

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF OHIO**  
**EASTERN DIVISION**

Effie Stewart, et al.,	)	
	)	
Plaintiffs	)	<b>CASE NO. 5:02CV2028</b>
	)	
v.	)	<b>Judge: Dowd</b>
	)	
J. Kenneth Blackwell, et al.,	)	<b>Magistrate Judge Gallas</b>
	)	
Defendants	)	

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs move the Court pursuant to Rule 56, F.R.Civ.P. for summary judgment on their claim that the Secretary of State of the State of Ohio, the State Board of Examiners for the Approval of Electoral Marking Devices, the members of the County Board of Commissioners, and County Councils, and the County Boards of Election in Hamilton, Montgomery, Sandusky, and Summit Counties have conducted and maintained a dual, non-uniform, and unequal elections system in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. Plaintiffs likewise move the Court for summary judgment on the claim that the State and County Defendants have maintained and operated balloting systems that fail to count all votes cast, in violation of the Due Process Clause of the Fourteenth Amendment. Finally, Plaintiffs move the Court for summary judgment on the claim that the State and County Defendants have operated and maintained voting systems that have a discriminatory and disparate impact on the right of African American voters to participate equally with

whites in the electoral process, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. The basis for this motion is that there are no genuine issues of material fact with respect to each of these claims, and that, under applicable principles of law, the Plaintiffs are entitled to judgment as a matter of law. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. JURISDICTIONAL STATEMENT

The Court has original jurisdiction over this case pursuant to the following federal statutes: 28 U.S.C. §1331; 28 U.S.C. §§ 1343(a)(3) & (4); 42 U.S.C. §1983; 42 U.S.C. § 1973; 28 U.S.C. §2201(a); and 28 U.S.C. §2202. Declaratory relief may be issued in this case pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is proper in the Northern District of Ohio pursuant to 28 U.S.C. § 1391(b).

II. THE PARTIES

A. Plaintiffs

All of the Plaintiffs are citizens of the State of Ohio and registered voters in their respective counties. See Depositions of the Plaintiffs (Exhibits 1a-1g). Effie Stewart and Marco D. Summerville are registered voters and residents of Summit County. Erin Otis and Vernelia Randall are registered voters and residents of Montgomery County. Howard Tolley and Art Slater are residents and registered voters of Hamilton County. Linda See is a registered voter and resident of Sandusky County.

B. Defendants

1. The State Defendants

Defendant J. Kenneth Blackwell is the chief elections officer and Secretary of the State of Ohio. Defendants Raymond Butler, Geraldine Lewis, and Larry Loutszenhiser are Members of the State of Ohio Board of Examiners for the Approval of Electoral Marking Devices and are sued here in their official capacities and as the entity Ohio Board of Examiners for the Approval of Electoral Marking Devices.

2. The County Defendants

The county defendants are the boards of elections for Summit, Sandusky, Montgomery and Hamilton Counties who select the voting technology used in each of the elections and conduct elections. The county defendants also include the county council for Summit County and boards of commissioners for Sandusky, Montgomery and Hamilton Counties and their members who fund the boards of elections for their respective counties. O.R.C. § 3501.17. They are sued here in their official capacities.

INTRODUCTION

The fundamental flaws in punch card and other non-notice voting technology have become common knowledge throughout the country since the 2000 presidential election. Images of election officials squinting at ballot cards attempting to determine a voter's intent covered the television screens and newspaper pages in November and December 2000. It is unfortunate that it took a close election for the highest office of the country to alert the public and election officials across the nation about the problems with voting technology. However, it is far more unfortunate that in 2004, with a second presidential election approaching, 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. As Secretary of State Blackwell has recently acknowledged, "the possibility of a close election with punch cards as the state's primary voting devices invites a Florida-like calamity." Letter of J. Kenneth Blackwell to Honorable Doug White (Doc. 159), p. 3.

In this action, Plaintiffs are seeking declaratory and injunctive relief from Defendants' creation and utilization of a non-uniform, unequal, and dual balloting system. By certifying and

operating various balloting systems that favor or disfavor voters on the basis of their residence, the Defendants violate the Equal Protection Clause of the Fourteenth Amendment which protects Plaintiffs' fundamental right to have their votes count on an equal basis with those cast by other citizens. The Defendants also violate Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to a rational and non-arbitrary system for registration and tabulation of their votes. Additionally, the African American Plaintiffs, through both lay and expert witness testimony, demonstrate that there is a racial disparity in whose votes are not counted due to the flaws inherent in non-notice technology. Therefore, the certification and use of this technology by the State of Ohio and Hamilton, Summit and Montgomery Counties violates Section 2 of the Voting Rights Act of 1965. Plaintiffs ask the Court to require the Defendants to provide each voter in his or her respective jurisdiction an opportunity to vote with election equipment that eliminates these disparities.

#### Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that, upon motion, summary judgment "shall be granted forthwith if the [record shows] that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." The Sixth Circuit has concluded that litigants face a "new era" in summary judgment practice in which parties will find it easier to prevail on such motions. Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989). The new era was ushered in by three decisions of the Supreme Court. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co., Ltd., 475 U.S. 574 (1986). From these decisions, the Sixth Circuit has adduced that: complex cases are not necessarily inappropriate for summary judgment; the absence of evidence to support a material fact for the non-moving party can be

given great weight where ample time has been provided to the parties for discovery; and the non-moving party must produce more than a "scintilla" of evidence to overcome the motion. Street, 886 F.2d at 1478-80.

Plaintiffs submit that they are more than entitled to summary judgment. Defendants themselves admit that problems with non-notice technology lead to certain voters facing a statistically significant greater risk of having their ballots rejected. Second, Defendants have failed to create a triable issue of fact by producing the report of an expert who claims to disagree with the Defendants' own public statements. Third, Defendants do not have more than a "scintilla" of reliable evidence that can refute the voting disparities that Plaintiffs have documented.

#### STATEMENT OF MATERIAL FACTS

The State of Ohio, including the four defendant counties, certifies and operates a myriad of election systems. The State, through its chief election officer Secretary of State Blackwell, authorizes a variety of systems for voters to cast their ballots, including punch card machines, optical scan machines, lever machines and direct recording machines. The counties choose their voting equipment from a list of systems that have been certified by the Secretary of State. See O.R.C. § 3506.15.

There are two main components to any election system: (1) the vote recording technology that the voter uses to record his or her preferences, and (2) the vote tabulating technology that reads and counts the ballots. See, e.g., Deposition of Heizer, (Exhibit 3e), p. 31. The State of Ohio has a wide range of both recording and tabulating technology. As to the recording devices, "69 of Ohio's 88 counties use punch card voting.... Among the 19 counties that use voting devices other than punchcard ballots, two use automatic voting machines, six

have electronic voting devices, and 11 use optical scanning equipment.”<sup>1</sup> See HAVA Plan (Exhibit 7a), p. 10; Deposition of Walch (Exhibit 2a), p. 40. These systems utilize different methods of reading and counting votes. Some systems, such as the ones operated by all four county defendants, count ballots at a central location after the polls have closed. Other counties have optical scan ballots with readers located in the precinct that enable voters to check the accuracy of their ballot by placing it in the vote tabulator while the voter is still present at the polling location. See Deposition of Walch (Exhibit 2a), p. 40. Six others utilize electronic voting equipment which allows a voter to verify his or her selections by viewing a screen that shows exactly who the voter voted for before finally casting a ballot. Id. In total, 81 of Ohio's 88 counties use "non-notice" equipment – voting technology that does not provide a voter a chance to assess his choices before finally casting his vote in the precinct at the time of voting. Id., p. 24.

The most crucial concern with non-notice technology involves the incidence of unintentional “residual votes” – i.e., ballots for which no vote can be tallied for a ballot in a particular electoral contest. There are two types of residual votes: overvotes and undervotes.

"Overvoting" occurs when the voting system determines that more votes have been cast in a particular race than permitted in that race. See, e.g., Deposition of Walch (Exhibit 2a), p. 57-58; Deposition of Lott (Exhibit 6b); Saltman Report (Exhibit 4p). In punch card counties, this appears as more dislodged chads for a slate of candidates than allowed; while in optical scan counties, more marks are made on the ballot than permitted. When these ballots are taken to the tabulating machines after the polls have been closed, it is impossible for the machines or officials to determine for which candidate the intended vote was cast. See, e.g., Depositions of Wolfe

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<sup>1</sup> See page 15, n. 3, *infra*.

(Exhibit 2b), Heizer (Exhibit 3e), Wagner (Exhibit 3c), and Stautberg (Exhibit 3d), *passim*. Therefore, unbeknownst to the voter, no vote is tabulated for that ballot. 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. See, e.g., Answer of Montgomery County ¶7. In notice technology jurisdictions, voters using optical scan machines with in precinct notification would be alerted if they had cast an overvote before leaving the polls. Electronic machines and direct recording equipment (DREs) prevent voters from casting overvotes. See, e.g., Deposition of Wolfe (Exhibit 2b), p. 28.

"Undervoting" occurs when the voting system determines that the voter has cast no vote in a particular race, or fewer votes than permitted for the office in question. According to electoral experts, the majority of undervotes at the top of the ballot – those occurring in the most high profile and significant political contests – do not accurately reflect the intent of the voter to cast an invalid vote. The majority of undervotes at the top of the ballot represent errors that are attributable to defects in the operation of the voting equipment. As a separate matter, undervoting also encompasses voters intentionally not voting for a particular race. While rarely seen at the top of the ballot, the occurrence of undervoting increases further down the ballot. See Deposition of Heizer (Exhibit 3e), pp. 56-58.

Residual votes or invalid ballots are the aggregate of overvotes and undervotes that are determined when the vote tabulator attempts to read the ballots. Defendants each keep information on the number of residual ballots following an election. Additionally, Hamilton County and Summit County began reporting the number of overvotes and undervotes separately in 2000.

The State of Ohio 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. The state defendants agree that this feature makes electronic machines superior to punch card machines:

It is much easier [on DREs] for a voter to look at their [sic] ballot to see all of their choices they have made throughout the voting process before casting the final ballot than it is on a punch card device.

Also with the DRE technology one way or another it advises, tells the voters the ballot they are about to cast and give them a message to ask if that is in fact the ballot they want to cast. Deposition of Walch (Exhibit 2a), p. 58.

There are scores of problems that have occurred throughout counties in Ohio using the "non-notice" equipment that are not due to any intentional error of the voter. See generally, Deposition of Heizer (Exhibit 3e); Deposition of Tuckerman (Exhibit 3a); Deposition of Wagner (Exhibit 3c), and Deposition of Stautberg (Exhibit 3d). The punch card balloting system has given rise to a common set of problems over the years, particularly in close elections. State and county election officials have reached the consistent conclusion that the punch card technology is faulty and the voting public no longer has confidence in it. The State of Ohio reported in its Help America Vote Act submission that:

The data shows [sic] 29 counties with the highest over/under vote percentage in the 2000 election were all counties that use the punch card method of voting. The seven counties with the lowest over/under vote percentage in the 2000 election were all counties that did not use punch cards as their primary voting system. HAVA Plan (Exhibit 7a), p. 16.

Election officials in Hamilton County have formally and repeatedly expressed concern that the punch card balloting system leads to disfranchisement of African-American voters in the City of Cincinnati. See Letters of Timothy Burke, Chairman of the Hamilton County Board of Election (Exhibit 7c). Furthermore, Dana Walch, Director of Election Reform for the Ohio Secretary of State's Office, stated:

It's been the belief of the Secretary and this office that there are better ways in which to do it. Punch card technology has served the State well in the past, but there are better ways to do this. And it's been a belief of this administration that it is time to move to new and more modern systems of voting equipment. Not only more reliable, they are more user friendly. They provide the options for voters, second chance options, and certainly options for the disability community also....

We believe there to be a lesser rate of voter error on DRE technology and other second chance technologies than there is with punch card technology....

There is research that has been done that has shown voter error higher on punch card devices than other forms of voting, yes.

Deposition of Walch (Exhibit 2a), pp. 57-58. There is simply no dispute among the parties to the fact that the non-notice technology leads to higher rates of residual ballots and that voters who are forced to use this inferior equipment face a statistically greater risk of their ballots being spoiled than voters in neighboring counties who vote on notice technology. See Deposition of Walch (Exhibit 2a), pp.56-59.

Despite the studies that counties and the state were conducting, even before the 2000 election, no relief has been implemented. The Plaintiffs therefore have brought this lawsuit against the State of Ohio and four counties for certifying and using voting equipment that deprives them of their constitutional right to have their votes counted.

Shortly after this lawsuit was filed, Congress passed the Help America Vote Act, which is intended to help states fund the transition from non-notice equipment to electronic machines. The State of Ohio has elected to participate in this plan and has stated that it wishes to replace all of its non-notice equipment with DREs. Section 101(a)(1)(B) of HAVA expressly permits the punch card system to be used in the future if modest steps for public education concerning its defects are undertaken. Funds authorized in HAVA for the current and upcoming fiscal years have not yet been appropriated, and even if full funding becomes available, there is no guarantee

that it will be sufficient to replace the punch card ballot in all of the 69 counties that currently use it. County Commissioners in several areas, including Montgomery and Warren Counties, have expressed concern that the move to replace the punch card balloting system amounts to an unfunded mandate. Plaintiffs asked a member of the Montgomery County Board of Elections whether Montgomery County had any financial obligations under HAVA who responded: “Personally, I have ran [sic] numbers. And I believe that our county’s out-of-pocket will be somewhere between two and two and a half million [dollars].” Deposition of Heizer (Exhibit 3e), pp. 23-24. Mr. Heizer then elaborated on the reasons Montgomery County could not implement actual notice technology in time for the March 2004 primary. *Id.*, pp. 23, 24, 102-103. In short, even assuming that federal funds are made available to Ohio counties, it is at best doubtful that those funds will be sufficient to replace the voting equipment challenged in this case.

Furthermore, Defendants have repeatedly stated that they will not upgrade the voting technology unless and until they receive money under HAVA. Beyond submitting a HAVA report and selecting replacement vendors, the State of Ohio has not given the Plaintiffs much hope that this matter will be resolved in the absence of litigation. Recently, the various branches of state government have bickered openly about whether the punch card system should be replaced. *See* Doc. 159, 160. In a letter to Ohio Senate President Doug White, Secretary of State J. Kenneth Blackwell asserted that the current impasse over the replacement of punch card equipment will delay electoral reform until after the 2004 election, and perhaps completely abort all reform efforts that are currently underway.

#### ARGUMENT

**I. THE CONTINUING USE OF ERROR-PRONE VOTING EQUIPMENT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY DEVALUING THE VOTES OF PLAINTIFFS AND OTHER CITIZENS WHO MUST USE THAT EQUIPMENT**

As the Supreme Court has both long and recently held, the right to vote is fundamental under our constitutional scheme. Inequalities in the mechanisms used to cast and count votes are anathema to the Fourteenth Amendment of the United States Constitution because, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” Bush v. Gore, 531 U.S. 98, 104 (2000); see also Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (recognizing that the right to vote is fundamental because it is “preservative of all rights”). The State of Ohio’s continuing use of error-prone voting systems in some of its counties contravenes this basic equal protection principle. As the state’s own evidence and admissions confirm, punch cards and other voting systems that lack error notification are substantially less reliable than other available systems, thereby undermining the public confidence upon which our democracy depends.

Worse still, the continuing use of unreliable voting machines is a recipe for an election-day disaster. As Defendant Blackwell recently acknowledged, the State of Ohio’s failure to replace the punch card as the state’s principal voting method “invites a Florida-like calamity.” Referring specifically to this litigation, Secretary Blackwell candidly admitted that the ongoing legislative foot-dragging in providing funds to upgrade Ohio’s voting system “proves only to support the plaintiff’s concerns that Ohio is not serious about [Help America Vote Act] implementation and will likely be used in support of a plaintiff’s motion to win immediate judgment.” See Letter of J. Kenneth Blackwell to Honorable Doug White, p. 3 (Doc. 159). Yet despite the admitted inadequacy of Ohio’s existing voting systems and the pendency of this

litigation, the state has still failed to allocate the funds needed to replace them in time for the 2004 elections.

**A. The Equal Protection Clause Does Not Tolerate Election Practices That Devalue the Votes of Some Citizens Compared to Others Based Upon Their Place of Residence.**

Plaintiffs' equal protection claim is simple: the simultaneous use of defective voting machines in some counties, while far more accurate systems are used in other counties, denies equal protection by denying some votes and impermissibly diluting the voting strength of voters compelled to utilize machinery that fails to satisfy minimal criteria for accuracy and reliability. The votes of some voters, those not counted, are absolutely denied. Persons who vote in those precincts cannot even tell if their votes are among those denied, but the evidence is undisputed that the votes of many are in fact denied. Whether an individual's vote is counted is a matter of completely arbitrary happenstance, and "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." Shelley v. Kraemer, 334 U.S. 1, 22 (1948). As the Court explained in Bush v. Gore: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Bush, 531 U.S. at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)). Further, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." Id. at 107 (quoting Moore v. Ogilvie, 394 U.S. 814, 819 (1969)). In Bush, the Court applied this equal protection principle to hold unconstitutional a manual recount that was being conducted without sufficiently clear and definite standards to ensure equal treatment. Id. at 106. What was necessary in order to satisfy the requirements of equal protection were "specific rules designed to ensure *uniform treatment*" of voters in different counties. Id. (emphasis added).

The principle of voting equality upon which Bush relies is beyond dispute. The Supreme Court has long held that: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” Wesberry v. Sanders, 376 U.S. at 17. It is also settled law that at the core of the fundamental right to vote is “the right of qualified voters within a state to cast their ballots *and have them counted.*” United States v. Classic, 313 U.S. 299, 315 (1941) (emphasis added); Shelley v. Kraemer, 334 U.S. at 22 (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”).

In holding that Florida’s vote-counting method violated equal protection, the Court explicitly based its decision on equal protection doctrine developed in earlier cases requiring equal weight to each vote and equal dignity to each voter. Id. at 104, 107 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966), Reynolds v. Sims, 377 U.S. 533, 555 (1964), Gray v. Sanders, 372 U.S. 368 (1962), and Moore v. Ogilvie, 394 U.S. 814 (1969)). In each of these cases, the weight of a citizen’s votes impermissibly turned on his or her place of residence. For example, in Reynolds, the Court struck down a legislative apportionment scheme that gave some voters less representation than others, solely based on the jurisdiction within which they lived. The Court held that “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment.” 377 U.S. at 566; see also Moore v. Ogilvie, 394 U.S. at 818-819 (striking down apportionment plan that gave greater voting strength to rural counties than to urban counties).

This line of cases establishes that inequalities in the realm of voting – particularly those that accord greater weight to voters in some counties compared with others – are subject to heightened constitutional scrutiny. It is, of course, hornbook law that strict scrutiny is the proper standard for assessing state action that impairs the exercise of fundamental rights, such as the right to vote. See Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988); see also, Idaho Coalition United for Bears v. Cenarrussa, 342 F.3d 1073 (9th Cir. 2003)(applying strict scrutiny to state’s regulation of election process). As the Court stated in Harper: “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement must be carefully and meticulously scrutinized.” Harper, 383 U.S. at 667; see also Reynolds, 377 U.S. at 562 (“any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”). Practices that deny electoral equality may therefore be upheld only if narrowly tailored to serve a compelling state interest.

In the wake of Bush, two federal courts have relied upon its equal protection analysis to uphold challenges to the use of voting systems with disparate error rates. In Black v. McGuffage, 209 F. Supp.2d 889 (N.D. Ill. 2002), the court denied a motion to dismiss an equal protection claim brought by Illinois voters, challenging the state’s continuing use of punch cards and other systems lacking error notification. The court reasoned that “[s]imilarly situated persons are treated differently in an arbitrary manner,” due to the use of different systems in different jurisdictions. Id. at 899. As in Bush and its predecessor cases, such disparities “value[d] one person’s vote over that of another.” Id. (quoting Bush, 531 U.S. at 104-05). Even in the absence of a suspect classification or invidious discrimination, the alleged inequalities amounted to an equal protection

violation. Likewise, in Common Cause v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001), the court considered an equal protection claim based on the use of unreliable punch card voting systems in some counties but not others. Regardless of the applicable level of scrutiny, the alleged disparities in voting equipment indicated “unreasonable and discriminatory treatment” sufficient to state an equal protection claim. Id. at 1109-10; see also, Southwest Voter Registration Education Project v. Shelley, 344 F.3d 882, 899-901 (9th Cir. 2003) (noting that strict scrutiny is generally applied to deprivations of the right to have one’s vote counted, but that plaintiffs were likely to prevail on the merits “regardless of the standard of review.”).<sup>2</sup>

**B. The Continuing Use of Punch Card Voting and Other Systems Without Error Notification Violates Equal Protection by Denying and Devaluing the Votes of Citizens in Counties That Still Use Those Systems.**

Plaintiffs’ equal protection showing is far stronger than the showing advanced in Bush v. Gore, and that alleged in either Common Cause or Black v. McGuffage. In fact, Defendants’ own election results – not to mention the admissions of Secretary of State Blackwell – demonstrate a statistically substantial disparity in error rates among the voting technologies used in Ohio. Punch card voting systems, used by 70 of 88 counties in the 2000 presidential election,<sup>3</sup> fared particularly badly, resulting in a significantly greater percentage of lost votes than any other system used in the state. The claimed disparities in Bush v. Gore, principally involving non-uniform standards for the hand-counting of undervotes, were speculative by comparison, though the undergirding of that

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<sup>2</sup> The three-judge court’s opinion in Southwest Voter was later reversed by the en banc Ninth Circuit, which affirmed the district court’s denial of a preliminary injunction postponing the California recall election. 344 F.3d 914 (9th Cir. 2003) (en banc). The en banc court relied on the hardship to the State of California that would result from enjoining an election that had “already begun,” something that is not at issue in this case, and did not address the standard of review for constitutional challenges to state election practices.

decision was, as here, the differential “opportunity to have [one’s] vote count.” 531 U.S. at 108. Even more clearly than in Bush, the non-uniformity of the state’s voting system results in the debasement of the votes of citizens in some counties compared to others.

Of particular note in this regard is the deposition testimony of Dana Walch, who currently serves as Defendant Blackwell’s Director of Election Reform. In his deposition, Mr. Walch candidly acknowledged that punch card equipment is significantly less reliable – more prone to error – than are other kinds of equipment. For example, Mr. Walch testified that “[w]e believe that there [is] a lesser rate of voter error on the DRE technology and other second chance technologies than there is with punch card technology.” Deposition of Walch (Exhibit 2a), pp. 46-47. In response to the question of whether “there are a substantially higher number of under and over votes cast on punch card equipment,” Mr. Walch conceded that “[t]here is research that has been done that has shown voter error higher on punch card devices than on other forms of voting, yes.” Id., p. 47. And Mr. Walch, who is one of the Defendants’ chief advisors on election reform, went on to describe a number of ways in which he believed DRE technology to be superior to punch card technology in terms of reducing voter error. Id., pp. 48- 51. And, importantly, Walch conceded that “the most likely source” of residual voting on punch card equipment is not attributable to voter intent, but rather to problems with the punch card machines themselves. Id., p. 52. Walch also conceded that restoration of voter confidence in Ohio depended on the “replace[ment] of punch card technology.” Id., p. 55.

Defendant Blackwell has admitted the deficiencies in Ohio’s existing voting system. In the State of Ohio’s Preliminary State Plan for Implementing the Help

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<sup>3</sup> In the 2000 general election, 70 counties used punch cards. By the 2002 general election, one county (Mahoning) moved from punch cards to electronic technology. The State HAVA Report uses 2002 data, which shows only 69 counties using punch cards still.

America Vote Act ("HAVA Plan"), submitted to federal authorities on June 16, 2003, Secretary Blackwell acknowledged that: "In a study of 'over' and 'under' voting in Ohio, it was clearly demonstrated that punch card voting was unreliable to the extent votes cast by thousands of Ohioans were not being counted in the final election tabulation." HAVA Plan, p. 14. In particular, Secretary Blackwell notes:

The data shows 29 counties with the highest over/under vote percentage in the 2000 election were all counties that use the punch card method of voting. The seven counties with the lower over/under vote percentage in the 2000 election were all counties that did not use punch cards as their primary voting system.

Id., p. 16.

The statistics collected by the Secretary of State's office, regarding residual vote rates in the 2000 presidential election, bear out Mr. Blackwell's admission that punch card voting systems result in a significantly larger numbers of lost votes than other voting systems. As set forth above, the four types of voting equipment used in Ohio's 2000 presidential election were punch card systems (used by 69 counties), optical scan systems (used by ten counties), electronic systems (used by six counties), and mechanical lever systems (used by two counties). Punch cards had a combined residual vote rate of 2.3%, significantly higher than that of optical scan (1.7%), electronic (0.7%), and lever (0.5%) voting systems. In view of these disparities, it cannot reasonably be said that Ohio's election system affords voters the "uniform treatment" that is required when the franchise is at stake. Bush, 505 U.S. at 106; id. at 105, 107 (citing cases).

The higher rate of residual votes for punch cards in Ohio is consistent with the performance of punch cards gathered from throughout the country. As set forth in the expert report of Roy Saltman, studies of Massachusetts, Maryland, Michigan, Florida, and California elections have all demonstrated that punch card systems result in

substantially more residual votes than other voting systems. Saltman Report, pp. 9-15. These states have all either wholly or substantially replaced their punch card machines with more reliable voting systems. As Saltman explains, a “fundamental defect” with the punch card voting system is that it is difficult for voters to use. *Id.*, p. 2. This “human factors problem,” as he calls it, “cannot be fixed by engineering or management changes and requires that use of this system be abandoned.” *Id.*

Of course, not all residual votes are *unintentional* non-votes. At least some of the residual votes reflected in the above statistics reflect voters who deliberately chose not to cast a vote in the 2000 presidential elections. In order to ascertain the percentage of unvoted ballots that are inadvertent (*i.e.*, where the voter attempted to cast a vote, but failed to do so), Plaintiffs have introduced the report of Dr. Martha Kropf. In her report, Dr. Kropf sets forth the results of her research into how often voters intentionally chose not to cast votes for President. Because it is not possible to distinguish accidental from intentional undervotes simply by looking at the ballot or analyzing county-level data, “[v]oter self-reports represent the only systematic way to estimate the incidence of intentional voting.” Kropf Report ¶ 7. Based on survey data collected by National Election Studies (“NES”), Dr. Kropf found that for the *presidential* elections between 1980 and 2000, an average of 0.73% of voters intentionally chose not to vote. For the 2000 election, the number of those who intentionally chose not to vote was 0.34%. *Id.* ¶ 8. Based on data showing that approximately 2% of votes were invalidated in the 2000 election, Dr. Kropf concludes that “the majority of invalidated votes are due to accidental undervoting and overvoting.” *Id.* ¶ 11.

By subtracting intentional undervotes from the total of unvoted ballots, the percentage of voters who *unintentionally* cast non-votes can be estimated. The chart

below shows the percentage of residual votes, and the percentage of unintentional non-votes in Ohio's 2000 presidential election, based on the intentional undervote estimate provided by Dr. Kropf:

**Ohio – 2000 Presidential Election**

Type of Voting Equipment	Non-Vote Rate	Unintentional Non-Vote Rate
Punch Card	2.3%	2.0%
Votomatic Punch Card	2.3%	2.0%
Datavote Punch Card	2.9%	2.6%
Optical Scan	1.7%	1.4%
Electronic	0.7%	0.4%
Lever	0.5%	0.2%

As these statistics demonstrate, the use of punch card voting systems is much more likely to lead to unintentional non-votes than any of the other voting systems used in Ohio, and Defendants cannot seriously deny that there is discrimination against voters in counties using punch card voting. An Ohio citizen voting for president using a punch card voting machine is over 40% more likely not to have his vote counted, compared to a citizen using an optical scan machine. The discrepancy between punch card and electronic voting systems is even more severe: a punch card voter, voting for president, is over *five times more likely* not to have his or her vote counted than a citizen using an electronic voting machine.

The discrimination arising from the increased likelihood that their votes cast might never be counted, on the basis of nothing more than the serendipity of geography and the accident of timing, cannot, from a constitutional point of view, be considered anything other than arbitrary and irrational. Accordingly, and in light of Common Cause

and Black v. McGuffage, the arbitrary discrimination against voters in Ohio's punch card counties cannot survive even the most lenient review. The “significantly different probabilit[y] of having their votes counted” violates the Equal Protection Clause, regardless of the level of scrutiny applied. 209 F. Supp. 2d at 897-99.

**C. John Lott's Report Does Not Create a Triable Issue of Fact as to the Unreliability of Punch Card Voting.**

Faced with the undisputed fact that punch card voting machines result in a significantly higher rate of overvotes and undervotes than any other voting system in presidential elections, Defendants attempt to create a factual issue on a point that is not only immaterial, but that they still get wrong. Dr. John Lott, the Defendants' expert, argues that the residual vote rates differ when down ticket races are compared to presidential races. But Lott and the Defendants make several glaring mistakes.

First, they treat undervoting the same whether it occurs in an uncontested race or a hotly contested race. Unlike presidential and U.S. Senate races, these "down ticket" races are not statewide and therefore vary throughout the state – a fact which Lott admits. Deposition of Lott (Exhibit 6b), p. 170. Aggregating unweighted data from the 1992, 1996 and 2000 presidential elections, Lott finds that the residual vote rate for Votomatic punch card machines was 2.4%, and the residual vote rate for Datavote punch card machines was 3.49%. By contrast, electronic voting machines had a residual vote rate of 1.0%, lever machines a rate of 1.43%, and optical scan systems a rate of 2.01%. Dr. Lott's report asserts, however, that punch card ballots actually result in *fewer* residual votes than some other voting systems. Dr. Lott admits that optical scan systems do better than punch cards on U.S. Senate, U.S. House, and State House races, but asserts that

electronic and lever machines have a higher residual vote rate than punch cards on down-ticket races.

A careful review of Lott's data and the state's election results belies the conclusions that Defendants are most likely to ask this Court to draw from his report. In reality, Dr. Lott's statistics tell us nothing about the reliability of punch card systems, as compared to the other systems used in the State of Ohio. That is because Dr. Lott's report contains no analysis of how many non-votes in down-ticket races are *intentional*. A substantial but unstated number of voters intentionally choose not to cast a ballot on down-ticket races. Without providing an estimate of the baseline number of voters who intentionally undervote on down-ticket races -- as Plaintiffs have done with respect to the presidential race -- Dr. Lott's statistical information is meaningless. Without information on whether his residual vote rates reflect accidental as opposed to intentional non-votes, his report provides no information about how reliably the various voting systems reflect voter intent.

Dr. Lott uses races toward the bottom of the ballot for U.S. House, State Senate, and State House, which are particularly meaningless for comparison purposes. Voters throughout the State of Ohio are voting for different candidates in different parts of the state in those elections. Some of these races were competitive, while some of these races involved candidates running unopposed. Some of these races received significant attention in local media, while others received virtually none. In fact, Dr. Lott himself admitted in his deposition that different races will have "different candidates and ... different closeness of races and sometimes you have people running unopposed." Deposition of Lott (Exhibit 6b), p. 170. The rate of nonvoted ballots, he further admitted, "is much higher, hugely higher when you have only one person running." *Id.*, p. 153. In

short, there are a wide variety of factors that affect whether voters choose to vote for candidates in various races for down-ticket offices throughout the state. Yet Dr. Lott's report provides *no information whatsoever* about the various factors that may affect the choice whether to vote in a particular down-ticket race. Given that Ohioans were voting for different races in different parts of the state in these lower-level elections, Lott's attempt at statewide comparisons on lower-level races attempts to average apples and oranges.

The U.S. Senate race, of course, is the only contest other than the presidential race in which voters would be choosing between the same candidates throughout the state. Dr. Lott's report paints an extremely misleading picture of the Senate races, one that his own data belie. Aggregating unweighted data from 1992 and 2000, Dr. Lott asserts that the residual vote rate for Votomatic punch card machines (5.47%) is higher than that of optical scan systems (4.88%) but lower than that of electronic voting machines (6.29%).<sup>4</sup> Looking at 1992 data, however, does not provide an accurate picture of the *current* reality of Ohio's voting equipment. It does not reflect the machines that are currently in use in Ohio, much less the present-day performance of those machines.

If one looks at the data from 2000 -- a much more reliable indicator of the current performance of Ohio's voting machines -- a very different picture emerges from the one that Dr. Lott attempts to paint. The state's own data show that punch card machines actually did *significantly worse than* either electronic or optical scan voting systems in the 2000 Ohio senatorial contest, just as in the presidential contest:

**Ohio – 2000 Presidential and Senatorial Elections (Weighted by Population)**

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<sup>4</sup> There was no senatorial race in 1996, as stated in Table 2 of Lott's report (Exhibit 6a). Accordingly, the statistics he reports can only be from the 1992 and 2000 senatorial race.

Type of Voting Equipment	Number of Ballots Cast	President Non-Vote Rate (with Number of Non-Voted Ballots)	U.S. Senate Non-Vote Rate (with Number of Non-Voted Ballots)
Punch Card	3,593,958	2.3%(81,767)	7.6% (274,801)
Votomatic	3,555,712	2.3%(80,639)	7.7%(272,173)
Datavote	38,246	2.9%(1,128)	6.9% (2,628)
Optical Scan	492,102	1.7%(8,264)	5.2%(25,627)
Electronic	537,474	0.7%(3,564)	6.1%(32,962)
Lever	176,467	0.5%(825)	8.2%(14,445)

Declaration of Dr. Martha Kropf (Exhibit 7b), p. 4.

As this chart shows, both types of punch card voting machines had higher residual vote rates than either optical scan or electronic voting systems in the 2000 U.S. Senate race, as in the presidential race. Based on the 2000 election data provided by the Secretary of State's office, then, it is simply *not* the case that punch cards result in fewer residual votes than electronic or optical scan voting equipment. The State's *own data contradict* the conclusion that Dr. Lott's report would have this Court draw.

Although the 1992 senatorial results tell us nothing about the current performance of Ohio's voting equipment, even if one believed these twelve-year old results to be relevant, there is an even more fundamental flaw in Dr. Lott's reported data. Instead of taking the statewide residual vote rate, Dr. Lott has averaged the unweighted mean percentage of non-votes among *wards* in each county. The result of this flawed methodology is to give smaller wards weight disproportionate to their size. If, however, the statewide residual vote for each system is examined, weighted for *population*, then *Lott's own data* paint a very different picture for the 1992 and 2000 senatorial races from the conclusion stated in his report:

**Ohio – 1992, 1996 and 2000 Elections Combined (Weighted by Population)**

Type of Voting Equipment	President Non-Vote Rate (1992, 1996 and 2000)	Senate Non-Vote Rate (1992 and 2000)
Punch Card	2.29 %	5.89%
Votomatic	2.27%	5.90%
Datavote	3.13%	5.47%
Optical Scan	2.05%	4.37%
Electronic	0.94%	6.13%
Lever	1.04%	7.32%

Declaration of Dr. Martha Kropf (Exhibit 7b), p. 5.

Based on Lott's own data, it is clear that optical scans have lower residual vote rates than both Votomatic and Datavote punch card machines. Furthermore, the performance of electronic equipment in the U.S. Senate races, the only down-ballot contests that conceivably *could* have any significance, is substantially equivalent to that of punch cards, even when the 1992 results are included. Plaintiffs take no position on whether electronic technology or optical scan with error notification represents the best form of “actual notice” voting equipment, and leave it to Defendants to determine which type of replacement system should be implemented statewide. But when it comes to a comparison of the overall performance of punch card and non-punch card technology, reasonable minds can draw only one conclusion from the evidence: that punch cards result in higher rates of non-voted ballots than all other forms of voting technology.

In sum, Dr. Lott has mischaracterized his data to present a misleading picture of the performance of Ohio's voting machines. A careful examination of his report, in light of the data on which it is based, belies his suggestion that punch cards do better than other equipment in down-ballot races. For the only down-ballot race that could even

arguably provide meaningful statistics on the performance of Ohio's *current* systems -- the 2000 race for U.S. Senate -- punch cards do *worse* than either electronic or optical scan voting systems. Lott's report therefore does *nothing to create a triable issue of fact on the equal protection question before this Court*: Does the continued use of punch card voting systems devalue the votes of citizens in counties that continue to use this equipment? The answer to this question, based upon the Secretary of State's own data as well as that provided by Dr. Lott, is "yes."

**II. THE CONTINUING USE OF ERROR-PRONE VOTING EQUIPMENT DEPRIVES OHIO VOTERS OF THE OPPORTUNITY TO HAVE THEIR VOTES COUNTED WITHOUT ANY RATIONAL JUSTIFICATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

The Defendants 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. See Deposition of Saltman (Exhibit 5c), pp. 14-26, 33-34; see generally Asher Report (Exhibit 4i). Indeed, Ms. Peg Rosenfield, a representative of the Ohio Secretary of State's Office, collaborated with Dr. Asher on a 1982 study that demonstrated the extent to which punch card voting equipment was prone to error. See Asher Report (Exhibit 4i), p. 2, n.1; Deposition of Asher (Exhibit 5e), p. 18 (identifying Peg Rosenfield as co-author of 1982 Report.). And yet, prior to the 2000 presidential election, neither the Defendants nor any other state official made any serious effort to either correct the problems associated with punch card equipment or replace that equipment with other, less error-prone voting equipment.

The Due Process Clause of the Fourteenth Amendment prohibits the government from enacting and enforcing regulations that are either arbitrary or capricious, or that

have no rational relationship to a legitimate governmental interest. In the voting context, as the Court noted in Bush v. Gore, 531 U.S. at 105, the Constitution embodies a “minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.” Courts are even more demanding when the “liberty” interest subject to regulation is fundamental in the constitutional sense, and, as Plaintiffs have noted above, courts have consistently viewed the right to vote as fundamental.

Black v. McGuffage provides a template for the adjudication of the due process claim in this case. In Black, the court addressed an Illinois voting system that, much like Ohio’s, relied extensively on punch card equipment that produces significant numbers of residual votes. Noting that “the right of suffrage is a fundamental matter in a free and democratic society,” 209 F. Supp. 2d at 900, the court concluded that a system for registering and tabulating votes that resulted in a situation where “the votes cast in some districts will have a significantly greater chance of being counted than votes cast in neighboring election districts” would be “irrational” and would give rise to a due process violation. Id. at 900-901.

This, of course, is the precise situation presented in this case. As Plaintiffs’ evidence shows and as many of the Defendants and other state election officials have conceded, see, e.g. Deposition of Walch (Exhibit 2a), p. 47-55, the Defendants have created, maintained, and operated a system that largely has relied upon the use of punch card voting equipment that they have long known would subject citizens who are required to use that equipment – including voters who live in Montgomery, Hamilton, and Summit Counties – to a significant and unreasonably great risk that their votes would not be counted. Under any standard of review, such a system does not relate to any legitimate government interest and is irrational under the Due Process Clause.

**III. THE DEFENDANTS VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT BY CERTIFYING AND USING EQUIPMENT THAT DISPROPORTIONATELY REJECTS BALLOTS OF AFRICAN AMERICAN VOTERS WITHIN SUMMIT, HAMILTON AND MONTGOMERY COUNTIES.**

Compounding the geographical inequities that violate the Fourteenth Amendment is clear, undisputed and troubling evidence that punch card systems disfranchise African American voters in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. The recent Section 2 challenges in other states to non-notice technology proceeded under two different but equally legitimate arguments: (1) that African American voters are more likely than white voters to use punch cards; and (2) within these punch card counties, African American voters have more of their ballots spoiled due to residual ballots than white voters. This case only proceeds on the second type of claim: within counties that employ punch card systems, African Americans using punch card technology are approximately *six to eight times more likely* than their white counterparts to have their ballots thrown out because of overvoting. See Engstrom Report (Exhibit 4n), Table 3. Such disfranchisement violates Section 2. Therefore, the African American plaintiffs<sup>5</sup> claim that Summit, Hamilton and Montgomery Counties each have violated their rights by conducting elections using equipment that denies them their right to have their ballots counted. Additionally, they charge the State for its role in certifying such equipment and continuing to allow the counties to use this equipment with the knowledge that other forms of technology will remedy the disparities that violate Section 2.

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<sup>5</sup> As members of the protected class of electors under Section 2, the African American plaintiffs include: Effie Stewart and Marco Summerville of Summit County, Vernelia Randall of Montgomery County; and Arthur Slater of Hamilton County. They assert their individual claims against the state and their respective counties and have moved this court to name them as class representatives for the class of African American

**A. Section 2 of the Voting Rights Act Prohibits Election Practices that Have a Discriminatory Impact, by Denying or Diluting the Votes of a Racial Group.**

As the Supreme Court has explained, Section 2 prohibits "any...practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities." Thornburg v. Gingles, 478 U.S. 30, 43 (1986) (emphasis in the original). Section 2 of the Voting Rights Act provides in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color  
...

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or participation by members of a class of citizens protected by subsection (a) of this section 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 (emphasis supplied).

The Voting Rights Act is a congressional directive for the immediate removal of all barriers to equal participation by racial minorities in the political process. When it adopted the stringent remedial provisions of the Act in 1965, Congress cited the "insidious and pervasive evil" of discrimination in voting and acted "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 309, 328 (1966). In the legislative history of the 1965 Act, as well as the 1970, 1975 and 1982 extensions, Congress repeatedly expressed

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voters in the state of Ohio who cast their ballots on non-notice voting technology. This class certification motion is still pending.

its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" NAACP v. New York, 413 U.S. 345, 354 (1973), quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965); see also S.Rep. No. 417, 1982 U.S. Code Cong. & Adm. News 182 ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"). As the Court held in Briscoe v. Bell, 432 U.S. 404, 410 (1977), the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination *with all possible speed*." (emphasis added).

To prevail under this statute, plaintiffs need not establish that the state or three defendant counties acted with a discriminatory purpose; it suffices to prove that the contested standard, practice, or procedure has a discriminatory effect. Bush v. Vera, 517 U.S. 952, 976 (1996); Gingles, 478 U.S. at 35-36. "[T]wo types of discriminatory practices and procedures are covered under Section 2: those that result in 'vote denial' and those that result in 'vote dilution.'" Burton v. City of Belle Glade, 178 F.3d 1175, 1196 (11th Cir. 1999). "Vote denial" occurs when a state "employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race." Id., at 1197-98. A vote denial claim challenges a voting practice that actually prevents minority voters from casting ballots or having their votes counted. See Reynolds v. Sims, 377 U.S. at 555 n.29 ("The right to vote includes the right to have the ballot counted."). By contrast, "vote dilution" occurs where, despite the ability of all citizens to vote and have their votes counted, "an election practice results in the dilution of minority voting strength and, thus, impairs a minority's ability to elect the representative of its choice." Burton, 178 F.3d at 1198; see also Reynolds, 377 U.S. at 555, n.29. ("[The right to vote]

also includes the right to have the vote counted at full value without dilution or discount." ). In vote dilution cases, minority voters can actually cast ballots and have those ballots counted. The harm addressed there is the weakening or dilution of the voting strength if the minority community's votes have been submerged into a predominately white multi-member district or if all representatives are elected at large. See, e.g., Thornburg v. Gingles.

Vote denial does not focus on the minority community's relative voting strength in the presence of a majority white district; rather these cases focus exclusively on the minority community's access to the polls, the ability to cast ballots, and – crucial to this litigation – the ability to have their ballots counted.<sup>6</sup> Regardless of the type of claim brought under Section 2, it is well established that a violation of the statute may be shown by proof of racial effects alone. Thornburg v. Gingles, 478 U.S. at 43-4 & n.8.

Plaintiffs prevail on a claim of vote denial by demonstrating that a practice or procedure – such as the certification and implementation of non-notice election equipment – results in members of the minority community not being able to cast a ballot or not having those ballots counted. Section 2 reaches electoral practices that deny minority voters an equal opportunity to participate in any phase of the political process, even if the challenged practice is episodic and did not affect the outcome of an election. In Harris v. Graddick, 593 F. Supp. 128, 132 (M.D. Ala. 1984), the court enjoined county

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<sup>6</sup> The Supreme Court has only decided two cases that directly applied Section 2. In Gingles, the Supreme Court applied Section 2 to "a claim of *vote dilution through submergence in multimember districts*": (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district; (2) the minority group must be able to show that it is politically cohesive"; and (3) "the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority's preferred candidate." 478 U.S. at 48-51. The Court held that if these circumstances do not exist, the "dilution" of the group's voting strength "cannot be responsible for minority voters' inability to elect [their preferred] candidate. Id. at 50. However, the Gingles factors, which are widely employed in vote dilution cases, are not the appropriate standard for vote

officials in Alabama from failing to appoint blacks as poll workers. According to the Court, "section 2 is violated if the result of a practice is that minorities cannot participate in the electoral process on the same terms and to the same extent as non-minority voters." Accord, Harris v. Siegelman, 695 F. Supp. 517 (M.D. Ala. 1988); Goodloe v. Madison County Bd. of Election Comm'rs, 610 F. Supp. 240, 242 (S.D. Miss. 1985) (giving erroneous instructions to minority voters). "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 circumstances, that the challenged voting practice results in discrimination on account of race." Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003) (emphasis added). Another federal court, addressing fact patterns virtually identical to those at bar, held that plaintiffs have stated a claim under Section 2. Black v. McGuffage, 209 F.Supp. 2d at 897 (minority plaintiffs who alleged that punch card machines disproportionately undervalued their vote "state a claim" for a violation of Section 2).

**B. The Evidence in This Case Shows That Punch Cards and Other Systems That Lack Error Notification Result in the Disproportionate Denial of African Americans' Votes in Violation of the Voting Rights Act.**

The Plaintiffs allege that the State of Ohio and the Counties of Montgomery, Summit, and Hamilton have violated their rights under Section 2 by certifying, purchasing and utilizing non-notice voting technology that causes the ballots of minority voters within their respective counties to be rejected due to overvoting. The precincts within the Defendant Counties where the highest percentages of residual voting, and specifically overvoting, occurred were areas whose population is overwhelmingly African American. The punch card ballot without error notification has had a

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denial cases. Voinovich v. Quilter, 507 U.S. 146, 158 (1993) ("the Gingles factors cannot be applied mechanically and without regard to the nature of the claim").

disproportionate effect on African American voters in the Defendant Counties in that such voters are at a statistically greater risk of casting overvotes than are white voters. As discussed below, the net effect is that African American voters, specifically in Summit, Hamilton and Montgomery Counties, suffer a greater risk of being absolutely deprived of their right to vote.

The State Defendants and these Defendant Counties were aware of the disparities within these counties prior to this litigation. One of plaintiffs' experts, Dr. Herbert Asher, has been studying this very concern in the State of Ohio for a few decades. In his report he states:

We have known for a long time that there are problems with punch card voting in Ohio, the most serious one being that thousands of voters invalidate their votes through mistakes that can occur with punch card voting, the key mistake being overvoting. With other kinds of voting systems, such mistakes cannot occur (mechanical voting machines, electronic voting machines, touch screen voting machines) or they are easily remedied (optical scan with a second chance). We also know that the harmful effects of punch card voting are not distributed uniformly across the entire population; instead, they disproportionately affect citizens who are black, poor and of lower education. Given that Ohio witnessed serious problems with punch card voting back in 1978, it is regrettable that it took the 2000 fiasco in Florida to get the issue of voting system reform on the agenda. Now that the issue is on the agenda, it is time to move forward with the replacement of punch card voting. Expert Asher Report (Exhibit 4i), p. 4.

Two of the Defendant Counties, Summit and Hamilton, have kept evidence of overvoting and undervoting in the 2000 election. That evidence shows where the greatest rates of residual ballots were cast and that the punch card equipment in those counties produces racially discriminatory results. See generally, Expert Report and Deposition of Salling (Exhibits 4f, 5d). Election officials in Hamilton County have formally and repeatedly expressed concern that the punch card balloting system leads to disfranchisement of

voters in predominantly African American precincts. In 1999, the City of Cincinnati used punch cards to conduct an election for nine members of City Council. Voters were asked to select nine candidates, but if they voted for more than nine, the ballots in this contest were discarded as overvotes.

In fact, the residual ballot problem was so apparent and troublesome that the Director of the Hamilton County Board of Elections wrote several letters to his colleagues and members of the Ohio Congressional delegation. See Letters from Timothy Burke, Chairman of the Hamilton County Board of Election (Exhibit 7c), he wrote:

In the 2000 presidential election, almost 3,000 Hamilton County voters cast more than one vote for president. The actual figure was 2,916 out of 384,336. In the 1999 City Council election, the over vote problem was even more dramatic. 1,534 of 68,446 voters (2.24%) cast votes for more than nine candidates, and, therefore, lost their votes entirely for the City Council election. ... In the 1999 City Council election, in the City of Cincinnati, 23 of the 25 precincts with the most over-votes, came in what appear to be minority precincts (3 in Madisonville, 2 in Evanston, 5 in Bond Hill, 3 in Roselawn, 2 in Avondale, one in Kennedy Heights, one in Lower Clifton, one in the West End, 4 in College Hill, and one in Venetian Terrace.

The report of Plaintiffs' expert, Dr. Richard Engstrom (Exhibit 4n), provides empirical support for these allegations for the 2000 Presidential Election, not only in the context of overvotes in Hamilton County, but also for overvotes in Summit County, and all residual ballots in Montgomery County. Dr. Engstrom employs a statistical procedure, routine in Section 2 cases, that provides estimates of individual level behavior from aggregate data in the form of the percentage of overvotes or undervotes in a given precinct. He uses three different methods to do this: homogeneous precinct analysis, ecological regression, and ecological inference. All three of these methods are widely

used to examine racial differences in voting behavior, although ecological regression and homogeneous precinct analysis are the two that have been approved and most widely employed by federal courts for use in voting rights cases. See Appendix 7d (discussing the many courts that have relied upon bivariate ecological regression analysis ("ecological regression") and homogeneous precinct analysis in Section 2 cases). While soundly based in statistical theory, these three techniques are sophisticated versions of post-election analysis. Each looks at precincts with a specific demographic characteristic – in this case precincts where significant numbers of African Americans live – and observe what took place during the election.<sup>7</sup>

Dr. Engstrom presents estimates for overvoting by race in Hamilton and Summit Counties using all three of the methodologies outlined above.<sup>8</sup> See Engstrom Report (Exhibit 4n), p. 6. His conclusions take the form of differences between estimated percentages of African American and Non-African American overvotes. These results are summarized in Table Three from his report.

**Table Three: Differences between African American and Non-African American Overvote Percentages in Hamilton and Summit Counties**

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<sup>7</sup> A brief review of each method may be helpful. The first method, homogenous precinct or extreme case analysis, is a confirmatory technique that looks at how votes were cast in nearly all white or all black precincts. Customarily, precincts having more than 90 % black or white turnout are used. A determination can be made of how members of a particular race voted in each precinct from the election returns for the precinct. One of the most useful aspects of the homogeneous precinct analysis is that it is intuitively easy to understand and ascertain the results. It does not utilize any inference generated by statistics.

The second method, ecological regression, has been approved for use in voting rights cases by the Supreme Court. Thornburg v. Gingles, *supra*. By looking at all of the precincts in a county or other jurisdiction, ecological regression can detect if there is a relationship between the number of residual votes and the racial composition of the precinct. If there is a relationship, this method is able to produce an estimate of the percentage of white and black voters whose ballots contained residual votes.

The third method, ecological inference, is a more recent technique developed by Professor Gary King of Harvard University. The ecological inference technique estimates voter behavior by calculating minimum and maximum values of the percentage of blacks or whites who engaged in the behavior under study. These estimates are derived by taking hundreds of samples from each precinct and calculating confidence intervals to more accurately estimate the voting behavior in question.

<sup>8</sup> These two counties reported overvote separately from undervotes.

**Hamilton County      Difference Between AA and Non-AA Overvote %s**

<b>Ecological Inference</b>	<b>2.05%</b>
<b>Ecological Regression</b>	<b>2.31%</b>
<b>Homogeneous Precincts</b>	<b>2.61%</b>

**Summit County      Difference Between AA and Non-AA Overvote %s**

<b>Ecological Inference</b>	<b>4.53%</b>
<b>Ecological Regression</b>	<b>2.49%</b>
<b>Homogeneous Precincts</b>	<b>2.43%</b>

Dr. Engstrom also compared occurrences of residual ballots cast on punch cards in Montgomery, Summit and Hamilton Counties to Franklin County which currently uses touchscreens. It is noteworthy that the demographic characteristics of each of these counties are substantially similar. See Report of Dr. Engstrom (Exhibit 4n) at ¶6. Furthermore, Dr. Engstrom studied the rates of residual ballots and, in the case of Summit and Hamilton Counties, the rates of overvotes cast for the 2000 Presidential contest. Montgomery County only reported data that combined both types of residual ballots.

Comparing these counties to Franklin shows that: (1) there are stark disparities in the residual ballot rates for African American voters between punch card counties and a county that uses technology that prohibits overvoting and warns voters if they undervote; and (2) that the racial differences in undervoting found within each county would be reduced and the racial differences in overvoting would be eliminated if voters used notice technology to cast their ballots. In all cases, Dr. Engstrom finds that overvoting by African Americans in Summit and Hamilton counties is at least five times as high as that of non-African Americans. Based upon his thorough, reliable, and court-accepted methodology, Dr. Engstrom concludes:

The use of voting equipment that does not provide voters notice of errors, and a chance to correct their ballots to eliminate errors, as is the case with the punch card systems in Hamilton, Montgomery, and Summit Counties, results in larger racial differences in over and/or under voting than do systems that provide such notice and opportunity, such as the electronic voting systems used in Franklin County. The counties using punch cards, which are not counted at the precincts but rather at a different location, have larger racial differences in over and/or undervotes than present in the county using electronic voting machines. This is clearest in Summit and Montgomery Counties, which have larger racial differences in over and/or undervotes than does Franklin County. It is also the case in Hamilton County. While the comparison of under voting between Hamilton and Franklin Counties produced mixed results, the more frequent type of ballot for which a preference was not counted in Hamilton was that with an overvote. In Hamilton County, therefore, proportionately more African American votes were discarded, due to mistakes, than those cast by non-African Americans, than was the case in Franklin County, in which overvotes cannot be cast.

Engstrom Report (Exhibit 4n) at 10. It bears emphasis that these findings are based on precinct analysis, which is the most precise method available.

Additionally, Dr. Engstrom focused his analysis on the 2000 presidential race. This race, according to the common assumptions of political scientists studying electoral behavior, represents the pinnacle contest for most voters. See Deposition of Engstrom (Exhibit 5b), p. 135. Generally, electoral turnout across the country and the state is highest for presidential contests.<sup>9</sup> Deposition of Walch (Exhibit 2a), p. 82. Furthermore, in terms of formulating a reliable study of what might be the culprit of the racial disparities within the defendant counties and if those disparities can be either eliminated or alleviated, it is critical to examine an electoral contest that was the same for every voter within the state; therefore, externalities such as placement on the ballot,

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<sup>9</sup> According to the Secretary of State: "[D]uring the course of the past six gubernatorial elections, voter turnout has averaged about 55.79 percent. During the past six presidential elections, voter turnout in Ohio has averaged 71.33 percent. Based on this historical data, Ohio can generally anticipate about 1.25 million more voters in a presidential election year than in a gubernatorial election cycle." HAVA Plan (Exhibit 7a), p. 17.

competitiveness of the candidates, or number of races on the ballot are all uniform. There simply is no explanation for these differences except for the type of technology that was used by each of these counties.

The Defendants have presented no reliable evidence to refute the findings of the Plaintiffs. Indeed, as discussed earlier, their own lay witnesses corroborate what the Plaintiffs have shown. Furthermore, their expert, Dr. Lott, conducted a study that never specifically addressed the intra-county racial disparities. Dr. Lott offered no opinion on what specifically occurred in Summit, Hamilton or Montgomery Counties. See generally Lott Report (Exhibit 6a). These three county defendants therefore have no evidence in defense to the findings of Dr. Engstrom.

As noted above, Dr. Lott did not even attempt to refute the disparate impact at the top of the ballot. He focuses his effort on trying to show that punch cards had no negative impact on the down ticket contests. Dr. Lott's own data, and his specific testimony under oath supports the conclusion that both at the top of the ballot and in down-ballot races African Americans in Ohio have a higher residual ballot rate for punch card equipment than non-African Americans. Lott Report (Exhibit 6a), Table 4; Deposition of Lott (Exhibit 6b), pp. 174-183.

It is almost beside the point that Dr. Lott's expert report is unreliable when measured by the research standards of social scientists,<sup>10</sup> and that his analysis is based on

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<sup>10</sup> Dr. Lott purports to study the differences in rates of nonvoted ballots between African Americans and whites. See Lott Report (Exhibit 6a), Tables 5, 6. However, his conclusions are so weak that it may be due to just chance. "Researchers generally accept as reliable results for which statistical significance equals or exceeds the conventional standards of either .05 (corresponding to a five in one-hundred probability of obtaining results from chance or random factors) or .01 (corresponding to a one in one-hundred probability)." Garza v. County of Los Angeles, 756 F. Supp. 1298, 1336 (C.D. Cal. 1990); see also Chava Frankfort-Nachmias and David Nachmias, Research Methods in the Social Sciences (1996) ("Most researchers in the social sciences set their significance levels at .05 or .01."); Fed. R. Evid. 702 (experts may testify if ..."(2) the testimony is the product of reliable principles and methods, and (3) the witness has

statistical procedures that have not been relied upon by any federal court confronting voting rights issues. His conclusions are not supported by his own data. Not only are his conclusions inaccurate, but he contradicts himself. He concluded that, “[g]enerally, heavily white wards tend to have higher nonvoted ballot rates at the top ten percent of the districts with either Hispanic or adult African-American populations.” Lott Report (Exhibit 6a), pp. 6 – 7. But Dr. Lott admitted in his deposition that, contrary to the assertions of his written report, the empirical findings in Table Four indicate that African American voters exhibit *higher* levels of residual balloting at the bottom of the ballot than do white voters:

Q. “So the bottom line is, Doctor, the black population is exhibiting higher levels of nonvoted ballots down the ballot compared to the top ten percent whites and the 100 percent white wards, is that correct?”

A. “That's right.” Deposition of Lott (Exhibit 6b), pp. 180-183.

In sum, African American voters using punch cards overvote at over five to eight times the rate of their non-black counterparts, and, as a result, they are at a statistically greater risk of disfranchisement. Dr. Lott's conclusions, which rely on results which social science standards reject as unreliable, do not create a genuine dispute as to any material fact.

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applied the principles and methods reliably to the case.”). None of Dr. Lott's F-tests comparing whites to African-Americans show significance at this level.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motions for summary judgment be granted.

Respectfully submitted,

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This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 19th day of March, 2004.

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