicators for Montgomery, Hamilton and Summit Counties); Tr. Exhs. 32-34, J.A. 870-965 (Summary and Charts of Socioeconomic Census Data for Montgomery, Hamilton and Summit Counties). This evidence and the racial disparities of non-voted ballots clearly demonstrate the "past and present reality" of black and white voters within these counties. See Thornburg v. Gingles, 478 U.S. 30, 45 (1986). The reality is that black votes do not get counted at a rate equal to that of whites.

The Senate Report stresses the significance of these socioeconomic factors on political participation: "The courts have recognized that disproportionate educational [sic], employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the

depressed level of political participation.” S. REP. NO. 97-417, at 29 n. 114. Plaintiffs need not prove any additional effect on racial minorities or causal connection. In a vote dilution case decided prior to the 1982 amendments of the Voting Rights Act, Kirksey v. Board of Supervisors, 554 F.2d 139, 145 (5th Cir. 1977)(en banc), held:

The Supreme Court and this court have recognized that disproportionate educational, employment, income level and living conditions tend to operate to deny access to political life. In this case the court held that these economic and educational factors were not proved to have “significant effect” on political access in Hinds County. It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which flows from the existence of economic and educational inequalities.

This holding was adopted by S.Rep. 97-417, p. 29, n. 114, cited and relied on in Gingles.

Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, e.g., *White v. Regester*, 412 U.S. [755], 768-769 [(1973)]; *Kirksey v. Board of Supervisors of Hinds County, Miss.*, 554 F.2d 139, 145-146 (5th Cir. 1977)(en banc).

478 U.S. at 69. See also, United States v. Dallas County Comm’n, 739 F.2d 1529, 1537 (11th Cir. 1984)(“Once lower socio-economic status of blacks has been shown, there is no need to show the causal link of this lower status on political participation”); United States v. Marengo County Comm’n, 731

F.2d 1546, 1569 (11th Cir. 1984)(“the burden is not on the plaintiffs to prove that this [socio-economic or political] disadvantage is causing reduced political participation”); Cross v. Baxter, 604 F.2d 875, 881-82 (5th Cir. 1979). Plaintiffs here have met their burden and no further causal nexus is necessary.

Additionally, a causal relationship between race and residual ballots due to punch cards becomes apparent by comparing Franklin County, which is nearly identical to Montgomery, Hamilton and Summit in its racial distribution of relevant socioeconomic variables. The material difference between the Section 2 Defendant Counties and Franklin County is the latter’s use of electronic voting machines that prevent overvoting and severely reduce undervoting by notifying voters when they fail to cast a vote for a particular race. R. 275, Mem. Op. at Appendix I, ¶¶ 16, 23, 43, J.A. 118-19, 121. By employing voting technologies that nearly eliminate nonvoted ballots for all racial groups, Franklin County has minimized the racial disparities in the rate of nonvoted ballots.¹⁴ Conversely, by employing voting technologies that readily translate race-based low socioeconomic indicators into relatively high rates of nonvoted ballots, Summit, Hamilton

¹⁴ For non-African Americans (whites), the rate becomes negligible, and for African Americans it drops below 1%, nearly eliminating the racial gap in accidental undervotes. Tr. Exh. 11 (Engstrom Report), p. 8, J.A. 608.

and Montgomery have employed machines that interact with those indicators resulting in racial disparities in the rate of nonvoted ballots. Both blacks and whites within these counties are encountering the same technology, and yet, the residual vote rates vary startlingly without explanation. Contrary to Defendants' assertions, Summit En Banc Br., pp. 16-17, Montgomery En Banc Br., pp. 13, 22, 25, Plaintiffs' evidence consisted of far more than bare statistical showings of disproportionate impact.

It merits repeating that the Supreme Court has stated that defending a racial disparity in the electoral system by claiming all is explained by poverty or education and not race is pernicious when such factors are tied to discrimination. Gingles, 478 U.S. at 64-65. In support of the court's finding that factors such as education and income are the more probable culprits of residual voting, Defendants argue that Plaintiffs' expert Dr. Asher supports Defendants' position. Hamilton En Banc Br., p. 34. The Court's clearly erroneous Supplemental Finding of Fact ¶120 misrepresents Dr. Asher's study of punch card ballots in the 1978 election. R. 275, Mem. Op. at Appendix II, ¶120, J.A. 132. Both the Court and Defendants ignore Dr. Asher's complete findings, most notably that "precincts characterized by higher poverty, central city precincts like Montgomery County, precincts that were overwhelmingly inner city African American, oftentimes had rates

of vote invalidation much higher than average.” Furthermore, Asher emphasized one of the central conclusions of his study: “race has an effect *even when you control for this particular measure of poverty or education.*” Asher, Tr. 9/30/2004, Vol. IV, p. 797, 825, J.A. 568, 580 (emphasis added).

Finally, Defendants contend that a voting system that systematically generates accidental nonvotes does not rise to the level of a “practice” for purposes of Section 2 since, they argue, any nonvotes stem from acts of negligence or indifference on the part of individual voters. *E.g.*, Hamilton En Banc Br., p. 22. This argument, too, is unpersuasive. Historically, the inability to pay poll taxes or pass literacy tests also represented individual conditions that, strictly speaking, were not the responsibility of voting officials. Rather, it was the *effect* of the poll tax and the *interaction* between the white registrars and the prospective African American voters that led to the deprivation of voting rights. Similarly, it is the effect of the unreliable voting device and the interaction between punch cards and African American voters that leads to voting discrimination here. Plaintiffs’ undisputed evidence shows that the “practice” of electronic voting devices in Franklin County led to no overvotes by African American voters there, whereas the punch card “practices” in the three defendant counties led to over 6,000 overvotes, almost entirely in precincts that were heavily African

American. Kropf, Tr. 9/30/2004, Vol. IV, p. 862:18–863:14, J.A. 583-84. Clearly a voting “practice” in the three defendant counties led to denial of the right to participate in the democratic process on the basis of race in violation of Section 2.

Further, the racial disparities are not the cause of inadvertent errors, neglect, or apathy. See Hamilton En Banc Br., pp. 22-23. Plaintiffs certainly hope that Hamilton County is not attempting to justify the racial disparities by claiming (without any evidentiary support) that black voters are simply sloppier, more neglectful, or more apathetic than white voters when both groups turn out on election day. Plaintiffs went to great lengths to show that few voters show up to presidential elections seeking not to cast votes for their candidate of choice. Furthermore, Plaintiffs were able to show that there was no greater or lesser tendency for black voters to intentionally cast no vote for president than white voters. Plaintiffs also were able to demonstrate that no voter leaves any polling place within these three punch-card counties aware whether his or her ballot was cast “properly enough” to withstand all the inherent flaws already demonstrated in the faulty voting technology.

C. Cases relied upon by Defendants are easily distinguishable or inapplicable to Plaintiffs' Section 2 vote denial claims.

Most of the cases cited by the Defendants purporting to address omissions in the Plaintiffs' Section 2 claim are distinguishable or inapplicable. For instance, Mallory v. Ohio, 173 F.3d 377 (6th Cir. 1999), is a dilution case, and Plaintiffs have never argued that certain Senate factors are more probative as circumstantial evidence when attempting to show the impact that vote dilution has on the minority group's ability to participate in the electoral process. See also Solomon v. Liberty County, 899 F. 2d 1012 (11th Cir. 1990). However, this is a denial case; thus, plaintiffs have direct evidence that their ability to participate in the electoral process was violated.

Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999), which was cited by the Summit County and the State Defendants, provides only the weakest support, if any, for Defendants' argument that denial and vote dilution are measured by exactly the same test under Section 2. The Burton court correctly noted that Subsection (b), 42 U.S.C. § 1973(b), "has come to be known as the 'results test' because it seeks to measure the *effect* of vote dilution." 178 F.3d at 1196 (emphasis in original). That subsection is the only place where the statutory phrase "totality of circumstances" appears. Confusingly, Burton went on to apply a totality test to a vote denial claim, but it did so in two paragraphs with no discussion of whether that was the

appropriate test. 178 F.3d at 1198. It provided no discussion of how or why a vote dilution test was relevant to or could be applied as a denial test. Indeed, that issue was not presented to the court by the parties.

The dispute in Burton was a challenge to a city's decision to annex an all-white, *de jure* segregated housing project but not a companion project that had been all black. The central issue involved intentional racial discrimination. Constitutional and Section 2 claims were presented.¹⁵ The city defendant moved for summary judgment solely on a very specific theory—that no Section 2 remedy was available because state law did not allow annexation of the property at issue (as being non-contiguous). 178 F.3d at 1186. The district court agreed with that state law argument. It went on to note that it “doubt[ed] whether plaintiffs have even made a prima facie showing of vote dilution within the meaning of § 2.” Burton v. Belle Glade, 966 F.Supp. 1178, 1186, n. 10 (S.D. Fla. 1997). The latter was not

¹⁵ The Court of Appeals affirmed the dismissal of plaintiffs' constitutional claims holding that plaintiffs were required to prove intentional discrimination within the four year statute of limitations. It held that the evidence of explicit racial segregation in the white annexation prior to the statute of limitation period did not show a current racial motive. 178 F.3d at 1195. It is noteworthy that this holding is impossible to square with such cases as Hunter v. Underwood, 471 U.S. 222, 233 (1985)(invalidating a 1901 disfranchising provision 84 years after it was enacted based on discriminatory intent), an error that significantly detracts from the persuasiveness of the opinion.

surprising since neither side moved for summary judgment based on the merits of the Section 2 claims.

The Court of Appeals affirmed the dismissal of the Section 2 claims based on what it viewed as a lack of evidence,¹⁶ but without acknowledging that neither party had sought summary judgment based on the evidence of vote denial or dilution and so neither had placed their evidence before the court except that which related to the constitutional and state law issues. The appropriate test for vote denial under Section 2 was never at issue between the parties. See *Burton v. Belle Glade*, (11th Cir. No. 97-5091), Brief of Appellants, p. 1 (statement of the issues)(Jan. 9, 1998).

Burton illustrates that applying the totality test in a vote denial case is largely, if not totally, impractical. The vote denial claim was brought by residents of a formerly *de jure* segregated, all black housing project, seeking annexation into a city which had annexed an all white housing project. The court held that the residents outside the city limits “*never* possessed a right to vote within the City.” 178 F.3d at 1187, n. 8 (emphasis in original). But in

¹⁶ Notably, the Eleventh Circuit in Burton found no evidence of any Senate factor, *id.* at 1198; Plaintiffs here have shown that blacks in Hamilton, Montgomery and Summit counties bear the continuing effects of "discrimination in such areas as education, employment and health which hinder their ability to participate effectively in the political process" S. Rep. No. 97-417 at 28, reprinted in 1982 U.S.C.C.A.N. at 207. They have also shown that the tenuous policy of continuing to use faulty equipment cannot withstand constitutional scrutiny.

applying the totality test, it recited, *inter alia*, that these residents failed to show that the residents *of the city* “bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process,” or that *the city* “uses or used any voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” 178 F.3d at 1198. (Internal quotation marks omitted.) Those factors simply tell us nothing about the impact on citizens outside the city whose claim of vote denial was at issue. They were denied the right to vote no matter what was happening within the city.

Likewise, United States v. Jones, 57 F.3d 1020 (11th Cir. 1995), (cited by the Hamilton County Defendants) is distinguishable from the instant case. S. REP. 97-417 at 30. In Jones, the wrongful admission of out-of-district voters was a unique inadvertent error. Because it was unlikely to occur, the court had difficulty in conceiving of it as a “practice or procedure.” Yet, Hamilton County voters use the same punch card machines in election after election. Their officials willfully selected these machines. Though the errors associated with the machines may be inadvertent, the selection and repeated mandatory use of the machines surely constitutes an election practice or procedure. And this practice causes discriminatory results. By

claiming that Hamilton County officials are “not responsible for the errors they cannot control,” Hamilton is merely claiming that though they chose the voting technology that they did, they did so in good faith without any intent to discriminate. *Hamilton En Banc Br.*, p. 22. Good faith and nondiscriminatory intent are laudable, but not a defense to Section 2 claims. *Jones* does not provide one—it barred that claim because the plaintiffs failed to establish the threshold requirement of identifying a state election practice; no such problem exists here.

Smith v. Salt River Project Agricultural Improvement & Power Dist., 109 F.3d 586 (9th Cir. 1997) is cited by Defendants for their argument that a violation of Section 2 cannot be shown “purely upon the showing of some apparently relevant statistical disparity between minorities and whites.” *Montgomery En Banc Br.*, p. 5.¹⁷ There are several reasons *Salt River* does not help Defendants. First, the plaintiffs there apparently failed to produce

¹⁷ *Montgomery County* goes even further, contending that plaintiffs must show “the existence of racial bias in the voting community.” *Id.*, pp. 10-11. They rely on an opinion by Judge Tjoflat of the Eleventh Circuit. If the phrase “racial bias” in that opinion is read as calling for plaintiffs to prove intentional discrimination, that could not be squared with *Thornburg v. Gingles* results test. Indeed, Judge Tjoflat has authored three en banc opinions on Section 2, but has never got a majority of the court to join his views to concur with his views. *Solomon v. Liberty County*, 899 F.2d 1012, 1021 (11th Cir. 1990)(four judges joined); *Nipper v. Smith*, 39 F.3d 1494, 1547 (11th Cir. 1994)(1 of 7 judges joined part II of Tjoflat opinion); *SCLC v. Sessions*, 56 F.3d 1281 (11th Cir. 1995).

any evidence of lingering effects of discrimination, in contrast to this case, shown by disparities in socio-economic data. Second, Salt River is overall a failure of proof case.

Salt River was a challenge to the land owner requirement for voting in a water utility district. Plaintiffs relied on the fact that 40.1% of African American heads-of-households owned their homes, while 60.3% of non-Hispanic whites heads-of-household owned their own homes. But what plaintiffs did not show, insofar as the published opinion reveals, was any connection to past discrimination and socio-economic disparities which could have shown that the home-ownership disparity was a lingering effect of discrimination. As Kirksey v. Bd. of Supervisors held, and as embraced by the Senate Report and Thornburg v. Gingles, see supra, pp. 52-53, “[i]nequality of access is an inference which flows from the existence of economic and educational inequalities.” 554 F.2d. at 145. In Salt River those statistics might have provided the required nexus to vote denial that would be prohibited by Section 2. In this case those statistics were introduced. If Plaintiffs here had introduced only the evidence of vote count disparity, Salt River would be relevant. But the conjunction of the two

statistical proofs in this record provided exactly the type of proof approved by Congress.¹⁸

In Ortiz v. Philadelphia, 824 F. Supp. 514 (E.D. Pa. 1993) aff'd 28 F.3d 306 (3rd Cir. 1994), the federal district court employed a “dispositive factor” test to conclude that a Pennsylvania voter purge statute was not the cause of disparate levels of voter turn-out among African American and non-African American voters. The Pennsylvania voter purge law at issue there required voting officials to remove voters from the registration rolls if they failed to vote in a primary or general election during the preceding two years. Those who were removed from the registration list had to re-register in order to be eligible to vote again.¹⁹ The plaintiffs challenged this statute

¹⁸ The Salt River plaintiffs faced other difficulties according to the appellate court. They had stipulated "to the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination." 109 F.3d at 595. Additionally, the district court had credited expert testimony that concluded that factors other than race determined home ownership. 109 F.3d at 590-91.

¹⁹ 25 P.S. § 623-40. Subsequently, the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg set federal standards concerning the purging of voters for failure to vote in federal elections, and states were prohibited from removing individuals from the official list of voters eligible to vote in federal elections by reason of a person's failure to vote. 42 U.S.C. § 1973gg-6(b)(2). The rationale of Ortiz is suspect because while the case was pending Congress adopted the NVRA which expressly rejected non-voting as a basis for purging votes. See Ortiz, 28 F.3d 306, 319, n. 5 (3rd Cir. 1994) (Scirra, concurring). Congress clearly disagreed with the argument that Ortiz credited that non-voting was an appropriate element to trigger a purge. The value of Ortiz as precedent is also undercut by its holding that

under Section 2, citing statistical evidence that minority voters were purged at higher rates than white voters. The defendants responded by arguing that under the totality of the circumstances minority voters were not denied the opportunity to participate in the political process and the voter purge statute did not cause minority voters to have unequal access to the political process or fail to elect the candidates of their choice. The district court held that the plaintiffs failed to meet their burden under Section 2 because they failed to show that the purge law was the dispositive force in depriving minority voters of the right to participate in the political process. The court noted that voter apathy, rather than the purge law itself, was the primary factor leading to minority voters' disfranchisement, and the process for reinstatement was a relatively simple matter of re-registering to vote. *Id.* at 539.

Defendants here argue that Ortiz is controlling here, but in making that claim, Defendants must prove that *specific African American voters* in the Section 2 Defendant Counties have been able to vote successfully using the punch card system. In Ortiz, individualized information was available

the failure of voters to re-register was attributable to apathy. According to the Senate Report and Gingles, once discrimination is shown to result in socio-economic disparities, an inference of unequal political access is established. No further causal connection to a particular election structure need be shown. See p. 52-53, *supra* (discussing the Senate Report and Kirksey). Apathy has been rejected as a defense. Kirksey, 544 F.2d at 145 (error to attribute post-1966 disparity in registration to "lack of interest or apathy.").

from registration records showing that specific voters had managed to register before the vote purge laws went into effect. Here, in contrast, there is no similar evidence. Accordingly, Defendants' efforts to analogize this case to Ortiz fail.

As with the felon disfranchisement cases, e.g., Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003); Muntaqim v. Coombe, 366 F.3d 102 (2nd Cir. 2004),²⁰ an intervening act of malfeasance or nonfeasance on the part of the putative voters in purge list challenges arguably led to or at least contributed to the racial impact. Voters failed to vote after registering (Ortiz) or committed a felonious act (Farrakhan and Muntaqim). This is a critical distinction for voting technology cases: there is simply no evidence that black voters behaved in any manner distinct from white voters when using the punchcard equipment, nor is there any evidence that black voters engaged in some intervening act that minimized the effectiveness of their ballots. No voter – black or white – in these three counties could be aware of any act by them that voided their ballots, which is the inherent flaw of the technology at issue. Yet, a racial disparity exists.

²⁰ Notably, the Second Circuit en banc has since vacated the panel opinion, 396 F.3d 95 (2nd Cir. 2004), and ultimately dismissed the case for lack of standing, 449 F.3d 371 (2nd Cir. 2006).

This distinction further amplifies the differences between cases such as Ortiz, Muntaqim, and Farrakhan when reviewing the Senate factor of the tenuous of the state policy. Unlike Farrakhan and Muntaqim, where there is an arguably defensible state policy of disfranchising felons, or Ortiz, where there is a colorable legitimate state interest in purging registration lists to keep them current, there is no state interest here in continuing to use faulty election equipment.

Demanding strict proof of a causal relationship between the voting practice and racial discrimination amounts to an intent requirement, an approach that Congress squarely rejected in the 1982 amendments. The court's logic discounts the role that social discrimination in education and employment plays in preventing African Americans from participating effectively in elections that are conducted with punch card equipment. The interest that is protected in the Voting Rights Act – equal participation in the franchise for all Americans regardless of race or ethnicity – is jeopardized when neutral electoral practices have the effect of excluding racial minorities.

D. Plaintiffs rely upon applicable case law to support their claims of vote denial under Section 2.

Contrary to the State's assertions, Plaintiffs do not rely on inapplicable case law. Courts have found violations of Section 2 when

election officials afforded disparate opportunities to similarly situated white and black voters to obtain and use absentee ballots, Brown v. Post, 279 F. Supp. 60, 62 (W.D. La. 1968); when election officials changed the operation of voting machines without adequately informing both black and white voters, United States v. Post, 297 F. Supp. 46, 49 (W.D. La. 1969); and when the registrar illegally purged a list of voters, which disparately prevented black voters from voting, Toney v. White, 488 F.2d 310, 312 (5th Cir. 1973).

In Goodloe v. Madison County Bd. of Election Comm'rs, the court found a violation when election officials summarily invalidated 250 absentee ballots, virtually all of which were cast by black voters, when they discovered that four absentee ballots were improperly submitted. 610 F. Supp. 240 (S.D. Miss. 1985). The court found that there was no intentional or purposeful discrimination against black voters, that the election was fundamentally fair, and that the wrongfully invalidated ballots may have (but not necessarily *would have*) changed the results of the election. Id. at 242. In particular, citing the Senate report, the court recognized that “[w]here a practice is such that it involves a series of events or episodes the same factors used when assessing a permanent structural barrier are not necessarily involved.... [But the] relevant inquiry is whether the practice

before this Court operated to deny the minority an equal opportunity to participate and to elect candidates of their choice.” Id. at 243. Because the Goodloe court was able to make this determination without considering any of the Senate factors, it found a violation without any showing that any of the Senate factors obtained.


Each of these practices had the result of making it either disproportionately easier for whites or disproportionately more difficult for blacks to access the ballot (Brown, Toney) or to cast a vote effectively despite sufficient access to the ballot (Post). In *each* of these cases, the courts specifically held that the state officials either acted in good faith or that so acting was irrelevant. Brown, 279 F. Supp. at 63; Post, 297 F. Supp. at 51; Toney, 488 F.2d at 312. Moreover, in each case, the courts specifically held that the state officials did not intentionally discriminate. Rather, the challenged practices had a discriminatory effect. Brown, 279 F. Supp. at 63; Post, 297 F. Supp. at 50; Toney, 488 F.2d at 312. Finally, the Brown court specifically held that the “result of the election would not have been different had the final tabulation not included [illegally cast] absentee ballots” of white voters. 279 F. Supp. at 63. Similarly, the Toney court, without deciding whether a violation was contingent on election results, held that the actual results of the election should be set aside because the

“discrimination based on race [is] of such a substantial nature as *possibly* to have affected the outcome of the election.” 488 F.2d at 315.

Similarly, the Plaintiffs here face a more difficult path than white voters within the same county to having their ballots counted and included in the final tally due to faulty election equipment. It matters not whether the disfranchising mechanism is the overt refusal to collect and count absentee ballots cast by black voters or a machine that operates to reject ballots cast by black voters; the end result (which is the basis of any Section 2 claim) is the same. Racial animus or intent need not be shown.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment in favor of Defendants and order that judgment be entered on behalf of Plaintiffs and all those similarly situated on their Fourteenth Amendment and Voting Rights Act claims.


Meredith Bell-Platts

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing En Banc Reply Brief of Appellants has been served via First Class U.S. Mail to the parties listed below on the 18th day of October, 2006:

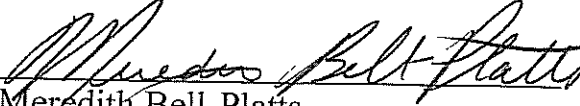
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