

Memorandum In Support

I. Introduction

The closeness of the 2000 Presidential election in the State of Florida, the subsequent recounts, and the ever changing subjective standard of what constituted a legal “vote” in that contest caused federal, state, and local governmental officials to re-examine the voting machines used in their particular jurisdictions. Fortunately for all residents of the State of Ohio, as one of the Plaintiffs’ experts freely admitted, “if the situation in Florida in 2000 had happened in Ohio, the United States would not have suffered the embarrassment that it did...because in Ohio we have a much better – a much better-run election system.” Asher Depo. at 66. That does not mean, however, that Ohio plans to simply rest on its laurels. Instead, after careful consideration and thought by Secretary of State Blackwell, the Ohio General Assembly, and various local elections officials, the State will upgrade its voting technology so that every voter in the State can vote with the same belief as the Plaintiffs’ expert that “by and large, Ohio has a good system.” Asher Depo. at 68.

Haste, when dealing with new voting technologies, is never virtuous. Although Governor Taft expressed the intention of the State of Ohio to modernize its voting machines two years ago, the State recognizes that before it undertakes the massive project of changing voting machines, it needs to subject those new machines to some of the most stringent security tests in the country. Only after these machines pass the rigors of these tests can the State of Ohio comfortably certify, purchase, and use the systems.

Currently, Secretary of State Blackwell has expressed his intent to contract with three different vendors to supply the citizens of Ohio with their next generation of voting machines. As a part of the negotiating terms and conditions for the proposed contracts, Blackwell has

subjected the new machines to rigorous security tests. The testing identified 57 separate security issues present in the new machines that needed to be corrected before they could be safely used. *See* R. 148, Security Report, filed on January 7, 2004. The General Assembly has authorized a committee to conduct hearings on the new voting technology in order to further verify that Ohio's voters can rest assured they will never have to endure a Florida-like election. The State's political branches of government are reviewing and checking these new voting machines so that everything will be ready for implementation in January of 2006.

Unfortunately, however, the Plaintiffs in this case are asking this Court to require the State of Ohio to bypass these important security checks. Instead of guaranteeing the accuracy and security of the voting machines, the Plaintiffs seek to rush unproven technology into Ohio's elections. This Court should decline the Plaintiffs' invitation to rush changes to Ohio's elections system and should allow Ohio to continue to implement its voting system changes only after the new technologies have been adequately screened and tested in time for the 2006 primary elections.

II. Statement of the Case and Statement of Facts.

A. Statement of the Case.

Seven individual Plaintiffs (two from Hamilton County,¹ two from Montgomery County, two from Summit County, and one from Sandusky County) have filed this action against Ohio Secretary of State J. Kenneth Blackwell, Ohio Board of Examiner Members Raymond Butler, Geraldine Lewis, and Larry Loutszenhiser; and various local agencies and officials from Hamilton, Montgomery, Summit, and Sandusky Counties. Through this litigation, these seven Plaintiffs seek an order decertifying the use of punch card ballots and requiring the four counties

¹ Plaintiff Art Slater was added as a party well after the initial filing of this action. The Hamilton County Defendants objected to his inclusion and restate their objection here. *See* R. 103 filed on June 25, 2003.

to purchase new voting technology with error notification. This Court should grant the Defendants' summary judgment and deny the Plaintiffs' request for injunctive relief.

In the aftermath of the 2000 Presidential Election, Congress passed the Help America Vote Act ("HAVA") in order to modernize the voting technology used across the country. President Bush signed HAVA into law in October of 2002. Under HAVA, the States have until 2006 to comply. In that same month that HAVA was signed, the State of Ohio had expressed its intent to meet all deadlines in order to be eligible to receive HAVA funding. That same month, the Plaintiffs filed this litigation seeking the exact remedy the State already intends to provide through its compliance with HAVA. After extensive fact and expert witness depositions, this case is now before this court on Defendants' summary judgment motion.

B. Statement of the Facts.

Plaintiffs' Complaint alleges that punch card ballot devices and optical scanning devices, which use central ballot tabulation, violate their rights under the Due Process Clause, the Equal Protection Clause, and also under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Although the Plaintiffs acknowledge that the State will soon be implementing the requirements of HAVA, they have brought this litigation in order to "force" the State to do the very thing it is doing voluntarily.

The Plaintiffs' own experts have admitted that the perfect voting system does not exist. Saltman Depo. at 34; Asher Depo. at 129. However, the comprehensive actions performed by the Ohio Secretary of State's Office and other State and Local Officials will provide Ohio's electorate with new voting technologies that are reliable and safe to use.

Throughout the course of this litigation, the Ohio Secretary of State's Office has worked to replace traditional punch card ballot machines with more modern voting technologies. Within

weeks of the October 2002 effective date of HAVA, Governor Bob Taft contacted the U.S. General Services Administration to confirm Ohio's intent to meet all deadlines and requirements in order to receive HAVA funding. On December 10, 2002, the General Assembly passed the State's Capitol Budget Bill, H.B. 675 appropriating \$5,800,000 in order to purchase upgraded voting equipment. H.B. 675, signed by Governor Taft on December 13, 2002, specifically provided that the appropriation "shall match federal funds provided through the Help America Vote Act of 2002." H.B. 675, § 11.13. On April 23, 2003, the Secretary of State applied for funds pursuant to HAVA Section 101 (Payments to States for Activities to Improve Administration of Elections) and Section 102 (Replacement of Punchcard or Lever Voting Machines).

Blackwell, as part of the elections reform process, reconfigured his office and required many of his senior staff to work on HAVA. He included his Chief of Staff, General Counsel, and Director of Elections as part of his HAVA team. *See* January 23, 2003 Press Release, Attached as Exh. A. The Secretary of State's Office also trained other staff members on the intricacies of HAVA compliance. In May of 2003, Blackwell's office finalized Ohio's HAVA Plan and published the document for the public's review. *See* May 12, 2003 Press Release, Attached as Exh. B. In that same month, Ohio released its Request for Proposal ("RFP") to solicit proposals from vendors that wished to supply the State with HAVA compliant voting systems.²

The Secretary of State's Office solicited bids during the RFP process. In September 2003, the Secretary of State's Office qualified the following four vendors to offer voting devices in Ohio: 1) Sequoia Voting Systems, 2) Diebold Elections Systems, 3) Election Systems &

² The Ohio Secretary of State's Office was able to negotiate voting machine contracts that were \$30 million lower than the projected estimate noted in Ohio's State HAVA plan.

Software, and 4) Maximus/Hart Intercivic/DFM Associates, pending a security review for all prospective voting devices.³ See September 10, 2003 Press Release Attached as Exh. C. The security review assessments included an examination of voting machine consumer source codes, and scrutiny of the potential for penetration and points of failure specific to each voting machine. The security reviews revealed that there were 57 potential security risks within the software and hardware for the prospective voting devices, and, in December 2003, the Secretary of State ordered the qualified voting device vendors to resolve the identified security concerns. See December 2, 2003 Press Release, Attached as Exh. D. These security concerns prompted the Secretary of State's office to seek a waiver as set forth in HAVA. HAVA § 102(a)(3)(B).

In January 2004, the U.S. Congress passed the Omnibus Appropriations Act that guaranteed the State of Ohio the monies necessary to implement its HAVA plan. P.L. 108-199. Shortly afterwards, the Ohio Secretary of State's Office submitted a request to the State's Controlling Board for release of monies to begin the process of replacing the State's existing voting technologies. The request was temporarily delayed because the General Assembly expressed concerns that security risks are still an issue with these machines. The General Assembly did create a House-Senate Ballot Security committee to ensure that all replacement machines will provide accurate, reliable and tamper-proof results. *Controlling Board puts off decision on money for new voting machines*, AP State and Local Wire, March 8, 2004, Attached as Exh. E. This committee has already held four hearings to discuss security concerns and other issues (e.g. whether the new voting systems should issue paper receipts).

Although there might be some debate about the best way for the State of Ohio to implement the requirements of HAVA, no State official has commented that the State will not comply with those requirements. Simply put, Ohio's officials are acting responsibly in

³ Sequoia Voting Systems has subsequently declined to participate as a vendor for the State of Ohio.

guaranteeing the State and its voters the best technology, and technology in which the public will have complete confidence. It is, therefore, undisputed that the State of Ohio has taken substantial actions to replace its current voting technology, and that the State has sufficient federal funding to implement its planned changes once all security concerns have been satisfied.

1. The Expert Reports.

The testimony of the Plaintiffs' own expert witnesses doom their claims. Dr. Martha E. Kropf's testimony fails to focus on any particular voting technology and has no relation to Ohio or the four counties at issue in this case.⁴ Kropf purports to "examin[e] intentional undervotes at an individual level where people report that they did not vote for a candidate." Kropf Depo. at 58. Kropf's data, however, does not focus on any particular voting technology, and fails to support Plaintiffs' concerns about punch card ballot equipment. When asked whether the NES and VRS data⁵ focuses on different types of voting equipment, Kropf stated "[w]e have no way of identifying or placing with an individual the type of equipment that they use because all we know from the data that we have is what state they are from." *Id.* at 63. Thus, from this data, Kropf cannot determine whether punch card ballot machines are the cause of accidental undervoting in Ohio.

Mr. Roy Saltman's testimony, like Dr. Kropf's, adds nothing to advance Plaintiffs' claims for relief. Saltman's report and testimony are based upon his experience at a national level, and he fails to express any conclusions based on Ohio equipment, Ohio voting behavior, or any other Ohio-related claim in this action. Saltman's examination of punch card ballot devices traces the history through the years, from the beginning of the 1960's to 2000. Saltman Expert Report at ¶4, Attached as Exh. F. Saltman makes several broad conclusions in his report, based

⁴ The Defendants have filed, under separate cover, a motion to strike the reports of Drs. Kropf and Saltman.

⁵ VRS and NES are different national exit surveys asking people how they voted in the election.

on his experience as a Computer Scientist that generally provide that “the use of pre-scored punch card ballots should be ended.” Saltman Depo. at 8; Expert Report at ¶7. However, Saltman has not examined punch card ballot devices in Ohio, nor does he have any knowledge about their effects upon voter behavior in Ohio.

In addition, Saltman’s expert report for this case was first submitted to the ACLU of Southern California in 2001. The report is tailored to the national level, and fails to expressly address anything specific to punch card balloting devices in Ohio. For example, Saltman did not review any punch cards from the November 2000 election in the State of Ohio. Saltman Depo. at 49. When asked whether his report directly addresses the counties in the current litigation, Saltman responded “[m]y research has not been limited to anyplace in the country because we have a product which is being sold nationally.” *Id.* at 100, 159: (When asked whether Saltman had analyzed “specific voting data from any of the county defendants in the case, Saltman replied “Myself, personally, no.”). The only reference to the State of Ohio stems from a 1988 report that Saltman developed, where he examined the integrity and security of computerized vote-tallying in several jurisdictions, including Stark County, Ohio. *Id.* at 28. Thus, Saltman’s report bears no correlation to the Plaintiffs’ specific Due Process Clause, Equal Protection Clause, and Voting Rights Act claims in Ohio.

Law And Argument

I. The Plaintiffs Have Failed To Establish Any Violation Of The Voting Rights Act By The State of Ohio Or Any Of Its Local Boards Of Electionsgh.

In order to remedy the historical disenfranchisement of certain minority groups, Congress passed the Voting Rights Act, 42 U.S.C. § 1973. This Act prohibits any voting practice or procedure that results in “a denial or abridgement of the right of any citizen of the United States

to vote on account of race or color....” 42 U.S.C. § 1973(a). In order to show a violation of this Act, a minority group must demonstrate that as a result of the challenged practice or procedure:

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

42 U.S.C. § 1973(b). The protections provided for by this Act, as well as the Equal Protection Clause and the Fifteenth Amendment “are aimed only at ensuring equal political opportunity: that every person’s chance to form a majority is the same, regardless of race or ethnic origin.” *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (*en banc*). The Plaintiffs have failed to show that the punch card ballot, as used in the State of Ohio, interferes with a minority’s ability to elect representatives of its choice.

A. A Voting Rights Act Claim Must Demonstrate A Challenged Voting Practice Causes An Unequal Opportunity For African-Americans To Elect Their Preferred Representatives.

The central issue surrounding any § 2 claim is that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The intent of the Voting Rights Act is “to combat electoral structures and procedures that deprive minority voters of an opportunity to participate effectively in the political process.” *Southwest Voter Registration Education Project v. Shelley*, 278 F. Supp. 2d 1131, 1142 (C.D. Cal.) *aff’d* 344 F.3d 914 (9th Cir. 2003) (*en banc*).

The Sixth Circuit has recognized that, although the Voting Rights Act is remedial legislation meant to correct historical discrimination, the 1982 Amendments to the Act were

heavily contested in Congress and because the Act is a “significant intrusion into the rights of States,” “the words of the 1982 amendment were chosen with particular care and courts should be cautious in construing them.” *Kent County*, 76 F.3d at 1390. Instead of stating a traditional Voting Rights Act claim, the Plaintiffs claim that Ohio has violated the rights of minorities in three counties by using punch card technology without in-precinct error notification. *Second Amended Complaint* at ¶¶ 99-101. Yet, both the very language of the Plaintiff’s Second Amended Complaint, as well as the expert testimony in this case, disproves the Voting Rights Act Claim.

B. Prior Voting Rights Act Litigation Against The State of Ohio Has Demonstrated That No Recent History Of Racial Discrimination Exists.

In the past, the State of Ohio has defended itself from § 2 Voting Rights Act cases. One of those cases, *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997) *aff’d* 173 F.3d 377 (6th Cir. 1999) demonstrates why the Plaintiffs in this case cannot prevail.

Mallory represented a class of plaintiffs who claimed that Ohio’s system of “at large” elections for judicial candidates diluted African-American voting strength in violation of § 2 of the Voting Rights Act. In its opinion, the Sixth Circuit complemented the District Court’s “carefully written, solidly reasoned, and extremely comprehensive opinion” and adopted it as its own. *Mallory*, 173 F.3d at 380.

The District Court noted that the *Mallory* Plaintiffs failed to allege any recent history of voting-related discrimination in Ohio and that Dr. Herb Asher, Plaintiffs’ expert in both that case and this one, testified, “there was, in fact, no such recent history of voting-related discrimination.” *Mallory*, 38 F. Supp. 2d at 541. The District Court also noted that the State of Ohio prevailed in litigation over its 1990 redistricting plan, in part, because “the United States Supreme Court found no legally significant racial bloc voting in Ohio legislative elections and, therefore, no Voting Rights Act violation in the reapportionment of Ohio’s legislative

districts....” *Id. citing Voinovich v. Quilter*, 507 U.S. 142 (1993). The City of Cincinnati did not violate the Voting Rights Act by electing its City Council members in at-large elections. *Id. citing Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994) *cert. denied*, 514 U.S. 1109 (1995). And finally, the Ohio Supreme Court rejected a Voting Rights Act and Fifteenth Amendment claim to the at-large election of judges and county commissioners in Mahoning County. *Id. citing State, ex rel. Rogers v. Taft*, 64 Ohio St. 3d 193 (1992).

In the present case, the Plaintiffs, much like the plaintiffs in *Mallory*, have failed to allege a recent history of racial discrimination in elections. Of course, as demonstrated through *Mallory*, such a recent history does not exist in the State of Ohio. This court, like numerous others before it, should reject the notion that the State of Ohio has violated § 2 of the Voting Rights Act in the manner in which it conducts elections.

C. The Plaintiffs Cannot Show A Political Process Not Equally Open To African-Americans Preventing Them From Engaging In The Political Process Or Electing Representatives Of Their Own Choice.

As noted above, Section 2 of the Voting Rights Act requires a covered racial minority to demonstrate that the State has enacted a voting practice or procedure that results in a denial or abridgement of the right to vote because its members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” The Plaintiffs have failed to prove such a situation exists in Ohio and, as a result, the Defendants are entitled to summary judgment on the plaintiffs’ Voting Rights Act claim. Similarly, although the Plaintiffs allege that punch card ballots exclude African-American voters, they have failed to demonstrate that African-American voters in Ohio have not been able to elect their chosen candidate.

1. The second amended complaint itself fails, as a matter of law, to state a Voting Rights Act violation.

After the closeness of the Florida Presidential contest in 2000, a veritable cottage industry has spawned in order to bring litigation challenging the States' use of punch card ballots. *See, e.g., Shelley*, 278 F. Supp. 2d at 1131 (challenging California's use of punch cards in four counties during the Gubernatorial recall election); *Black v. McGuffage*, 209 F. Supp.2d 889 (N.D. Ill. 2002) (challenging Illinois' use of punch cards). However, in order for a plaintiff to prevail in this type of litigation, he must still demonstrate a claim under traditional § 2 requirements. As the Plaintiffs have failed to do that, the Defendants are entitled to summary judgment.

The central purpose of § 2 “was designed as a means of eradicating voting practices that ‘minimize or cancel out the voting strength and political effectiveness of minority groups.’” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) quoting S. Rep. No. 97-417 at 28 (1982). Under § 2, two different types of discriminatory practices and procedures are covered: those that lead to “vote denial” and those that result in “vote dilution.” *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). Although the Plaintiffs in this case have not specified which type of claim they are attempting to bring, they have, in fact, failed to bring either one successfully.

a. The Plaintiffs Have Failed To Bring Or Prove A Vote Denial Claim.

In deciding a vote denial claim, “a court must assess the impact of the contested structure or practice on minority electoral opportunities ‘on the basis of objective factors.’” *Gingles*, 478 U.S. at 44 quoting S. Rep. No. 97-417 at 27. The Plaintiffs fail to either properly plead or to demonstrate such a claim.

First, the Plaintiffs focus on punch card ballots in only three counties: Montgomery, Summit, and Hamilton. However, as their own complaint states, “ninety percent of the black population in Ohio resides in 15 counties. Of these 15 counties, 9 use notice voting systems.” *Second Amended Complaint* at ¶ 101. Thus, by the Plaintiffs own complaint, 60% of the counties containing 90% of the black population of the State of Ohio use the very voting technologies the Plaintiffs are claiming should be made mandatory.

The California Recall case demonstrated the fallacy of raising this type of claim under the Voting Rights Act. “This is not a situation where, for instance, punch-card machines are alleged to be used only in minority-majority precincts, or where the error rate is so high as to consistently disable minority voters from electing their candidates of choice.” *Shelley*, 278 F. Supp. 2d at 1143. Similarly, in this case, the Plaintiffs are only concentrating on voting machines in Montgomery County, Summit County, and Hamilton County. There is no allegation, nor is there any proof, that these machines are only used in minority-majority precincts. In fact, the Plaintiffs’ own expert, Herb Asher, testified that of the ten counties with the highest residual vote rates,⁶ eight of the counties were Appalachian counties, one was Holmes County,⁷ and the last one was Summit County. Asher Depo. at 83-84.

The eight Appalachian counties in Ohio with the highest residual votes, according to Asher, were Pike, Adams, Vinton, Meigs, Noble, Monroe, Jackson, and Gallia County. *Id.* at 84. When one examines the makeup of nine of these ten counties, however, one thing is obvious –

⁶ A “residual” vote occurs whenever a voter, either intentionally or unintentionally, fails to record a legal vote for a particular office. This could occur either because the voter intentionally chose not to vote for any candidate for an office, or, in one way or another, improperly recorded a vote for a candidate for the office.

⁷ Asher claimed that Holmes County was unusual because it had a high percentage of Amish among its population. Asher Depo. at 85. Although Holmes County does have a large Amish population, the Amish refuse to participate in the political process or voting because of their religious beliefs. *See, e.g., Some Faiths Abstain from Casting Ballots*, LOS ANGELES TIMES, Apr. 10, 2001 at Metro Part B, Page 1, Attached as Exh. G.

there are very small black populations in each county. Each of the rural counties had a substantially lower percentage of black residents than the State as a whole.⁸

County	% Black	% H.S. Graduate	Per Capita Income
Adams	0.2	68.6	\$14,515
Gallia	2.7	73.7	15,183
Holmes	0.3	51.5	14,197
Jackson	0.6	73.5	14,789
Meigs	0.7	73.2	13,848
Monroe	0.3	78.8	15,096
Noble	6.7	78.6	14,100
Pike	0.9	70.1	16,093
Summit	13.2	85.7	22,842
Vinton	0.4	70.7	13,731
State Average	11.5	83.0	21,003

Even Asher admitted that for many of these counties, the black population is so small that it could not be responsible for the residual votes. (Asher Depo. at 91). In fact, he even went so far as to admit that “no social scientist could ever come up with one factor [race, education, income level] that would be the explanation of anything...” *Id.*

Not only did the Plaintiffs’ own expert admit that the highest incidents of residual votes occur in counties in which the African-American population could not be the cause, they failed to examine the effect punch card voting has on blacks in the State of Ohio. First, their experts

⁸ These numbers come from the Asher Deposition and from the United States Census Bureau’s results for the State of Ohio from the 2000 Census. Asher Depo. at 86-91.

only examined statistics for the 2000 presidential election in Franklin, Hamilton, Montgomery, Summit, and Sandusky Counties.⁹ This narrow focus does not in fact show whether punch cards actually exclude people on the basis of race from participating in the political process.

Defendants' expert, Dr. John Lott, demonstrated in both his expert report and in his deposition that the residual ballot rate of the most heavily concentrated white wards in the State is higher than the residual ballot rate of either the most heavily concentrated African-American or Hispanic wards.¹⁰ Lott Depo. at 192. Dr. Lott went on to clarify that:

Wards that are ten percent – top ten percent white have nonvoted ballot rates of about 2.85. Both of those are higher than for the black population, the top ten percent wards by black population, which is 2.82 or for Hispanics, which is even lower. 2.07.

Id.

The Senate Report accompanying the 1982 Amendments to the Voting Rights Act set forth the “typical factors” that might show a violation of § 2. Those factors include:

- The extent of any history of official discrimination in the State or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
- The extent to which voting in the elections of the State or political subdivision is racially polarized;
- The extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
- If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

⁹ Paul Moke, trial counsel for the Plaintiffs, was in the process of writing an academic paper on voter participation in those four counties. Apparently, this litigation may be an attempt by Mr. Moke to provide support for some of the theses in his paper because he selected the counties upon which their experts focused. *See, e.g.*, Saltman Depo. at 59.

¹⁰ While the Plaintiffs only examined residual vote rates for Franklin, Hamilton, Montgomery, Summit, and Sandusky Counties for the 2000 presidential election, Dr. Lott examined residual vote rates for the entire State of Ohio over the 1992, 1996, and 2000 election cycle and all the various non-judicial, non-referendum races that occurred in those cycles.

- 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 effectively in the political process;
- Whether political campaigns have been characterized by overt or subtle racial appeals; and
- The extent to which members of the minority group have been elected to public office in the jurisdiction.
- Additional factors that may have probative value include whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group and whether the policy underlying the State or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. 97-417 at 28-29 *cited in Gingles*, 478 U.S. at 36-37. The Plaintiffs in this case have not shown, nor have they even attempted to show, any of these factors. Instead, they merely claim that blacks in certain counties do not have access to error notification and as a result, their current voting technology violates the Voting Rights Act.

Another of the Plaintiffs' experts, Dr. Richard Engstrom, also made some very interesting findings in this case. In his comparisons between Franklin County and Hamilton County, he determined that there was no difference whatsoever in the rates of undervotes¹¹ between those two counties. Engstrom Depo. at 73.¹² Hamilton County uses punch cards while Franklin County uses electronic touch screen voting that informs the voter if he failed to select a candidate for a particular election. Similarly, Engstrom noted that blacks in Summit County were more than six and one half times more likely to undervote for president than blacks in Hamilton

¹¹ An undervote occurs on a punch card or optical scan ballot whenever the voter fails to vote for any candidate for a particular office. An overvote occurs on a punch card or optical scan ballot whenever a voter attempts to vote for more candidates for an office than can be elected.

¹² In fact, in one of the methods that Engstrom used, he actually determined that African-Americans were more likely to undervote for President in Franklin County using electronic voting machines than they were in Hamilton County using punch card ballots.

County. Engstrom at 75. Likewise, Engstrom determined that whites in Summit County were more than twice as likely to undervote on a punch card system than blacks in Hamilton County. Engstrom Expert Report at 8, Attached as Exh. H.

As noted above, the Plaintiffs have not produced any evidence whatsoever that shows punch cards disproportionately affect black voters in the State of Ohio. As the *Shelley* Court noted,

In sum, Plaintiffs suggest a Voting Rights Act violation based exclusively upon the alleged error rate of machines that poll “majority” as well as minority voters, and are used in counties containing nearly one-half of California’s voters. They contend that some 40,000 votes may be lost as a result of higher error rates (many if not most of which votes will be cast by non-minority voters) in a State of nearly eight million voters. Accordingly, there is, at best, a slim chance that Plaintiffs will be able to prove that punch-card machines in California “interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”

Shelley, 278 F. Supp. 2d at 1143. Instead, the Plaintiffs have shown that most of the residual votes from punch card machines occur in counties that are almost exclusively white. Asher Depo. at 88-93. They have also shown that undervotes occur at the same rate in Franklin County and Hamilton County and that whites in Summit County are more than two times more likely to undervote than blacks in Hamilton County. Thus, the Plaintiffs have failed to provide any evidence whatsoever that the punch card machines in the State of Ohio interact with “social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Id.* As a result, the defendants are entitled to summary judgment on the Plaintiff’s vote denial claim.

b. Likewise, the Plaintiffs Have Failed To Plead Or Prove A Vote Dilution Case.

In order to properly state a vote dilution case under § 2 of the Voting Rights Act, the Plaintiffs must establish:

- It is sufficiently large and geographically compact to constitute a majority in a single-member district;
- It is politically cohesive; and
- The white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

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

In this case, the Plaintiffs have failed to produce evidence of any of these prerequisites. They have failed, for example, to put on any evidence that blacks in the State of Ohio are politically cohesive. That can be an important element of any claim dealing with punch card voting. In the Florida 2000 Presidential election, for example, Dr. Lott determined that "virtually all the nonvoted ballot rates were being driven by the percent of the district that was African-American Republican and not African-American Democrats." Lott Depo. at 60. The Plaintiffs in this case, however, have not demonstrated whether the black voters in Ohio are politically cohesive, whether the white community in Ohio votes sufficiently as a block in order to be able to defeat the blacks' preferred candidate, or whether the use of punch cards in 70 of Ohio's 88 counties deprives blacks of an equal opportunity to participate in Ohio's political process.

In fact, the evidence as determined by Dr. Asher shows that punch cards tend to exclude rural, poor, white counties. Asher Depo. at 86-93. Likewise, the work of Dr. Engstrom shows that whites in Summit County are more likely to have cast a residual vote for president than blacks in Hamilton County. Engstrom Depo. at 74. Thus, the Plaintiffs have failed to produce any evidence of a vote dilution case and the Defendants are entitled to summary judgment on this claim.

II. The State of Ohio Has Not Violated The Plaintiffs' Constitutional Rights To Due Process Or Equal Protection By Not Mandating The Use Of Voter Error Notification Technology.

In addition to obtaining summary judgment on the Plaintiffs' claims under the Voting Rights Act, the Defendants are entitled to summary judgment on the plaintiffs' claims under 42 U.S.C. § 1983. Although the Plaintiffs claim that the use of voting systems that do not include error notification violates the Due Process and Equal Protection Clauses, they are incorrect on that claim as a matter of law. In addition, even if they theoretically have stated a claim, the Defendants are entitled to summary judgment as the Plaintiffs have failed to bring forth specific evidence in support of their constitutional claims.

A. The State of Ohio Is Not Constitutionally Mandated To Provide Error Notification Technology On Its Voting Equipment.

Although there is no constitutional right to cast a vote for Presidential electors, once a State legislature grants its citizens the right to vote for President, the State needs to accord equal weight and equal dignity to each voter. *Bush v. Gore*, 531 U.S. 98, 105 (2000). If the State practice at issue “does not infringe on the right to vote, we examine the challenged statute under the rational basis standard.” *Mixon v. NAACP*, 193 F.3d 389, 402 (6th Cir. 1999). Since the certification and selection of voting technology does not infringe directly upon the right to vote,

the Defendants merely need to have a rational basis for not requiring error notification in the voting technologies present for Ohio's citizens.

No court in the country has ever determined that the Constitution of the United States requires voter error notification technology be employed in elections.¹³ As the Second Circuit recognized long ago, the Constitution contains no guarantee that an election be free from error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). After rejecting the concept of perfect elections, the *Powell* court noted that “[w]ere we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Id.* at 86. If error-free elections are not constitutionally mandated, it stands to reason that error-free voting technology also is not subject to a constitutional requirement. Yet, the Plaintiffs in this case actually seek an error-free election with complete federal court oversight.

The *Bush* Court was faced with a very narrow issue: “Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush*, 531 U.S. at 105. The Florida Supreme Court had allowed a recount to occur in which:

- Three members of the county canvassing board applied different standards in defining a vote.
- One county changed its evaluating standards for a legal vote several different times during the recount.
- Some counties that had not completed recounts until after the certification date had their totals included in the certified vote total.

¹³ It is hard to contemplate that the drafters of the Fourteenth Amendment ever contemplated requiring States to include error notification technology as a part of their voting systems.

- Some counties examined ballots with both under and overvotes while other counties did not.

Id. at 107-08.

Based upon the complete lack of any standard for the legal definition of a vote, the *Bush* Court determined that whenever “a court orders a *statewide* remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.* at 109. (emphasis added). The Court further discounted any idea that it was announcing a constitutional standard that required a State to adopt a uniform voting system. “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.” *Id.* Thus, it is clear from the *Bush* opinion that the Supreme Court was not attempting to announce a new constitutional standard or to imply that all voting systems across a State must be identical. Instead, the Court merely decided that a State has to have a uniform set of rules in place during a recount to make sure that every ballot is treated equally.

B. There Is No Constitutional Right To A Perfect Election System.

Although the Plaintiffs in this case are asking this Court to order the State of Ohio to implement the most technologically up to date voting system, they have no constitutional right to such system. When dealing with Congressional elections, the Constitution grants to the States the power to decide the “Times, Places, and Manner of holding Elections for Senators and Representatives....” U.S. Const. Art. I. Sec. IV. The only limitation it places upon this power is that “Congress may at any time by Law make or alter such Regulations, except as to the Places

of Chusing Senators.” *Id.* Likewise, for Presidential elections, the Constitution grants the States the right to select Presidential electors without any popular vote. U.S. Const. Art. II Sec. I.

Thus, so long as the States do not engage in invidious discrimination in violation of the Fourteenth or Fifteenth Amendment, the Constitution affords the States great leeway in implementing the way elections are conducted. Likewise, as long as States follow the mandate of “one man, one vote,” it is beyond debate that the right to vote in any manner is not an absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

1. The Defendants Have Rational Reasons For Allowing Voters To Use Punch Card Ballots In Elections.

The Sixth Circuit has recognized that while any legislation that grants some residents the right to vote while denies that right to others is subject to strict scrutiny analysis, if the state practice does not infringe on the right to vote itself, it is subject to rational basis review. *Mixon*, 193 F.3d at 402. The Supreme Court, in examining whether a challenged practice should be subject to strict scrutiny or rational basis, typically examines whether the challenged practice “has an impact on appellants’ ability to exercise the fundamental right to vote.” *McDonald v. Board of Election Comm’rs of Chicago*, 394 U.S. 804, 807 (1969). Thus, so long as the regulation does not impact directly the right to vote, but rather a claimed right to vote in a particular manner, such a regulation is subject to rational basis review. *Id.* (using rational basis review on an Illinois regulation that allowed certain people to receive absentee ballots but refusing to give absentee ballots to unsentenced inmates).

The State of Ohio has certified, pursuant to State law, several different types of voting machines for the local Boards of Elections to use. Each Board of Elections, then, has a choice as to which certified voting technology it will use. The State has rational reasons for initially certifying the punch card ballot and for keeping that ballot in use. Similarly, the Counties have

rational reasons for purchasing the Votomatic¹⁴ Punch Card Ballot machine and for continuing its use.

First, as the Supreme Court noted, the closeness of the 2000 election “and the multitude of legal challenges, which have followed in its wake, have brought into sharp focus a common, *if heretofore unnoticed*, phenomenon.” *Bush*, 531 U.S. at 397 (emphasis added). The Supreme Court itself recognized that government officials did not realize that punch cards could produce any problems in elections. Second, punch card systems are cheap to purchase and to store. *See, e.g., Vote troubles may aid sales; Ballot machine makers anticipate bonanza after election confusion, Ft. Worth Star-Telegram*, Feb. 8, 2001 at Business Pg. 1, Attached as Exh I. The preservation of taxpayers’ money, naturally, is a rational basis for a State or a County to certify, purchase, or maintain a particular type of voting machine.

Furthermore, the State of Ohio and the County Defendants have very rational reasons for properly examining voting technology and making absolutely sure such new equipment is safe and secure. The Secretary of State’s Office has already produced a massive report detailing different security problems with the new voting technologies that contain error notification. *See Secretary of State Security Report*, R. 148, previously filed on January 7, 2004. The State’s General Assembly is also conducting its own hearings to see whether the new technology will be safe to use. On Wednesday March 17, for instance, one security expert testified to a committee of the Ohio General Assembly that “his technicians were able to insert computer viruses into the equipment and modify the database.” *Experts disagree on security of voting machines, Paper backup could help prevent possible fraud, state panel members told, The Columbus Dispatch*, March 18, 2004, at B4, Attached as Exh. J. Obviously, no government official wants to

¹⁴ Two different versions of punch card ballot machines exist: Votomatic and Datavote. The State of Ohio only uses the Votomatic machine.

introduce an unsafe or unproven voting system to the taxpayers of Ohio. Such a system would only lead to more litigation as, no doubt, the Plaintiffs' lawyers would immediately file yet another lawsuit against these Defendants for introducing the very technology they are asking for here. The State and County Defendants would then be responsible for turning around and spending millions more dollars to further "upgrade" their voting machines in order to remedy those problems.

Finally, if the Plaintiffs do have a constitutional right to the "more modern voting technology equipment with error notification," that would mean that federal courts would be continually deciding litigation whenever a "new" voting machine was introduced. No doubt each such machine would have somebody serve as its champion in litigation, claiming that the constitution required the State to upgrade to this "new and improved" technology. Such changes are not required by the Constitution and should not be entertained by this court.

D. The Plaintiffs Cannot Use Section 1983 In Order To Force The State To Immediately Implement The Requirements Of The Help America Vote Act.

Congress has already directed the States to improve their voting technologies for the 2006 elections. *See* HAVA, 42 U.S.C. § 15301 *et seq.* As part of the requirements under HAVA, each lever, optical scan, or direct recording electronic voting system used in a federal election must:

- Permit the voter to verify the votes he has selected before his ballot is cast and counted;
- Provide the voter with an opportunity to change his ballot or correct any error before the vote is cast and counted; and
- Notify the voter that he has either over or under voted in a particular race.

42 U.S.C. § 15481(a)(1)(A).

If the State chooses to retain a paper or punch card voting system for federal elections after January 1, 2006, that State must:

- Establish a voter education program specific to the voting system that notifies the voter of the effect of casting multiple voters for an office; and
- Provides the voter with instructions on how to correct the ballot before it is cast and counted.

42 U.S.C. § 15481(a)(1)(B).

A plaintiff cannot use § 1983 in order to require a State to implement overnight all changes the plaintiff would like to see in a State's voting regime. *McDonald*, 394 U.S. at 810-11; *see also Bush v. Viterna*, 795 F.2d. 1203, 1210 (5th Cir. 1986).¹⁵ Ohio, by implementing the requirements of HAVA, will, in an appropriate manner, at an appropriate time, and with the appropriate security arrangements, continue to maintain a constitutional and efficient voting system that the Plaintiffs' own expert has described as good. *Asher Depo.* at 68. As the Supreme Court recognized in *McDonald*, the lawsuit did not disclose that the State had acted in an arbitrary and unconstitutional manner in thwarting the rights of its citizens to vote. Rather, the State had a "consistent and laudable" policy of adding rights to its citizens for over fifty years. *Id.* at 811. "That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, 'strike at all evils at the same time.'" *Id. quoting Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935).

¹⁵ Although *Bush* involved the failure of a state actor to affect a *state-imposed* duty, the principle here is no different. A federal court has no authority under Art. III. to entertain an action under § 1983 to institute a federal reform that is not yet required.

- E. Even if the Plaintiffs could somehow theoretically claim that the Defendants are constitutionally required to use upgraded voting technology with error notification, they have failed to introduce any evidence whatsoever that such equipment produces fewer nonvoted ballots than the technologies currently in use.**

The plaintiffs in this case seem to like the voting technology used in Franklin County. Richard Engstrom, for example, used the Franklin County voting technology against which he compared punch cards. Engstrom Depo. at 19. Yet, the Franklin County system that Engstrom spoke so highly about does not contain voter error notification. *See* Asher Depo. at 110. In fact, none of the Plaintiffs' experts compared the voting systems currently in use in Ohio to voting technologies with error notification. Thus, they ask this court to rely on hearsay and speculation that these machines with the new technology would have a constitutionally significant lower residual ballot rate than the voting systems currently in use. Of course, the Plaintiffs cannot rely on this hearsay and speculation in order to prevail on this claim.

Conclusion

For all the foregoing reasons, the Defendants respectfully request this Court to issue an order granting them summary judgment and dismissing all of the plaintiffs' claims.

Respectfully submitted,

Jim Petro
Attorney General

/s/ Arthur J. Marziale, Jr.

Arthur J. Marziale, Jr. (0029764)

Senior Deputy Attorney General

E-mail: amarziale@ag.state.oh.us

Darrell M. Pierre, Jr. (0067012)

E-mail: dpierre@ag.state.oh.us

Richard N. Coglianese (0066830)

E-mail: rcoglianese@ag.state.oh.us

Holly J. Hunt (0075069)

E-mail: hhunt@ag.state.oh.us

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 17th Floor

Columbus, OH 43215-3428

(614) 466-2872

(614) 728-7592 (facsimile)

Counsel for State Defendants

/s David T. Stevenson

David T. Stevenson (0030014)

Assistant Prosecuting Attorney

Hamilton County Prosecutor's Office

230 East Ninth Street Suite 400

Cincinnati, Ohio 45202-1474

E-mail: dstevens@prosecutor.hamilton-co.org

513-946-3120

513-946-3018 (facsimile)

Counsel for Hamilton County Defendants

/s Anita L. Davis

Anita L. Davis (0012849)

Assistant Prosecuting Attorney

Summit County Prosecutor's Office

53 University Avenue

Sixth Floor

Akron, Ohio 44308
E-mail: davis@prosecutor.summitoh.net
330-643-2800
330-643-2137 (facsimile)
Counsel for Summit County Defendants

/s Victor T. Whisman
Victor T. Whisman (0008033)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
301 West Third Street
P.O. Box 972
Dayton, Ohio 45422
E-Mail: whismanvt@mcoho.org
937-225-5760
937-225-4822 (facsimile)
Counsel for Montgomery County Defendants

Certificate of Service

I hereby certify that on March 19, 2004, a copy of foregoing Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Copies will also be mailed to the following:

Scott T. Greenwood
American Civil Liberties Union
1 Liberty House
P.O. Box 54400
Cincinnati, OH 45202
Laughlin McDonald
American Civil Liberties Union
2725 Harris Tower
233 Peachtree Street NE
Atlanta, GA 30303

Richard Saphire
Professor of Law
University of Dayton
300 College Park
Dayton, OH 45469-2772
Daniel P. Tokaji
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210

/s/ Richard N. Coglianesse

Richard N. Coglianesse
Assistant Attorney General