

**In The United States District Court  
For The Northern District Of Ohio  
Eastern Division**

<b>Effie Stewart, et al.,</b>	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>Case No: 5:02CV-2028</b>
	:	
<b>J. Kenneth Blackwell,</b>	:	<b>Judge Dowd</b>
<b>Ohio Secretary of State, et al.,</b>	:	
	:	<b>Magistrate Judge Gallas</b>
<b>Defendants.</b>	:	

**Defendants’ Memorandum Contra Plaintiffs’  
Motion For Summary Judgment**

**I. Introduction**

The Plaintiffs’ summary judgment motion is filled with contradictions. One learns that either elections officials became aware of the problems with non-notice “voting technology ... since the 2000 [P]residential election,” or they “have known, at least since the 1970s, that the use of punch card equipment without in-precinct error notification and the opportunity to correct mistakes results in the failure to count a significant percentage of the ballots of Ohio’s voters.” [Plaintiffs’ Summary Judgment Motion at 2, 24]. Either “the State of Ohio’s failure to replace the punch card as the state’s principal (sic) voting method ‘invites a Florida-like calamity,’” or, as the Plaintiffs’ expert has 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.” [Plaintiffs’ MSJ at 10, Asher Depo. at 66]. Either “[t]he precincts ... where the highest percentages of residual voting, and specifically overvoting, occurred were areas whose population is overwhelmingly African-American,” or as the Plaintiffs’ expert has admitted, nine of the ten counties with the highest residual voting rates in the State of Ohio are Appalachian counties where the African-American population is so small that it could not be responsible for the residual vote rates. [Plaintiffs’ MSJ at 30, Asher at 91]. Either “African-American voters using punch cards overvote at over five to eight times the rate of their non-black counterparts...” or there is no difference whatsoever in the rates of undervotes between Franklin and Hamilton County and whites in Summit County and more than twice as likely to undervote than African-Americans in Hamilton County. [Plaintiffs’ MSJ at 37; Engstrom Depo at 73, 75; Engstrom Expert Report at 9]. Finally, either following the dictates of federal law and the schedule it imposes on the State of Ohio for modernizing its voting equipment means that the State has acted in a constitutional manner or the State of Ohio and its officeholders are obliged to ignore those dictates and merely follow the whim of some plaintiffs who will, no doubt, sue again when their “preferred” method of voting produces similar errors and concerns.

The State of Ohio understands the value of the right to vote. That is why the Plaintiffs’ own expert freely admits that Ohio has a good elections system. [Asher Depo. at 68]. Ohio is in the process of turning that good system into a spectacular one. Yet, it needs to do so in such a manner that it retains the complete faith and confidence of Ohio’s citizens. Forcing the State to make changes through litigation will not do that.

In a motion filled with contradictions and incorrect factual and legal claims, the Plaintiffs distort the facts and the law. Yet, they have asked the Court to grant them summary judgment. Their motion, however, is completely self-contradictory, relying upon hearsay and speculation. It fails to contain admissible evidence supporting any of their claims. Some of the evidence is “expert” opinion that was never provided to the defendants and in fact was not even apparently completed by their experts until the very day they submitted their motion. In addition to the factual problems contained in the plaintiffs’ motion, it is apparent that they do not understand any of the legal burdens or obligations that exist under either the Voting Rights Act or under the Fourteenth Amendment. Thus, this Court should reject their motion for summary judgment.

## **II. Law And Argument**

### **A. The Defendants Did Not Violate The Voting Rights Act By Approving And Using Voting Technology That Does Not Include In-Precinct Voter Error Notification.**

Although the centerpiece of the Plaintiffs’ Voting Rights Act claim is that the State of Ohio and the county Defendants violated their rights under the Voting Rights Act, they have failed to properly plead such a claim, must less prove that they are entitled to summary judgment under any Voting Rights Act theory. This Court, therefore, should reject the Plaintiffs’ motion for summary judgment.

As demonstrated in the Defendants’ motion for summary judgment, there are two different types of Voting Rights Act claims – vote denial and vote dilution. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (6th Cir. 1999). After examining the Plaintiffs’ summary judgment motion, however, it is completely unclear whether they raise a vote denial claim, a vote dilution claim, or both. What is clear, however, is that under either theory, they are not as a matter of law entitled to summary judgment.

**1. Since Voting Equipment Can Never *Per Se* Violate The Voting Rights Act, The Plaintiffs Must Introduce Specific Evidence Proving Their Voting Rights Act Claim.**

The Supreme Court has determined that “[e]lectoral devices ... may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process.” *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). The Plaintiffs, however, appear to rely on a “sky is falling” approach to litigation. They simply claim that the State has authorized the use of punch card ballots and some of the counties have purchased and used them. Therefore, since something bad happened in Florida in 2000, this court should grant them summary judgment. Unfortunately for the Plaintiffs, however, the American legal system actually requires them to prove their claim before a court can grant them summary judgment. Because the Plaintiffs do not have that proof, this Court must deny their Summary Judgment motion.

**a. The Plaintiffs have produced no proof whatsoever that the use of punch card ballots has the practical effect of denying African-Americans equal access to the electoral process.**

The burden in proving a § 2 Voting Rights Act claim rests squarely upon the Plaintiff. “Section 2 ... places at least the initial burden ... on the plaintiff’s shoulders. Section 2(b) specifies that § 2(a) is violated if ‘it is shown’ that a state practice has the effect of denying a protected group equal access to the electoral process.” *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993). The evidence produced by the Plaintiffs fails to show that punch cards deny African-Americans equal access to the electoral process, much less prove that these same plaintiffs are entitled to summary judgment.

The only evidence relied upon by the Plaintiffs is votes from the 2000 Presidential election in Summit, Hamilton, and Montgomery County. They compare those statistics to results

from Franklin County with the apparent hope of proving that punch cards violate § 2 of the Voting Rights Act case. However, this selective use of data does not prove anything.

African-Americans make up 27.4% of the population of Cuyahoga County. *See* U.S. Census Data, Attached as Exh. A. Cuyahoga County is the largest county in the State of Ohio and the 27.4% of African-Americans is the largest concentration of African-Americans in any county in the State. In fact, there are more African-Americans living in Cuyahoga County than there are people in 83 of Ohio's 88 Counties. *Id.* In the 2000 Presidential Election, Cuyahoga County used punch cards, yet, the plaintiffs, who are seeking a Statewide remedy, failed to show whether African-American precincts in Cuyahoga County had a higher residual vote rate than whites did in Cuyahoga County. Furthermore, the Plaintiffs' own expert, Dr. Herb Asher, testified that nine of the ten counties with the highest residual vote rate in the State were predominantly made up of white citizens, and Cuyahoga County was not the tenth one.

When examining the underlying population data, one does not need to be a statistician or have any expertise at all to understand that punch card voting technology does not deny African-Americans equal access to the political process. The following table shows the population information on nine of the ten counties that the Plaintiff's own expert claims made up the counties with the highest residual ballot rate for the State and compares that information to the Defendant counties in this case.

County	Total Population	White Population	African-American Population	Total Votes Cast	Total Presidential Votes Cast	Total Residual Votes	Residual Vote Percentage
Adams	27,330	26,721	48	10,727	10,235	492	4.59
Gallia	31,069	29,596	839	13,203	12,776	427	3.23
Holmes	38,943	38,564	127	9,937	9,145	792	7.97
Jackson	32,641	31,953	193	12,918	12,490	428	3.31
Meigs	23,072	22,850	159	10,228	9,795	433	4.23
Monroe	15,180	15,079	40	7,377	7,115	262	3.55
Noble	14,058	13,010	940	6,210	5,899	311	5.01
Pike	27,695	26,786	246	11,084	10,560	524	4.73
Vinton	12,806	12,560	45	5,184	4,946	238	4.59
Summit	542,899	453,336	71,608	232,252	224,839	7,413	3.19
Hamilton	845,303	616,487	198,061	384,336	377,899	6,437	1.67
Montgomery	559,062	428,084	111,030	237,580	230,987	6,593	2.78
Sandusky	61,792	56,974	1,650	26,441	25,744	697	2.64
Cuyahoga	1,393,978	938,863	382,634	590,473	574,782	15,691	2.66

As one can see, Adams County, for example, which has a total of 48 African-Americans living in the entire county, had 492 residual votes for President in the 2000 Presidential Election. Similarly, Holmes County, which has 127 African-American residents, had 792 residual ballots in the 2000 Presidential election. In fact, Jackson County, Meigs County, Monroe County, Pike County, and Vinton County also had more residual votes for President in the 2000 election than African-Americans living in the jurisdiction.

On the other hand, one of the defendants in this case, Hamilton County, had a residual vote rate in the 2000 Presidential Election of only 1.67%, almost 5 times less than the residual vote rate of Holmes County. Whatever one makes of all of these numbers, it is abundantly clear that punch card ballots in Ohio do not have the affect of denying African-Americans equal access to the electoral process. Thus, the Plaintiffs have failed to demonstrate that punch card ballots actually affect African-Americans at a rate that is any different from whites.

**b. The Plaintiffs have failed to show that punch card ballots exclude them from the political process.**

As referenced above, in order to meet their burden in this case, the Plaintiffs must prove that punch card ballots exclude them from the political process. Instead of focusing upon whether punch card ballots exclude African Americans from the political process on equal terms with non-African Americans, the Plaintiffs are merely focusing on a single election for a single office in a single year. Furthermore, they are not focusing on the entire State, but instead, only focus on select counties that their trial attorney selected for an academic paper he is writing.

During discovery, the Plaintiffs focused exclusively on the residual vote rate in the Presidential 2000 election. In fact, none of the Plaintiffs experts examined any other electoral contest for their Rule 26(a) reports. The Defendants, however, had their expert, Dr. John Lott, prepare a Statewide study over time to access whether punch cards exclude African-Americans from the electoral process by examining whether punch cards systematically prohibited African-Americans from voting. Dr. Lott's report is telling.

After examining elections for President, the U.S. Senate, the U.S. House of Representatives, and the State Senate and House, Dr. Lott concludes that:

All white or the top 10 percent of wards with highest percentage concentrations of adult whites tend to have significantly higher non-voted ballot rates than the overall category, "all wards." The

top 10 percent of wards by the percent of adults who are African-American or on the basis of Hispanics of all ages show lower rates of non-voted ballots, though the differences are only statistically significant for Hispanics.

Lott Expert Report at 4.

Lott's comprehensive analysis led him to conclude that:

In the 70 counties that used the Votomatic system, whites had a significantly higher non-voted ballot rate than African-Americans for U.S. Senate, Congressional, and state House races. Indeed, this is the system under which African-Americans generally fared best.

Lott Expert Report at 7.

Since the plaintiffs have brought their attack on punch cards as a Voting Rights Act § 2 violation, they have the legal obligation to show that punch cards prevent African-Americans equal access to the political process. However, this evidence from Dr. Lott demonstrates that African-Americans are not denied equal access to the political process because of punch card ballots.

- c. **The Plaintiffs, apparently realizing that they did not adequately explore whether punch cards denied African-Americans equal access to the political system, commissioned a new expert report that was never disclosed or provided to the Defendants during discovery.**

Apparently recognizing that they never actually examined whether punch card ballots deny African-Americans equal participation in Ohio's political system, the Plaintiffs now rely on *an expert report that was never provided to the Defendants during discovery in violation of Rule 26(a) and this Court's prior orders*. On January 9, 2004, this Court issued an order that stated, in part, "[f]ailure to comply with the provisions of Rule 26(a)(2)(B), absent a showing of good cause, will **disqualify the expert from testifying and in addition, his or her submissions in connection with summary judgment practice will be stricken.**" [R. 149, Order at 2]

(Emphasis added). Despite this Court's very explicit order, the Plaintiffs have used a report from Martha Kropf that they never disclosed to the Defendants. The report, however, was prepared and signed on March 17, 2004 – two days before the Plaintiffs filed their summary judgment motion. Based upon that date, it was not and could not have possibly ever been presented to the Defendants in discovery.<sup>1</sup>

Since the Plaintiffs never bothered to produce Dr. Kropf's report, this Court's prior orders dictate that anything the Plaintiffs use that report to "prove" is automatically struck from their motion. Based upon that, this Court should strike and refuse to consider *any* argument or data that appears on pages 19-24, inclusive, of the Plaintiffs' motion. Unfortunately, the Plaintiffs have decided to try this case by ambush instead of by complying with the Federal Rules and this Court's prior orders. Because of that tactic, the sanction listed in this Court's January Order is an appropriate Fed. R. Civ. P. 37 sanction.

If this Court reviews the Kropf study that was never produced or disclosed report, it can see for itself how unreliable and contradictory the report is.<sup>2</sup> Based upon Kropf's report, lever voting machines either perform the best in preventing residual votes or they are the worst technology available. Kropf shows that lever machines have a residual vote rate of 0.5% (Presidential Race 2000) or a residual vote rate of 8.2% (Senatorial Race 2000). [Plaintiffs' MSJ at 22]. The Plaintiffs have once again contradicted themselves by claiming that lever machines are both the best and worst election technology available.

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<sup>1</sup> Under separate cover, the Defendants are filing a motion to strike Dr. Kropf's report and to sanction the Plaintiffs pursuant to Fed. R. Civ. P. 37.

<sup>2</sup> If this Court were to allow the Plaintiffs the right to use Dr. Kropf's initially withheld report, the Defendants reserve the right to depose Kropf again and would seek from this Court an order requiring the Plaintiffs to bear the entire cost of that deposition including any travel expense, paying for the expert's time, paying for the court reporter, and paying all fees and costs the Defendants incur as a result of that deposition including Attorneys Fees and time spent with their expert in preparation.

Of course, this contradiction in numbers shows the very reason that for purposes of a § 2 Voting Rights Act case, a court cannot simply focus on one election for one office in one year. Depending upon how a person chooses data, that data can either show that there is a problem or there is no problem at all. However, the Plaintiffs are not able to contradict themselves in order to present their case. They have the legal burden to prove that the equipment at issue prevents African-Americans from equal access to the political process. As their own numbers demonstrate, the Plaintiffs have merely succeeded in showing that at one moment in time, a specific type of voting technology may produce the largest number of residual votes for one elective office while producing the fewest number of residual votes for the next elective office on the ballot.

**d. The Plaintiffs have either intentionally or very sloppily misstated some of the data from Dr. Lott's report and are internally inconsistent in the use of prior elections data.**

Although the Defendants appreciate that the Plaintiffs were able to inform the Court how the Defendants would use Dr. Lott's expert report, they were incorrect in their guesses. Not only do they misunderstand what the data from Lott's report says, they misstate completely some of the data. For example, the Plaintiffs claim that "[t]here was no senatorial race in 1996, as stated in Table 2 of Lott's Report. Accordingly, the statistics he report can only be from the 1992 and 2000 senatorial race." [Plaintiffs' MSJ at 21 n. 4]. However, if one examines Table 2 of Dr. Lott's report, it states for the 1996 Senate Race, "No race." Dr. Lott, however, does provide data for the 1996 *State Senate* races. [Lott Report at 9, Table 2]. There were State Senate Races in Ohio in 1996. Ohio Const. Art. II § 2. Either the Plaintiffs do not realize that State Senate terms are for four years with half of the seats up every year or they were just very sloppy in their analysis of Dr. Lott's data in an effort to discredit his report.

The Plaintiffs have also been very inconsistent in their approach to the value of data for prior elections. Dr. Lott uses panel data for his report. He examined the election results in Ohio's more than 2,700 wards for the three presidential election years from 1992-2000 and looked at the Presidential, Senatorial, Congressional, State Senate, and State House races in each during that time. [Lott Report at 2-3]. The Plaintiffs, however, complain that he should have only looked at 2000 data since that is a "much more reliable indicator of the current performance of Ohio's voting machines." [Plaintiff's MSJ at 21]. That statement, however, is confusing in light of what the Plaintiffs' experts have done.

For example, Herb Asher examined Ohio's Gubernatorial elections in 1974 and 1978. [Asher Report at 2]. Apparently, for Dr. Asher, it is acceptable to go back 25 years yet it is not legitimate for Dr. Lott to examine changes in voting error rates over 3 specific elections cycles. Furthermore, in the Kropf report that was provided to the Defendants during discovery, she states "survey questions over a 20 year period are used here...." [Kropf Report at ¶ 7]. Likewise, Saltman, who according to his own report bases his opinion on newspaper articles, goes back to 1988 in his reading. [Saltman Report at 6]. Thus, if the Plaintiffs are correct in their statements that Dr. Lott cannot go back to and use data from 1992 to the present, it becomes confusing how they could possibly justify the use of a 1978 gubernatorial election, exit polls from 1980, or Saltman's newspaper articles from 1988. The plaintiffs therefore either need to admit that Dr. Lott's data and report are legitimate statistical techniques or they need to withdraw their own expert reports.

**2. The Plaintiffs rely on questionable legal and factual arguments in order to claim they are entitled to summary judgment.**

Although correctly citing that "Section 2 plainly provides that a voting practice or procedure violates the VRA when a plaintiff is able to show, based on the totality of the

circumstances, that the challenged voting practice results in discrimination on account of race,” they never actually address the “totality of circumstances” in this case. [Plaintiffs’ MSJ at 30 quoting *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003)]. The Supreme Court has already approvingly cited the factors that are to be considered when examining the “totality of circumstances” in a § 2 Voting Rights Act case. Those factors are:

- 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;
- 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. Although the Plaintiffs have claimed they are entitled to summary judgment on their Voting Rights Act claim, they have completely failed to address the “totality of circumstances.”

For example, the Plaintiffs have failed to introduce any evidence of a history of official discrimination against African-Americans with regard to the right to vote by either the State of Ohio or the Defendant Counties. Furthermore, Herb Asher, one of the Plaintiffs’ experts, has previously testified, “there was, in fact, no such recent history of voting-related discrimination.” *Mallory v. Ohio*, 38 F. Supp. 2d 525, 541 (S.D. Ohio 1997) *aff’d* 173 F.3d 377 (6th Cir. 1999). Since it is the Plaintiffs’ burden of proof in this case, we can only assume that they, like their expert, are conceding that no such history of discrimination exists and they are not trying to claim one.

Likewise, the Plaintiffs, in their summary judgment motion did not argue that voting in the State of Ohio or in any of the Defendant Counties is racially polarized. They are apparently conceding that such evidence does not exist. It is understandable why the Plaintiffs would make such a concession. After all, both State and Federal Courts have consistently rejected § 2 Voting Rights Act claims brought against the State and its political subdivisions noting, for example, that “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.” *See, Mallory*, 38 F. Supp. 2d at 541 *citing Voinovich v. Quilter*, 507 U.S. 142 (1993); *see also Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994) *cert. denied*, 514 U.S. 1109 (1995); *State, ex rel. Rogers v. Taft*, 64 Ohio St. 3d 193 (1992). Thus, based upon this overwhelming prior judicial finding, the Plaintiffs have apparently abandoned any thought that they could prove their case by resorting to claiming racially polarized voting patterns.

Likewise, the Plaintiffs in this case have failed to claim that African-Americans have been denied access to any candidate slating process. Since they have the burden of proof in this case, they have apparently conceded that they are unable to establish that point.

The Plaintiffs have not claimed in their summary judgment motion that African-Americans in the State of Ohio or in any of the Defendant Counties bear the effects of discrimination in areas such as education, employment, or health that prevents them from effectively participating in the political process. They have to be conceding that they have no evidence whatsoever to prove this point.

The Plaintiffs never raised a claim that any political campaigns in Ohio or its political subdivisions have been characterized by overt or subtle racial appeals. Much as courts have determined that Ohio does not have a history of polarized voting patterns, the Plaintiffs must realize that Ohio lacks political campaigns that make either overt or covert racial appeals.

Of course, the Plaintiffs also fail to argue that Ohio has a history of failing to elect African-Americans to public office. Needless to say, the plaintiffs would not be able to show such a history. African-Americans, such as the Secretary of State, have been elected to statewide office and other important positions in the local governments in this State.

In addition, the Plaintiffs have failed to articulate any other “additional factors” that might enable them to show the “totality of circumstances” proves a Voting Rights Act violation. Instead, they focus merely on the alleged racial disparity in the error rate of punch card ballots. Even though they have asked this Court to provide them summary judgment based upon the questionable litigation strategy of looking merely at the Presidential election in 2000, they ignore the results of that very election. They do not even address the fact that, for example, Holmes County had the worst residual vote rates in the 2000 Presidential election with a residual vote

rate percentage of 7.92% and 792 residual votes out of 9,937 total voters who arrived at the polls that day. Holmes County, according to the 2000 census, had only 127 African-American residents.<sup>3</sup> Thus, African-Americans could not have been the reason for Holmes County's residual vote rate. The same is true for Pike County that had the third largest residual vote rate percentage at 4.73% and 524 residual votes out of 11,084 voters who arrived at the polls that day. Yet, Pike County has only 246 African-American residents. Likewise, Vinton and Adams County tied for fourth in residual vote rate percentages at 4.59%. Adams County had 492 residual votes for the Presidential election and an African-American population of 48 while Vinton County had 238 residual votes and an African-American population of 45. Finally, Monroe County was eighth in the residual vote rate percentage at 3.55% and had 262 residual votes for President but only 40 African-American residents. These numbers required Herb Asher to admit that African-Americans were not the reason for the residual vote rates in the Appalachian counties.

These numbers demonstrate something fundamental, and completely fatal to the Plaintiffs' Voting Rights Act case – African-Americans are not excluded from equal access to the political process as a result of punch card voting. If the Plaintiffs had any evidence that African-American residents of one of the Defendant counties had residual vote rates higher than the general population of Holmes County, for example, they would have no doubt made that the centerpiece of their motion. Instead, they merely try to compare punch cards to Franklin County's Electronic Voting Machines. Such a comparison, however, fails to prove a Voting Rights Act claim, much less prove that the plaintiffs are entitled to summary judgment. Thus, although the Plaintiffs would like this Court to find that punch cards *per se* violate the Voting

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<sup>3</sup> The census population figure for African-Americans includes all African-Americans who reside in the various counties. Thus, it includes people who are below legal voting age as well people who are eligible to register to vote, yet decided never to do so.

Rights Act, both the law and the facts of this specific case prohibit such a finding. For that reason alone, this Court should reject the Plaintiffs' Summary Judgment Motion.

**2. The Plaintiffs' Expert Reports Concerning Punch Card Ballots Do Not Adequately Address Whether The Failure To Use Punch Cards Or Any Other Non-Notice Voting Technology Violates The Voting Rights Act.**

Since no technology can *per se* violate the Voting Rights Act, it becomes the Plaintiffs' legal obligation, simply for purposes of stating a *prima facie* case, much less in order to receive summary judgment, to introduce specific evidence that shows punch cards or any other non-notice voting technology violates the Voting Rights Act. As the plaintiffs have failed in this requirement, they have not actually proven a *prima facie* case, much less established that they are entitled to summary judgment.

The first problem with the Plaintiffs' summary judgment motion is their claim that "punch cards and other systems that lack error notification results in the disproportionate denial of African-American votes" in violation of § 2 of the Voting Rights Act. [Plaintiffs' MSJ at 30]. After reading both their complaint and their motion, it becomes very confusing exactly what the plaintiffs' claim is except for their general mantra that they do not like punch cards.

The Plaintiffs' claim against the State Defendants, for example, concerns the certification of punch card machines and other machines that "lack any error notification..." [Second Amended Complaint at § 104a and b]. However, in regard to their claim against the State of Ohio, since there can be no *per se* election device violations of the Voting Rights Act, the sole act of certifying punch card machines or any other election device cannot be in violation of the Voting Rights Act.

Likewise, as it relates to the County Defendants, the Plaintiffs' evidence does not show any violation of the Voting Rights Act. The Plaintiffs, in their summary judgment motion, focus

on the report of Richard Engstrom and specifically his analysis of overvoting in Hamilton and Summit Counties. [Plaintiffs' MSJ at 34]. To begin with, the Defendants are unaware of any case that has ever found a violation of § 2 of the Voting Rights Act premised simply upon overvotes. In addition, the Plaintiffs have also failed to explain the significance of Engstrom's own data showing that whites in Summit County are more than twice as likely to undervote than blacks in Hamilton County. [Engstrom Report at 8]. If we begin to parse out overvoting and undervoting issues in specific counties in order to demonstrate a Voting Rights Act violation, we are inviting an ACLU lawyer to file another Voting Rights Act lawsuit. The plaintiffs in that case would be African-Americans living in Hamilton County who might then claim that since they undervote at a rate much lower than whites living in Summit County and since they also have far fewer residual ballots than Holmes County, they are being excluded from the political process if Summit or Holmes County were ever to replace the punch card ballot. The claim, on its face, is ridiculous, but it may well be sufficient to at least survive a motion to dismiss if this court were to start parsing specific errors on individual ballots as legitimate subjects for Voting Rights Act violations.

In addition, although the Plaintiffs make claims in their motions about voter error notification systems, their experts never actually analyzed any voting system using error notification technology. Herb Asher, one of Plaintiffs' experts, said that Franklin County voting machines, the machines to which the Plaintiffs have compared some systems, do not contain the very technology that the Plaintiffs claim are mandates. Thus, if this court rules in their favor, it would be invalidating the very technology that the Plaintiffs claim is mandated.

- a. The Plaintiffs cannot use any statements by the defendants as “proof” of their Voting Rights Act violations as these statements are not admissible evidence supporting any of the Plaintiffs’ Voting Rights Act claims.**

Throughout their motion, the Plaintiffs point to some opinion statements of various defendants in order to “prove” their claim on the Voting Rights Act. For example, they quote Secretary of State Blackwell and statements about using punch cards “invites a Florida-like calamity.” However, the Plaintiffs have failed to realize that this is merely a statement by Blackwell about his desires to purchase new elections equipment for the State of Ohio. They also ignore both the statement of their own expert that a Florida-like situation will not happen in Ohio because this State has defined what constitutes a legal vote on a punch card ballot. [Asher Depo. 67]. Thus, none of the statements attributable to Blackwell actually do anything whatsoever to prove the plaintiffs’ case.

**III. As Ohio’s Use Of Punch Card Voting Machines Does Not Violate The Constitution, The Plaintiffs Have Failed To Prove They Are Entitled To Summary Judgment On Their Constitutional Claims.**

The United States Supreme Court, in *Bush v. Gore*, 531 U.S. 98, 105 (2000), focused on a very narrow issue, namely 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.” In *Bush*, then, the Supreme Court simply focused on whether having a limited recount of punch card ballots that had no readily discernible standard violated the Equal Protection Clause. It did not, as the Plaintiffs seem to assume, dictate a broad general statement that the use of punch card ballots violates the Fourteenth Amendment. [MSJ at 10].

**A. The Use Of Punch Card Ballots Is Rational And Therefore Constitutional.**

Although the Plaintiffs claim that they are entitled to summary judgment on their constitutional claim, they have failed to articulate either the proper constitutional standard for the

use of voting equipment or any evidence whatsoever that Ohio's use of punch cards violates that constitutional standard. First, the Plaintiffs have incorrectly informed this Court about other federal court decisions concerning the punch card ballots. Although the Plaintiffs have told this Court that "two federal courts have relied upon its [*Bush*'s] equal protection analysis to uphold challenges to the use of voting systems with disparate error rates," they have completely misstated the holding of these cases. In *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002), the court denied a defendants' motion to dismiss for failure to state a claim after it assumed, as it must for purposes of a 12(b)(6) motion, that the allegations in the complaint are true. Therefore, based upon the mere allegation in the complaint that punch card voting systems arbitrarily and unnecessarily result in a much greater nonvoted ballot rate than other voting systems, the district court determined that such an allegation is sufficient to state a legal claim and allow the case to go on to discovery. *Id.* at 899. However, the Plaintiffs, even in *Black* still had the affirmative obligation to come forward with evidence in order to prove this allegation.

In our case, the Plaintiffs are unable to prove such an allegation. Delaware County, Ohio uses punch cards while Franklin County uses an electronic voting machine. In the 2000 elections, Delaware County had 55,959 total votes cast and 55,403 votes cast for President for a residual vote total of 556 votes or 0.99% while Franklin County had 417,800 total votes cast and 414,074 votes cast for President for a residual vote total of 3,726 votes or 0.89%.

County	Total Votes	Presidential Votes	Residual Votes	Residual Vote %	Senate Votes <sup>4</sup>	Residual Votes	Residual Vote %
Delaware	55,959	55,403	556	0.99%	53,603	2,356	4.21%
Franklin	417,800	414,074	3,726	0.89%	392,741	25,059	6.00%
County	Presidential Votes	Senate Votes	Residual Votes <sup>5</sup>	Residual Vote %	House Votes	Residual Votes <sup>6</sup>	Residual Vote %
Delaware	55,403	53,603	1,800	3.2489%	54,151	(548)	(1.022%)
Franklin	414,074	392,741	21,333	5.1520%	388,881	3,860	0.98284%

This table illustrates, in fact, that the punch card system in Delaware County performs equally as well as the electronic machines in Franklin County in the 2000 Presidential race with residual vote rates of 0.99% and 0.89%, respectively, while the punch card system in Delaware County produces a much lower residual vote rate for both the Senatorial and House elections. [See Elections Data, Attached as Exh. B].

However, the Plaintiffs failed to address the fact that voters in Delaware County, where punch cards are used, have their votes counted at a higher rate than voters in Franklin County where electronic voting machines are used. They merely gloss over these results. Instead, they ask this Court to rely on the *overruled* decision of *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882 (9th Cir.) *unanimously overruled by* 344 F.3d 914 (9th Cir. 2003) (en banc).

In addition to citing bad case law, the Plaintiffs take deposition quotes out of context in order to “prove” their case. For example, the Plaintiffs cite to several statements by Dana

<sup>4</sup> Residual Votes for Senate are calculated by the number of total votes minus the number of votes cast in the senate race.

<sup>5</sup> Residual Votes in this column are calculated by the number of votes cast for President minus the number of votes cast in the senate race.

<sup>6</sup> Residual Votes in this column are calculated by the number of votes cast for the U.S. Senate race minus the number of votes cast in the House Race. Negative Numbers are indicated by parenthesis.

Walch, Director of Election Reform in the Ohio Secretary of State's Office. Although Mr. Walch has testified that some research has shown that certain electronic voting machines might have a lower residual vote rate than punch card ballots, there is no proof whatsoever in his statements that such alleged differences are constitutionally significant.

Furthermore, the plaintiffs are unable to define exactly where the constitutional line in residual voter rates must be drawn. For example, in redistricting cases, the Court has rejected the view that every electoral district must be of identical size. Thus, the Supreme Court upheld as constitutional under the Equal Protection Clause electoral districts that differed in population size by as much as 16%. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146 (1993); *Mahan v. Howell*, 410 U.S. 315 (1973).

The Plaintiffs have not given this Court a standard under the Equal Protection Clause to determine whether punch cards meet the Constitutional burden. Instead, they merely state that some research shows that new voting machines perform better than punch cards. Although this may be true, that does not translate to punch card systems as being unconstitutional.

**B. If The Constitution Demands That States Only Use Voting Technology That Produces The Smallest Number Of Residual Votes, States Would Be Forced To Only Use One Specific Type Of Voting Machine And To Purchase New Equipment Every Time A Different Machine Had The Most Statistically Insignificant Difference In Residual Vote Rates.**

As noted above, punch cards in Delaware County outperform the electronic voting machines in Franklin County in both the Senatorial race in 2000 as well as the House race in 2000. They are practically identical for the Presidential race. If, however, the plaintiffs prevail in their claim that punch card ballots violate the Equal Protection Clause, the State would be forced into a situation where only one voting machine could be used Statewide. After all, if different residual vote rates existed in different counties using different machines, one person's

vote might be counted more than another's depending upon geography. Likewise, each time a new technology comes into existence that has a lower residual vote rate than the one currently in use in Ohio, the State may well be forced to adopt that new technology because to do otherwise might be considered to be an arbitrary and irrational decision.

**C. The Determination Concerning Which Voting Technology To Either Approve Or Purchase Does Not Directly Impact A Person's Right To Vote And Is Subject Only To Rational Basis Review.**

As the Defendants already have demonstrated in their motion for summary judgment, decisions that do not directly impact a person's right to vote are subject only to rational basis review. *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 804, 807 (1969). As has been demonstrated, the State and the local boards of elections can rationally decide to use punch cards based upon the comparison of Delaware County to Franklin County showing that punch cards perform just as well if not better than electronic voting machines.<sup>7</sup> The Defendants have previously shown that the decision to use punch cards is rational because of the cost of the system relative to other types of technology and also because of potential security problems that exist in the new systems. [Defendants MSJ at 21-23]. The Defendants incorporate that discussion and those reasons by reference in this memorandum contra.

**D. The Defendants Have A Right To Rely On The HAVA Timeframe In Order To Show The Constitutionality Of Their Action In Modernizing Their Voting Equipment.**

As the Defendants have shown in their summary judgment motion, the State of Ohio will be improving its voting technology in compliance with the Help America Vote Act ("HAVA"),

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<sup>7</sup> The Plaintiffs will no doubt claim that the comparison between Franklin County and Delaware County is arbitrary and cannot be used to show how punch cards perform relative to other voting technologies. Yet this selection is no more arbitrary than the Plaintiffs decision to compare Hamilton, Montgomery, Summit, and Sandusky County to Franklin County. Nor is it any more arbitrary than the Plaintiffs' decision to only focus on the Presidential election of 2000 as opposed to using the Presidential Races from 1992-2000 or for looking at all elections that took place in those years to truly determine how punch card machines operate in comparison to other types of voting technology.

42 U.S.C. § 15301 *et seq.* [See Defendants' MSJ at 23-24]. Courts have already found that a Plaintiff cannot use a § 1983 claim in order to require a State to implement overnight all changes the Plaintiff would like to see in a State's voting system. *McDonald*, 394 U.S. at 810-11; *see also Bush v. Viterna*, 795 F.2d 1203, 1210 (5th Cir. 1986). Through Ohio's implementation of HAVA, the State will continue to provide its citizens with an efficient and constitutionally acceptable voting system.

The State has announced its plan to comply with the HAVA requirements and the Plaintiffs have not introduced any admissible evidence suggesting that Ohio will not comply with the HAVA timeframes or voting machine requirements. Under the Constitution, the Plaintiffs are not allowed to demand this Court grant them the voting system they wish at the time they wish it. Instead, this Court should give Ohio's governmental officials the freedom to operate under the requirements of HAVA.

**IV. The Plaintiffs Have Made Numerous Arguments In Their Motion For Summary Judgment For Which They Either Completely Lack Support Or That Are Self-Contradictory.**

As noted in the introduction to this memorandum contra, the Plaintiffs have contradicted themselves at numerous times in their motion. They have also made numerous blanket statements that are either false or completely lack support. For that reason alone, this Court should deny the Plaintiffs' Summary Judgment Motion.

The Plaintiffs claim that "the State of Ohio still remains one of the few states that conducts its elections largely on the very same equipment that led to the confusion and breakdown in public confidence in 2000," yet they are unable to attribute this blanket statement to any source. Furthermore, this statement is demonstrably false. The Plaintiffs claim that the problem with Ohio's voting system is not punch cards *per se* but the failure to use error

notification technology. Second Amended Complaint at ¶ 2. However, for the 2004 election, only 28% of the voters nationally will use this new voting technology with error notification.

See <http://www.msnbc.msn.com/id/4570339>

Likewise, the Plaintiffs claim that they will demonstrate “through both lay and expert witness testimony ... that there is a racial disparity in whose votes are not counted due to the flaws inherent in non-notice technology.” Of course, any non-expert would simply testify to their opinion about non-notice voting technology. Such testimony is not admissible either in trial or for purposes of summary judgment briefing. *See, e.g.*, Fed. R. Evid. 701. Furthermore, such testimony would probably be based purely upon hearsay and idle speculation, thus making it inadmissible on that basis alone. Finally, although the Plaintiffs claim that they will prove that error notification voting systems are superior to the non-error notification technologies currently in use, the problem that the plaintiffs have with this claim is that even their own experts admit that the system the plaintiffs are proposing, the electronic machines in use in Franklin County, are not error notification devices. [*See* Asher Depo at 110].

In addition, the Plaintiffs make the sweeping claim that “it is well recognized among electoral scholars and election officials that the majority of overvotes are due to error and do not represent the voter’s intent.” They, however, fail to provide any proof whatsoever for such a broad generalization. The Plaintiffs have a legal and ethical obligation to prove the elements of their claims. They cannot simply throw accusations against a wall and require the Defendants to disprove what they are claiming. Unfortunately, however, that appears to be exactly what the Plaintiffs are doing in this motion.

These Plaintiffs, again without support, state “the majority of undervotes at the top of the ballot ...do not accurately reflect the intent of the voter to cast an invalid vote.” Again, the

plaintiffs simply state this without any support. If, however, they depend upon the Kropf report to make this statement, such reliance is misplaced. As has been demonstrated in the various motions to strike, the Kropf report simply does not deal with the intentions of Ohio voters. Instead, it merely states what people nationally have told exit pollsters. Thus, the Plaintiffs cannot credibly maintain that the majority of undervotes are not an accurate reflection of the intent of the voter.

The Plaintiffs have also badly mischaracterized the position of the State of Ohio with respect to punch card voting. For example, they state that the State “agrees with the Plaintiffs that the punch card machines are inferior and unreliable due to the fact that voters cannot review their ballots before casting them to clearly and easily ascertain that their preferences have been properly recorded.” [MSJ at 7]. However, the deposition that they quote as support for this statement merely states that it is much easier for a voter who uses a DRE system to look at a ballot to see the choices they made during the voting process. The Plaintiffs are unable to point to any statement made by an Ohio or local official that admits punch cards are inferior and unreliable. Instead, they merely either quote depositions or letters out of context in order to attempt to support a point of view that has no support in the actual evidence of this case.

Likewise, the Plaintiffs use various quotes from the Walch deposition and the HAVA plan to claim that Ohio has admitted to deficiencies in its current voting technology. Of course, such claims are blatantly false. First, the Plaintiffs again quote Walch out of context in order to reach the conclusion that Ohio has admitted to any problems with any of its voting systems. Although Walch may have said that studies exist that show a lower residual vote rate with DRE machines, this does not amount to a concession that Ohio’s voting system is somehow flawed. Likewise, the State’s HAVA submission shows that different residual rates occurred on different

voting technology. However, this does not prove that the cause of the different rates was the technology itself. It could simply be that people in different areas of the State decided to actually vote at different rates. Furthermore, if the Plaintiffs were actually convinced in the correctness of these numbers, they would ask this Court to require the State to implement lever voting machines as those had the lowest residual vote rates. [MSJ at 16].

Similarly, the use of Secretary of State Blackwell's letters concerning alleged "foot-dragging" cannot be used as a basis to either believe that Ohio's current voting technology is not sufficient or that Ohio will not comply with the mandates of HAVA. The Secretary of State and the Ohio General Assembly are merely in a policy debate over the best way to comply with HAVA. This does not mean that Ohio is dragging its feet. Rather, it merely means that the two political bodies in Ohio have different opinions about how the new machines will be configured – not whether new machines will be purchased.

### Conclusion

For the foregoing reasons, Defendants respectfully request this Court issue an order denying the Plaintiffs' summary judgment motion.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on April 16, 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.

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