
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)

EN BANC BRIEF OF APPELLANTS

Meredith E.B. Bell-Platts
Laughlin McDonald
American Civil Liberties Union
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
404-523-2721

Richard Saphire*
Dayton Law School
300 College Park Drive
Dayton, OH 45469
937-229-2820

Paul F. Moke*
Wilmington College
1252 Pyle Center
Wilmington, OH 45177
937-382-6661

Daniel P. Tokaji*
Ohio State University College of Law
55 W. 12th Avenue
Columbus, OH 43210
614-292-6566

ATTORNEYS FOR APPELLANTS

*Institutional affiliation provided for purposes of identification only.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This appeal was timely filed on January 6, 2005, and this Court has jurisdiction over the final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

- I. Whether Defendants' certification and use of error-prone voting equipment in some counties but not others deprives voters' of their fundamental right to vote in violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.
- II. Whether the use of punch card voting equipment in Hamilton, Montgomery, and Summit Counties violates Section 2 of the Voting Rights Act, 42 U.S.C. §1973(a), where the evidence shows that punch cards disproportionately harm black voters within those counties.
- III. Whether District Court erred in denying Plaintiffs' motion for class certification.
- IV. Whether the case has been rendered moot by Defendants' voluntary cessation of putatively illegal conduct.

INTRODUCTION

The question before this Court is whether to honor the basic constitutional principle that “equal weight” must be accorded to each vote and “equal dignity” to each voter. Bush v. Gore, 531 U.S. 98, 104 (2000). The Supreme Court did not invent this principle in Bush v. Gore. To the contrary, it relied on a settled line of authority stretching back more than four decades, which prohibits unequal treatment of voters based on their place of residence. Id. at 105 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). This principle applies with the same force to the state’s method of conducting elections as it does to the state’s drawing of district boundaries. Id. at 104-05; see also Gray v. Sanders, 372 U.S. 368 (1963) (striking down county unit system in which votes for statewide offices were given different weight depending on the county in which the voter lived).

To be sure, the Bush v. Gore Court did not apply this basic equality principle to facts or controversies that were not before it. It did not, in particular, have before it evidence of statistically proven disparities arising from the use of different voting equipment in different counties. But if the principle that the Court developed in the 1960s and reaffirmed in 2000 is faithfully applied to the record in this case, the inter-county disparities in Ohio’s voting system cannot stand.

By forcing voters to use non-notice voting equipment in some counties but not others, Defendants have discriminated against voters based on their place of residence, in violation of the “one person, one vote” rule. Reynolds, 377 U.S. at 558. The record here establishes that Ohio voters using non-notice punch card ballots were *more than twice as likely* to have their votes rejected, as those using more reliable technology, resulting in tens of thousands of lost votes in each presidential election. Given the substantial disparities documented in the record, Plaintiffs’ equal protection claim was established under long standing law, even if Bush v. Gore had never been decided.

Worse still, the evidence shows that punch card voting equipment results in pronounced racial disparities, within the three counties (Hamilton, Montgomery, and Summit) that are the subject of Plaintiffs’ claims under Section 2 of the Voting Rights Act. Defendants’ use of punch-card voting equipment within these counties, “result[s] in” the disproportionate denial of African Americans’ votes, in plain violation of Section 2. 42 U.S.C. § 1973(a).

STATEMENT OF THE CASE

On October 11, 2002, Plaintiffs – African American and Caucasian voters residing in Hamilton, Montgomery, Sandusky, and Summit County,

Ohio – filed this action. Plaintiffs claim that the use of unreliable voting equipment in some counties but not in others violates the Fourteenth Amendment to the United States Constitution. Specifically, they challenge “non-notice” punch card and optical scan voting equipment, which does not provide voters notice and the opportunity to correct errors. Plaintiffs also claim that the use of punch card ballots in Hamilton, Montgomery, and Summit Counties has a disparate impact on African American voters, in violation of Section 2 of the Voting Rights Act of 1965.

The complaint sought declaratory and injunctive relief prohibiting Defendants from: (1) continuing to allow the use of non-notice voting equipment in some Ohio counties, while more reliable equipment is used in others; (2) utilizing non-notice punch card voting equipment in Hamilton, Montgomery, and Summit Counties; and (3) using non-notice optical scan voting systems in Sandusky County. Plaintiffs have never sought to dictate that Ohio adopt any particular type of voting equipment, given that there are two types of systems – precinct-count optical scan and direct record electronic (DRE) – that would resolve the voting rights violations they claim.

On December 14, 2004, the district court issued a memorandum opinion and order granting judgment in favor of the Defendants after a

bench trial. See R.275, Mem. Op; J.A. 84-116. Pursuant to 28 U.S.C. § 1291, Plaintiffs timely filed this appeal on January 6, 2005. On April 21, 2006, a three-judge panel of this Circuit reversed the judgment of the district court on the Plaintiffs’ equal protection claim. Stewart v. Blackwell, 444 F.3d 843, 856-77 (6th Cir. 2006). The panel vacated the judgment of the district court on Plaintiffs’ Voting Rights claim and remanded the case for further proceedings. Id. at 877-79. On July 21, 2006, the Court granted rehearing en banc, vacating the panel’s decision.

STATEMENT OF FACTS

I. PUNCH CARD AND CENTRAL-COUNT OPTICAL SCAN SYSTEMS ARE SIGNIFICANTLY LESS ACCURATE THAN OTHER VOTING SYSTEMS USED IN OHIO.

A. Description of Ohio’s Voting Systems

Under Ohio law, the Secretary of State has the duty to certify voting equipment. Ohio Rev. Code § 3506.05. The Secretary has certified two broad categories of voting equipment for use in Ohio elections: (1) “actual notice” equipment, such as direct record electronic (“DRE”) and precinct-count optical scan systems; and (2) “non-notice” equipment, such as punch cards and central-count optical scan systems. “Actual notice” equipment provides notice and the capacity to correct errors, such as mistaken

overvotes;¹ “non-notice” equipment provides no such protection or warnings. R.234, Pretrial Stip. of Fact, ¶ 12; J.A. 274.

In the 2000 general election, approximately 72.5% of Ohio voters used non-notice equipment and 27.5% used notice equipment. Although the Complaint and evidence in this case reference data from the 2000 election, the same approximate percentages of Ohio voters used notice and non-notice equipment in the 2004 general election.² The statistical evidence demonstrates that Ohioans are subject to a dual voting system, in which voters using non-notice equipment have a much greater risk of having their votes nullified than those using notice equipment.

Despite the adoption of the federal Help America Vote Act (HAVA), 42 U.S.C. § 15301 *et seq.*,³ and the Secretary of State’s promises to conduct future elections using only notice equipment, the Secretary has refused to

¹ “Overvoting” occurs when the voting system determines that more votes have been cast in a particular contest than permitted, whereas “undervoting” occurs when the voting system determines that the voter has cast no vote in a particular contest, or fewer votes than permitted for the office in question. R.234, Pretrial Stip. of Fact, ¶ 24, J.A. 275.

²The 2004 election took place after trial in this case but, detailed official information on the 2004 presidential election is available on the Secretary of State’s website: <http://www.sos.state.oh.us/sos/results/11-02-04.htm>. For an analysis of which counties used various forms of voting equipment in 2004, see <http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-all.pdf>.

³ HAVA funds new voting equipment but does not require the states to replace punch card voting equipment, nor does it mandate the use of notice voting equipment. 42 U.S.C. §§ 15481(a)(1)(B), 15481(c)(2).

decertify the non-notice voting equipment that is at issue in this case. Defendants therefore remain free to use non-notice voting equipment at any time in the future. There is no assurance against the State allowing different types of voting equipment with substantially different levels of accuracy, including punch cards, as it has done in the past.

The stipulated evidence contains detailed descriptions of the punch card, optical scan, and DRE voting systems that the Secretary of State has approved for use in Ohio elections. R.234, Pretrial Stip. of Fact, ¶¶ 19-23, J.A. 274-75. In the 2000 and 2004 general elections, the most pervasive equipment used in Ohio was the Votomatic punch card, a non-notice system that relies on a ballot card with pre-scored, square perforations or “chad” that correspond to the names of the candidates as listed in an accompanying booklet. Because the candidates’ names and other identifying information for ballot initiatives do not appear on the face of the ballot, voters encounter difficulty ensuring that their votes are cast as intended. Hanging chad, which result from failure to press the stylus completely through the ballot card or failure of the chad to dislodge despite the stylus being pressed completely through the card, also may result in the vote not being counted. Nor is there any protection against overvoting, by making more choices than is allowed, and thus having one’s ballot invalidated.

Optical scan systems resemble answer sheets used in standardized examinations. The voter receives a ballot that lists the names of all candidates and ballot initiatives and either uses a pencil to darken the circle next to the preferred candidate or draws a straight line connecting two parts of an arrow. Some versions of the optical scan system are precinct-count systems, which enable voters to scan the ballot at the polling place, thereby providing notice and the opportunity to correct unintended overvotes. Conversely, when ballots are only read at a central location after the precincts are closed (referred to as "central-count" systems), voters are not provided notice and the opportunity to correct mistakes.

Direct record electronic voting systems come in several different varieties, but most resemble the ATMs that banks use. Voters either touch the name of the preferred candidate on the screen or press a button that corresponds to the desired candidate. All forms of DRE technology currently used in Ohio make it impossible to vote twice, or "overvote" for the same office or ballot measure. Additionally, DRE systems can be programmed to warn voters if their ballots contain undervotes. R.234, Pretrial Stip. of Fact, ¶¶ 21 & 23, J.A. 275. DREs are therefore a "notice" system.

As of 2004, when this case was tried, 69 of Ohio's 88 counties used punch card ballots, none of which provide notice and opportunity to correct mistakes. R.234, Pretrial Stip. of Fact, ¶ 14, J.A. 274. Eleven others used optical scan equipment, six used DRE equipment, and two used automatic (or “lever”) voting machines. Id. ¶ 15, J.A. 274. All DREs in Ohio employ notice technology that prevents overvotes. Dana Walch, Tr. 7/26/2004, Vol. I, p. 150:4-6, J.A. 377. Of the optical scan counties, one whole county and a portion of another used “precinct-count” systems allowing voters to check the accuracy of their ballots. Id. at pp. 149:17-151:23, J.A. 376-78. The other optical scan counties used “central-count” systems that do not provide notice and the opportunity to correct errors. In total, 78 of Ohio's 88 counties were using "non-notice" punch-card or optical scan systems at the time of trial. Id. at p. 157:4-6, J.A. 381; see also R.234, Pretrial Stip. of Fact, ¶ 17, J.A. 274.

B. Deficiencies in the Design of Ohio’s Voting Equipment

During the five days of trial, Plaintiffs presented uncontradicted lay and expert testimony concerning the deficiencies of punch card and central count optical scan equipment. Roy Saltman, formerly of the National Bureau of Standards, wrote two federal studies on the use of computers in vote tallying. Saltman, Tr. 7/27/2004, Vol. II, p. 248:16–21, J.A. 412. In

his report and testimony, Saltman noted that punch cards contain perforated chads that are inherently fragile. They become less stable when ballots are handled, manipulated, or sent through a tabulator, resulting in overvotes, undervotes, and inconsistent vote tabulations. Id. at pp. 268:11–269:9, J.A. 415-16. In close contests, repeated vote tabulations compound these problems. Id.

In addition, “human factors,” which arise from the interaction between the voter and the equipment, cause voters to make mistakes while using punch cards. These include inserting the card backwards, not anchoring it properly in the voting machine, or, for left-handed voters, covering up the voting booklet with the left hand and thereby having difficulty knowing which hole to punch. Id. at pp. 298:20–299:17, J.A. 426-27. Because these problems arise from a nexus between the voter and the voting equipment, they are not solely attributable to the negligence of the voter.

Dana Walch, Director of Election Reform for the Ohio Secretary of State’s Office, confirmed that there is “a higher residual vote rate [the combined overvote and undervote rate] in punch card counties than in ... counties with other types of voting technology.” Walch, Tr. 7/26/2004, Vol. I, p. 180:3-5, J.A. 398. Testifying on behalf of the Ohio Secretary of State,

Walch acknowledged: “[P]roblems with punch card ballots resulted from some physical failure of the ballot or voter error.” Id. at pp. 201:21-202:3, J.A. 401-02. In contrast, he admitted that notice voting systems used elsewhere in Ohio, specifically DRE and precinct-count optical scan systems, do provide voters with notice of errors. Id. at pp. 150:1–9, J.A. 377; see also, Saltman, Tr. 7/27/2004, Vol. II, pp. 273:4–276:25, J.A. 419-22. Such equipment is more “user friendly” than punch card equipment because it provides “options for voters to reduce error.” Walch, Tr. 7/26/04, Vol. I, p. 160: 2–18, J.A. 382.

Official documents issued by the State and County Defendants confirm these assertions. The State’s HAVA implementation plan, released by the Secretary of State’s office, repeatedly acknowledges that non-notice voting technology is substandard, stating that:

Boards of election should upgrade their voting systems to new, more trustworthy technology. Tr. Exh. 17 at 13, J.A. 626.

These goals demand immediate attention, or our state runs the risk of repeating the problems of our nation’s most recent presidential election – and suffering irreparable damage to the most important and basic concepts of democracy. Id.

The evidence is overwhelming that thousands of Ohio voters have been disenfranchised by antiquated voting equipment.... Tr. Exh. 17 at 45, J.A. 658.

In a study of ‘over’ and ‘under’ voting in Ohio, it was clearly demonstrated that punch-card voting was unreliable to the extent

[that] votes cast by thousands of Ohioans were not being counted in the final election tabulation. Tr. Exh. 17 at 14, J.A. 627.

Voting officials in the Defendant counties have echoed these concerns. Tim Burke, the Chairman of the Board of Elections in Hamilton County, made the following statement in a letter to U.S. Senator Mike DeWine:

Having looked closely at the punch card system of voting we use here in Hamilton County, I am convinced that this outdated technology is having a disparate effect in depriving a significant number of voters of having their electoral choices given... Newer technology, particularly the touch screen voting systems, provide both a more accurate count and prevent a voter from [overvoting]. Tr. Exh. 19, J.A. 678.

The State and County Defendants' own documents and public statements thus support the factual assertions that Plaintiffs have made in this case.

C. Disparities in the Accuracy of Ohio's Voting Systems

Official data from the 2000 presidential election indicate that the 29 counties with the highest overvote and undervote percentages were *all* counties that used the punch card method of voting. R.234, Pretrial Stip. of Fact, ¶ 25, J.A. 275; Tr. Exh. 17, p. 16, J.A. 629. Additionally, the seven counties with the lowest overvote and undervote percentages were all jurisdictions that did not use punch cards as their primary voting system. *Id.*

Both parties presented evidence showing that non-notice technologies – punch cards and central count optical scans – result in substantially more

uncounted votes than notice voting equipment used in the State of Ohio. R.275 Mem. Op., at Appendix I, J.A. 117-28; R.234, Pretrial Stip. Of Fact ¶¶ 14-17, 20-23, J.A. 274-75. In 2000, the uncounted vote rate for punch cards was more than three times as high as that for electronic voting, and more than twice as high as that for precinct-count optical scans:

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

R.275, Mem. Op., App. III, J.A. 138-41.

Plaintiffs' expert Dr. Martha Kropf presented uncontradicted testimony concerning the level of overvotes in the only three urban counties that collected such statistics in 2000. She testified that there were 2,916 overvotes in Hamilton County, 1,470 overvotes in Summit County, and 2,469 overvotes in Montgomery County, for a total of 6,855 overvotes.

Martha Kropf, Tr. 9/30/2004, Vol. IV, pp. 862:18–863:14, J.A. 583-84. All these are counties that used punch card voting systems in the 2000 general election. In contrast, Franklin County used DRE technology providing notice, which safeguarded voters from casting any overvotes. Walch, Tr. 7/26/2004, Vol. I, p. 153:8–10, J.A. 379. In Franklin County, there were no overvotes. Id. at p.186:15-24, J.A. 399.

Dr. Kropf's uncontradicted testimony, based on her published research, was that the estimated percentage of intentional undervoting in presidential elections is between 0.23% and 0.75%. Martha Kropf, Tr. 7/26/2004, Vol. I, p. 85:5-9, J.A. 356; id. at pp. 95:7–9, 231:12–14, J.A. 359, 409. She also found that there were no significant differences between African American and non-African American voters in the level of intentional undervotes. Id. at pp. 99:24–100:2, J.A. 360-61. From these findings, Dr. Kropf concluded that unintentional undervoting with non-notice equipment was primarily responsible for the higher rate of uncounted ballots. Id. at pp. 105:11–108:8, J.A. 362-65. Given Dr. Kropf's estimate that intentional undervoting at the top of the ballot is no more than 0.75%, it

follows that approximately 26,955 residual votes were intentional, and 54,812 were lost due to error.⁴

Defendants responded to this evidence with the report of their expert, John Lott, who analyzed residual vote data from *down-ballot* contests in the years 1992, 1996, and 2000. These elections featured contests that were not uniform across the state; they included non-competitive and even uncontested elections, where one would expect more voters to abstain, resulting in intentional undervotes. Kropf, Tr. 10/01/2004, Vol. V, pp. 887:18–888:21, J.A. 588-89; Tr. 7/26/2004, Vol. I, p. 105:15–25, J.A. 362. All experts in this case agreed that the most likely explanations for the fall-off in voting down ballot are that voters deliberately choose not to vote or that elections are not competitive. Kropf, Tr. 7/26/2004, Vol. I, p. 105:11–25, J.A. 362; Lott, Tr. 9/30/2004, Vol. IV, p. 625:4–13, J.A. 477. The down-ballot races upon which Defendants seek to rely are therefore meaningless, since it is impossible to control for the many different factors that would cause voters to abstain in the many different contests – some competitive and some not – taking place across the state. Kropf, Tr. 10/01/2004, Vol. V, p. 890:2-17, J.A. 590.

⁴ This number of lost votes is derived by subtracting the number of *intentional* undervotes with punch cards (0.75% of the 3,593,958 cast with this system, or 26,955) from the total number of residual votes with punch cards (81,767).

II. THE PUNCH CARD SYSTEM HAS A DISPARATE IMPACT ON AFRICAN AMERICAN VOTERS IN HAMILTON, MONTGOMERY, AND SUMMIT COUNTIES.

The three counties that are the subject of Plaintiffs' Voting Rights Act claim (Hamilton, Montgomery, and Summit) use punch card voting equipment that results in a significantly higher rate of lost votes for African American voters than for whites. In these counties, there are pervasive socioeconomic disparities between African Americans and non-African Americans. Racial disparities exist in the number of single parent homes, the number of children attending private schools, levels of educational attainment, unemployment rates, size of the labor force, income levels, the number of people living in poverty, earnings, the incidence of crowded housing conditions, access to telephones and transportation, plumbing, rental expenses, and property values. Mark Salling (Plaintiffs' expert), Tr. 7/27/2004, Vol. II, pp. 336:12-345:13, J.A. 432-41; Tr. Exhs. 32-34, J.A. 870-965.

Regression analysis of data from each precinct in the Defendant counties established that the correlation between overvoting and the percentage of African American voters in a given precinct in Hamilton

County was .517; and in Summit County the correlation was .682.⁵ Salling, Tr. 7/27/2004, Vol. II, pp. 388:17-390:23, J.A. 442-44. In unrebutted testimony, Plaintiffs' experts characterized each of these correlations as "strong." Salling, Tr. 7/27/2004, Vol. II, pp. 392:24–393:12, J.A. 445-46. In Montgomery County, where data of overvotes mixed together with undervotes was the only form data available at the precinct level, there is a smaller, but nevertheless "strong" .440 level of correlation. *Id.* at pp. 389:15–20, 393:13–18, J.A. 443, 446. All of these findings are statistically significant.⁶ Maps showing striking geographical representations of these findings are in the record. Tr. Exhs. 50-55, 62-64, J.A. 971-79.

Dr. Richard Engstrom, Professor of Political Science at the University of New Orleans, analyzed Dr. Salling's data based on methods of statistical analysis approved by the Supreme Court and other federal courts for use in

⁵ Regression coefficients measure the strength of association between two variables. They range between +1.0 (a perfect correlated relationship through 0 (no relationship), to -1.0 (an inverse relationship). Hubert M. Blalock, Jr., Social Statistics 396-97 (2nd ed. 1979).

⁶ 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. *Id.* at 154 – 165. The findings presented by the plaintiffs fell within a reliable threshold of statistical significance.

voting rights cases.⁷ Engstrom, Tr. 7/27/2004, Vol. II, p. 449:4 – 9, J.A. 450. Dr. Engstrom reached the following conclusions, all of which were unrebutted: (1) African Americans in Hamilton County overvoted at a rate seven times higher than non-African Americans; (2) in Summit County, they overvoted at a rate nine times higher than non-African Americans; (3) in Montgomery County, where only combined over and undervote statistics are available on a precinct basis, African Americans were disfranchised by residual voting at a rate two and one-half times that of non-African Americans. Engstrom, Tr. 7/27/2004, Vol. II, p. 438:8–15, J.A. 447. In contrast to these punch card counties, Franklin County had no overvotes, even though it is demographically quite similar, because it uses DRE machines that prevent overvoting. Tr. Exh. 11 at p. 7, J.A. 607; see also Engstrom, Tr. 7/27/2004, Vol. II, pp. 438:8–439:16, J.A. 447-48; Tr. Exh. 11 (Engstrom Report), J.A. 601-12. Consequently, in Franklin County, there were no overvotes.

Dr. Engstrom concluded that punch card equipment interacts with socioeconomic conditions, resulting in statistically significant disparities

⁷ Thornburg v. Gingles, 478 U.S. 30, 52 (1986); Mallory v. Ohio, 173 F. 3d 377, 383-84 (6th Cir. 1999). The three methods are homogeneous precinct analysis, ecological regression, and ecological inference. Dr. Engstrom used all three methods and “triangulated” among them to verify that his findings moved consistently in the same direction. In contrast, the Defendants’ expert used none of these methods.

between the levels of disfranchisement among African American and non-African American voters. Notice voting in Franklin County dramatically reduced both the incidence of residual voting and its racial disparity. *Id.* Dr. Engstrom testified that these findings square with the work of other leading scholars in the field, including Michael Tomz of Stanford University and Robert Van Houweling of the University of Michigan. Engstrom, Tr. 7/27/2004, Vol. II, pp. 481:1–482:20, J.A. 455-56.⁸ Election officials in Hamilton County also have verified the accuracy of Engstrom’s conclusion by formally and repeatedly expressing concern that the punch card balloting system leads to disfranchisement of African American voters in the City of Cincinnati. *See* Tr. Exh. 19 (Letters of Timothy Burke, Chairman of the Hamilton County Board of Election), J.A. 666-78.

The Defendants’ expert John Lott did not make any specific findings with respect to the three Defendant Counties, nor did his analysis address the discrete problem of overvoting. Kropf, Tr. 9/30/2004, Vol. IV, p. 862:8–12, J.A. 583. Instead, he studied the racial gap in invalid balloting by examining all wards in the state in the 1992, 1996, and 2000 general elections. Experts on both sides agreed that it is best to use the smallest unit of geography

⁸Michael Tomz and Robert P. Van Houweling, “How Does Voting Equipment Affect the Racial Gap in Voided Ballots?,” 47 *Am. J. Pol. Sci.* 46-60 (2003).

possible when studying the political behavior of specific groups, like African Americans. Salling, Tr. 7/27/2004, Vol. II, p. 335:1-16, J.A. 431; Lott, Tr. 9/30/2004, Vol. IV, pp. 594:22–596:1, J.A. 474-476; Depo. of Herb Asher, Tr. 9/30/2004, Vol. IV, pp. 801:23–802:18.8, J.A. 569-70. Wards in Ohio are made up of several precincts and represent a larger unit of geography. While Plaintiffs’ experts followed this counsel by analyzing the data in this case at the level of precincts, the Defendants’ expert studied his data at the level of wards. This introduces additional error into the Defendant’s expert’s findings. Salling, Tr. 7/27/2004, Vol. II, pp. 335:4–336:11, J.A. 431-32. For example, the Defendants’ expert attempted to estimate the behavior of African American voters by examining wards that, by his own admission, are only 9% black. Lott, Tr. 9/30/2004, Vol. IV, p. 626:19–23, J.A. 478. Such a low percentage of blacks cannot accurately be described as an African American ward. Furthermore, such predominately white wards cannot reliably measure the incidence of black undervoting or overvoting.

STANDARD OF REVIEW

This Court reviews the district court’s conclusions of law after a bench trial *de novo*. Burzynski v. Cohen, 264 F.3d 611, 616 (6th Cir. 2001); Kline v. TVA, 128 F.3d 337, 341 (6th Cir. 1997). Findings of fact are reviewed under a “clearly erroneous” standard. Id.

SUMMARY OF ARGUMENT

I. Fourteenth Amendment.

The Supreme Court has long affirmed that the right to vote is fundamental, because it is preservative of all other rights. Dunn v. Blumstein, 405 U.S. 303, 336 (1972) (citing cases). The fundamental character of the right to vote requires that “equal weight” be accorded to each vote and “equal dignity” to each voter. Bush v. Gore, 531 U.S. 98, 105 (2000). Electoral practices that deny equality when it comes to this fundamental right may be upheld only if narrowly tailored to a compelling government interest. Dunn, 405 U.S. at 336; Mixon v. NAACP, 193 F.3d 389, 402 (6th Cir. 1999).

In this case, the evidence shows that people of all races residing in non-notice punch card and optical scan counties are significantly less likely to have their votes counted than are voters in counties using more reliable notice equipment. In fact, Defendants have conceded that the use of non-notice voting technology results in a disproportionate number of uncounted votes. The district court erred as a matter of law by applying rational basis rather than strict scrutiny to these undisputed inequalities. Because there is no rational – let alone compelling – interest for continuing to use unreliable equipment in certain Ohio counties and more reliable equipment in others,

Defendants' use of this equipment violates Plaintiffs' rights under the Equal Protection Clause and Due Process Clause of the U.S. Constitution.

II. Voting Rights Act.

The Voting Rights Act protects not just the right to cast a ballot, but also the “right to have such ballot counted properly” and “included in the appropriate totals of votes cast.” 42 U.S.C. § 1973l(c). The undisputed evidence shows that African American voters in the three Defendant counties are far more likely than non-African Americans to have their votes rejected, due to the use of punch-card voting equipment in violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973.

These racial disparities arise from the punch-card voting system's interaction with underlying socioeconomic inequalities in the three Defendant counties. The evidence further shows that notice voting technology, which is readily available and used in other Ohio jurisdictions, significantly reduces the racial gap in uncounted votes. The fact that there are also high residual vote rates in predominantly white Appalachian counties cannot justify the demonstrated racial disparities in the three Defendant counties. To the contrary, these facts reinforce Plaintiffs' claim that socioeconomic inequalities interact with voting equipment to cause racial disparities in the three Defendant counties. Accordingly, Defendants

have violated Plaintiffs' rights under Section 2 of the Voting Rights Act.

III. Class Certification.

The district court also erred in denying Plaintiffs' motion to certify the class and subclass for purposes of their Fourteenth Amendment and Voting Rights claims. Plaintiffs adequately represent the unnamed members of the class. See Senter v. General Motors, 532 F.2d 511, 524-25 (6th Cir. 1976). They also satisfy the commonality, typicality, and numerosity prongs for class certification.

IV. Mootness.

This case is not moot. The challenged voting equipment remains certified, and there is nothing to prevent Defendants from using it in future elections. Under the precedent of this Court and the Supreme Court, the Defendants' voluntary cessation of illegal conduct does not moot a case unless it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth v. Laidlaw Env'tl. Svs., 528 U.S. 167, 190 (2000); Golden v. City of Columbus, 404 F.3d 950, 962 n.10 (6th Cir. 2005). Defendants have not satisfied their heavy burden of showing that their voluntary cessation of illegal conduct moots

the case.

ARGUMENT

I. THE STATE'S USE OF ERROR-PRONE VOTING EQUIPMENT IN SOME COUNTIES BUT NOT OTHERS VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Because the right to vote is fundamental, practices that infringe upon this right are subject to strict scrutiny and may only be upheld if narrowly tailored to serve a compelling government interest. See Dunn, 405 U.S. at 366; Reynolds v. Sims, 377 U.S. at 562 (1964); Mixon v. NAACP, 193 F.3d 389, 402 (6th Cir. 1999). The issue in this case is not, as the district court supposed, whether states may use “different types of voting technology within their borders.” R.275, Mem. Op., at 33, J.A. 116. There is no question that they may.

The constitutional question in this case is whether voters in counties using non-notice voting equipment are “less likely to cast an effective vote” than voters in counties using notice voting equipment. Wexler v. Anderson, 452 F.3d 1226, 1231 (11th Cir. 2006); see also Black v. McGuffage, 209 F. Supp.2d. 889, 898 (N.D. Ill. 2002) (question is “whether a state may allow the use of different types of voting equipment with *substantially different levels of accuracy*”) (emphasis added). The evidence here demonstrates

beyond any shadow of doubt that voters using non-notice punch card and optical scan systems are substantially more likely to have their votes rejected than those using notice voting technologies.

By the district court's own estimate, between 1.4% and 2.0% of punch card voters who attempted to cast a vote for President did not have their votes counted at all in 2000 – an uncounted vote rate that translates into approximately 50,000 to 72,000 lost votes statewide. R.275, Mem. Op., at 27, J.A. 110.⁹ While Defendants attempt to characterize this burden on the franchise to be *de minimis*, it is decidedly not so for the tens of thousands of Ohio voters whose votes have not been counted in every election cycle. For those citizens, the denial of their right to vote is not just substantial but absolute – and, given the ready availability of more accurate technologies, constitutionally impermissible.

A. STRICT SCRUTINY IS THE APPROPRIATE STANDARD FOR PRACTICES THAT DENY EQUAL TREATMENT TO VOTERS BASED ON WHERE THEY HAPPEN TO LIVE.

The Supreme Court has long held that the right to vote encompasses not only the ability of citizens to cast their votes unimpeded, but also the

⁹This estimate is computed by multiplying the district judge's estimate of the percentage of unintentional overvotes and undervotes cast with punch cards (1.4-2.0%) by the total number of ballots cast with this system in the 2000 election (3,593,958) and then rounding off to the nearest thousand.

right to “have their votes counted.” Reynolds, 377 U.S. at 554. As the Supreme Court most recently expressed this venerable principle of democratic equality, the Equal Protection Clause commands that the state accord “equal weight” to each vote and “equal dignity” to each voter in tabulating the votes. Bush, 531 U.S. at 104; see also id. at 105, 107 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966); Reynolds, 377 U.S. at 555; Gray v. Sanders, 372 U.S. 368 (1962); Moore v. Ogilvie, 394 U.S. 814 (1969)). Under these precedents, election practices that fail to accord equal treatment to all voters are subject to strict scrutiny. Those practices are particularly suspect when they operate to disadvantage certain voters based upon their county of residence.

Long before Bush v. Gore, the Supreme Court established that the core principle of democratic equality required heightened scrutiny of practices that limit citizens' voting rights based on wealth or place of residence. For example, in Reynolds, the Court struck down a legislative apportionment scheme that gave some voters less representation than others, based solely on the jurisdiction within which they lived. In articulating the “one person, one vote” principle, the Court held that “[d]iluting the weight of votes *because of place of residence* impairs basic constitutional rights under the Fourteenth Amendment.” 377 U.S. at 566 (emphasis added). It

made clear that heightened scrutiny was the appropriate standard, stating that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Reynolds, 377 U.S. at 562.

The line of equal protection cases following Reynolds struck down electoral practices disadvantaging voters based on the county within which they happened to live. See, e.g., Gray v. Sanders, 372 U.S. 368 (1963) (holding that “county unit” system for primary elections violated Equal Protection Clause, because it gave more weight to voters in some counties than to those in others). And in striking down the poll tax Harper followed Reynolds, in holding that practices infringing upon the fundamental right to vote are subject to heightened scrutiny. 383 U.S. at 670 (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be *closely scrutinized and carefully confined*”)(emphasis added).

The level of scrutiny required by Reynolds and Harper is perfectly consistent with – and in fact reinforced by – the Supreme Court’s subsequent decision in Burdick v. Takushi, 504 U.S. 428 (1992). In Burdick, the Court considered a state’s prohibition on write-in votes. Though quite different from this case on its facts, Burdick’s statement of the underlying legal principles is helpful in clarifying the applicable level of scrutiny. The Court

drew a distinction between “reasonable, *nondiscriminatory*” regulations of the election process on the one hand, and “severe” restrictions on the other, which may only be upheld if “narrowly drawn to advance a state interest of compelling importance.” *Id.* at 434 (emphasis added). Hawaii’s prohibition on write-in candidates clearly fell on the “reasonable, nondiscriminatory” side of the line. The law did not deny anyone the right to vote or have their vote counted; rather, the most that voters could claim is that their choices of candidates were limited, something that necessarily occurs whenever the state places limits on which candidates may appear on a ballot.

On the other hand, where a law treats some voters differently from others – and particularly when it does so by subjecting voters in some counties to different treatment than those in other counties – strict scrutiny applies. Such a practice discriminates among voters based on “place of residence,” and is therefore subject to strict scrutiny. *Reynolds*, 377 U.S. at 561, 566; *see also* *Mixon*, 193 F.3d at 402 (“If the 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.”).

While *Bush v. Gore* did not specifically identify the level of scrutiny applicable to infringements of the right to vote, it cited both *Reynolds* and

Harper, which applied heightened scrutiny. Bush, 531 U.S. at 104-05. Nothing in Bush v. Gore purports to reverse the Supreme Court’s consistent recognition that strict scrutiny is the proper standard for practices that infringe on the right to vote. Lower courts considering challenges to voting equipment since Bush v. Gore have therefore applied a similar analysis. See Black v. McGuffage, 209 F. Supp. 2d at 899 (where a state selects and allows voting equipment “with greatly varying accuracy rates,” it “value[s] one person’s vote over that of another”)(quoting Bush, 531 U.S. at 104-05); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1107, 1109-10 (C.D. Cal. 2001) (denying state’s motion for judgment on the pleadings, where voters alleged that “individuals living in counties where the punch-card system is used are substantially less likely to have their votes counted.”).

Most recently, the Eleventh Circuit applied precisely the equal protection analysis that Plaintiffs-Appellants have urged in this case, in determining the appropriate level of scrutiny. Wexler, 452 F.3d at 1231-32. The issue in Wexler was whether Florida’s use of touchscreen voting machines was consistent with equal protection. As the Court explained, the level of scrutiny to be applied turns on “the degree to which a regulation burdens the right to vote.” Id. at 1232. The court defined the “constitutional question” in the following terms: “Are voters in touchscreen counties less

likely to cast an effective vote than voters in optical scan counties?” Id. at 1231.

In Wexler, the answer to that question was an easy “no,” since plaintiffs in that case failed even to could not even allege that voters using touchscreens were less likely to have their votes counted. Florida’s use of touchscreens thus fell on the “reasonable, nondiscriminatory” side of the line – to the extent there was any burden on voters, it was “not so substantial that strict scrutiny is appropriate.” Id. at 1232-33. By contrast, as explained below, the Plaintiffs in this case have not just alleged but have proven that voters using non-notice punch card and optical scan equipment are less likely to have their votes counted. They have therefore shown the sort of “substantial” burden on their right to vote warranting strict scrutiny.

B. OHIO VOTERS IN NON-NOTICE COUNTIES ARE LESS LIKELY TO HAVE THEIR VOTES COUNTED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

As set forth above, the Supreme Court has long held election practices subject to strict scrutiny if they have the effect of discriminating against voters based on place of residence. Reynolds, 377 U.S. at 561, 566; see also Bush v. Gore, 531 U.S. at 107 (concluding that differences in recount processes among Florida counties lacked “sufficient guarantees of equal treatment”). If the use of non-notice punch card and optical scan voting

systems has a differential impact on the fundamental right to vote, then the certification and use of such systems is subject to strict scrutiny and may only be upheld if “necessary to promote a compelling state interest.” Mixon, 193 F.3d at 402. The evidence leaves no room for doubt that the certification and use of non-notice punch card and optical scan systems has an impact – and a profound one – on the ability of tens of thousands of Ohioans to have their votes counted in each election cycle, based solely on their misfortune of residing in a county that uses that equipment.

To be perfectly clear, Plaintiffs do *not* assert that the state is obliged to provide exactly the same type of voting equipment to all voters. Instead, they challenge the use of equipment with “substantially different levels of accuracy” in different counties. Black, 209 F. Supp. 2d at 898; see also Wexler, 452 F.3d at 1231 (defining question as whether voters in some counties are “less likely to cast an effective vote” due to differences in voting equipment). More specifically, Plaintiffs’ equal protection claim rests on the statewide disparities arising from the use of two types of non-notice voting equipment: (1) the punch card system, used by the vast majority of Ohio counties in the past two presidential elections, and (2) optical scan systems that lack error notification, used in ten Ohio counties. Walch, Tr. 7/26/2004, Vol. I, p. 157:4-6, J.A. 381.

The evidence demonstrates these two types of equipment to be substantially inferior to the others in their ability to accurately record the votes of those who use them. It is uncontested that the residents of most Ohio counties have been required to vote with punch card equipment that does not include error notification, while those in a handful of other counties have used better equipment that provides voters with notice and the opportunity to correct errors. See R.275, Mem. Op., App. I, J.A. 117-28; R.234, Pretrial Stip. of Fact, ¶¶ 14-17, 20-23, J.A. 274-275. The voters in the non-notice counties are subjected to a significantly greater risk that their votes will not be counted. Walch, Tr. 7/26/2004, Vol. I, p. 157:4-6, J.A. 381; R.234, Pretrial Stip. of Fact, ¶¶ 16, 17, 18, 25, J.A. 274-75.

There is no real dispute that the use of punch cards, and to a lesser extent non-notice optical scan voting equipment, significantly increases the likelihood that one's vote will not be counted. In the 2000 presidential election, for example, the combined overvote and undervote rate for punch cards was 2.3% and for non-notice optical scans 1.8%; in contrast, it was 0.7% and 1.0% for notice optical scan and electronic voting equipment respectively. R.275, Mem. Op., App. III, J.A. 138-41. Defendants' own data shows that non-notice punch cards and optical scans result in substantially higher numbers of lost votes than the other equipment that has been used in

the State of Ohio. R.275, Mem. Op., App. III (Summary of Residual Votes by Voting Type and Race), J.A. 138-41.

Although Defendants criticized Plaintiffs for relying exclusively on 2000 data, an analysis of their own experts' data for the presidential elections in 1992, 1996, and 2000 yields similar results. According to the data from *Defendants' own expert*, the residual vote rate for punch card voting machines was 2.29%, compared to 0.94% for electronic, 1.04% for lever, and 1.15% for precinct-count optical scans. Tr. Exh. 18, at 5, J.A. 665.¹⁰ See also Stewart, 444 F.3d at 848-50 (describing statistical evidence of lost votes with non-notice technology from both sides' experts). There is no question, then, that Plaintiffs have proven that Ohio's voting equipment has "substantially different levels of accuracy." Black v. McGuffage, 209 F.

¹⁰While accepting Plaintiffs' evidence concerning the operation of voting equipment used in Ohio, the district judge appears to have relied upon his personal experience and opinions regarding punch card voting (R.275, Mem. Op., at 25, J.A. 108). During trial, Judge Dowd asserted on more than one occasion that he himself had no trouble using punch cards and, at one point, that persons who make mistakes are "stupid." Dowd, J., Tr. 7/28/2004, Vol. III, p. 527:8-9, J.A. 469; Tr. 9/30/04, Vol. IV, p. 707:23-25, J.A. 509. As the district judge put it at one point, in explaining the reason for the high number of uncounted votes in punch card jurisdictions: "I opt for stupidity quicker than equipment. Having voted that way for so many years, I think it's very simple to vote punch card. I've been doing it for many, many years, and I don't have any problem with it at all." Id. at 527:12-16, J.A. 469; see also R.275, Mem. Op., at 18 n. 11, J.A. 101. The judge's personal experience, as well as his opinions of other voters based on that experience, are both clearly erroneous as a factual matter and irrelevant as a legal matter.

Supp. 2d at 898; see also Wexler, 452 F.3d at 1232 (strict scrutiny applies where burden on voters is “substantial”).

While evidence from the 2004 presidential election is not in the record, the results available on the Secretary of State’s website¹¹ confirm the substantial burden on the ability to cast an effective vote in non-notice counties. Despite the Secretary of State’s intensive efforts to educate the public on how to use the punch card system, counties using this equipment as their primary voting method still had an uncounted vote rate of 1.84% in 2004. That represents a slight decrease in the rate of overvotes and undervotes from 2000, but is still significantly higher than the rate arising from either electronic or optical scan equipment providing notice.¹²

The uncounted votes arising from the use of punch cards are not attributable solely to voters’ failure to follow instructions. As Roy Saltman explained at trial: “[W]hen the ballot is then handled or manipulated or sent through a reader, it is more likely that additional chads will be dislodged and fall out. And if that happens, the votes indicated on the ballot are changed

¹¹<http://www.sos.state.oh.us/sos/results/11-02-04.htm>. Plaintiffs respectfully submit that this Court may take judicial notice of this data. See Abrams v. Johnson, 521 U.S. 74, 93 (1997) (court noted that black incumbent won district in election although election results were not in record).

¹²A compilation of the combined overvote and undervote rate among counties using different types of equipment in 2004, based on the Secretary of State’s data, may be found here: <http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-all.pdf>.

because the presence of holes indicates votes.” Roy Saltman, Tr. 7/27/2004, Vol. II, p. 269:7-11, J.A. 416. The result will be that the ballot shows an invalid “overvote” even though the voter followed instructions to the letter. Tr. 7/27/2004, Vol. II, p. 269:13-15, J.A. 416. In fact, the district court acknowledged that “running the punch card ballots repeated times through the counting machinery will result in different results.” R.275, Mem. Op. at 22, J.A. 105. It should therefore come as no surprise that in the most recent presidential election, large numbers of uncounted votes were found in the State of Ohio, despite the intensive voter education efforts in which the state engaged in an effort to prevent invalid votes from being cast on punch cards.

Defendants’ own statements confirm the unequal treatment of voters arising from demonstrably unreliable voting equipment. At trial, the Secretary of State’s designated witness Dana Walch testified that there is a lower rate of error with Direct Record Electronic (“DRE”) and other “second chance” technologies than with punch card voting. Dana Walch, Tr. 7/26/2004, Vol. I, p. 163:9-12, J.A. 384. Secretary of State Blackwell himself has acknowledged that a “vast body of information ... documenting the higher rate of error for punch cards compared to other systems, and highlighting the benefits of second chance precinct count voting systems.” Id. at 200:16-23, J.A. 400; Tr. Exh. 22 at 17, J.A. 680. The Secretary of

State's office has therefore recognized the need to move to "more reliable" and "more user friendly" forms of voting technology. Walch, Tr. 7/26/2004, Vol. I, p. 160:15-18, J.A. 382. As the panel noted, the Secretary of State's office has further admitted that Ohio's non-notice voting equipment is untrustworthy and, further, that the "evidence is overwhelming that thousands of Ohio voters have been disenfranchised by antiquated voting equipment" Stewart, 444 F.3d at 871 (quoting Ohio Secretary of State, State Plan to Implement the Help America Vote Act of 2002).

The district court's entire discussion of the applicable level of scrutiny was relegated to a single footnote, in which the court states in conclusory fashion that it is "of the view that rational basis is the level of scrutiny applicable to Ohio's use of punch card voting technology." R.275, Mem. Op., at 23 n.19, J.A. 106. The district court fails even to acknowledge the long line of Supreme Court precedent holding that practices that deny or diminish the vote based on "place of residence" must be "carefully and meticulously scrutinized." Reynolds, 377 U.S. at 562, 566.

Mixon v. NAACP, the lone case that the district court cites in its footnote on the level of scrutiny, actually demonstrates that strict scrutiny, not rational basis review, is the proper test in this case. This Court in Mixon upheld a law providing that municipal school district boards would be

appointed rather than elected. 193 F.3d at 402-07. The Mixon court made very clear, however, that its application of rational basis review was based upon the fact that there was no unequal treatment. Id. at 402 (“If the 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.”). In Mixon, the state’s decision to make school boards appointed rather than elected did not result in any unequal treatment.

Conversely, the unequal treatment here is readily apparent. Voters residing in some counties are less likely to have their votes counted than others for president and other statewide races, based on the happenstance of what voting equipment is used there. For example, a voter in a punch card county like Cuyahoga is about four times as likely not to have her presidential vote counted as a voter in Franklin County, which uses more reliable electronic voting machines.¹³ These statistics are comparable to those evident throughout the state. The evidence shows that punch cards generated a 2.3% residual vote rate, compared to 0.7% with electronic voting technology. The effect of this inequality is to disadvantage citizens in

¹³The record shows that in 2000, Cuyahoga County had a 2.7% uncounted vote rate with its punch card machines, while Franklin County had a 0.6% residual vote rate with its electronic machines. R.275, Mem. Op., App. III, J.A. 138-41.

counties that use punch card equipment in statewide races, such as elections for President and U.S. Senate. Mixon thus supports the principle, repeatedly stated in the line of Supreme Court cases preceding it, that election practices are subject to strict scrutiny where they place some voters at a comparative disadvantage to others based on their place of residence.

C. STRICT SCRUTINY ALSO APPLIES UNDER THE DUE PROCESS CLAUSE, BECAUSE THE USE OF ERROR-PRONE VOTING EQUIPMENT DEPRIVES VOTERS OF THEIR RIGHT TO HAVE THEIR VOTES COUNTED ACCURATELY.

Plaintiffs' right to vote and have their vote counted is protected by the Due Process Clause of the Fourteenth Amendment, as well as the Equal Protection Clause. As the Court stated in Bush v. Gore, the Constitution embodies a "minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." 531 U.S. at 105. When a state extends the right to vote to its citizens, it must assure that the Due Process Clause's "rudimentary requirements...of fundamental fairness" are satisfied. Id. at 109. In Black v. McGuffage, for example, the court considered a due process challenge to punch card voting equipment in Illinois. 209 F. Supp. 2d at 901. It concluded that a due process violation would arise, where "the votes cast in some districts will have a significantly greater chance of being counted than votes cast in neighboring election districts." Id. at 900-01. So

too, in this case, Defendants have operated a system that uses error-prone voting equipment, subjecting thousands of voters, including the Plaintiffs, to a significant and unreasonable risk that their votes would not be counted. Such a system arbitrarily deprives voters of their voting rights, thus giving rise to a due process violation. For this alternative reason, Ohio's use of non-notice voting equipment warrants strict scrutiny.

D. THE CONTINUING USE OF ERROR-PRONE VOTING EQUIPMENT CANNOT SURVIVE ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

1. As Defendants All But Admit, the Use of Non-Notice Voting Equipment in Some Counties But Not Others Cannot Remotely Satisfy Strict Scrutiny.

As explained above, strict scrutiny is applicable under both the Equal Protection Clause and the Due Process Clause. The Defendants have never asserted that their continuing use of error-prone voting technology is needed to serve a compelling state interest, and consequently there is no evidence to support such a defense.

Throughout this litigation the Defendants have conceded, in their HAVA plan and elsewhere, that the use of punch card and non-notice voting technology is deeply problematic and that it needs to be replaced with less error-prone equipment. For example, Defendant Blackwell has acknowledged that the State of Ohio's failure to replace the punch card as

the state's principal voting method "invites a Florida-like calamity." Referring specifically to this litigation, Secretary Blackwell candidly admitted that the ongoing legislative foot-dragging in providing funds to upgrade Ohio's voting system "proves only to support the plaintiff's concerns that Ohio is not serious about [Help America Vote Act] implementation and will likely be used in support of a plaintiff's motion to win immediate judgment." See Tr. Exh. 24 (Letter of J. Kenneth Blackwell to Honorable Doug White), at 3, J.A. 681. These statements support the idea that Ohio has a compelling interest in replacing—not maintaining—its punch card and optical scan systems.

Strict scrutiny places the burden on the Defendants to establish that the use of error-prone equipment furthers a compelling state interest. This the Defendants did not and cannot do. Defendants have argued only that there are "rational reasons" for the state to have certified "different types of voting machines for the local Boards of Elections to use." R.173, Memorandum in Support of Motion for Summary Judgment By Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County, at 21, J.A. 264; id. at 21-22, J.A. 264-65 (asserting that the "State has rational reasons for initially certifying the punch card ballot and for keeping that ballot in use," and that "the Counties have rational reasons for

purchasing [punch card equipment] and for continuing its use.”). Accordingly, if strict scrutiny applies – as the panel rightly concluded it should, Stewart, 444 F.3d at 873 – there is no plausible defense for the statistically proven inequalities arising from disparities in Ohio’s voting equipment.

2. Even Under a Lesser Level of Scrutiny, the Use of Non-Notice Voting Equipment in Some Counties But Not Others Violates Plaintiffs’ Constitutional Right to Vote.

Even if Ohio’s use of non-notice voting equipment fell on the “reasonable, nondiscriminatory” side of the line—and it does not—this practice would still violate Plaintiffs’ voting rights. Under Burdick, reasonable and nondiscriminatory election regulations may generally be justified by “the State’s important regulatory interests.” 504 U.S. at 434. Defendants cannot show that the use of non-notice equipment is justified by such “important regulatory interests.” None of the three justifications that Defendants have offered in support of their dual voting system can remotely justify the failure to provide voters notice and the opportunity to correct errors.

First, the Defendants claimed that they were ignorant of the defects in non-notice voting equipment before this litigation. Id. at 22, J.A. 265 (claiming pre-2000 ignorance that “punch cards could produce any problems

in elections.”). There are reasons to doubt that assertion, but it is irrelevant. This is not a damages action. At the most, the Defendants’ alleged ignorance might provide a “good faith” defense to a claim of damages for the violation of Plaintiffs’ constitutional rights. See Flagner v. Wilkinson, 241 F.3d 475, 483 (6th Cir. 2001) (no good faith defense to claim for equitable relief). It does not establish compliance with the Constitution or excuse them from declaratory and injunctive relief.

The second asserted justification is that it would cost money to change to a system that treats all voters equally. But the Secretary of State acknowledged that the state already has some \$132 million in federal funds in the bank to upgrade its voting system. Walch, Tr. 7/26/2004, Vol. I, p. 166:18-25, J.A. 387. In any event, cost savings is not a justification for an ongoing constitutional violation, particularly where the right to vote is at issue. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (“costs cannot justify an otherwise invidious classification”); Memorial Hospital v. Maricopa County, 415 U.S. 250, 263-65 (1974) (cost savings cannot justify classifications affecting a fundamental interest); Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) (“federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.”) (citing cases).

Nor can the security concerns associated with some of the potential replacement equipment (specifically, DRE technology) justify Defendants' use of non-notice technology. The trial testimony of the Secretary of State's own witnesses lays this argument to rest. As Walch testified, there have never been any instances of fraud in the State of Ohio with electronic voting technology. Walch, Tr. 7/26/2004, Vol. I, p. 156:17-20, J.A. 380. The Secretary of State's office has conducted an intensive investigation of the security of electronic voting and concluded that this technology can be securely implemented. Id. at 142:15-143:3, J.A. 374-375. Moreover, Plaintiffs do not demand the use of touchscreen voting equipment. Nothing would preclude Defendants from moving to a precinct-count optical scan system that provides notice and the opportunity to correct errors. Defendants' security argument is therefore a red herring.

In sum, even under a lesser standard than strict scrutiny, the state has failed to demonstrate that "important regulatory interests" justify its use of non-notice equipment.

II. DEFENDANTS' USE OF PUNCH CARD EQUIPMENT VIOLATES BLACK VOTERS' RIGHTS UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

The district court's Section 2 analysis was fundamentally flawed because it viewed the statute's protections as stopping at the ballot box. The

right to vote protected by Section 2 encompasses more than the act of marking and turning in a ballot. It also includes having one's ballot counted and included in official election totals. 42 U.S.C. §1973l(c). When punch card technology fails to count a ballot properly, these votes cannot appear in the appropriate totals of votes cast, denying the right to vote within the plain meaning of Section 2 of the Voting Rights Act. Under Section 2's results test, such a practice has the same effect on counting votes or whether votes are effective as the deliberate refusal to admit African Americans to the polling place. In both cases, the result is the disproportionate denial of black votes – exactly what the plain language of Section 2 prohibits. See 42 U.S.C. § 1973(a) (prohibiting practices that “result[] in the denial or abridgement” of the right to vote on account of race).

Plaintiffs assert separate Section 2 claims against each of the three Defendant counties: Hamilton, Summit, and Montgomery. Each of these counties employs non-notice voting technology that results in the disproportionate denial of African American votes. The testimony of all experts illustrates that African American voters in each of these three counties experience unintentional residual voting at much higher rates than white voters within the same respective county. Plaintiffs have therefore shown that, in the totality of the circumstances, voting technology is the

cause of these racially disparate residual voting rates.

A. THE DEFINITION OF VOTING UNDER SECTION 2 INCLUDES ANY ACTION NECESSARY TO HAVE A VOTE PROPERLY COUNTED AND INCLUDED IN THE VOTE TOTALS.

The Voting Rights Act clearly and broadly defines voting as follows:

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

Section 14 of the Voting Rights Act of 1965, 42 U.S.C. §1973l(c) (emphases added). Under the express terms of the statute, a denial of the right to vote would include anything that prevents black voters from having their ballots “counted properly and included in the appropriate totals of votes cast.”

Despite that clear, all encompassing language, the District Court held that the reach of Section 2 is limited to cases where the “state or a municipality employs a ‘practice or procedure’ that results in the ‘actual’ denial of the right to vote on account of race.” R.275, Mem. Op., at 30, J.A. 113. There is no question that the use of technology can lead to the denial of the right to vote, although it happens when the voter is in the process of marking the ballot, or afterwards, when the ballot is counted (or not

counted). If an election practice results in the disproportionate denial of minority votes, then that practice is covered by Section 2 whether it occurs at the point of admission to the polls, casting the vote, or tabulating ballots.

Section 2's plain terms provide that an election practice is prohibited if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). By inserting the word "actual," despite its absence from the plain language of Section 2, the district court erroneously curtailed the scope of protection that Congress intended to provide through Section 2. As the express definitions of the terms "vote" and "voting" in the statute plainly indicate, Congress did not limit the Act's protection to cases in which blacks are denied entry to the polls. That is precisely why Congress expressly wrote Sections 2 and 14 of the Act to protect voters' right to have their votes "counted properly and included in the appropriate totals...." Congress sought to leave no potential area of manipulation outside the protection of the Act, and it certainly did not stop the protection at access to the polling booth or ballot box.

It is well recognized, moreover, that Congress intended to address "subtle, as well as the obvious state regulations that have the effect of denying citizens their right to vote because of their race" when it enacted the Voting Rights Act. Allen v. State Bd. of Elections, 393 U.S. 544, 565

(1969). Even prior to its amendment in 1982 that added the “results” test, Congress intended to make the Act “broad enough to cover various practices that might effectively be employed to deny citizens the right to vote.” Allen, 393 U.S. at 566-67. The expansive range of practices and procedures subject to challenge under Section 2 shows that Section 2 applies not just at the point of entry to the polls but also at the voting tabulation stage.¹⁴ The district court’s conclusion is thus contrary to that of other courts, which have

¹⁴ See, e.g., Brown v. Post, 279 F. Supp. 60, 62 (W.D. La. 1968) (racially disparate access to absentee ballots violated § 2); United States v. Post, 297 F. Supp. 46, 49 (W.D. La. 1969) (changed operation of voting machines without adequately informing both black and white voters, resulting in increased difficulty for residents of special districts—who were predominantly black—to have their votes counted violated § 2); Toney v. White, 488 F.2d 310, 312 (5th Cir. 1973) (illegal purge of registered voters, affecting more blacks than whites violated § 2); Goodloe v. Madison County Bd. of Election Comm’rs, 610 F. Supp. 240 (S.D. Miss. 1985) (election officials summarily invalidated 250 absentee ballots, virtually all of which were cast by black voters, upon discovering that four absentee ballots were improperly submitted, in violation of § 2); Roberts v. Warner, 679 F. Supp. 1513, 1532 (E.D. Mo. 1987) rev’d. (for lack of standing) 883 F.2d 617 (8th Cir. 1989) (summary refusal to review for recount ballots rejected by punch card machines violated § 2 because voters in wards that used those machines were predominantly black); Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1268 (N.D. Miss. 1987), aff’d. sub nom. PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991) (dual registration requirement and lack of satellite registration violated § 2); Harris v. Siegelman, 695 F. Supp. 517 (M.D. Ala. 1988) (limiting access to polling booth to five minutes and requiring illiterate voters to affirm their illiteracy before getting assistance violated § 2); Black v. McGuffage, 209 F. Supp. 2d. 889, 896-97 (N.D. Ill. 2002)(plaintiffs stated a claim under § 2 by alleging that state’s punch card machines resulted in disparate rate of uncounted votes among African Americans and Latinos).

found that plaintiffs who challenge punch card voting have stated a claim for vote denial. E.g., Black v. McGuffage, 209 F. Supp. 2d. at 896-97 (plaintiffs' Section 2 claim withstands motion to dismiss); Common Cause, 213 F. Supp. 2d at 1110 (plaintiffs' section 2 claims withstand judgment on pleadings).

The district court cited one case, Muntaqim v. Coombe, 366 F.3d 102 (2nd Cir. 2004),¹⁵ in support of its position that Section 2 is inapplicable to practices that result in the disproportionate rejection of black votes. There are factual and legal distinctions between the status of the plaintiffs in a felon disfranchisement case such as Muntaqim and Plaintiffs here. Muntaqim involved a separate constitutional dispute about whether citizens with felony convictions were protected by Section 2. This case however involves whether fully qualified voters are able to cast ballots that will count. In Wesley v. Collins, for example, this Circuit upheld Tennessee's felon disfranchisement statute. 791 F.2d 1255 (6th Cir. 1986). The court held that "the disproportionate impact suffered by black Tennesseans does not 'result'" from the state's disfranchisement law, but rather from would-be black voters' intentional decisions to commit crimes and, therefore,

¹⁵ 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).

disfranchise themselves. Id. at 1262. Here, the racial disparities are not a result of any intentional conduct on the part of African Americans. Even after accounting for intentional undervoting — which occurs at statistically indistinguishable rates for white and black voters, Kropf, Tr. 7/26/2004, Vol. I, pp. 99:24-100:2, J.A. 360-61 — the racial disparities in uncounted votes remain severe in the Section 2 Defendant Counties.

B. WITHIN EACH OF THE SECTION 2 DEFENDANT COUNTIES, BLACK VOTERS' BALLOTS ARE DISCARDED AT A DISPROPORTIONATELY HIGHER RATE THAN THE BALLOTS OF WHITE VOTERS.

Plaintiffs' Section 2 claims are straightforward allegations of intra-county vote denial. In each county individually, the rights of black voters under Section 2 are violated because the voting technology discards the ballots of black voters at a substantially higher rate than the ballots of white voters within the subject county

Settled Voting Rights Act precedent demands that courts engage in "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (quoting White v. Regester, 412 U.S. at 769-70); see also Sanchez v. Colorado, 97 F.3d 1303, 1316 (10th Cir. 1996) (voting rights cases require "penetrating, case by case, fact bound analysis"). With due respect to the district court, the careful fact-finding and intensely local appraisal of the

design and impact that is indispensable to effective appellate review in this matter is simply not present on this record. Fed. R. Civ. P. 52(a) requires the district court, sitting without a jury, to “find the facts specially.” The district court did not weigh much of the evidence because it ruled on a narrow interpretation of Section 2. To the extent that the court made factual findings under an incorrect view of the law, this Court may correct “errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.” Gingles, 478 U.S. at 79.

Under the correct Section 2 analysis, the record compels a finding of a Section 2 violation in all three counties. Through the testimony of Dr. Mark Salling and Dr. Richard Engstrom, Plaintiffs presented evidence that within Hamilton, Summit, and Montgomery Counties there are vast racial disparities between whose votes for President were not counted in the 2000 election. In Hamilton County, ballots of African American voters were rejected at nearly *seven times* the rate of non-African Americans, due to overvoting; African Americans also cast ballots that result in total undervotes at nearly twice the rate of non-African Americans. R.234, Pretrial Stip. of Fact, ¶¶ 36-38, J.A. 276 (approving Engstrom’s findings on overvotes and undervotes in Section 2 Defendant Counties). Similarly, in

Summit County, African Americans suffer overvotes at over *nine times* the rate as non-African Americans; they suffer total undervotes at about two-and-a-half times the rate as non-African Americans; and they suffer unintentional undervotes at over three times the rate as non-African Americans. In Montgomery County, data were not available which separated overvotes and undervotes, but African Americans suffer residual votes about two-and-a-half times as often as non-African Americans.

The evidence also shows that blacks in each of these counties suffer the lingering effects of discrimination and rank lower than their white neighbors in every socioeconomic and educational indicator reported by the United States Census. See Tr. Exhs. 32-34; Salling, Tr. 7/27/2004, Vol. II, pp. 336-45, J.A. 432-441. These socioeconomic conditions are not unique to Hamilton, Montgomery and Summit Counties. Plaintiffs buttressed their proof of discriminatory effect by comparing the residual vote rates in these three punch card counties with those in Franklin County, another urban county with a high black population and similar socioeconomic conditions, but one that uses notice voting technology. Even though African Americans suffer the same socioeconomic and educational barriers in Franklin County, the technology eliminates the racial disparity in voting. Tr. Exh. 11, ¶¶ 10-15, J.A. 606-10.

The Senate Judiciary Committee Report accompanying the 1982 amendments to the VRA¹⁶ stresses the significance of these socioeconomic factors: "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; reprinted in 1982 U.S.C.C.A.N. 177, 206; see also Kirksey v. Bd. of Supervisors, 554 F.2d 139, 145 (5th Cir. 1977) (en banc) (cited by the Senate Report discussing depressed socioeconomic conditions).

Defendants presented no reliable evidence to refute Plaintiffs' claims. Indeed, Defendants' own lay witnesses corroborated what the Plaintiffs proved. See Tr. Exh 17, J.A. 614-62 (State HAVA Plan); Tr. Exh. 19, J.A. 666-78 (Letters of Timothy Burke, Chairman of the Hamilton County Board of Education). Dr. Lott, Defendant's expert, did not refute this intra-county disparity. It thus remains unrefuted that punch cards resulted in a racial disparity in uncounted votes within each of the three counties. Plaintiffs

¹⁶ The Senate Report is recognized as the "authoritative source for legislative intent..." Gingles, 478 U.S. at 44, n. 7.

conclusively established these disparities through precinct-level data, applying statistical techniques that federal courts have approved for use in voting rights cases. See Gingles, 478 U.S. at 52; Mallory v. Ohio, 173 F. 3d 377, 383-84 (6th Cir. 1999).

Dr. Lott offered no opinion on what specifically occurred in Summit, Hamilton or Montgomery Counties. See generally Tr. Exh. R, J.A. 998-1026 (Lott Report); see also Kropf, Tr. 10/1/2004, Vol. V, pp. 904: 11-905:12, J.A. 592-593. Nor, by his own admission, did Lott have complete and accurate data for Hamilton County, one of the parties in this lawsuit. The record established not only that Dr. Lott did not testify on this point, but also that he had no basis for rebutting Plaintiffs' evidence. Lott, Tr. 9/30/2004, Vol. IV, pp. 629:12-630:4, J.A. 481-82. Furthermore, Dr. Lott did not refute the disparate impact at the top of the ballot. By Dr. Lott's own admission, he agreed that African Americans cast more residual votes at the presidential level. Tr. Exh. R (Lott Report), at 13, J.A. 1010. In any event, Dr. Lott's own data and testimony support the conclusion that African Americans in Ohio have a higher residual vote rate for punch card equipment than non-African Americans. Even with Dr. Lott's errors in research design and methodology, the racial disparities could not be clearer: In every contest Dr. Lott studied, black voters had a higher residual vote rate than white voters,

with the exception of congressional races, as to which Dr. Lott conceded the rates for blacks and whites were statistically indistinguishable. Tr. Exh. R, Table 4; Lott, 9/30/2004, Vol. IV, pp. 632:13-636:4, J.A. 484-88 (Lott cross examination about Table 4).

In sum, the evidence overwhelmingly showed that the use of punch-card voting systems in Summit, Montgomery and Hamilton Counties resulted in the disproportionate denial of African Americans' votes.

C. THE EXISTENCE OF VOTING DISPARITIES IN OTHER COUNTIES IS NOT A DEFENSE TO RACIAL VOTING DISPARITIES WITHIN EACH OF THE DEFENDANT COUNTIES.

The district court in this case concluded that Plaintiffs' Section 2 rights could not be violated, given that white voters in Ohio's Appalachian counties also have high rates of lost votes with punch cards. R.275, Mem. Op., at 20; J.A. 103. This fact is simply irrelevant to the issue at hand. The issue before the Court is whether African American residents in each of the three subject counties have an equal ability to participate in the electoral process as other voters in that county. Despite the fact that everyone in Summit, Hamilton, and Montgomery Counties uses identical equipment, black voters have far more ballots rejected due to technology than white voters.

It is not a defense to a Section 2 violation in one county to argue that non-African Americans in another county may also be hurt by the use of punch cards. The Senate Report plainly directs that plaintiffs may establish a claim by showing that "the challenged system in the context of all the circumstances *in the jurisdiction in question*, results in minorities being denied equal access to the political process." S. REP. NO. 97-417 at 27 (emphasis added). The jurisdictions in question are Summit, Montgomery and Hamilton Counties. The circumstances of voters in Appalachian counties using punch cards elsewhere in the state have no relevance to the effect of voting technology on black and white voters *within these three counties*.

No reported Section 2 decision, at least none of which Plaintiffs are aware, creates a defense against discrimination against blacks within one county, based on harms to whites in another county. In fact, the Supreme Court has held directly to the contrary. See Johnson v. DeGrandy, 512 U.S. 997, 1018-22 (1994) (alleged violation in plaintiffs' named jurisdictions cannot be negated or proven by contrary evidence elsewhere or in the state as a whole); Rural West Tennessee African American Affairs Council v. Sundquist, 209 F.3d 835, 844 (6th Cir. 2000) (district court properly

restricted the geographic scope of relevant statistical data to the six counties of rural west Tennessee instead of urban areas or state as a whole).

Instead of focusing on the racial disparities in the three Defendant Counties, the District Court concluded that:

The common factors that accompany a higher residual vote rate are the extent of the education and income level of the voters. The lower the educational level and the lower the income level, the higher the residual vote is in comparison with other counties demonstrating a higher educational level and income level. Those factors apply without regard to race. See Fact Findings 125-134.

R.275, Mem. Op. 20, J.A. 103. In support of this proposition, the court offered statistics about high residual vote rates from other counties with small black populations.

Plaintiffs certainly do not dispute that overvote and undervote rates are correlated with low education and income levels. Far from defeating Plaintiffs' Section 2 claim, this observation strongly supports it. The evidence shows that poverty and lower educational attainment bear more heavily on the black voting community in the three subject counties. Salling, Tr. 7/27/2004, Vol. II, pp. 336:12-345:13, J.A. 432-441; Tr. Exhs. 32-34, J.A. 870-965. See also Gingles, 478 US at 64 (plurality recognizing "the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level,

employment status, amount of education, housing and other living conditions, religion, language, and so forth"). Because blacks in these counties are more likely to be poor and to have lower education levels, it should come as no great surprise that they are disproportionately affected by non-notice punch card voting systems.

To the extent that punch card voting interacts with socioeconomic inequalities adversely affecting certain racial groups, the continuing use of this equipment is all the more indefensible under the Voting Rights Act. Plaintiffs do not dispute that white rural voters, poor voters, or voters with less education are also disadvantaged by punch cards, but that can provide no defense. Undeniably, poor white voters also faced disfranchisement by poll taxes, literacy tests, and other devices. Such racially discriminatory effects in our electoral system cannot stand simply because some whites also suffer. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”).

While African American voters are not the only ones affected by the use of punch cards, the bottom line remains that their votes are disproportionately denied due to this equipment. It is no doubt true that “the common factors that accompany a higher residual vote rate are the extent of the education and income level of the voters.” See R.275, Mem. Op., at 20

and Appendix II Supp. Fact Findings ¶¶ 123-132, J.A. 103, 132-134. But it is plainly wrong as a legal matter to conclude that this justifies the racial disparity in uncounted votes within the three subject counties. On this point, the district court has Section 2 law exactly backwards. As Gingles put it: “[T]he essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” 478 U.S. at 47. It is precisely *because* punch-card voting interacts with background socioeconomic disparities, resulting in racial disparities, that Section 2 is violated.

Plaintiffs thus met their burden of proof by presenting uncontroverted statistical evidence of the relationship between race and lost votes in the Defendant counties. It was not their burden to disprove that any factors also correlate with vote loss. Gingles, 478 U.S. at 64-65 (plurality opinion uses the word "pernicious" to describe a defense of socioeconomics when those are tied to discrimination). Rather, the interaction between socioeconomic disparities and the challenged voting equipment supports Plaintiffs' claims that their rights under Section 2 have been violated.

III. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' CLASS CERTIFICATION MOTION.

Plaintiffs moved to certify a class for purposes of declaratory and

injunctive relief, pursuant to Rule 23(b)(2). The proposed class consisted of all voters in the State of Ohio who use non-notice voting equipment, since all of these voters are subject to the same Fourteenth Amendment violation of which Plaintiffs complain. Plaintiffs also moved to certify a subclass, for purposes of their Voting Rights Act claim, consisting of all *African American* voters who use this equipment in the three counties, given the evidence that this technology results in the disproportionate denial of minority votes. In a nine-line order, the district court denied this motion, saying only that Plaintiffs are not proper representatives for voters in other counties.

The district court was wrong to deny class certification. Like voters of all races residing in counties that use substandard voting equipment, Plaintiffs are subjected to a greater likelihood that their votes will not be counted. In fact, this is the quintessential class action claim, given that Plaintiffs are identically situated to all others who have no choice, if they vote, but to use unreliable voting equipment. In addition, the African American plaintiffs are identically situated with respect to other African American voters who use this technology. There is thus no doubt that Plaintiffs have “common interests with unnamed members of the class,” as this Court’s precedents require. Senter v. General Motors, 532 F.2d 511,

524-25 (6th Cir. 1976). Nor is there any serious question as to the commonality, typicality and numerosity prongs of the class certification analysis. They seek declaratory and injunctive relief, pursuant to Rule 23(b)(2), on behalf of voters who are identically situated, in being subject to the threat that their votes will not be counted due to the continuing use of unreliable voting equipment.

IV. THIS CASE IS NOT RENDERED MOOT BY DEFENDANTS' VOLUNTARY CESSATION OF ILLEGAL CONDUCT.

The District Court rejected Defendants' mootness argument both before and after trial, as did all the judges on the panel. R.233, Order, J.A. 272; R.275. Mem. Op. at 19, J.A. 102; 444 F.3d at 855-56 (majority), 881 (Gilman, J., dissenting). Plaintiffs nevertheless anticipate that Defendants will argue that this case is now moot, on the ground that the counties have now replaced their punch-card voting equipment. Even assuming that all of Ohio's non-notice systems have been replaced as of the 2006 election, that would not be sufficient to moot this case.

Voluntary cessation of illegal conduct is not generally sufficient to moot a case. A party asserting that a case has been rendered moot bears a heavy burden:

As a general rule, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the

legality of the practice’ unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”

Golden v. City of Columbus, 404 F.3d 950, 962 n.10 (6th Cir. 2005)(quoting Friends of the Earth v. Laidlaw Env’tl. Svs., 528 U.S. 167, 189 (2000) and Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Svs., 532 U.S. 598, 609 (2002)).

Likewise, in Akers v. McGinnis, 352 F.3d 1030 (6th Cir. 2000), this Court held that a state agency failed to meet this “heavy burden” where was no guarantee that it would “not change back to its older, stricter Rule as soon as this action terminates.” Id. at 1035. Other cases of this Court apply the same stringent of standard for mootness. See American Canoe Ass’n v. City of Louisa Water & Sewer Comm’n, 389 F.3d 536, 543 (6th Cir. 2004) (defendants failed to meet “stringent” test for voluntary cessation); Johnson v. City of Cincinnati, 310 F.3d 484, 490 (6th Cir. 2002)(city’s assurance that it no longer enforced challenged ordinance did not moot case).

Defendants have not met the heavy burden that these cases impose on a party claiming that a case is moot. Neither the Secretary of State nor the Ohio legislature has decertified the challenged voting equipment. The decision to keep the door open to reversion flatly defeats any mootness argument.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment in favor of Defendants and the denial of class certification, and should order judgment entered in favor 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 Brief of Appellants has been served via First Class U.S. Mail to the parties listed below on the 21st day of August, 2006:

David T. Stevenson
Hamilton County Prosecutor's Office
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202

Victor T. Whisman
Montgomery County Prosecutor's Office
301 West Third Street, Post Office Box 972
Dayton, Ohio 45422

Anita L. Davis
Summit County Prosecutor's Office
53 University Avenue, 6th Floor
Akron, Ohio 44308

Mark Landes
Jeffrey A. Stankunas
Isaac, Brant, Ledman & Teetor, LLP
250 E. Broad St., Suite 900
Columbus, Ohio 43215

Richard N. Coglianese
Holly J. Hunt
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Meredith Bell-Platts