

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF OHIO  
 EASTERN DIVISION AT AKRON

Effie Stewart, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 5:02-CV-2028
	)	Judge David D. Dowd
J. Kenneth Blackwell, <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

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**Plaintiffs’ Trial Brief**

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I. Statement of Material Facts

There are two groups of defendant parties: (1) the County Defendant parties are composed of members of the Summit, Sandusky, Montgomery, and Hamilton Counties' Boards of Elections and Boards of Commissioners; and (2) the State Defendant parties are composed of the members of the Ohio Board of Examiners for the Approval of Electoral Marking Devices and Secretary of State J. Kenneth Blackwell. See Final Fact Stipulations (Doc. 234), ¶¶ 6-11. All Defendants are sued in their official capacities. Plaintiffs are registered voters in the four Defendant Counties who voted in the 2000 election and plan to vote in future elections. *Id.*, ¶1-4. Additionally, Plaintiffs Effie Stewart, Marco Sommerville, Vernelia Randall, and Arthur Slater are African American registered voters in Summit, Montgomery and Hamilton Counties. Final Fact Stipulation (Doc. 234), ¶5.

A. Ohio's Flawed Voting Technology

The State of Ohio, including the four defendant counties, certifies and operates an election system that relies on a variety of different voting equipment. The State, through its chief election officer Secretary of State Blackwell, has authorized the following types of equipment for use in Ohio: punch card machines, optical scan machines,<sup>1</sup> lever machines and direct recording electronic machines. Final Fact Stipulation (Doc. 234), ¶13; State HAVA Plan, pp. 11-13. The counties choose their voting equipment from a list of possible technologies that were certified by the Secretary

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<sup>1</sup> There are two types of optical scan systems used in Ohio: "central-count" optical scans, and "precinct-count" optical scans. Precinct-count optical scan systems have an error-correction feature which gives voters a chance to discover and correct possible mistakes at the poll, while central-count optical scan systems does not have such a feature. Final Fact Stipulation (Doc. 234), ¶21.

of State. See O.R.C. § 3506.15. Ohio is a pervasively punch card state;<sup>2</sup> Summit, Hamilton, and Montgomery Counties use punch card voting equipment. Final Fact Stipulation (Doc. 234), ¶¶ 14, 20. In the 2000 election Sandusky County used a punch card voting system; however, beginning in 2001, and continuing for all subsequent elections, Sandusky County has utilized a central-count optical scan system. Id., ¶22.

There are two main components to any election system: (1) the vote recording technology with which the voter records his or her preferences, and (2) the vote tabulating technology that reads and counts the ballots. Additionally, these technologies utilize different methods of reading and counting votes. Some voting systems have a feature (often referred to as "second chance" voting) which provides some form of active feedback from a ballot reader that instantly informs the voter of potential errors on her ballot and allows the voter to make any needed corrections. Final Fact Stipulation (Doc. 234), ¶16. Most counties in Ohio do not utilize voting machines which allow a "second chance." Id., ¶17. Neither the punch card system nor the central-count optical scan system gives the voter notice to discover and correct possible mistakes at the poll; therefore, none of the defendant counties have such features included in their recording and tabulating equipment.

One of the most crucial concerns about non-notice technology involves the incidence of residual votes, which represents occasions when no vote can be tallied for a ballot in a particular electoral contest. There are two types of residual votes: overvotes and undervotes. An "overvote" occurs when a voter registers more than one choice for a

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<sup>2</sup> 69 of Ohio's 88 counties use punch card voting. These 69 counties include 72.5% of the state's registered voters, and 74% of the 11,756 precincts. Final Fact Stipulations (Doc. 234) ¶14. Among the 19 non-punch card counties in the State of Ohio, 11 use optical scan equipment, six use electronic voting equipment, and two use lever machines. Id., ¶15.

candidate in a particular race and thereby disqualifies his or her vote for that particular race. An “undervote” occurs when a voter does not mark a ballot in a particular race or votes for fewer than the allowed number of candidates. “Residuals votes” are overvotes and undervotes combined. Id., ¶24. 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) can be programmed to alert voters of undervotes and prevent voters from casting overvotes.<sup>3</sup> Id., ¶23.

It is well recognized among electoral scholars and election officials, that the majority of overvotes are due to machine error, and do not represent the voter's intent. See, e.g., Answer of Montgomery County ¶7. While undervotes can result from a voter intentionally wishing not to vote for any candidate in a particular race, most undervotes at the top of the ballot represent errors that can be attributable to defects in the operation of the voting equipment.

Undervoting also encompasses voters intentionally not voting for a particular race. See Final Fact Stipulations (Doc. 234), ¶75. While rarely seen at the top of the ballot, the occurrence of undervoting increases as one looks at races further down the ballot. See Deposition of Christopher Heizer, pp. 56-58. Plaintiffs will offer expert testimony of Dr. Martha Kropf on the occurrence of intentional undervoting. Using exit polls – the only way to constitutionally determine a rate of intentional undervoting, Final Fact Stipulations (Doc. 234), ¶76, Dr. Kropf estimates that a minimum of one-ninth but

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<sup>3</sup> Electronic or “DRE” voting machines can be programmed to alert voters that they have not made a choice in a particular race. DRE technology advises voters of the choices they have made, showing whether they have undervoted, and gives them a message allowing them to review and verify their choices before casting their votes. Final Fact Stipulation (Doc. 234), ¶23.

no more than two-fifths of residual votes in presidential contests may be accounted for by intentional undervoting. Kropf Report (Doc. 171-15-4a), at 2. Voter self-reports show that, for presidential elections between 1980 and 2000, the average level of intentional undervoting was between 0.73% and 0.77%. Kropf Report (Doc. 171-15-4a) at 3. In 2000, the estimated level of intentional undervoting was 0.34%. Id.

B. Lost Votes in Ohio During the 2000 General Election

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 public confidence in our democracy. Defendant Blackwell has acknowledged that the State of Ohio's failure to replace the punch card as the state's principal voting method "invites a Florida-like calamity." See Letter of J. Kenneth Blackwell to Honorable Doug White at 3 (February 26, 2004). 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." Id. 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. Defendants' own self-reported election results – not to mention the admissions of Secretary 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, fare particularly badly, resulting in a significantly greater percentage of lost votes than any other system used in the state.

Dana Walch, who currently serves as Defendant Blackwell's Director of Election Reform, testified during his deposition case 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 Dana Walch at 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. at 47. Mr. Walch, who is one of the Defendants' chief advisors on election reform, went on to describe a number of ways in which he, and presumably Defendant Blackwell, believed DRE technology to be superior to punch card technology in terms of reducing voter error. Id. at 48- 51. 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. at 52. Walch also conceded that restoration of voter confidence in Ohio depended on the "replace[ment] of punch card technology." Id. at 55.

Defendant Blackwell has also admitted the deficiencies in Ohio's existing voting system. In the State of Ohio's Preliminary State Plan for Implementing the Help 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 (Doc. 115), at 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. at 16; Final Fact Stipulations (Doc. 234), ¶25.

As explained in a report by the minority of the Ohio Election System Study Committee, to which Defendant Blackwell and four other committee members signed on: “A vast body of information was presented to the Committee documenting the higher rate of error for punch cards compared to other systems, and highlighting the benefits of second-chance precinct-count voting systems....” Transmittal Letter of Secretary of State Blackwell and Report of Final Recommendations of the Election Study Committee, November 8, 2001 (Doc.206-1-a) at 16 (minority recommendations of Secretary Blackwell, State Senator Mark Mallory, State Representative Tom Lendrum, Allen County Board of Elections Director Keith Cunningham, and Mr. E.J. Wunsch, Esq.). The report also explains:

In Florida, Ohio and other states, punch card ballots have a higher rate of mechanical error than other types of devices because of the nature of their operation. Optical scan systems, that were centrally counted, in Florida, on the other hand, had the highest rate of voter error that led to disqualification of a vote. However, punch card systems and optical scan systems with a ‘second chance’ feature that counts ballots at the precinct level had significantly lower instances of both voter error and mechanical error.... [M]any Ohio voters also encountered trouble executing their ballots correctly in the 2000 Presidential election, most of which centered on punch card ballots and were the results of some physical failure of the ballot or voter error. Many times, these problems resulted in ‘over-voting’ which is when a voter casts more votes than is allowed for a given race.

Id. at 18. The report further explains:

[T]he ideal voting system provides voters with a ‘second-chance’ opportunity to review ballots and be informed of potential errors before finalizing the casting of their votes, counts votes at the precinct level, and provides election administrators with an audit trail to perform post-election audits. This finding is further reinforced by the Supreme Court ruling in *Gore v. Bush* that each ballot cast must carry the same weight under the law. ‘Second chance,’ precinct-count systems offer voters the most opportunities to correct for potential voter error and as such satisfies *Gore v. Bush*. The fundamental need to count every vote accurately is addressed along with the need to have those votes reported in a timely and verifiable manner.

Id. at 19.

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 seventy 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 the 2000 elections, the State’s data show that the residual vote rates for the different voting systems used in Ohio were as follows for the President and U.S. Senate races:

Type of Voting Equipment	Number of Ballots Cast	Presidential Residual Vote Rate (Number of Non-Voted Ballots)	U.S. Senate Residual Vote Rate (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)
Central	433,914	1.8% (7,688)	4.9% (21,402)
Precinct	58,188	1.0% (576)	7.3% (4,225)
Electronic	537,474	0.7% (3,564)	6.1% (32,962)
Lever	176,467	0.5% (825)	8.2% (14,445)

Appendix E to Pls.' Opp. Defs.' Mot. Summ. J. (Doc. 187) (compiling data provided by the Secretary of State's office).

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 than 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 above statistics also show that, in the 2000 election, punch cards had a residual vote rate of 7.6% in the U.S. Senate election, the only race other than the presidential election in which voters throughout the state chose between the same candidates. The residual vote rate for punch cards in this race was higher than for any other system except lever machines. In the 2000 U.S. Senate race, the residual vote rate for punch cards was significantly higher than the residual vote rate for electronic voting equipment. Id.

C. Intra-County Racial Disparities in Residual Votes in Summit, Montgomery and Hamilton Counties

During the 2000 presidential election, the use of punch card voting equipment also resulted in larger intra-county racial differences in overvoting and/or undervoting than did notice technology. Engstrom Report (Doc 171-42-4n) at 10. Plaintiffs' expert Dr. Richard Engstrom used three analytic procedures to assess the extent to which the African-American voters overvoted or undervoted at different rates than non-African Americans voters in each of these counties.<sup>4</sup> See Final Fact Stipulations (Doc. 234), ¶35.

In Hamilton County, due to overvotes, the ballots of African-American voters were rejected at nearly *seven times* the rate of the ballots of non-African-American voters; African-Americans ballots resulted in total undervotes at *nearly twice* the rate of non-African-American ballots.<sup>5</sup> Adjusting for the rate of intentional undervotes, African-Americans in Hamilton County suffered unintentional undervotes *seven-and-a-half times* more than non-African American voters did. See Kropf Report, ¶¶8-10 and Appendix I (taken from Engstrom's report), *infra*. Similarly, in Summit County, African-American voters experienced overvoting more than *nine times* the rate of non-African-Americans. African-American voters experienced total undervoting almost *two-and-a-half times*

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<sup>4</sup> Two of these methods were approved by the United States Supreme Court in Thornburg v. Gingles, 478 U.S. 30 (1986). These are homogeneous precinct analysis and ecological regression analysis. Homogeneous precinct analyses simply report the percentage of the voters that overvoted or undervoted in the precincts in which over 90 percent of the voting age population was not African American and in those in which over 90 percent was African American. Regression analyses provide estimates of these rates for African American and non-African American voters based on the votes cast in all of the precincts in an election. The third methodology is called Ecological Inference (or EI). This is an estimation procedure that also takes into account all of the precincts in which votes are cast that was developed subsequent to Thornburg v. Gingles by Gary King. Engstrom Report (Doc 171-42-4n) at 5-6.

<sup>5</sup> The result of fractional disparity between the races on over- and under-votes is calculated from data from the Engstrom Report by averaging the results for each of the three methods and dividing the averages. For Hamilton overvotes, the exact number is 6.808. For Hamilton undervotes, it is 1.737. Summit overvotes—9.217; Summit undervotes—2.442. Montgomery residual votes—2.554.

more frequently than non-African-Americans and experienced unintentional undervoting more than *three times* the rate of non-African American voters. In Montgomery County, African-Americans voters experienced residual voting around *two-and-a-half* times as often as non-African-Americans voters. Appendix I: Racial Disparities by County in Residual Data, infra.

Franklin County, a county within the state of Ohio, uses Direct Record Electronic (“DRE”) voting machines. Engstrom Report (Doc. 173, Ex. H), 3. These machines do not allow overvoting, notify voters when undervoting occurs, and afford voters an opportunity to correct an accidental undervote. Id. Consequently, there is no racial disparity in the number of observed overvotes in Franklin County—neither blacks nor whites experience any overvoting. Id. at 6-7. Moreover, DRE machines greatly reduce the rate of accidental undervoting. For non-African-Americans, the rate becomes negligible, and for African-Americans it drops below 1%, nearly eliminating the racial gap in accidental undervotes. See appendix I, infra.

These racial disparities in the rates of residual votes exist against a backdrop of consistent socioeconomic disparities between African-Americans and whites in each of the respective counties. In particular, racial gaps exist in the number of single parent homes, the number of children attending private schools, level of education attained, unemployment rates, size of the labor force, income levels, the number of people living in poverty, earnings, crowded housing conditions, access to telephones and transportation, plumbing, rental expenses, and property values. See Appendix II: Racial Disparities in Socioeconomic Data, infra; Pls’ Opp. to Defs’ Mot. Summ. J. (Doc. 187) at n. 13, App. B, C, and D; U.S. Census 2000 Summary File 3. The size and direction of

these disparities are remarkably consistent among the four counties considered. However, while the racial disparities do interact with error-prone punch card machines in Hamilton, Summit, and Montgomery Counties to cause racially disparate rates of residual ballots, the superior voting technology used in Franklin County prevents the socioeconomic disparities from translating into a racial gap in residual ballots. In other words, unlike Defendant Counties, Franklin County's use of DRE machines overcomes ambient racial disparities and ensures that blacks and whites have an equal opportunity to participate in the political process. Defendant Counties' use of punch card machines interacts with socioeconomic disparities to cause the racial disparities observed in the rate of uncounted ballots.

Though Defendants have claimed to have begun the process of replacing some of the non-notice voting technology in Ohio, see Final Fact Stipulations (Doc. 234), ¶¶44-49, many of Ohio's counties – including the Defendant Counties – continue to use non-notice voting technology and will likely continue to do so unless enjoined by this Court. Therefore, the plaintiffs will vote on non-notice technology in November 2004 and for the foreseeable future, with no assurances or date certain from the defendants that these violations of the Plaintiffs' statutory and constitutional rights will end.

II. The Defendants' Certification and Use of Error-Prone Voting Equipment Violates the Fourteenth Amendment to the United States Constitution

A. 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

The Supreme Court has long held that inequalities in the area of voting warrants special attention under the Fourteenth Amendment. As the Court most recently put it in Bush v. Gore, the Equal Protection Clause demands that election officials accord "equal

weight” to each vote and “equal dignity” to each voter. 531 U.S. 98, 105 (2000). The question in this case is whether, under Bush and other cases stating this core principle of electoral equality, Defendants “may allow the use of different types of voting equipment with substantially different levels of accuracy.” Black v. McGuffage, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002).

The evidence in this case will show that Ohio uses voting equipment with substantially different levels of accuracy, and therefore violates the Equal Protection Clause. Plaintiffs’ equal protection claim rests on the statewide disparities arising from the use of two types of voting systems: 1) the infamous punch card system, used by the vast majority of Ohio counties, and 2) optical scan systems that lack error notification, used in eight Ohio counties. As summarized below, the continuing use of these demonstrably unreliable voting systems denies equal treatment to those citizens who have no choice but to use the equipment provided, and are disadvantaged in comparison to their fellow citizens in other counties who use better voting systems.

1. Ohio’s Election System Unconstitutionally Discriminates Against Individuals Who Are Required to Use Unreliable Voting Equipment Without Error Notification

In Bush v. Gore, which involved unequal systems for casting and counting votes, the Supreme Court explained that “[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)). Bush is not the first case to have articulated this principle. In fact, 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. 2, 17 (1964). It is also settled law that at the core of the 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).

In holding that Florida’s vote-counting method violated equal protection, the Bush Court explicitly based its decision on equal protection doctrine developed in earlier cases affirming equal weight to each vote and equal dignity for each voter. 505 U.S. 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)). For example, in Reynolds, the Court struck down a legislative apportionment scheme that gave some voters less representation than others, based solely on the jurisdiction within which they lived. 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.

Significantly, Defendants *agree* with Plaintiffs about the constitutional rule that governs 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 Opp. to MSJ (Doc. 186), at 22 (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 (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). The central question before this Court, therefore, is whether the evidence shows such an impact. If the use of non-notice punch card and optical scan voting systems does have an impact on

the fundamental right to vote, then the certification and use of such systems may only be upheld if “necessary to promote a compelling state interest.” Mixon, 193 F.3d at 402.

In this case, the evidence will show that the use of different voting equipment with substantially different levels of accuracy *does* limit many Ohioans’ ability to exercise their right to vote. First, state law permits, and has resulted in, a system wherein some voters must use equipment that is substantially less reliable than that used by others. Ohio has thereby established a dual system of voting, where the residents of most counties – including the Montgomery, Hamilton, and Summit County Plaintiffs – are required to vote with “hanging chad” punch card equipment that does not include error notification, while the residents of other counties vote with equipment that does provide voters with notice and the opportunity to correct errors. See Order (Doc. 234) at ¶¶12, 13; Ohio Revised Code §§ 3506.01 *et seq.* Second, some voters, particularly those who are required by the operation of law to vote on punch card machines (or, in Sandusky County, on central-count optical scans), are subjected to a significantly greater risk that their votes will not be counted. Id. at 2-4, ¶¶ 16, 17, 18, 25. As a result of this statutory scheme, the Plaintiffs and members of the class which they purport to represent, are disadvantaged in the meaningful exercise of the franchise when compared to those individuals who live and vote in counties that have adopted the more reliable and accurate voting equipment that incorporates “second chance” voting. See id. at 2, ¶¶16-18.

The Defendants’ decisions to certify and use punch card voting equipment deny the votes of tens of thousands of Ohioans in each election cycle. In particular, Defendants’ own evidence, summarized in the chart appearing in the Statement of

Material Facts, supra, 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.

These results are consistent with those which Dr. Martha Kropf has drawn from the dataset provided by Defendants' expert Dr. John Lott.<sup>6</sup> In the presidential contests from 1992-2000, for example, 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>7</sup>

Thus, Ohio and the Defendant Counties have adopted an election system that results in discrimination with respect to the right to vote, based solely on the jurisdiction in which one happens to reside – and, more specifically, on whether that county continues to use demonstrably unreliable voting equipment. Citizens in most counties (including all of those in which the Plaintiffs reside) are required to vote on equipment without error notification, while voters in other counties use more reliable voting equipment with error notification. See Order (Doc. 234) at 3, ¶¶ 22-23. This effect of this dual system is to deny the votes and dilute the voting strength of Ohioans compelled to use less reliable, less accurate machinery. Whether an individual's vote is counted – or whether an

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<sup>6</sup>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.

<sup>7</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. Pls' Mot. Summ. J. (Doc. 171) at 21-24. For the reasons explained in Plaintiffs' prior briefs, 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.

individual is exposed to a significant or minor risk that his or her vote will not be counted – is a matter of completely arbitrary happenstance, and “[e]qual protection of the law is not achieved through indiscriminate imposition of inequalities.” Shelley v. Kraemer, 334 U.S. 1, 22 (1948); see also Bush v. Gore, 531 U.S. 98, 105 (2000) (“The right to vote 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.”) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

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 novelty of the Florida recount made it impossible for the Court to assess precisely what impact varying recount procedures would have. 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 “safeguards” 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 in residual ballots from county to county as a result of the different voting equipment used. Plaintiffs show that this statistical disparity remains from year to year and contest to contest. 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 lower courts since Bush have had no

difficulty in upholding equal protection claims, arising from the use of unreliable voting systems in some counties but not others. See Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002). 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; 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>8</sup>

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 Black or Common Cause – and much stronger than in Bush where no such statistical evidence of unequal treatment was presented.

2. Since Ohio’s Election System Has a Differential Impact on the Fundamental Right to Vote, Equal Protection Analysis Requires That it Must Satisfy the Requirements of Strict Judicial Scrutiny.

Modern equal protection analysis requires a court to determine the applicability and then to apply one of three “standards of review.” The first and most deferential

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<sup>8</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.

standard, generally applicable to so-called economic or social welfare regulations, is the “rational basis” test which requires a plaintiff show that a challenged classification is not rationally related to a legitimate state interest. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985). The second standard, often described as “intermediate scrutiny,” requires the state to show that the classification is substantially related to an important governmental interest. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (standard applicable to gender classifications). Finally, and most significantly for this case, the Supreme Court has adopted a “strict scrutiny” standard. This standard, described as “strict in theory but fatal in fact,” Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)(Marshall, J, concurring), is most difficult for the government to satisfy. It presumes that a classification is unconstitutional and places the burden squarely on the state to show that the classification is “necessary” to further a “compelling” state interest. Among other features, strict scrutiny requires the state to show that a classification is narrowly tailored to further its compelling interest and that there are no less restrictive or less discriminatory alternatives available to it which would forward that interest. See Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

Strict scrutiny review is required where the state discriminates in ways that either adversely affect so-called “suspect classifications” or “fundamental interests.” And it has long been established that the right to vote, whether in federal or state elections, is a fundamental interest for purposes of equal protection analysis. 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 v. Virginia Bd. of

Elections, 383 U.S. 663, 667 (1966): “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.” see also, Reynolds, 377 U.S. at 562. Practices that deny electoral equality may therefore be upheld only if narrowly tailored to serve a compelling state interest. Harper v. Sims, 383 U.S. 663, 667 (1966).

In determining the extent to which strict scrutiny applies in the voting context, the pivotal question is whether the challenged practice “has an impact on the [Plaintiffs’] ability to exercise the fundamental right to vote.” McDonald v. Bd. of Elect. Comm’rs of Chicago, 394 U.S. 802, 807 (1969). Moreover, “a careful examination...is especially warranted where lines are drawn on the basis of wealth or race.” Id. at 807. As Defendants have acknowledged, election practices that *do* have such an impact are subject to strict scrutiny, and may only be upheld if the Defendants can establish that they are “necessary to promote a compelling state interest.” Mixon v. NAACP, 193 F.3d 389, 402 (6th Cir. 1999).<sup>9</sup>

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<sup>9</sup> In McDonald and Mixon, two cases relied upon by the Defendants in their memorandum opposing the Plaintiffs’ motion for summary judgment (Doc. 186), the courts found that the cases did not implicate the right to vote and therefore used rational basis review. In McDonald, the plaintiffs were Cook County, Illinois’ pre-trial detainees, unable to post bail, who asserted an equal protection claim to be included in the class of voters entitled to vote by absentee ballot. The Court found that the dispute centered not on the fundamental right to vote, but on the convenience of receiving an absentee ballot. Furthermore, the court noted nothing in the record to support an assumption that the plaintiffs were denied a right to vote; with armed transportation or polling stations put within reach, the detainees could easily vote. Since the right to vote was not implicated, the Court was “left with more traditional standards for evaluating [plaintiffs’] equal protection claim. 394 U.S. at 807-09. In Mixon, the plaintiffs claimed an equal protection right to an elected, instead of an appointed, school board. The Sixth Circuit applied a rational basis test to the statutory scheme before it because it found that the Supreme Court had “previously endorsed appointive systems for nonlegislative offices”, and that the Court has “implied that voters do not have a fundamental right to an elected school board.” 193 F. 3d at 402. Moreover, the Court found that the appointive system was rationally related to the legitimate state interest in having highly qualified individuals serve on school boards for long, stable terms. Id. at 403.

The election practice challenged in this case is markedly different than the practices challenged in McDonald and Mixon. Unlike the Plaintiffs in Mixon, there is no question that Plaintiffs have a right to vote in races for elective office. And here, there is uncontradicted evidence showing that punch card and

The evidence in this case overwhelmingly establishes that the election practices that the Plaintiffs challenge do have an impact on the Plaintiffs right to vote. *Defendants' own data* show such statewide disparities in lost votes. Pls' Mot. Summ. J. (Doc. 171), p. 22; Plaintiffs' Opp. Defs.' Mot. Summ. J. (Doc. 187), Appendix E. In particular, the data collected by the state show that in the 2000 presidential elections, the punch card voting machines had a residual vote rate over *three times* that of electronic and lever machines.

While it is certainly true that some undervotes are intentional, see Order (Doc.234) at 4, ¶30, Plaintiffs have provided uncontradicted evidence that the percentage of intentional non-votes has been quite small: 0.34% in 2000, and, on average, 0.73% in presidential elections from 1980 to 2000. Given this evidence, the statistical disparity between punch card and other voting systems is even more glaring. Thus, most non-votes at the top of the ticket are the reflection of an error, not of a deliberate intention not to vote. See Kropf Report at ¶8; id. at ¶ 11 (concluding that “the majority of invalidated votes are due to accidental undervoting and overvoting.”). Conservatively assuming an intentional non-vote rate of 0.3% in 2000, punch card machines had an error rate (i.e., *unintentional* non-vote rate), approximately *ten times* that of lever machines, *five times* that of electronic machines, and *three times* that of precinct-count optical scan systems.

See Doc. 171 at 18; Doc. 187, App. E.<sup>10</sup>

Although Defendants have criticized Plaintiffs for relying on 2000 data, an

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non-notice optical scan systems *do* have an impact – and a pronounced one – on the votes of those who must use them. Order (Doc. 234) at 3, ¶ 25.

<sup>10</sup> These statistics are derived by subtracting intentional non-votes from the total residual vote rate. This calculation yields the following unintentional non-vote rates:

Punch cards (Votomatic & Datavote combined)	2.0% (2.3-.3)
Central-count optical scan	1.5% (1.8-.3)
Precinct-count optical scan	0.7% (1.0-.3)
Electronic	0.4% (.7-.3)
Lever	0.2% (.5-.3)

analysis of the data for the presidential elections in 1992, 1996, and 2000 yields similar results. In particular, this data – supplied by Defendants’ own expert John Lott – shows that punch card voting machines had a residual vote rate significantly higher than other equipment in these elections. According to Lott’s data, the residual vote rate for punch card voting machines was 2.29%, compared to 0.94% for electronic, 1.04% for lever, and 1.15% for precinct-count optical scans. Kropf. Aff., 5. Central-count optical scan systems fared only slightly better than punch cards, according to this data, with a residual vote rate of 2.14% in the 1992, 1996, and 2000 presidential contests. Although Defendants’ expert John Lott relies on a flawed analysis of this data,<sup>11</sup> even he acknowledges that punch card machines had a significantly higher residual vote rate (2.4%) than electronic (1.0%), lever (1.4%), or optical scan machines (2.0%) in the presidential elections between 1992 and 2000.

Plaintiffs’ expert testimony confirms what the State’s own data and expert evidence show: that the challenged voting equipment is substantially less accurate than other systems that are available and in use elsewhere. The expert testimony of Roy Saltman will show that, far from being an isolated case, the problems experienced with Ohio’s punch card voting systems are typical of those that have plagued the use of this equipment nationwide. See generally Saltman Report (Doc. 171-4p). Saltman also describes the reasons for the problems with punch card voting machines – specifically, that the ballot is inherently fragile, that the chad prevents reproducible results, that the

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<sup>11</sup> Dr. Lott averaged non-votes among different wards without accounting for their size. As a result, his analysis gives undue weight to smaller wards, in calculating the percentage of residual votes. For example, under this methodology, a ward with 10 people would be given the same weight as one with 1000 people, for purposes of determining the residual vote rate within a county. If the statewide residual vote rate for each type of system is weighted by population, however, then the disparities described above result.

system is user unfriendly (a problem that cannot be remedied through voter training), and that voters cannot easily see their errors. Id. at 16-17.

The evidence will therefore show that the challenged voting equipment does have a substantial impact on the Plaintiffs' right to vote, and on all other citizens who vote in counties using equipment that does not provide error notification. In each election cycle, these voters are effectively subjected to the denial of thousands of votes. Ohio's election practices are subject to strict judicial scrutiny and can only be upheld if necessary to serve a compelling interest.

3. The Continuing Use of Error-Prone Voting Equipment Cannot Survive Equal Protection Scrutiny Because it is Not Necessary to Serve a Compelling State Interest

The Defendants have never asserted that their continuing use of error-prone voting technology is necessary to serve a compelling state interest, presumably because they realize they cannot carry the heavy burden that this standard requires. Indeed, throughout this litigation the Defendants have conceded, in their HAVA plan and elsewhere, that the use of punch card and non-notice election is deeply problematic and that it needs to be replaced with less error prone equipment. For example, Defendant Blackwell has acknowledged that the State of Ohio's failure to replace the punch card as the state's principal voting method "invites a Florida-like calamity." Referring specifically to this litigation, Secretary Blackwell candidly admitted that the ongoing legislative foot-dragging in providing funds to upgrade Ohio's voting system "proves only to support the plaintiff's concerns that Ohio is not serious about [Help America Vote Act] implementation and will likely be used in support of a plaintiff's motion to win immediate judgment." See Letter of J. Kenneth Blackwell to Honorable Doug White, p.

3 (Doc. 159). These statements support the idea that Ohio has a compelling interest in replacing—not maintaining—its punch card and optical scan systems.

Yet despite the admitted inadequacy of Ohio's existing voting systems and the pendency of this litigation, the state has still failed to allocate or otherwise obtain the funds needed to replace them. This was true before the enactment of recent state legislation requiring that any replacement voting machines be equipped to provide a voter verified paper audit trail (VVPAT). As the Defendants have all but conceded, it is even more true now, given the fact that HAVA funds, even if fully made available to the state, will not pay for machines that are originally equipped with VVPAT or for the retrofitting of replacement equipment installed without VVPAT. See Defendants' Supplemental Brief to Dismiss This Case Based Upon Mootness (Doc.224), at 5. Most recent reports indicate that 69 of Ohio's 88 counties will continue to use punch cards in 2004 and that at least 70% of Ohio's voters will continue to vote on punch cards. Jon Craig, "New Ballot Machines No Longer in Play," Columbus Dispatch, July 17, 2004, at C1; John McCarthy, "Electronic Voting on Hold," Cincinnati Post, July 17, 2004, available at <http://www.cincypost.com/2004/07/17/voting07-17-2004.html>.

The ongoing discrimination that results from the Defendants' continuing approval of and use of unreliable voting equipment cannot withstand strict scrutiny. As noted above, strict scrutiny places the burden on the Defendants to establish that the requirement that Plaintiffs vote on error-prone equipment furthers a *compelling* state interest. This the Defendants cannot do. Defendants have suggested only that there are "rational reasons" for the state to have certified "different types of voting machines for the local Boards of Elections to use." Memorandum in Support of Motion for Summary

Judgment By Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County (Doc. 173), at 21; *id.* at 21-22 (asserting that the “State has rational reasons for initially certifying the punch card ballot and for keeping that ballot in use,” and that “the Counties have rational reasons for purchasing [punch card equipment] and for continuing its use.”). But even under rational basis review – let alone the strict scrutiny standard that equal protection doctrine requires – these interests are clearly insufficient.

Defendants have proffered three justifications for their approval and implementation of a dual voting system. First, the Defendants have claimed that prior to this litigation, they were ignorant of the defects in punch card voting. *Id.* at 22 (claiming pre-2000 ignorance that “punch cards could produce any problems in elections.”). There are reasons to doubt the veracity of this claim, but even if the Defendants claim of pre-2000 ignorance is credible, it cannot provide a rational justification for the continuing use of the very error-prone equipment that the Defendants themselves now concede should be replaced. At the most, the Defendants’ alleged ignorance might provide a “good faith” defense to a claim of *damages* for the violation of Plaintiffs’ constitutional rights. But Plaintiffs have not asserted a claim for damages, and there is no “good faith” defense to a claim of equitable relief. Flagner v. Wilkinson, 241 F.3d 475, 483 (6th Cir. 2001), cert. denied, 534 U.S. 1071 (2001).

The second justification advanced by the Defendants is just as constitutionally inadequate as the first. The Defendants have argued that they are justified in maintaining a system that discriminates against the Plaintiffs because it would cost money to change to a system that treats all voters equally. Defs. Mot. Summ. J. (Doc. 173) at 22 (“The

preservation of taxpayers' money, naturally, is a rational basis for a State or County to certify, purchase, or maintain a particular type of voting machine.”). While the goals of cost-savings or “administrative convenience” may be sufficient to explain a garden-variety classification – state discrimination that does not burden fundamental constitutional rights – they are clearly not sufficient to justify infringements on the fundamental right to vote. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973)(plurality opinion) (“[W]hen we enter the realm of ‘strict judicial scrutiny’ there can be no doubt that ‘administrative convenience’ is no shibboleth, the mere recitation of which dictates constitutionality.”); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (the savings of “costs cannot justify an otherwise invidious classification”); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (cost savings cannot justify classifications affecting a fundamental interest); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 646-47 (3d Cir. 2003) (state interest in costs savings was not compelling and could not justify state election regulation); *Stone v. City and County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (“[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights.”) (citing cases). Accordingly, the Defendants’ cost-based arguments must be rejected.

Finally, the Defendants have suggested that they have still another “rational reason” for maintaining the current discriminatory system. Defs. Mot. Summ. J. (Doc. 173) at 22. In particular, they have argued that alleged security concerns associated with some of the potential replacement equipment (specifically touchscreens) justify their decision to continue to subject the Plaintiffs to unconstitutional discrimination. Id. at 22-23. But as the Plaintiffs have already argued, see Pls’ Opp. Mot. Summ. J. (Doc. 187) at

32-34, this argument goes to the question of *remedy*; it cannot be credited as a compelling or even legitimate interest for continuing to maintain a system that violates the Plaintiffs' fundamental rights.<sup>12</sup> Moreover, Plaintiffs do not argue that the Defendants are compelled to switch to touchscreens or any other particular type of equipment, but simply that they must eliminate the massive inter-county disparities that arise from the use of non-notice systems in some but not all counties. Nothing in Plaintiffs' arguments, for example, would preclude Defendants from moving to a precinct-count optical scan system throughout the state. Defendants' remedial argument is therefore a red herring, and does not justify their continuing authorization and implementation of a dual voting system in the State of Ohio.

B. 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 Due Process Clause of the Fourteenth Amendment prohibits the government from enacting and enforcing regulations that are either arbitrary or capricious. 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." When a state extends the right to vote to its citizens, it must not only comply with the Equal Protection Clause, but must also assure the Due Process Clause's "rudimentary requirements...of fundamental fairness" are satisfied. Id. at 109.

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<sup>12</sup> Moreover, while security issues have been raised with respect to so-called DRE, or electronic, touch screen voting equipment, they have not been raised with respect to other equipment, like precinct-count optical scan equipment, that presumably is available to replace equipment now in use. Thus, to the extent that the Defendants raise the so-called security issue as a justification for not complying with Constitution and the Voting Rights Act, they are raising a problem of their own making and one that can certainly be avoided.

The requirements of due process are especially 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 900-01.

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 (Doc. 171-2a), p. 47-55, the Defendants have created, maintained, and operated a system that largely has relied upon the use of error prone voting equipment, a system they have long known would subject thousands of voters, including the Plaintiffs, to a significant and unreasonably great risk that their votes would not be counted. Under any standard of review, such a system arbitrarily deprives the Plaintiffs of one of their most cherished constitutionally protected liberties – the right to vote. This system cannot be justified by any legitimate government interest. It therefore violates rights secured to the Plaintiffs by the Due Process Clause.

III. Defendants' Certification and Use of Non-Notice Punch Card Machines in Hamilton, Summit, and Montgomery Counties Violates § 2 of the Voting Rights Act

A. Defendants have committed vote denial by engaging in a state practice that, interacting with social and historical circumstances, results in significant intra-county racial disparities in the ability of African-American voters to have their votes counted in the Defendant Counties.

1. The right to vote in the Voting Rights Act includes the right to have one's vote counted.

The Voting Rights Act (VRA) defines the right to vote protected by § 2 as follows:

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

42 U.S.C. § 1973l(c) (emphases added). While the courts and Congress have long recognized that "the 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," Reynolds, 377 U.S. at 555, a core aspect of the right to vote protected by the Voting Rights Act includes, at a minimum, the proper counting and totaling of votes cast.<sup>13</sup> Protection against racially disparate exclusion of votes cast in the tallying of those votes falls squarely within the scope of the right to vote that § 2 protects.

2. Proof of vote denial requires only three elements: (a) state action with respect to an electoral practice or procedure, (b) racial disparities in the ability to cast one's vote or have it counted, and (c) a causal relationship between the state action and the observed disparities.

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<sup>13</sup> Defendants are simply wrong when they argue that Plaintiffs do not state a vote denial claim by showing that their votes are less likely to be counted. Defs.' Reply Br. Supp. Mot. Summ. J., (Doc. 198), 4 (claiming that Plaintiffs were not denied the right to vote after having registering and casting a ballot).

Section 2 of the VRA provides:

(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**, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(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 political subdivision are not equally open to 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphases added). Well before the 1982 amendments, and consistently thereafter, courts have interpreted § 2 to require proof of only three elements in order to establish a vote denial claim (i.e., where an electoral practice results in racially selective interference with the ability to cast a vote or have it counted properly).<sup>14</sup> That is, courts will find a vote denial violation of § 2 once Plaintiffs have proved that (a) state officials, or officials of any political subdivision,<sup>15</sup> have engaged in an electoral “standard, practice, or procedure”<sup>16</sup> (b) resulting in a racially disparate ability to cast ballots or have

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<sup>14</sup> Of course, the primary motivation behind the 1982 amendments was to clarify the elements of proof needed in vote dilution claims (i.e., where an electoral practice results in racially unequal valuation of votes properly cast and counted). *See, e.g.*, S.Rep. 97-417 at 10 (seeking to respond to the shift in state practice “from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority strength”); *id.* at 26 (discussing the cessation of litigation of vote dilution claims after City of Mobile v. Bolden, 446 U.S. 55 (1980) adopted the intent standard).

<sup>15</sup> Hereinafter, “state action” or “state officials” will also refer to county officials.

<sup>16</sup> This element should not be misconstrued to require a statewide election practice or interdistrict comparisons, as Defendants often argue. *E.g.* Defs.’ Mot. Summ. J. (Doc. 173), 12, 16; Defs.’ Reply Support Mot. Summ. J. (Doc. 198), 6. Most vote denial cases involve challenges to local elections and local practices. *See, Irby v. Virginia State Bd. of Elections, United States v. Post, Roberts v. Wamser, United States v. Jones, Brown v. Post, Goodloe v. Madison County Bd. of Election Com’rs, and Welch v. McKenzie, inter alia, infra.* While some of these cases found violations and others did not, *none* required

them properly counted, (c) as long as the electoral practice, interacting with social and historical circumstances, causes the racial disparity in access or counting. See, e.g., Brown v. Post, 279 F. Supp. 60, 62 (W.D. La. 1968) (election officials providing racially disparate access to absentee ballots violated § 2); United States v. Post, 297 F. Supp. 46, 49 (W.D. La. 1969) (election officials changed the operation of voting machines without adequately informing both black and white voters, resulting in increased difficulty for residents of a special districts—who were predominantly black—to have their votes counted, in violation of § 2); Toney v. White, 488 F.2d 310, 312 (5th Cir. 1973) (registrar conducted an illegal purge of registered voters, affecting more blacks than whites, in violation of § 2); Goodloe v. Madison County Bd. of Election Comm’rs, 610 F. Supp. 240 (S.D. Miss. 1985) (election officials summarily invalidated 250 absentee ballots, virtually all of which were cast by black voters, upon discovering that four absentee ballots were improperly submitted, in violation of § 2); Irby v. Virginia State Bd. of Elections, 889 F.2d 1352, 1358 (4th Cir. 1989) (there was no violation of § 2 when officials shifted from an election to an appointment process because that shift was not casually responsible for black underrepresentation on the school board); Roberts v. Warner, 679 F. Supp. 1513 (E.D. Mo. 1987) rev’d. (for lack of standing) 883 F.2d 617 (8th Cir. 1989) (the summary refusal to review for a recount ballots rejected by punch card machines violated § 2 because voters in wards that used those machines were predominantly black); Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff’d. sub nom. PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991) (a

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the existence of a statewide practice or the finding of an interdistrict disparity. § 2 applies to all “political subdivision[s],” without qualification. 42 U.S.C. § 1973. *Intra-district* racial disparities caused by *intra-district* electoral practices—here, the selection and use of punch-card machines—violate § 2 just as surely as do statewide practices.

dual registration requirement and the lack of satellite registration violated § 2 because these practices—combined with historical and social conditions such as racially disparate access to transportation and working hours—resulted in racially disparate access to registration); Harris v. Siegelman, 695 F. Supp. 517 (M.D. Ala. 1988) (limiting access to the polling booth to five minutes and requiring illiterate voters to affirm their illiteracy before getting assistance combined with historical and social conditions to result in racially disparate barriers to casting votes); Black v. McGuffrage, 209 F. Supp. 2d. 889 (N.D. Ill. 2002) (plaintiffs stated a claim under § 2 by showing that the state uses punch card machines, with higher rates of non-counted ballots, predominantly in counties with majority voting age populations that are African American or Latino); Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (plaintiffs made out a strong claim by showing that the state uses punch card machines, with higher rates of non-counted ballots, predominantly in counties with a majority of minority citizens); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (lower court erred in failing to take into consideration how a felon disenfranchisement statute interacts with historical and social conditions causing a racially disparate composition of the criminal justice system in order to result in racially disparate disenfranchisement of felons); Johnson v. Governor of State of Florida, 353 F.3d 1287 (11th Cir. 2003) (same). In each of these cases, the three elements of state involvement in an electoral practice,<sup>17</sup> racially disparate access to the ballot or racially disparate likelihood of having one's ballot count, and a causal link between the practice and the racial disparity were individually necessary and collectively sufficient to establish a vote denial violation.

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<sup>17</sup> Courts recognize that electoral practices can be episodic, informal, or even non-recurring. The touchstone is whether a state official substantially affects the implementation of the election system. See Brown, United States v. Post, Toney, Goodloe, and Roberts, *supra*.

To the extent that the 1982 amendments changed the elements of a vote denial claim, they made it *easier* to demonstrate causation by enabling the electoral practice to interact with the totality of circumstances to cause the racial disparity. See Chisom v. Roemer, 501 U.S. 380, 384-6 (1991) (“[T]he coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982....” If anything, Congress wanted to “expand the coverage of § 2 by enacting the 1982 amendment.”); compare id. at 408 (Scalia, J., dissenting) (“nothing was lost from the prior coverage; *all* of the new “results” protection was add-on. The issue is not, therefore, ... whether Congress has cut back on coverage of the Voting Rights Act; the issue is how far it has extended it.”).

In Gingles, the Supreme Court insisted that courts perform a “searching practical evaluation of the ‘past and present reality’ when analyzing a § 2 violation.” Thornburg v. Gingles, 478 U.S. 30, 45 (1986). In the context of a dilution claim, this searching practical evaluation involves a preliminary finding of the so-called Gingles preconditions (numerosity/compactness, minority political cohesion, and white bloc voting) in order to ensure that the suspect electoral practice is causally responsible for the minority’s diminished ability “to participate in the political processes and to elect candidates of their choice.” Id. at 44 (quoting S.Rep. 97-417 at 27, 29). These preconditions are not necessary to determine whether an electoral practice that prevents access to the ballot or counting of ballots cast is causally responsible for diminished ability to participate in the political process and elect candidates of choice. *Any practice* that prevents access to the ballot or counting ballots cast, by definition, is causally responsible for diminished ability to participate in the political process and elect candidates of choice. See Chisom, 501

U.S. at 397 (“[A]ny abridgment of the opportunity of members of a protected class to participate in the political process *inevitably impairs* their ability to influence the outcome of an election.”). Since the inability to cast a ballot or to have it counted is a clear abridgment of the opportunity to participate in the political process which inevitably impairs the ability to influence election outcomes, no court has ever held that any of the Gingles preconditions is necessary to establish a vote denial claim.<sup>18</sup> See cases cited supra pp. 30-31.

In short, while a variety of factors may buttress a vote denial claim (including any of the Senate factors), the three elements—(a) state involvement in an electoral practice, (b) racial disparities in the casting or counting of votes, and (c) a causal relationship between the electoral practice, interacting with the social and historical circumstances, and the observed disparities—are individually necessary and collectively sufficient to establish a vote denial violation.

3. The Defendants have engaged in state action with respect to an electoral practice or procedure.

Ohio certifies punch card machines as an acceptable voting technology. Order Stipulating Final Facts (Doc. 234), ¶¶ 12-13. Hamilton, Summit, and Montgomery Counties (hereinafter “Section 2 Defendant Counties”) select and operate these machines. Id. at ¶¶ 20, 32. The certification, selection, and use of punch card machines by the various state and county officials is clearly an election “standard, practice, or procedure.” Defendants’ conduct satisfies the first element of a vote denial claim.<sup>19</sup> Defendants have

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<sup>18</sup> For the completeness of the factual record, some district courts have analyzed the preconditions without deciding that they are necessary to denial claims. E.g., Roberts 679 F. Supp. at 1530.

<sup>19</sup> Hamilton County argues that while they did select and use punch card machines, any errors in counting ballots of African-Americans were inadvertent and did not itself constitute an election practice.

repeatedly in the past confused the nature of the Section 2 claim raised against them. Summit, Montgomery and Hamilton Counties are being sued specifically for their intra-county racial disparities in residual ballots which are clear violations of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Defendants have often attempted to seek refuge in the absence from this lawsuit of Cuyahoga County, another county in Ohio with African Americans voting on punchcards. To clarify at the outset, Cuyahoga County's residual ballot rates are immaterial and irrelevant to what disparities exist *within* Summit, Hamilton and Montgomery Counties; it neither elucidates what African American voters in these defendant counties face, nor does it provide any viable defense for the Section 2 claim. Unlike the statistics and election results from Franklin County, Defendants' mention of Cuyahoga County does not demonstrate how such violations can be redressed. Similarly, Defendants wish to draw attention to high residual ballot rates found in predominately white rural counties in Ohio. Again the fact that rural white voters, who are not a protected class under the Voting Rights Act, might also be disfranchised by punch cards does not negate or defend against the intra-county disparities present in the three defendant counties. These three counties and the State Defendants are sued for their respective roles in the certification, selection, purchase, maintenance and continued

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Hamilton Response Pl. Mot. Summ. J. (Doc. 190), 8-9, relying on United States v. Jones, 57 F.3d 1020 (11th Cir. 1995). Yet, Jones is clearly distinguishable from the case at bar. In Jones, election officials wrongfully admitted out-of-district, predominantly white voters and improperly counted their votes. The court found no § 2 violation since the improper count was a unique inadvertent error unlikely to recur, not a "standard, practice, or procedure." In Hamilton County, however, voters use the same punch card machines in election after election. Their officials willfully selected these machines. Though the errors associated with the machines may be inadvertent, the selection and repeated mandatory use of the machines surely constitutes an election practice or procedure, a practice which consistently causes discriminatory results. By claiming that Hamilton County officials are "not responsible for the errors they cannot control," Hamilton is merely claiming they selected the punch card machines in good faith. Hamilton Response (Doc. 190), 9. But good faith is not a defense to a § 2 vote denial claim. See cases cited supra pp. 30-31.

utilization of technology that disfranchises African-American voters in violation of Section 2 of the Voting Rights Act.

4. African Americans suffer far higher rates of ballot rejection than do white voters in the Section 2 Defendant Counties.

The statistics compiled by the parties' various experts clearly demonstrate a racial disparity in the opportunities to have one's vote count effectively, with many more African-Americans suffering nonvoted ballots in the Section 2 Defendant Counties.

In Hamilton County, African-American voters have their ballots rejected at *nearly seven times* the rate that non-African-Americans do, due to overvoting; African-Americans also cast ballots that result in total undervotes at *nearly twice* the rate that non-African-Americans do. Order Stipulating Final Facts (Doc. 234), ¶¶ 36-38 (approving Engstrom's findings on overvotes and undervotes in Section 2 Defendant Counties).<sup>20</sup> Adjusting for the rate of intentional undervotes, African-Americans in Hamilton County suffer accidental (i.e., unintentional) undervotes at *seven-and-a-half times* the rate that non-African American voters do. See Kropf Report (Doc. 171-4a), ¶¶8-10 and Appendix I: Racial Disparities by County in Residual Data, infra. Similarly, in Summit County, African-Americans suffer overvotes at *over nine times* the rate that non-African-Americans do; they suffer total undervotes at about *two-and-a-half times* the rate that non-African-Americans do; and they suffer unintentional undervotes at *over three times* the rate that non-African Americans do. In Montgomery County, Plaintiffs

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<sup>20</sup> This fractional disparity is calculated by taking the average of the rate of overvotes and undervotes, respectively, calculated by the three methods (HP, ER, and EI) for blacks and dividing that number by the same average calculated for whites. For Hamilton overvotes, the exact number is 6.808. For Hamilton undervotes, it is 1.737. Summit overvotes—9.217; Summit undervotes—2.442. Montgomery residual votes—2.554.

do not have statistics disaggregated by overvotes and undervotes, but African-Americans suffer residual ballots about *two-and-a-half* times as often as non-African-Americans do. These figures are summarized in Appendix I: Racial Disparities by County in Residual Data, infra.<sup>21</sup>

5. The certification and use of punch card machines, interacting with social and historical circumstances, causes the racially disparate rates of non-counted ballots observed in the Section 2 Defendant Counties.

The Section 2 Defendant Counties' use of punch cards allows socioeconomic disparities<sup>22</sup> between racial groups to result in racial disparities in the rates of nonvoted ballots. This causal relationship becomes apparent by comparing Franklin County, which is nearly identical to the Section 2 Defendant Counties in its racial distribution of relevant socioeconomic variables, Order Stipulating Final Facts (Doc. 234), ¶ 33, to the Section 2 Defendant Counties. The material difference between the Section 2 Defendant Counties and Franklin County is the latter's use of DRE (Direct Record Electronic) voting machines that prevent overvoting and severely reduce undervoting by notifying voters when they fail to cast a vote for a particular race. Id. at ¶¶ 16, 23, 43. By employing voting technologies that nearly eliminate nonvoted ballots for all racial groups, Franklin

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<sup>21</sup> Dr. Lott's data, approved by Order Stipulating Final Facts (Doc. 234), ¶ 26, supports this finding as well. Depo. of Lott (Doc. 171-6b), pp. 180-183 (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.").

<sup>22</sup> In particular, racial gaps exist in the proportion of families headed by single parents, the proportion of children able to attend private schools, the level of education attained, unemployment rates, the size of the labor force, income levels, the proportion of people living under poverty, earnings, crowded housing conditions, access to telephones and transportation, plumbing, rental expenses and property values. Order Stipulating Final Facts (Doc. 234), ¶ 33.

County has minimized the racial disparities in the rate of nonvoted ballots.<sup>23</sup> On the other hand, by employing voting technologies that readily translate low socioeconomic indicators into relatively high rates of nonvoted ballots, the Section 2 Defendant Counties have employed machines that interact with those indicators to result in racial disparities in the rate of nonvoted ballots.

This interaction of inferior non-notice voting technology with socioeconomic racial disparities meets the “totality of circumstances” test of § 2 (b) for causation as applied to the vote denial context. 42 U.S.C. § 1973(b). The Senate Judiciary Committee’s Committee Report makes clear that the Senate factors<sup>24</sup> that are generally probative of vote dilution need not apply straightforwardly or at all to cases of vote denial.

[Section 2] prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to *any phase of the electoral process for minority group members*.

If the challenged practice related to such a series of events or episodes, the proof sufficient to establish a violation would *not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers*. Of course, the ultimate test would be the *White* standard codified by this amendment to Section 2: whether, in the particular situation, the practice *operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their [sic.] choice*.

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<sup>23</sup> For non-African Americans (whites), the rate becomes negligible, and for African-Americans it drops below 1%, nearly eliminating the racial gap in accidental undervotes. Engstrom Report (Doc. 171-4n), 8.

<sup>24</sup> The “Senate factors” are the factors that the Senate discussed in its Committee Report that would typically add support to the finding that the totality of circumstances operated to deny minorities the opportunity to participate in the political process and to elect preferred representative. They include 1) a history of official discrimination; 2) racially polarized voting; 3) various suspect electoral practices; 4) denied access to the candidate slating process; 5) continued bearing of the effects of discrimination; 6) racial appeals in campaigns; 7) electoral success of minority candidates; [8] lack of responsiveness by officials to minority needs; and [9] the tenuousness of the policy supporting the suspect practice. S.Rep. 97-417 at 28-29.

S.Rep. 97-417 at 30 (emphases added). The statistics recited above demonstrate unequivocally how punch card machines in the Section 2 Defendant Counties—but not in Franklin County where the only relevant difference is the use of notice technology—operate to deny the minority Plaintiffs an equal chance to have their votes counted and, therefore, an equal opportunity to participate in elections, which inevitably denies them an equal opportunity to elect their candidates of choice.

Not every racial disparity in access to the ballot or counting of ballots necessarily is caused by an electoral practice that violates § 2. Ortiz v. City of Philadelphia Office of City Commissioners Voter Registration Division, 824 F. Supp. 514, 539 (E.D.Pa. 1993) (“Not every incidental burden on the right to vote violates § 2.”) aff’d 28 F.3d 306 (3rd Cir. 1994).<sup>25</sup> In Wesley v. Collins, for example, the Sixth Circuit upheld Tennessee’s felon disenfranchisement statute. 791 F.2d 1255 (6th Cir. 1986). The court held that “the disproportionate impact suffered by black Tennesseans does not ‘result’” from the state’s disenfranchisement law, but rather from would-be black voters’ intentional decisions to commit crimes and, therefore, disenfranchise themselves.<sup>26</sup> Id. at 1262.

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<sup>25</sup> Ortiz went on to require that the suspect electoral practice be the “dispositive force” in causing the racial disparities in casting or counting ballots. Id. at 524. This stringent but-for requirement is certainly at odds with Gingles’s command to find a § 2 violation whenever the electoral practice “**interacts with** social and historical conditions to cause inequality in the opportunities” to participate in the electoral process. Gingles, 478 U.S. at 47 (emphasis added). Though a dispositive force, or but-for, version of the causation requirement is far more stringent than Gingles requires, Plaintiffs have met even this rigorous burden. By demonstrating that notice technology overcomes all of the socioeconomic differences between white and black voters virtually to eliminate any racial disparity in nonvoted ballots, Plaintiffs have shown that the non-notice technology employed in the Defendant Counties is clearly the “dispositive force” that allows the racially disparities in nonvoted ballot rates to deprive them of opportunities to participate in the political process.

<sup>26</sup> More recent considerations of felon disenfranchisement laws have declined to follow Wesley. E.g., Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (individual decision to commit a crime was not itself a bar to causal link between the disenfranchisement statute and the racial disparity in access to the ballot; indeed, the lower court erred in failing to take into consideration how a felon disenfranchisement statute interacts with historical and social conditions causing a racially disparate composition of the criminal justice system in order to result in racially disparate disenfranchisement of felons); Johnson v. Governor of State of Florida, 353 F.3d 1287 (11th Cir. 2003) (same).

Nevertheless, Wesley and the more modern disfranchisement cases are distinguishable from the case at bar. Here, the racial disparities are not a result of any intentional conduct on the part of the Plaintiffs, or the class that they seek to represent. Even after accounting for intentional undervoting—which occurs at statistically indistinguishable rates for white and black voters, Kropf Report (Doc. 171-4a), ¶¶8-10—the racial disparities in overvoting and undervoting remain severe in Section 2 Defendant Counties. The remaining racial disparities in nonvoted ballots are due to machine error, outside the control of voters. While Defendants argue otherwise, claiming that the remaining racial disparities are due to Plaintiffs’ limited skill in voting, this argument comes too late in the day to be entertained seriously. Hamilton Answer (Doc. 120) ¶ 110; Montgomery Answer (Doc. 121), ¶ 16; Hamilton Response Mot. Summ. J. (Doc. 190), 9-10. Such an argument is analogous to a justification for literacy tests—if only the illiterate voters would learn to read, they could register to vote just like any one else. Yet it is not the Plaintiff-voters’ duty to overcome facially neutral election practices or standards that, in practice, operate to make it much more difficult for minority voters to vote. As long ago as United States v. Post, courts have recognized that **election officials** have “the duty to refrain from engaging in conduct which involves or results in any distinction based upon race, and to refrain from applying any voting procedure which **will have the effect of denying to Negro voters the right to cast effective votes for the candidate of their choice.**” 297 F. Supp. 46, 50 (W.D. La. 1969) (emphasis added). While intentional choices to cast improper ballots may break the causal chain, limited skill in voting—tied, no doubt, to the socioeconomic disparities between black and white voters in the Section 2 Defendant Counties—does not.

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In sum, because punch card machines interact with socioeconomic differences between blacks and whites to result in racially disparate rates of nonvoted ballots, while notice voting machines eliminate those disparities, punch card machines meet the causation requirement outlined in § 2(b) and analyzed in Gingles.

- B. Unlike in claims of vote dilution, Plaintiffs do not have to satisfy any of the Senate factors in order to establish their vote denial claims.

Defendants have claimed that a mechanical proof of (some unspecified number of) the Senate factors is necessary to establish a vote denial violation. Defs.' Mem. Sup. Summ. J. (Doc. 173), 9-10, 14-15; Defs.' Mem. Contra Pl. Mot. Summ. J. (Doc. 186), 12; Hamilton Response Pl. Mot. Summ. J. (Doc. 190), 11. Yet, a mechanical recitation of the Senate factors has never been a part of vote denial jurisprudence. As discussed above, the very same Senate Judiciary Committee that enumerated the Senate factors in its report on the 1982 amendments also recognized that a vote denial "violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers." S.Rep. 97-417 at 30. More importantly, no court has ever found any particular Senate factor (or group thereof) necessary to the disposition of a vote denial claim.<sup>27</sup> In fact, some courts that did consider the Senate factors explicitly disclaimed that those factors formed part of their holding. E.g., Roberts, 679 F. Supp. at 1530. Some courts considered the Senate factors and found them decidedly irrelevant. E.g., PUSH, 674 F. Supp. at 1264-1268 (polarized voting, suspect practices, candidate

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<sup>27</sup> Irby, Black, and Shelley, *supra*, did not discuss the Senate factors at all. Siegelman mentioned the factors, but investigated only the current extent of discriminatory effects, finding only that factor to be relevant. 695 F. Supp. at 528. Farrakhan mentioned the factors, but instead of applying any of the enumerated factors, it analyzed only the extent of racial discrimination in the criminal justice system, since only that was relevant. 338 F.3d at 1020. Johnson found the plaintiff's evidence of a history of official discrimination, the use of suspect electoral practices, and the current effects of discrimination relevant and supportive, but made no factor dispositive. 353 F.3d at 1306.

slating, and racial appeals are all irrelevant to vote denial; but a history of official discrimination, current discriminatory effects, lack of electoral success, representative unresponsiveness, and tenuous policies buttress a denial claim). Instead of mechanically marching through the nine Senate factors in check-list fashion, the courts apply a practical, context-sensitive, fact-intensive inquiry when considering which, if any, of the Senate factors help illuminate the totality of circumstances that allow the challenged electoral practice to cause discriminatory results.

Here, the continued effects of past discrimination and the tenuousness of the policy supporting the suspect practice are the only factors that are arguably relevant to the Plaintiffs' denial claim. Neither a history free of official discrimination, racially polarized voting, other suspect electoral practices, racial appeals in campaigns, the electoral success of minority candidates, nor responsiveness by officials to minority concerns will help ensure that African-American voters, including Plaintiffs, will cast ballots on punch card machines in Section 2 Defendant Counties that will be included in the vote tallies. Since none of those factors are probative of the likelihood that punch card ballots will be counted, none are relevant to Plaintiffs' § 2 vote denial claim.

C. Defendants' purported defenses have no basis in vote denial jurisprudence.

1. Neither good faith nor inadvertent error is a defense to a vote denial claim.

Defendants also err by claiming a defense of good faith or by demanding a showing of intentional discrimination. Hamilton Answer to Second Am. Compl. (Doc.120) ¶¶109, 111; Montgomery Answer (Doc. 121) ¶13; State Answer (Doc. 123) ¶27; Summit Answer (Doc. 124) Third Defense. No court has ever allowed good faith to

be a defense to a vote denial claim, or required a showing of intentional discrimination on the part of the defendants in order to establish that claim. See cases cited supra pp. 30-31. Several courts have specifically held that good faith is not a defense to a § 2 claim. E.g., Brown, 279 F. Supp. at 63; Post, 297 F. Supp. at 51; Toney, 488 F.2d at 312; Welch v. McKenzie, 765 F.2d 1311, 1314 (5th Cir. 1985). Similarly, intentional discrimination had only a brief lifespan in § 2 jurisprudence. The primary purpose of the 1982 amendments to § 2 was to replace the intent test of City of Mobile v. Bolden, 446 U.S. 55 (1980), with the prior results test of White v. Regester, 412 U.S. 755 (1973). Accord Thornburg v. Gingles, 478 U.S. 30, 35 (1986). Today, it could not be clearer that intentional discrimination is not an element of a § 2 vote denial claim.

2. Election success or failure is irrelevant to a denial claim.

Finally, Defendants err by claiming Plaintiffs must show that “African-American voters in Ohio have not been able to elect their chosen candidate.” Defs.’ Mot. Summ. J. (Doc. 173), 10. While this factor may be useful to a dilution claim, it is irrelevant to a denial claim. Brown, 279 F. Supp. at 63 (finding a violation of § 2 although the “result of the election would not have been different had the final tabulation not included [illegally cast] absentee ballots” of white voters); Toney, 488 F.2d at 315 (setting aside the results of the contested election because the § 2 violation could “possibly” have affected the outcome, without deciding whether the effect on the election was an element of the violation itself); Goodloe, 610 F. Supp. at 242 (finding a § 2 violation when wrongfully invalidated ballots *may have*, but not necessarily would have, changed the results of the election). If plaintiffs here were contesting an election, this would be a relevant inquiry, but plaintiffs here do not. Election success may help prove that a minority voter’s ballot

is not being valued with the same weight that a white voter's ballot receives. But because the inability to have one's vote count at all "inevitably impairs" the voter's right to participate in elections and, thereby, elect candidates of choice, Chisom, 501 U.S. at 397, election success is completely irrelevant to a vote denial claim.

D. Conclusion

In order to prove their § 2 vote denial claim, Plaintiffs will prove that Defendants have engaged in a state practice that, interacting with social and historical circumstances, results in significant racial disparities in the ability of African-American voters to have their votes counted in the Section 2 Defendant Counties. Plaintiffs need not demonstrate continued electoral defeat, any of the Gingles factors, nor even any of the Senate factors (although continued discriminatory effects in socioeconomic achievement and the tenuousness of the policy supporting punch cards do buttress Plaintiffs' claims). Finally, Defendants can find no comfort in defenses of good faith or inadvertent error—neither has any place in § 2 vote denial jurisprudence.

IV. Proposed Witnesses

Plaintiffs anticipate calling the following witnesses:

- Dana Walch, Director of Election Reform, to testify about the actions of the state following the 2000 election, the various forms of voting technology utilized in the state of Ohio and the concerns presented by non-notice technology.
- Secretary of State Kenneth Blackwell, to testify about his public statements regarding the unreliability of the punch card system and problems with non-notice technology. While not conceded Defendants' arguments that Secretary Blackwell cannot be compelled to offer testimony, Plaintiffs have stated that they will accept the person most knowledgeable of various documents in lieu of Secretary Blackwell.
- Dr. Mark Salling will testify about the generation of the database relied upon by all experts. He will also testify about the census information offered into

evidence and will present a demonstration of the correlation between high rates of residual ballot in Hamilton, Summit, and Montgomery Counties and the racial composition of the precincts.

- Dr. Martha Kropf will testify about undervoting, and specifically about the rates of intentional undervoting nationwide as observed in exit polls. She also offers testimony rebutting the allegations made by defendants' expert Dr. John Lott and his methodology.
- Dr. Richard Engstrom, a noted expert in voting rights, will testify about the correlation between the racial composition of precincts within the Section 2 Defendant Counties and the rates of residual votes.
- Roy Saltman will testify about the history of problems plaguing non-notice technology.

V. Potential Evidentiary Concerns

Plaintiffs have raised objections on the grounds of relevance to several matters raised by the Defendants in the Defendants' proposed supplemental briefs of undisputed facts. Arguments that white rural counties using punch cards have high residual ballot rates or arguments that Cuyahoga County is not present in this lawsuit are irrelevant to the intra-county racial disparities within Hamilton, Montgomery and Summit Counties that violate the rights of African American voters in those three counties.

Plaintiffs anticipate hearsay objections to several statements made by Secretary of State Blackwell and members of the County Defendants regarding the reliability and accuracy of non-notice technology. Plaintiffs will seek to introduce statements from the Transmittal Letter of Secretary of State Blackwell & Report of Final Recommendation of the Election Study Committee. The letter bears the signature of the Secretary and is issued on his official letterhead. Further, Secretary Blackwell signed onto the minority opinion of the Report of Final Recommendation of the Election Study Committee. The statements of Secretary Blackwell in this letter constituted a “party opponent admission”

and a "statement against interest." The same would be true of letters written by Secretary Blackwell to members of the Ohio General Assembly. Provided that these are properly authenticated, they constitute both party admissions and statements against interest and are properly admissible for the truth.

Defendants also have raised objections to the Letter of Timothy Burke to Stephanie Tubbs Jones dated July 18, 2001. The Defendants state that this letter was authored by Timothy Burke in his individual capacity and does not constitute a party admission. This letter is admissible as a party opponent admission. Rule 801(d)(2) and the advisory committee notes clearly state that "if [the declarant] has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent [sic] affairs." Fed R. Evid R 801, Advisory Committee Note (2004). As Co-Chairman of the Hamilton County Board of Elections, Mr. Burke obviously has a representative capacity, the letter is being offered against him in that capacity, and is relevant to the affairs of the trial. The letter is printed on the letter of the Board of Elections and lists him as a co-chair.

The Federal Rules of Evidence state that:

A statement is not hearsay if...[t]he statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy

and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Fed R. Evid R 801(d)(2) (2004). This rule governs the admissibility of party-opponent admissions. Moore v. KUKA Welding Systems & Robot Corp., 171 F.3d 1073, 1081 (6<sup>th</sup> Cir. 1999). The Advisory Committee Notes observe that because admissions against a party's interest are received into evidence without many of the technical prerequisites of other evidentiary rules, admissibility under this rule should be granted freely. Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534, 537 (2<sup>nd</sup> Cir. 1992). In order for a statement to be admissible as an agency admission, the proponent must establish that the declarant is, in fact, the agent of the party-opponent, and must also establish the scope of the agency. Fed Rules Evid R 801, Advisory Committee Notes (2004). The Advisory Committee Notes state that "if [the declarant] has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent [sic] affairs." Fed Rules Evid R 801, Advisory Committee Note (2004). It makes no difference whether the statement was actually made the party was acting as an official at the time he made the statement. Savarese v. Agriss, 883 F.2d 1194, 1200 (3d Cir. 1989). Chairman Burke's letters should be admitted.

**Respectfully submitted,**

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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 19th day of July, 2004.

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