

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

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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR**  
**SUMMARY JUDGMENT BY DEFENDANTS STATE OF OHIO,**  
**HAMILTON COUNTY, MONTGOMERY COUNTY, AND SUMMIT**  
**COUNTY**

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## **I. Introduction**

In their memorandum in support of summary judgment (Doc. 173; hereinafter “State’s Brief”), the Defendants portray Plaintiffs as social engineers who are using the courts to rush Ohio headlong into adopting new voting technologies without sufficient time for security checks or adequate testing. They assert: “Haste, when dealing with new voting technologies, is never virtuous.” In making this assertion, Defendants seek to divert attention from the two key questions that are presently before the Court: (1) Do Ohioans have a Fourteenth Amendment right to an equal balloting system that does not discriminate on the place of residency; and (2) Does the punch card balloting system abridge the right of African American voters to participate on a non-discriminatory basis with white voters in the political process? The precise timetable for allowing the political branches to frame a remedy should be addressed only after the rights of the parties have been delineated. To claim otherwise is to place the proverbial cart before the horse.

Recently, the Ohio House-Senate Committee on ballot security voted 7-1 in favor of a recommendation that the State Defendants cancel their plans to replace punch card ballots this year and require all touchscreen voting systems in Ohio to be equipped with voter-verified paper trails. See “Voting Machines Out for Now”, *Columbus Dispatch*, April 8, 2004, copy attached as Exhibit A. If followed, these steps will postpone and perhaps even negate the equalization of voting systems in Ohio. Requiring voter-verified paper trails, which will cost between \$300 and several thousand dollars per machine, will make it certain that Defendants will not have sufficient federal funds to replace punch card and other non-notice voting technology uniformly across the state without an infusion of funds from the Ohio General Assembly. In the three years since the 2000 presidential election, the legislature has been quite reluctant to appropriate the

necessary funds. Given the now certain fact that the inequality and disfranchisement that Plaintiffs seek to ameliorate in this action will be prolonged, there is a more appropriate aphorism that describes the current situation: “Justice delayed is justice denied.”

## **II. Statement of the Case and Statement of the Facts**

### **A. Statement of the Case**

Seven individual Plaintiffs have filed this action against Ohio Secretary of State J. Kenneth Blackwell, the Board of Voting Machine Examiners, and Boards of Election and County Commissioners in Hamilton, Montgomery, Sandusky, and Summit Counties. Their amended complaint charges that the State and County Defendants have certified and maintained disparate systems of voting technology that discriminate against Ohio voters on the basis of residence in violation of the Fourteenth Amendment’s Equal Protection Clause. The complaint also charges the County Defendants with violation of the Voting Rights Act insofar as African American voters face a disproportionate risk of disfranchisement when they use punch card balloting equipment. Plaintiffs seek an order decertifying the punch card balloting system and an order requiring the State to treat all voters equally with respect to actual notice forms of balloting equipment. Because reasonable minds cannot differ concerning the nature of the statistical evidence before the Court, Plaintiffs have filed a motion for summary judgment in this case; they incorporate by reference the factual and legal points stated in their supporting brief. The Court should deny the Defendants’ motion, grant the Plaintiffs’ motion, and grant the Plaintiffs’ request for injunctive relief.

Repeatedly during this litigation, Defendants have asserted that the adoption of the Help America Vote Act renders Plaintiffs’ case moot. Yet, as outlined above, the present predicament in which Defendants find themselves with respect to the Ohio General Assembly and the State

Controlling Board demonstrates only too well why this is not the case. It is not merely foreseeable but certain that any delay in replacement of outmoded punch card ballots uniformly throughout the State and any requirement that voter-verified paper trail features be added to electronic equipment will result in the State Defendants' continued use of punch card technology in certain, "disfavored" counties throughout the state.

**B. Statement of the Facts**

Plaintiffs will rely upon their Motion for Summary Judgment (Doc. 171) for a complete recitation of the facts in this matter and will not restate those allegations here. Nevertheless, there are several assertions in the State Defendants' Memorandum in Support of their Motion for Summary Judgment (Doc. 173; State's Brief) that are factually inaccurate and deserving of comment. First, Plaintiffs emphatically deny that Defendants "soon will be implementing the requirements of HAVA." Moreover, Plaintiffs repeat that compliance with HAVA will not redress the grievances that are set forth in their amended complaint.

Defendants argue that the State of Ohio presently has sufficient federal funds to replace all punch card balloting equipment in Ohio. Yet they offer no evidence of assurance that they now have enough money to replace all punch card equipment, even if the new equipment they buy lacks a voter-verified paper trail. Given the delay in upgrading to new equipment and the continuing political infighting, there is no reason to believe that the State and County Defendants will not continue to discriminate on the basis of residency in the certification and use of disparate balloting systems throughout Ohio.

Plaintiffs' expert, Dr. Richard Engstrom, provides compelling evidence of the difference a transition to actual notice technology will make for all voters, and especially African American voters, in Ohio. Comparing the estimated percentage of overvotes among African American

voters in Hamilton and Summit Counties (which used punch card equipment that allows overvotes) with those of Franklin County (which used electronic equipment that does not), Engstrom finds that the estimated rate of overvotes for black voters in Hamilton County would decrease from 2.5 – 3% to 0%. For African American voters in Summit County, the estimated decrease would be from 2.9 – 4.8% to 0%. For white voters in both counties, the estimated decrease would be from .3 - .45 % to 0%. Engstrom Report (Doc. 171-4n), ¶10. These reductions are dramatic, and they well illustrate the gravity of the issues presented in this lawsuit.

Overall, regardless of race, 2,916 voters in Hamilton County cast overvotes in the 2000 presidential election, and in Summit County, the analogous number was 646. In contrast, the number of overvotes cast in Franklin County was zero. See Ohio Secretary of State, “Overvoted and Undervoted Presidential Ballots in Ohio Counties Where Punchcard Used”, May 2001, attached as Exhibit F; see also Exhibit G. In 2000, George Bush won the State of Florida by 545 votes, and the 2004 presidential election in Ohio may well be equally close. Thus, it simply is not reasonable to conclude, as Defendants do, that error rates such as these are so low that they will not “consistently disable minority voters from electing candidates of their choice.” Cf. Southwest Voter Registration Education Project v. Shelley, 278 F. Supp. 2d 1131, 1143 (C.D. Cal. 2003), *reversed on other grounds*, 344 F.3d 882 (9<sup>th</sup> Cir. 2003).

### **1. The Expert Reports**

Defendants contend that the testimony of two of Plaintiffs’ experts, Dr. Martha Kropf and Mr. Roy G. Saltman, does nothing to advance Plaintiffs’ claims for relief, and they seek to have these experts’ testimony excluded. In a separate memorandum that is already of record (Doc. 181), Plaintiffs have addressed in full the factual and legal reasons why this contention is in error. Defendants’ argument misunderstands the significance of these expert reports to the

Plaintiffs' claims. Dr. Kropf's expert report provides reliable survey evidence of the extent of intentional undervoting in presidential elections, evidence that establishes the extent to which the punch card balloting system causes a violation of the Voting Rights Act and the Fourteenth Amendment. See Section C2, *infra* for further discussion of this issue.

For his part, Mr. Saltman has studied the problems with punch card voting machines for almost three decades. His report provides reliable information concerning problems with punch cards and the dynamics of other forms of balloting equipment currently in use in Ohio. Saltman's analysis of the problems with punch card voting machines was extensively relied on by a three-judge panel of the Ninth Circuit Court of Appeals. Southwest Voter Registration Education Project v. Shelley, 344 F.3d 882, 889 (9<sup>th</sup> Cir. 2003), *reversed on other grounds*, 344 F.3d 914 (9<sup>th</sup> Cir. 2003) (en banc). While it is certainly true that Saltman's report restates the conclusions in his California report, that is because the defects in punch card machines are a national problem. Regardless of where and how these machines have been utilized, they have resulted in the loss of substantial numbers of votes. Both experts present considerably more about the subject matter of this case than the average lay witness, and the testimony of both "fits the facts."

### **III. Law and Argument**

#### **A. This Court Should Deny Defendants' Motion for Summary Judgment on Plaintiffs' Voting Rights Act Claim Because the Evidence Shows that the Use of Punch Card Voting Machines Results in the Disproportionate Denial of African Americans' Votes.**

As the Plaintiffs noted in their Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Doc. 171), Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, prohibits "any...practices or procedures which result in the denial 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 original).<sup>1</sup> The Plaintiffs have asserted, and the Defendants agree, that Section 2, both in terms and as construed by the courts, prohibits two distinct kinds of discriminatory practices and procedures: those that result (whether or not intended) in “vote dilution” and those that result in “vote denial.”

In their summary judgment brief, the Plaintiffs made clear that they were asserting only a *vote denial* claim, not a claim for vote dilution. Much of the Defendants’ argument in State’s Brief focuses on what they refer to as the Plaintiffs’ “vote dilution case,” see State’s Brief at 17-18; since this argument is directed to a claim that the Plaintiffs have not made, it will not be addressed here. But to the extent that the Defendants purport to address the Plaintiffs’ *vote denial* claim, it is clear that the Defendants misunderstand both the nature of the Plaintiffs’ Section 2 vote denial claim and the sort of evidence that is relevant to making out this claim.

As an initial matter, much of the Defendants’ argument focuses on the alleged failure of the Plaintiffs to provide evidence that punch card machines are used only “in minority-majority precincts” in Montgomery, Summit, and Hamilton Counties. State’s Brief at 12. For example, they point to the fact that the complaint alleges that “ninety percent of the black population in Ohio resides in 15 counties,” and then argue that other counties in Ohio (the “eight Appalachian counties”) have high residual vote rates and that these counties have “very small black populations.” Id. at 12-13. But even if these claims were true, they are irrelevant to the Plaintiffs’ argument that the use of punch card equipment *within* Montgomery, Summit and Hamilton Counties violates Section 2. As the Plaintiffs have demonstrated in their Memorandum, the use

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<sup>1</sup> The Defendants do not dispute, nor could they, that the African American Plaintiffs in this case, or the class which they seek to represent, constitute a “protected class” under the Act.

of punch card equipment in these counties results in significantly higher rates of residual voting – especially overvoting – for minority voters than it does for non-minority voters. See, e.g., Expert Report and Deposition of Mark Salling (Doc 171 Exhibits 4f, 5d); Engstrom Deposition (Doc. 171 Exhibit 5b), discussed in Plaintiffs’ Memorandum in Support (Doc. 171) at 31-34. Defendants have introduced *no evidence* to refute the Plaintiffs’ evidence on this score. Indeed, as Plaintiffs have noted in their Memorandum in Support (Doc. 171 at pp.32-33), even the Defendants’ *own witnesses* have acknowledged these intra-county racial disparities.

These *intra-county* racial disparities flowing from the use of punch card voting constitute a discriminatory “denial of the right to vote” and amount to a violation of the Voting Rights Act *separate and apart from any inter-county discrimination associated with the current system*. Whether or not non-minority voters in other counties in Ohio, “Appalachian” or otherwise, also experience high residual vote rates as a result of the use of punch card equipment is simply irrelevant to the Plaintiffs’ claim that the State and County Defendants are in violation of Section 2.<sup>2</sup>

The Defendants’ misunderstanding of the Plaintiffs’ Section 2 vote denial claim is also revealed in another facet of their argument. While conceding that Section 2 provides a cause of action for vote denial, they then proceed to treat the vote denial claim as if it were a vote dilution claim. In vote dilution cases, it is often necessary to infer a discriminatory result from surrounding evidence, including the so-called “Senate factors” that were set out in the legislative history of the 1982 Amendments to the Voting Rights Act.<sup>3</sup> The Defendants argue that the Plaintiffs have not demonstrated that these factors were satisfied in this case. But while these

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<sup>2</sup> Defendants claim, without a scintilla of evidence, that Paul Moke is engaging in this litigation to “provide support for some of the theses” in a paper he wrote about voter participation in the defendant counties. The truth, however,

factors may have particular relevance to the sort of *vote dilution* claims often brought under Section 2(b) of the Act — such as the challenges to legislative apportionment schemes and the use of multimember voting districts involved in cases like Thornburg v. Gingles, 478 U.S. 30 (1986) — they have significantly less relevance to the vote denial claim that Plaintiffs make. Simply put, no such circumstantial evidence of discrimination is needed in a case like this one that involves the outright *denial* – and not simply the dilution – of minority voters. This is true for the following reasons.

First, as the Supreme Court and other courts have noted, the so-called Senate factors have no talismanic application in Voting Rights Act cases. See, e.g., Gingles, 478 U.S. at 45 (noting that the Senate Report itself “stresses, however, that this list of typical factors is neither comprehensive nor exclusive,” and that while the “enumerated factors will often be pertinent to certain types of §2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered.”) (italics added; footnote omitted); Farrakhan v. Washington, 338 F.3d 1009, 1019 (9<sup>th</sup> Cir. 2003) (rejecting, in a vote denial case under Section 2, exactly the sort of analysis the Defendants suggest here – namely, one that would attach talismanic significance to the Senate factors – and noting that the Supreme Court has “emphasized the importance of maintaining a practical perspective when evaluating the effects or lawfulness of a challenged practice”).

Second, while the Senate factors may be particularly relevant to many vote dilution cases, they are neither necessary nor relevant to the kind of vote denial claim asserted by the Plaintiffs here. In a case challenging a state’s redistricting plan or its use of particular election structures

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is that Moke’s paper represented an effort to test the Plaintiffs’ theories in advance to insure that any subsequent litigation would not be frivolous.

<sup>3</sup> See State’s Brief at 14 – 15 for a discussion of the eight Senate Factors.

like multimember voting districts, the effect of the challenged practice or structure on the right to vote (or more generally, the right to effectively participate in the political process) may be *indirect* and perhaps difficult to identify. In such cases – for example, in Nixon v. Kent County, 76 F.3d 1381 (6<sup>th</sup> Cir. 1996) (en banc) (redistricting) or in Mallory v. Ohio, 38 Fed. Supp. 2d 525 (S.D. Ohio 1997), *aff'd*, 173 F.3d 377 (6<sup>th</sup> Cir. 1999) (at-large voting) cited in State’s Brief at 8 and 9-10 respectively – there is almost never any question whether the minority plaintiffs had a right to vote, or whether their votes were *actually counted* in a non-discriminatory manner; it is clear that their right to vote was not “denied.” Instead, the question is whether the voting system or structure in some discriminatory way caused the votes of non-minority voters to have less effect or influence than the votes of non-minority voters. In this context, to determine whether and to what extent the system operated to dilute the actual effect of minority voting, a “totality of the circumstances” approach that takes into account, among other considerations, the Senate factors makes perfect sense.

But the issue in this case is quite different. The Plaintiffs do not argue that Ohio’s voting system somehow operates indirectly to minimize the effect of minority votes in terms of the right of minority voters to influence the political process or elect representatives of their choice. Instead, the Plaintiffs have claimed, and the record before the Court unequivocally establishes, that minority voters in Summit, Montgomery and Hamilton Counties simply *do not have their votes counted at all* in numbers that are significantly greater than those for non-minority voters in the same counties. Thus, there is no question that they are “denied” the right to vote on terms equal to non-minority voters, and this is caused *directly* by the Defendants’ “practice” (as that term is used in Section 2(a) of the Act) of requiring them to vote on the only voting equipment

available to them, punch card voting machines.<sup>4</sup> In this respect, the punch card machine is the functional equivalent of an ATM machine that charges a \$1.30 fee for white users, but a \$3.00 or \$4.00 fee for minorities, a situation that would clearly violate the Act notwithstanding the applicability of the Senate factors.

For similar reasons, the three-part threshold test for proof of voting discrimination that the Supreme Court announced in Gingles, which pertains to vote dilution due to at-large election plans, is inapplicable to the case at bar.<sup>5</sup> Other federal courts faced with vote denial claims have reached similar conclusions. Ortiz v. City of Philadelphia, 824 F. Supp. 514 (E.D. Pa., 1993), *aff'd* 28 F.3d 306 (3d Cir. 1994); see also, Mississippi State Chapter Operation PUSH v. Allain, 674 F. Supp. 1245, 1264-65 (N.D. Miss. 1987) (racially polarized voting, racial appeals in campaigns, candidate slating process, discriminatory voting requirements, such as large election districts and majority vote requirements, are irrelevant to a claim involving challenged registration procedures).

In Gingles, the Supreme Court also wrote that “the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” 478 U.S. at 47 (1986). Several circuit courts have interpreted this requirement to mean that “there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote.” Ortiz

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<sup>4</sup> Thus, it is not surprising that the court in Black v. McGuffage, 209 F.Supp. 2d 889 (N.D. Ill., 2003) did not apply the Senate factors in holding that the plaintiffs in that case, in which the Section 2 claim is quite similar to the case at bar, had properly asserted a Section 2 claim of vote denial.) To the same effect is Common Clause v. Jones, 213 F. Supp. 2d 1106, 1110 (C.D. Calif. 2001) (finding that the Gingles totality of the circumstances test is “inapposite in the context of a straight vote denial case...”).

<sup>5</sup> This test requires plaintiffs to prove that the minority group is geographically compact, that it is “politically cohesive”, and that white bloc voting exists. Thornburg v. Gingles, 478 U.S. at 50-1.

v. City of Philadelphia, 28 F.3d 306, 310 (3d Cir. 1994); Farrakhan v. State of Washington, 338 F.3d 1009 (9<sup>th</sup> Cir. 2003). These precedents break down into two categories: those in which plaintiffs seek to use evidence extrinsic to the field of voting to establish racial discrimination and those in which intrinsic voting evidence is utilized. Examples of extrinsic cases include challenges against felon disfranchisement laws, see e.g. Wesley v. Collins, 791 F. 2d 1255 (6<sup>th</sup> Cir. 1986), challenges against appointive systems for school board members, Irby v. Virginia State Board of Elections, 889 F.2d 1352, 1358-9 (4<sup>th</sup> Cir. 1989), and challenges against at-large voting districts, Salas v. Southwest Texas Junior College District, 964 F.2d 1542 (5<sup>th</sup> Cir. 1992). In all three of these cases, the appellate courts held that plaintiffs failed to demonstrate a causal link between the extrinsic discrimination and the denial of the right to vote. In the felon disfranchisement context, some courts hold that the disproportionate impact of conviction that falls upon African Americans may not “result” from state qualifications concerning the right to vote. Wesley, 791 F.2d at 1262; but cf. Farrakhan v. State of Washington, 338 F.3d 1009 (9<sup>th</sup> Cir. 2003) (Section 2 provides for a cause of action in a vote denial challenge to a state felon disfranchisement statute). In the challenge against the appointive school board selection, the court found the problem to be that blacks were not "seeking school board seats in numbers consistent with their percentage of the population." Irby, 889 F.2d at 1358. Likewise, in challenges against voter purge laws, the problem is that voters themselves do not show up to vote for two consecutive elections, a matter that is discretionary and easily remedied by the would-be voters themselves. Ortiz, 28 F.3d at 313. In none of these cases did the denial of minority votes result from the challenged voting practice; rather, it arose from circumstances extrinsic to the voting practice itself. In contrast, the evidence in this case establishes a causal nexus between use of punch cards and the denial of minority votes. Here, the vote denial results not from

circumstances extrinsic to the voting system (such as low Hispanic turnout or the high rate of incarceration among African Americans), but from circumstances that are *intrinsic to* the voting system itself. State and county officials, not individual voters, decide what balloting system voters must use. Yet African American voters have their ballots thrown out at a greater rate than whites. In such circumstances, the Court is “confronted with an electoral device – such as ‘race-neutral’ literacy tests, grandfather clauses, good character provisos, racial gerrymandering, and vote dilution – which discriminates against minorities, which has no rational basis, and which is beyond the control of minority voters.” Ortiz, 28 F.3d at 313.

In other instances, inexperienced or uneducated voters, especially those of color, often interact with punch card equipment in ways that result in improper overvotes or unintentional undervotes. Consider, for example, the three following situations: (1) poll workers hand voters ballots that already have been used by other voters; (2) voters punch out a hole for their preferred candidate and then write-in the name of that candidate in the space for write-in candidates; or (3) ballot instructions tell voters to vote each page of the ballot book and the number of candidates for one office extends for multiple pages, leading voters to vote for multiple candidates for the same office. As witnesses on both sides of this litigation have testified, nearly all overvotes in situations like these are mistakes. Saltman Report (Doc. 171 4p), ¶ 6c1; Walch Deposition (Doc. 171 2a) at 60; 62-3. Moreover, as Dr. Martha Kropf concludes in her report, the level of intentional undervoting in presidential contests is approximately .77%, and this is substantially below the level of undervoting that occurred in the Defendant counties. Kropf Report (Doc. 171 4a), ¶¶ 8 and 10. The balloting equipment Defendants select must be used effectively by all members of the body politic, not just by those whose levels of education, physical ability, and experience enable them to use punch cards successfully. Because disproportionate percentages

of African American voters routinely interact with punch cards in a manner that results in their disfranchisement, the punch card ballot *as applied to these users* has the effect of causing an abridgement of the right to vote on the basis of race.

At root, the Plaintiffs' theory of recovery in this case is elementary: when minority voters face a disproportionate likelihood of having their ballots thrown out, they are denied the right to participate in the political process and elect the representatives of their choice, regardless of the consequences on the election that is taking place. Once Plaintiffs' ballots are discarded, it is of no moment what the shape of their political district is, whether they vote for candidates running at large, or whether racial block voting exists. To insist, as Defendants do, that the Plaintiffs must present circumstantial evidence of voting discrimination under the Senate factors, when direct evidence unequivocally establishes that discrimination exists, is unreasonable and immaterial to the central allegations of Plaintiffs' Complaint.<sup>6</sup> For these reasons, the Senate factors do not apply to Plaintiffs' vote denial claim. As there is no genuine issue of material fact regarding the racial disparity in the rate of vote denial, this Court should reject the Defendants' Summary Judgment Motion and grant the Plaintiffs' Motion for Summary Judgment as it applies to the Voting Rights Act portion of this litigation.

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<sup>6</sup>In the event the Court believes that the Senate factors are relevant, Plaintiffs request that the Court take judicial notice that there is a history of official discrimination in the political subdivisions here at bar that touches upon the right of African Americans to vote and participate in the political process. An express provision of the Ohio Constitutions of 1802 and 1851 prohibited blacks from voting. Art. IV, Section 1 ("In all elections, all white male inhabitants above the age of twenty-one years ... shall enjoy the right of an elector.") This provision was not removed from the state constitution until 1923. See Swisher, Thomas B. *Ohio Constitutional Handbook* (1990). More recently, in the 1970s and 1980s, federal courts held that public school officials in Montgomery and Summit County operated a dual educational system that intentionally discriminated against black students. Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Bell v. Board of Education, Akron Public Schools, 491 F. Supp. 916 (N.D. Ohio 1980), aff'd 683 F.2d 963 (6<sup>th</sup> Cir., 1982)(board policy on decommissioning schools found discriminatory). In Hamilton County, public school officials undertook voluntary desegregation pursuant to a consent decree. Finally, official data from the 2000 census indicates unequivocally that African Americans in the three Defendant counties continue to bear the effects of discrimination in employment, housing, and education. See charts of socio-economic and racial data from 2000 census, <http://www.fairdata2000.com>, attached here as Appendix B (Hamilton County); Appendix C (Montgomery County); Appendix D (Summit County).

**B. Plaintiffs Do Not Assert a Claim Under 42 U.S.C. §1983 to “Force” Any Defendant to Implement, Immediately or Otherwise, the Help America Vote Act.**

In their Memoranda in Support of their Motions for Summary Judgment (Doc. 173), Defendants have argued that they are entitled judgment, in part, because 42 U.S.C. §1983 does not provide a cause of action for the implementation of the Help America Vote Act, 42 U.S.C. §15301 *et seq.* (HAVA). This argument borders on the frivolous, resting on a serious misunderstanding of Plaintiffs’ claims.

As Plaintiffs have made clear from the outset, neither of the claims in this case rests on the Help American Vote Act of 2002. Yet throughout this litigation, the Defendants have represented to this Court that this suit is “about HAVA,” as if one could find HAVA even mentioned in the original Complaint, or any of the Amended Complaints (which, of course, one cannot). Defendants have repeatedly relied upon HAVA, and their asserted intention to apply for and receive funds under it, as part of a strategy to make this case go away. This was the basis for the Defendants’ early request for a four-month delay in discovery, a request that the Court granted. It was also the basis for the Defendants’ effort to persuade this Court to extend that stay even longer (Doc. No. 83). Defendants’ either forgotten or ignored the Court’s their prior effort to play their “HAVA card” back then. In rejecting the Defendants’ effort to further delay the expeditious progress of this litigation, the Court noted: “The Court cannot justify extending the stay on discovery or postponing Plaintiffs’ day in court, particularly when Plaintiffs *aptly* point out that their claims are not under HAVA, but under the Voting Rights Act, 42 U.S.C. §1973 (1992), and the Constitution.” Order Resolving Docs. 82, 83, 94, at pages 1-2 (*italics added*). Nothing the Plaintiffs have said or done since could plausibly be construed to have altered this fact.

Since Plaintiffs have not asserted such a claim in this litigation, there can be no doubt at all that this is *not* that time. Since the issue has not been raised, Defendants are essentially asking the Court to provide them an advisory opinion on this matter, something that would not only be a waste of this Court's time and resources, but would be tantamount to the issuance of just the sort of advisory opinion precluded by Article III of the United States Constitution.

**C. The Evidence of Record, Including Defendants' Own Data, Shows an Ongoing Violation of Plaintiffs' Right to an Equally Weighted Vote under the Equal Protection Clause.**

Plaintiffs' equal protection claim is a straightforward application of the principle set forth in Bush v. Gore, 531 U.S. 98 (2000), and prior equal protection cases to the State's own evidence. As Defendants acknowledge, the Supreme Court's equal protection jurisprudence articulates the basic principle that the state must give every vote "equal weight" and every voter "equal dignity." State's Brief at 18 (quoting Bush, 531 U.S. at 105). Defendants' continuing use of unreliable voting systems, including the notorious "hanging chad" punch card, violates this fundamental principle. Data collected by the State itself show that this equipment results in more lost votes than other systems – in the case of punch cards, at least *three times* the lost votes of other voting systems. The evidence demonstrates that the poor performance of these voting machines is not unique to Ohio, but is symptomatic of a national problem evident in other states that have used such equipment. See generally Saltman Report (Doc. 171 4p). The only difference is that, while most other states will have updated their voting systems by 2004, Ohio's voters must continue to use the same defective equipment that caused so many problems in 2000.

To be clear, the issue before the Court is *not* whether Plaintiffs are entitled to a "perfect" voting system, as Defendants assert. State's Brief at 20. Rather, the issue is whether Defendants "may allow the use of different types of voting equipment with substantially different levels of

accuracy” without violating equal protection. Black v. McGuffage, 209 F. Supp. 2d 889, 898 (N.D.Ill. 2002). The denial of equality in this case is even clearer than in Bush, given the statistical evidence of vast inter-county disparities documented in the record. Defendants’ repeated statements that, at some point in the future, they plan to replace these systems cannot alter the fact that they are violating Plaintiffs’ rights to have their votes treated on an equal basis with other citizens.

**1. The Issue Before the Court Is Solely the Defendants’ Liability for the Ongoing Violation of Plaintiffs’ Rights Under the Equal Protection Clause, Not How Expeditiously a Remedy Should Issue for This Violation**

Plaintiffs’ equal protection argument is that by continuing to allow the use of non-notice punch card and optical scan voting systems, the state is violating the principle that every citizen’s vote must be given equal treatment. It should be emphasized at the outset that the question before the Court is *not* whether this Court should require that Ohio counties be rushed into replacing their punch card voting machines by the end of this year. In particular, the issue is not whether Defendants should be ordered to replace their defective voting equipment in time for the 2004 presidential election. See State’s Brief at 2 (asserting that “Plaintiffs seek to rush unproven technology into Ohio’s elections”). Plaintiffs recognize that that train has already left the station, and that it would be impracticable at this late date to force all Ohio counties to replace their defective voting machines by November 2004.

In mistakenly suggesting that this is the issue on this motion, Defendants confuse the distinct issues of liability and remedy. The sole question before this Court is liability; more specifically, whether or not the Defendants are violating Plaintiffs’ equal protection rights by continuing to employ punch cards and other non-notice voting systems. Should this Court conclude that there *is* such a violation, the next step will be to determine how and when this

violation should be remedied. It is therefore erroneous to assert that Plaintiffs are attempting to “rush” a conversion – not only because Ohio has now dragged its feet on election reform for a full four years, but also because the timetable for remedying Defendants’ ongoing equal protection violation is not before the court on this motion.

For the same reason, Defendants’ lengthy discussion of the baby steps toward reform that Ohio has begun to make since the 2000 election is beside the point. For purposes of Defendants’ present motion, the critical fact for purposes of liability remains undisputed: Ohio voters will continue to use precisely the same defective equipment that caused so many problems in 2000 a full four years later. By Secretary Blackwell’s own admission, the use of this equipment could well cause a “Florida-like calamity” here in Ohio. Letter of J. Kenneth Blackwell to Honorable Doug White (Doc. 159), at 3. Far from seeking to “rush” a conversion, Plaintiffs are challenging continuing equal protection violations that Defendants have thus far failed to remedy themselves. As a result of the glacial speed of reform, tens of thousands of Ohio citizens will be denied their right to have their votes counted.

Defendants do not attempt to argue – nor could they – that this case is either unripe or moot. Cleveland Branch, NAACP v. City of Parma, 263 F.3d 513, 530-31 (6<sup>th</sup> Cir. 2001) (holding that “a case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and ‘interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’ and that defendant bears “heavy burden of demonstrating mootness”). Their repeated statements that at some point in the future, they intend to replace the complained-of voting machines cannot allow them to escape liability for its current and continuing use. To draw an analogy to school desegregation litigation, Defendants’ current posture is no different than that of a school district

that has long operated a dual system of education, and promises at some point in the future to get rid of that system. These promises ring particularly hollow in this case, given the recent decision of a state legislative committee to force the Secretary of State to come up with a new list of machines, which will in turn force the counties to re-select vendors for their machines. Even if the state took one step forward by asking counties to contract with vendors for new voting machines, it has now taken two steps back. By pushing the process back to square one, legislative leaders have now ensured that Ohioans will continue to use their present systems for the foreseeable future.

As long as the status quo persists, Plaintiffs and thousands of other voters like them will continue to vote on unreliable machines that should have been replaced years ago. Ohio's failure to make election reform a reality is particularly glaring in light of the fact that many other states – including but not limited to Florida, California, Georgia, and Maryland – *have* now acted to refurbish their dilapidated voting systems in time for the 2004 election. Defendants' repeated assertions that they will at some point in the future remedy this violation does not alter the fact that there remains a live controversy as to whether Defendants are violating Plaintiffs' right to equal protection.

**D. Election Practices That Have an Impact on the Right to Vote Are Subject to Strict Scrutiny, and May Only Be Upheld if Narrowly Tailored to Serve a Compelling Interest**

On the merits of Plaintiffs' equal protection claim, the central issue is whether Defendants are denying equal protection by continuing to operate a dual and unequal system of voting, under which Plaintiffs and thousands of other Ohioans are forced to use voting systems – non-notice punch card and optical scan equipment – that are demonstrably inferior to equipment used in other parts of the State. What is most noteworthy about Defendants' equal protection

argument is what it does *not* say. In particular, Defendants do not deny that punch card voting machines result in a substantially greater number of lost votes than other voting machines used in the State of Ohio. For example, in the 2000 presidential election, punch card voting machines resulted in a 2.3% residual vote rate, compared with 0.7 for electronic touchscreen voting machines. See Appendix E. Even Defendants' own expert acknowledges that the challenged voting systems have done substantially worse in top-of-the-ticket races from 1992 through 2000. Lott Report (Doc. 171 6a), Table 3. Nor do Defendants dispute that, as a matter of law, election practices that have an impact on the right to have one's vote counted are subject to strict scrutiny under the Equal Protection Clause. As explained below, the undisputed evidence of substantial disparities arising from the use of non-notice punch card and optical scan voting systems unequivocally establishes a violation of the Equal Protection Clause.

Plaintiffs and Defendants agree on the equal protection standard that should be applied in this case. In particular, Defendants acknowledge an election practice is subject to strict scrutiny if it “has an impact on [Plaintiffs'] ability to exercise the fundamental right to vote.” State's Brief at 21 (quoting McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 814, 807 (1969); see also Mixon v. NAACP, 193 F.3d 389, 402 (6th Cir. 1999) (holding that a law that “grants the right to vote to some residents while denying the vote to others” is subject to strict scrutiny and can be upheld only if “necessary to promote a compelling state interest”). The only question, then, is whether the election practice being challenged in this case – the continuing use of punch card and non-notice optical scan systems – has an “impact” on Plaintiffs' fundamental right to vote.

Equal protection decisions in the area of voting, including the cases cited by Defendants, demonstrate that the conduct challenged here does indeed have a powerful impact on the ability

of Plaintiffs and other Ohio citizens to exercise their right to vote. That precedent makes clear that it is *not* sufficient for the state simply to grant all citizens access to the polling place and allow them to cast their votes. The Equal Protection Clause also protects the right of citizens to *have those votes counted* on an equal basis with other citizens. That is clear not only from Bush v. Gore, but also from the “one person, one vote” line of cases upon which Bush relied. Among the cases establishing this equality principle is Reynolds v. Sims, 377 U.S. 533 (1964), in which the Court struck down an apportionment scheme that gave greater weight to some counties’ votes than to others. As the Court explained in that case, the right to vote “can be denied by debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” Id. at 555. Such a diminution in the weight given to citizens’ votes “must be carefully and meticulously scrutinized.” Id. at 562.

In Bush v. Gore, the Court held that the principle of equal weight to each vote and equal dignity to each voter applies to the state’s mechanism for counting votes. 505 U.S. at 104. On this point, seven of the nine justices were in agreement. Id. at 111. Bush v. Gore certainly did not invent the principle that the state must treat the votes of its citizens equally. Rather, it drew this principle from Reynolds and several other cases. Bush v. Gore, 531 U.S. at 105, 107 (citing Moore v. Ogilvie, 394 U.S. 814 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); and Gray v. Sanders, 372 U.S. 368 (1963)).

What *was* novel about Bush was not the equality principle that it restated, but its application of this principle to strike down a state’s method of recounting votes, in the absence of any statistical evidence showing that some counties’ votes were being given greater weight than others. In particular, the Court held that without “specific rules designed to ensure uniform treatment” in the vote counting process, citizens cannot be assured that their votes will be

counted on an equal basis. 531 U.S. at 106. It is certainly true that Bush emphasized that the issue before it was the constitutionality of Florida's recount method, and not whether "local entities . . . may develop different systems for implementing elections." Id. at 109, *quoted in* State's Brief at 20. Because that specific issue was not before it, the Bush Court did not have before it the type of evidence presented in this case, showing substantial disparities in lost votes, depending on what type of equipment a voter happens to use.

The critical point, which Defendants do not deny, is that the equality principle stated in Bush and prior equal protection cases applies to the mechanisms used to cast and count votes. Merely allowing citizens to cast their votes cannot satisfy this principle; the State must also employ mechanisms to ensure that those votes are counted on an equal basis with other systems. This includes avoiding mechanisms that treat citizens in some counties less favorably than those in other counties, based on their “place of residence.” Reynolds, 377 U.S. at 566. As Bush and its predecessor cases recognize, such inter-county disparities are anathema to the “one person, one vote” basis of our democratic system.

1. **The State’s Use of Different Voting Systems with Substantially Different Accuracy Rates Violates the Equal Protection Clause Under Bush v. Gore and the “One Person, One Vote” Cases That Preceded It.**

In this case, the denial of equal treatment is much clearer than in Bush v. Gore – and, indeed, Plaintiffs’ evidence in this case would have been sufficient to make out an equal protection claim, even under pre-Bush case law. The equal protection claim in this case is stronger than in Bush, because Plaintiffs in this case have *statistical proof* that some counties’ votes are treated less favorably than others – evidence that comes from the state itself. In Bush, by contrast, no such statistical proof was in evidence. The Court did not, for example, find that a higher percentage of votes had been counted in one county than in another. Instead, it found an equal protection violation based solely on the fact that different standards were used from county to county, inferring from the absence of such “safeguards” the possibility that voters would be treated unequally. 531 U.S. at 107-10. Here, on the other hand, there is no need for such an inference, for the uncontroverted evidence demonstrates a statistical disparity from county to county as a

result of the different voting equipment used. This case is therefore much closer to earlier “one person, one vote” cases, in which similar statistical disparities were shown, than was Bush itself.

It should therefore come as no surprise that since Bush, courts have had no difficulty in upholding equal protection claims, arising from the use of unreliable voting systems in some counties but not others. For example, in Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2003), the court considered a claim very similar to the one at issue here. The Black court explained: “The question is whether the state may allow the use of different types of voting systems with substantially different levels of accuracy, or if such a system violates equal protection.” Id. at 898. As in this case, the State of Illinois left the “choice of voting systems up to local authorities,” but that choice resulted in some counties using less accurate voting systems and thus in “voters in some counties [being] statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office.” Id. at 899. Relying on Bush and its predecessor cases, the Black court held that:

The State, through the selection and allowance of voting systems with greatly varying accuracy rates, ‘value[s] one person’s vote over that of another,’ Bush, 531 U.S. at 104-105, even if it does not know the faces of those people whose votes get valued less. This system does not afford the ‘equal dignity owed to each voter.’ Id. at 899.

The Black court went on to explain that, when such inequalities have a “negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.” Id. Thus, a disparate impact on minority voters – such as the ones documented in the evidence supporting Plaintiffs’ voting rights claim – only makes Plaintiffs’ equal protection claim stronger. While Black recognized the “limited holding of Bush,” it

emphasized that the “overarching theme of voting rights cases decided by the Supreme Court– that theme being of course, ‘one man, one vote,’” prohibits the use of voting systems with substantially different accuracy rates from county to county. *Id.* at 899; see also Common Cause v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001) (denying state’s motion for judgment on the pleadings, where voters alleged that “individuals living in counties where the punch-card system is used are substantially less likely to have their votes counted.”).<sup>7</sup>

Just as in Black and Common Cause, the Plaintiffs’ claim here is that the use of voting systems with substantially different accuracy rates violates equal protection. Given the undisputed statistical evidence of disparities arising from the use of different voting systems in Ohio, Plaintiffs’ claim here is stronger than in either of these lower court cases – and much stronger than in Bush where no such statistical evidence of unequal treatment was presented.

2. **The Decisions Cited in Defendants’ Brief, Including Mixon and McDonald Provide Further Support for Plaintiffs’ Equal Protection Claim.**

In support of their argument for summary judgment on the equal protection claim, Defendants cite cases holding that election practices that have no impact on the fundamental right to vote are subject to “rational basis” review. State's Brief at 18 (quoting Mixon v. NAACP, 193 F.3d 389, 402 (2000)). While Plaintiffs have no quarrel

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<sup>7</sup> In addition, a three-judge panel of the Ninth Circuit in Southwest Voter Registration Education Project v. Shelley, 344 F.3d 882 (9th Cir. 2003), concluded that Plaintiffs had shown a likelihood of success on the merits of their claim that the use of pre-scored punch card machines violates equal protection, relying on evidence that this equipment “eliminates some voters’ ballots entirely.” *Id.* at 900 (issuing preliminary injunction postponing California recall election until the replacement of punch card voting equipment). Although the three-judge panel’s decision was subsequently vacated, 344 F.3d 914 (9th Cir. 2003) (*en banc*), the *en banc* court rested its decision on the burden on the state’s voters that would occur if the already-scheduled election were postponed. *Id.* at 919-20. On the merits of the equal protection claim, the *en banc* court stated that “the argument is one over which reasonable jurists may differ.” *Id.* at 918.

with this statement of the law, the evidence shows that the challenged voting equipment *does* have an impact on the right to vote.

In particular, Defendants' own evidence shows that non-notice punch cards and optical scans result in substantially higher numbers of lost votes than the other equipment used in the State of Ohio. More specific information about these data is located in Appendix E, attached. The chart below summarizes the rate of residual votes for the types of equipment used in the 2000 presidential race, with the challenged types of equipment in boldface type:

Table 1: Residual Vote Rate in 2000 Presidential Election (State's Data)

Type of Voting Equipment	Presidential Non-Vote Rate
<b>Punch Card</b>	<b>2.3%</b>
<b>Votomatic Punch Card</b>	<b>2.3%</b>
<b>Datavote Punch Card</b>	<b>2.9%</b>
Optical Scan	1.7%
<b>Central Count Optical Scan</b>	<b>1.8%</b>
Precinct Count Optical Scan <sup>8</sup>	1.0%
Electronic	0.7%
Lever	0.5%

<sup>8</sup> Precinct-count optical scan machines (unlike central count systems) provide the opportunity for voters to receive notice of mistaken votes, before those votes are actually cast.

These results are consistent with those which Dr. Martha Kropf has drawn from the dataset provided by Defendants' expert Dr. John Lott. Dr. Lott's dataset uses ward-level (rather than precinct-level) data, and appears to be less precise than the non-vote rates drawn from the state's own data. Still, as demonstrated by the statistical analysis contained in Dr. Kropf's report, punch card voting machines do substantially worse than other systems:

Table 2: Residual Vote Rate in 2000 Presidential Election (Lott's Data)

Type of Voting Equipment	Presidential Non-Vote Rate
Punch Card	2.22%
Votomatic Punch Card	2.21%
Datavote Punch Card	2.95%
Optical Scan	1.91%
<b>Central Count Optical Scan</b>	<b>1.58%</b>
Precinct Count Optical Scan	0.87%
Electronic	0.67%
Lever	0.47%

Kropf Affidavit (Doc. 171 7b), Table 1, at 4. The slight difference between the two datasets appears to result from the fact that: (1) Dr. Lott relies on ward-level data, as explained in Plaintiffs' summary judgment brief, which may lead to less accurate and less informative results than the actual vote count shown in Table 1 above; and (2) Dr. Lott's dataset does not appear to have taken into consideration the fact that *absentee* voters in

some counties vote on different systems than in-precinct voters, while Table 1 above relies on the State's own dataset which does allow for the system used by absentee voters to be taken into account. Regardless of the reason for these minor differences, they do not alter the basic point: that punch card and central-count optical scan systems fare substantially worse than other systems.

Similar results can be drawn from examination of Lott's dataset for presidential contests from 1992-2000. In those races, punch card machines had a residual vote rate of 2.29% and central-count optical scan systems a residual vote rate of 2.14%. By contrast, electronic voting machines had a residual vote rate of 0.94% and precinct-count optical scan systems a rate of 1.15%.<sup>9</sup> Kropf Affidavit, Table 2, at 5.<sup>10</sup>

In light of this statistical evidence – which Defendants conspicuously fail to mention – it cannot seriously be denied that the use of non-notice voting machines has an impact on the right to vote. The cases relied on by Defendant are consistent with this conclusion. In Mixon, for example, the Sixth Circuit upheld a legislative bill that changed the composition of the Cleveland school board, making it a municipal school district. 193 F.3d at 395. In reaching this holding, the Sixth Circuit recognized that a practice that "infringe[s] on the right to vote" is subject to strict scrutiny. Id. at 402. More specifically, the court stated: "If the challenged legislation grants the right to vote

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<sup>9</sup> As explained in Plaintiffs' Memorandum in support of their motion for summary judgment (Doc. 171), Dr. Lott attempts to argue that punch card machines perform better on down-ballot races than other systems. Doc. 171 at 21-24. For the reasons explained in Plaintiffs' prior brief, Dr. Lott's findings on this point tell us nothing about the accuracy of punch card voting machines compared to other systems. In particular, he compares apples to oranges, by comparing non-vote rates in which voters in different parts of the state are voting for different races and different candidates.

<sup>10</sup> As explained in Plaintiffs' brief in support of their motion for summary judgment, Dr. Lott attempts to argue that punch card machines perform better on down-ballot races than other systems. Doc. 171 at 21-24. For the reasons explained in Plaintiffs' prior brief, Dr. Lott's findings on this point tell us nothing about the accuracy of punch card voting machines compared to other systems. In particular, he compares

to some residents while denying the vote to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest.” Id. In Mixon, there had been no denial of any citizen’s right to vote; the legislature had merely changed the composition of a school board. Here, by contrast, the evidence shows that thousands of Ohio citizens *have* had their votes denied as the direct result of the use of defective voting equipment. Accordingly, under Mixon, the State’s use of this equipment is subject to strict scrutiny and can be upheld only if “necessary to promote a compelling state interest.”

The Defendants’ reference to McDonald v. Bd. of Election Comm’rs of Chicago, 394 U.S. 804, 807 (1969), provides further support for Plaintiffs’ equal protection claim. In McDonald, the court considered a state’s practice of not sending absentee ballots to inmates awaiting trial. Relying on such cases as Reynolds and Harper, the Court considered the circumstances under which an election practice “must be justified by a compelling state interest.” Id. at 807. As Defendants properly note, the McDonald Court concluded that the test is whether “the challenged practice ‘has an impact on [plaintiffs’] ability to exercise the fundamental right to vote.” State’s Brief at 21 (quoting McDonald, 394 U.S. at 807). In McDonald, there was no such impact, because there was no evidence that pretrial detainees had actually been prevented from exercising their right to vote. Id. at 809. After McDonald, in O’Brien v. Skinner, 414 U.S. 524, 530 (1974), when faced with a claim that prisoners confined in their home county could not vote while prisoners confined outside their home counties could register and vote absentee, the Supreme Court held this to be a restriction “so severe as itself to constitute an

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apples to oranges, by comparing non-vote rates in which voters in different parts of the state are voting for different races and different candidates.

unconstitutionally onerous burden...on the exercise of the franchise." (quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973)). In this case, by contrast, there is uncontroverted statistical evidence that the challenged practice *does* affect the right of voters to have their votes counted on an equal basis with other citizens. See also Burdick v. Takushi, 504 U.S. 428, 434 (1992) (election practices must be "narrowly drawn to advance a state interest of compelling importance" if they severely burden First and Fourteenth Amendment rights) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

Because the evidence shows that the continuing use of punch card voting machines has an impact on Plaintiffs' voting rights – and a severe one at that – that election practice is subject to strict scrutiny. Under this standard, it may be upheld only if narrowly tailored to serve a compelling state interest. Mixon, 193 F.3d at 402.

3. **The State's Continuing Use of Defective Voting Equipment Cannot Withstand Strict Scrutiny, or Even the Lower Level of Scrutiny That Defendants Wrongly Employ.**

The use of punch card voting machines cannot be upheld under strict scrutiny, or even under rational basis review. Defendants do not even attempt to argue that the practice Plaintiffs challenge is narrowly tailored to serve a compelling interest. Accordingly, if this Court concludes that strict scrutiny is the applicable standard, then summary judgment should be granted in Plaintiffs' favor. Defendants' sole rejoinder to Plaintiffs' equal protection claim is that the use of non-notice voting systems should be upheld under rational basis review. Even on this point, however, Defendants are mistaken and there is no evidence in the record to support their argument that there is a rational basis for the continuing use of punch card voting systems, a full four years after the Florida election debacle. To reach the conclusion that the continuing use of defective

voting equipment is not rationally related to a legitimate government interest, one need go no further than the Secretary of State's own admission that the continuing use of these systems "invites a Florida-like calamity."

As Blackwell further acknowledges in the same letter: "A number of other states have been sued on this same issue and have lost." In particular, federal courts in both Illinois and California have concluded that the use of defective voting machines states an equal protection claim *even under the rational basis standard*. In Common Cause v. Jones, the court concluded that even under this more lenient standard, the "alleged facts indicating that the Secretary of State's permission to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory" were sufficient to make out an equal protection claim. 213 F. Supp. 2d at 1109. And in Black v. McGuffage, the district court rejected a motion to dismiss without expressly deciding on the level of scrutiny, concluding that "the lack of a rational basis for implementing a different system of vote counting results in vote dilution." 209 F. Supp. 2d at 899. Even under rational basis review, then, the State's use of defective voting equipment should not be upheld.

The State's contrary argument rests on a misunderstanding of Plaintiffs' equal protection claim. In particular, Plaintiffs are *not* claiming that they are entitled to a "perfect" or "error-free" voting system, as Defendants wrongly maintain; nor are they maintaining that they have the right to vote "in a particular manner." State's Brief at 19, 20, 21. Rather, as in Black, the question here is "whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy." Black, 209 F. Supp. 2d at 898. Under this standard, it would not be a violation of equal

protection for the state to use imperfect voting systems, or even to use voting systems with substantial error rates – so long as there are not substantial inequalities among voters in different counties. For example, Plaintiffs do not claim that it would be a violation of equal protection for the state to use punch card voting equipment *throughout the State of Ohio*. It does, however, violate equal protection to allow the use of substandard voting equipment in some counties, while much more effective voting mechanisms are used in others. Such inter-county inequalities violate the principle that the state may not employ voting mechanisms that deny citizens the right to have their votes counted equally based on where they reside.

Defendants are left to argue that the continuing use of defective voting equipment is justified by the cheaper costs of these machines, relative to other systems. In particular, they argue that “punch card voting systems are cheap to purchase and store.” State's Brief at 22. Even on this point, however, Defendants have failed to introduce a shred of admissible evidence. Their only citation for the assertion that punch cards are cheaper is a 2001 article from the *Fort Worth Star-Telegram*. States have the duty under the Constitution, Art. I, §4, cl. 1 to provide “the manner of holding elections.” Expense is a constitutional duty, not a defense.

More importantly, the costs of complying with the law cannot excuse violation of citizens’ rights under the Fourteenth Amendment. In Bradley v. Milliken, for example, the Sixth Circuit held that the fact that expenditure of public funds that would result from a desegregation order did not excuse the failure to “comply with a constitutional requirement to eradicate all vestiges of de jure desegregation.” 540 F.2d 229, 245 (6<sup>th</sup> Cir. 1976), *aff'd* 433 U.S. 267 (1977). In that opinion, the Sixth Circuit quoted with

approval Judge Wisdom's rejection of an argument made by former Alabama Governor Wallace that "a state legislature is free, for budgetary or other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights." Bradley, 540 U.S. at 244 (quoting Watt v. Aderholt, 503 F.3d 1305, 1315 (5<sup>th</sup> Cir. 1974); see also Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9<sup>th</sup> Cir. 1992) ("[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights") (citing cases).

So too, the Defendants' arguments regarding the security of new voting technologies are *not* a sufficient justification for continuing to employ demonstrably error-prone voting systems. That is true for three distinct reasons. First, as noted above, this argument confuses the question of liability with the issue of remedy. The question before the court is whether the use of punch cards and other non-notice equipment violates equal protection, not what type of equipment should be installed to replace that defective equipment. Second, Plaintiffs do not seek – now or at the remedial stage – to dictate to the state what sort of equipment must be used to replace the systems challenged in this lawsuit. In particular, Plaintiffs do not insist upon the implementation of electronic voting systems, with respect to which some security concerns have been raised. State's Brief at 22. Plaintiffs' claims would be resolved, if Defendants were to move to an optical scan system that allows error notification. Third, even if electronic voting systems were the *only* alternative to the systems that Defendants now use, the Secretary of State himself has taken the position that these systems can safely be implemented, if proper safety precautions are followed.<sup>11</sup>

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<sup>11</sup> At the conclusion of their brief (State's Brief at 25), Defendants assert that Franklin County's electronic voting system does not contain error correction. In fact, this electronic system, though relatively old for an

It is therefore false to assert that, if electronic voting systems were implemented, “Plaintiffs’ lawyers would immediately file yet another lawsuit against these Defendants for introducing the very technology they are asking for here.” State’s Brief at 23. As an initial matter, contrary to Defendants’ assertion, Plaintiffs are not asking for the implementation of any particular voting technology here. What they are asking for – or more properly, what they will ask for at the remedial stage – is simply that the Defendants implement technology that avoids substantial disparities between citizens in different counties. Moreover, in the one place where a citizen has challenged the use of electronic voting systems based on the sort of security concerns raised by Defendants, that claim was soundly rejected. Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003). The court in that case found there to be no evidence that electronic voting “is inherently less accurate or produces a vote count that is inherently less verifiable, than other systems.” Id. at 1105. The court therefore rejected a claim that the use of user-friendly electronic voting systems violates equal protection. Id. at 1106.

The issue here is not whether Ohio must provide a “perfect” or “error-free” voting system, as Defendants mistakenly assert. Rather, the issue is whether Ohio violates equal protection by continuing to employ a dual voting system that systematically denies the votes of citizens in certain counties, based solely on the happenstance of geography – and more specifically, on what equipment is used in the county where they happen to live. Under Supreme Court precedent, such unequal impediments to the right to vote must be evaluated under strict scrutiny. As Defendants acknowledge through their silence on this

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electronic system, does have blinking lights that notify voters of whether they have undervoted. In addition, it does not allow overvotes, thus eliminating this source of error. In any event, the key question is *not* whether Franklin County’s electronic system should technically be characterized as an “error

point, the state's use of non-notice voting machines is not narrowly tailored to serve a compelling interest. Nor is it rationally related to any legitimate government interest. Accordingly, Defendants are not entitled to summary judgment on Plaintiffs' equal protection claim.<sup>12</sup> To the contrary, this Court should grant Plaintiffs' motion for summary judgment on this claim.

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notification" system or not; instead, the key point is that this system has proven much more accurate than the punch card and central-count optical scan systems used elsewhere in Ohio.

<sup>12</sup> Plaintiffs do not here discuss their Due Process Clause argument, since it is unnecessary to defeat Defendants' motion for summary judgment. This argument is addressed in Plaintiff's summary judgment brief (at 24-25), and incorporated herein by reference.

**IV. Conclusion**

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny the Defendants' Motion for Summary Judgment, and grant the Plaintiffs' motion for summary judgment on both Count One and Count Two.

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**Certificate of Service**

This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 16<sup>th</sup> day of April, 2004.

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