

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

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|--------------------------------------|---|--------------------------------|
| <b>EFFIE STEWART, et al.,</b>        | : |                                |
|                                      | : |                                |
| <b>Plaintiffs,</b>                   | : |                                |
|                                      | : |                                |
| <b>v.</b>                            | : | <b>CASE NO: 5:02CV-2028</b>    |
|                                      | : |                                |
| <b>J. KENNETH BLACKWELL, et al.,</b> | : | <b>JUDGE DOWD</b>              |
|                                      | : |                                |
| <b>Defendants.</b>                   | : | <b>MAGISTRATE JUDGE GALLAS</b> |
|                                      | : |                                |

**State Defendants’  
Post Trial Brief**

**I. Introduction**

Despite tales of gloom and doom and hysterical cries of the probability of a “Florida-like calamity” if the 2004 Presidential election in Ohio were close, Ohio’s elections system proved once again that it is a good system in which the citizens of this State can maintain confidence.<sup>1</sup> In fact, Ohio, in 2004, had far more voters show up to vote, had a closer election, and had fewer residual ballots cast, than Ohio in 2000. *See* Fewer Ohio Votes Uncounted This Time, Columbus Dispatch, November 4, 2004, attached as Exh. A. Yet, despite the international attention paid to

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<sup>1</sup> Ohio’s electoral system not only successfully dealt with an exceptionally close election, it also was tested with record turnout and pre-election day litigation of historic proportions.

Ohio's elections system since it determined the winner of the Presidential election, nobody has claimed that Ohio's system failed to perform admirably. The backdrop of 2004 further emphasizes the evidence in this case. Ohio has a very good election system and the Plaintiffs have failed to prove either that it violates the Voting Rights Act or the Constitution. As a result, this Court should reject the Plaintiffs' request to run Ohio's election system. Instead, the Court should issue a defense verdict in this case on all claims.

## **II. Proposed Findings of Facts**

The State Defendants offer the following as proposed findings of fact:

Some residual votes occur when voters intentionally choose not to cast votes in a particular race. Examining ballots does not allow for intentional and unintentional undervotes to be distinguished. July 12 Final Stipulation, #30.

African-Americans make up 27.4% of the population of Cuyahoga County, and there are more African-Americans living in Cuyahoga County than there are people in 83 of Ohio's 88 Counties. July 12 Final Stipulation, #41.

Delaware County, Ohio uses punch cards while Franklin County uses electronic voting machines, and in the 2000 elections, Delaware County had 55,959 total votes cast and 55,403 votes cast for President for a residual vote total of 556 votes or 0.99% while Franklin County had 417,800 total votes cast and 414,074 votes cast for President for a residual vote total of 3,726 votes or 0.89%. July 12 Final Stipulation, #43.

Shortly after the effective date of the Help America Vote Act ("HAVA"), Ohio Secretary of State J. Kenneth Blackwell reconfigured his office and required many of his senior staff to focus on implementing HAVA in the State of Ohio. July 12 Final Stipulation, #44.

In May of 2003, Secretary Blackwell's Office finalized Ohio's HAVA Plan and published the document for the public's review. July 12 Final Stipulation, #45.

In September 2003, the Secretary of State's Office qualified the following four vendors to offer voting devices in Ohio: 1) Sequoia Voting Systems; 2) Diebold Elections Systems; 3) Election Systems & Software; and 4) Maximus/Hart Intercivic/DFM Associates, pending a security review for all prospective voting devices. July 12 Final Stipulation, #46.

The security reviews revealed that there were 57 potential security risks within the software and hardware for prospective voting devices, and, in December 2003, the Secretary of State ordered the qualified voting device vendors to resolve the identified security concerns. July 12 Final

Stipulation, #47.

The Ohio Secretary of State's Office submitted a request to the State's Controlling Board for release of monies to begin the process of replacing the State's existing voting technologies, and the request was temporarily delayed. The Ohio General Assembly created a House-Senate Ballot Security committee to ensure that all replacement machines will provide accurate, reliable and tamper-proof results. July 12 Final Stipulation, #48.

On May 7, 2004, Governor Bob Taft signed H.B. 262 into law. July 12 Final Stipulation, #49.

Voters do report that they intentionally undervoted, or did not cast a vote, in presidential elections. July 12 Final Stipulation, #75.

There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to the polls. Supplement to Stipulated facts, #86.

There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to the voter instructions placed in each voting booth, on each ballot, and available at the polling location. Supplement to Stipulated facts, #87.

There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were denied in any way equal access to assistance from poll workers in casting a ballot, if they required it. Supplement to Stipulated facts, #88.

There is no evidence in the record of these proceedings that the named Plaintiffs from Hamilton, Montgomery, Sandusky, and/or Summit County were prevented from attempting to cast their vote in the 2000 general election. Supplement to Stipulated facts, #89.

Dr. Martha Kropf Trial Testimony:

- Dr. Kropf determined that undervoting on purpose is rare, but obtained the data for this conclusion from the University of Michigan's National Election Study (NES) and Voters News Service (VNS) studies, which are based on exit polling. Day 1 trial transcript, pp. 85-86.
- NES studies consistently over-report voter turnout. Day 1 trial transcript, p. 109.
- The VNS database, which is based on a nationwide survey, has 54,806 voters for the 1992 election, and is not just specific to Ohio. Day 1 trial transcript, p. 110.
- Among the 7,699 voters questioned in the 2000 NES survey, it is possible that none of them were Ohio voters. Day 1 trial transcript, p. 112.

- Dr. Kropf's report is based on national data and not data specifically from Ohio. Day 1 trial transcripts, p. 121.
- Education is an important factor to consider when evaluating intentional undervoting, but it was not included in Dr. Kropf's report. Day 1 trial transcripts, p. 122
- According to Exhibit TT, p. 28, the 1992 NES survey began on November 4, 1992 and ended on January 13, 1993. Day 1 trial transcripts, p.208.
- According to Exhibit UU, p. 9 Table 3, the 1996 NES survey began on November 6, 1996 and ended on December 24, 1996. Day 1 trial transcripts, p. 209.
- According to Exhibit UU, p. 11, the NES overestimated voter turnout. Day 1 trial transcripts, p. 210.
- According to Exhibit W, p. 10, the 2000 NES survey began on November 8, 2000 and ended on December 18, 2000. Day 1 trial transcripts, p.213.
- According to Exhibit SS, p. 9, the 1988 NES survey began on November 8, 1988 through January 30, 1989. Day 1 trial transcripts, p.214.
- According to Exhibit SS, p. 18, the only way to tell if someone actually voted is to look at voting and registration records. Day 1 trial transcripts, p. 215.
- Nearly 3-5% of those survey in the 1988 NES survey responded that they had voted, but actually there was no record of them voting. Day 1 trial transcripts, p. 216.
- Dr. Kropf conducted a nationwide regression analysis with controlling factors, but not in each county in Ohio. Day 1 trial transcripts, p. 220.
- Dr. Kropf could not recall if she analyzed the United States Congressional races for the years 1992, 1996, and 2000. Day 5 trial transcripts, p. 939.
- Dr. Kropf may have analyzed the Ohio senate and Ohio house of representative races in 1992, 1996, and 2000, and her results may have been the same as Dr. Lott's results. Day 5 trial transcripts, p. 940.
- Dr. Kropf's results were essentially the same results as Dr. Lott's results, with a different explanation as to the underlying results. Day 5 trial transcripts, p. 941.
- Plaintiffs' Exhibit 18 demonstrates that in the Presidential race, in precinct optical scan performed third, while electronic was second and lever machines performed the best as it relates to residual votes. Day 5 trial transcripts, p. 942.

- Plaintiffs' Exhibit 18 demonstrates that Datavote punch cards performed the worst while Votomatic performed the second worst. Day 5 trial transcripts, p. 943.
- In the 2000 Senate race, the lever machine went from best to second worst and optical scan in precinct went from 2nd best to worst. Day 5 trial transcripts, p. 944.
- Dr. Kroph agreed that social scientists would conclude that if a voting machine causes a specific problem for one political race, it should cause problems for all political races. Day 5 trial transcripts, p. 944.
- Plaintiff's Exhibit 18, p.5 shows that for residual votes, the order of best to worst performance in the presidential race was DREs, lever machines, in precinct optical scan, optical scan central count, Votomatic, and Datavote machines. Day 5 trial transcripts, p. 945.
- In the U.S. Senate race, Votomatic outperformed optical scan in precinct count, and DREs. Day 5 trial transcripts, p. 946.
- In the 2002 election in Miami-Dade County, DREs replaced punch card machines and the non-voted ballot rate was 8.2% for DREs versus a 6.75% with punch card machines in the thirty-one (31) most heavily concentrated African-American precincts. Day 5 trial transcripts, p. 952.

#### Roy Saltman Trial Testimony

- Hamilton County's residual vote rate in 2000 was 1.67%, which is one of the better counties in Ohio for residual vote rates. Day 2 trial transcripts, p. 309.

#### Dr. Richard Engstrom Trial Testimony

- Plaintiffs' attorneys advised Dr. Engstrom to look at only Hamilton, Franklin, Summit and Montgomery Counties in Ohio. Day 2 trial transcripts, p. 484.
- Dr. Engstrom did not evaluate any other County in Ohio, or any other elected office except the 2000 presidential race. Day 2 trial transcripts, p. 485.
- The counties evaluated by Dr. Engstrom were not random samples. Day 2 trial transcripts, p. 485.
- Dr. Engstrom did not account for income levels, education levels, age, disabilities, or foreign languages and how they relate to residual. Day 2 trial transcripts, p. 488-489.
- Non-African Americans in Summit County undervoted higher than African Americans in Hamilton County in the 2000 election. Day 2 trial transcripts, pp. 490-491.
- Using ecological inference analysis, racial disparity is four times higher in Franklin

County than in Hamilton County. Day 2 trial transcripts, p. 493.

- With ecological regression analysis, Hamilton County's residual vote rates is slightly higher, and with homogenous precincts Hamilton County and Franklin County have an identical residual vote rate. Day 2 trial transcripts, p. 493.
- In terms of undervoting, Franklin County voting technology actually increases, decreases or has the same racial disparity as Hamilton County. Day 2 trial transcripts, p. 494.
- Dr. Engstrom did not focus on the factors established for Voting Rights Act Section 2 "totality of the circumstances" analysis except for racial disparities in equipment. Day 2 trial transcripts, p. 499-500.
- Dr. Engstrom's report is only valid for conclusions that relate to the 2000 Presidential race. Day 2 trial transcripts, p. 501.

#### Dana Walch Trial Testimony

- Ohio counties used four types of voting equipment in 2000 – punch cards, lever machines, optical scan devices and direct recording electronic devices (DRE's). Day 1 trial transcript, pp. 134.
- House Bill 262 requires that in 2006, all DRE voting devices in Ohio must use Voter Verified Paper Audit Trails (VVPAT). House Bill 262 also mandates that any receipt or paper verification be behind glass. Day 1 trial transcript, pp. 142-143.
- House Bill 262 requires that a paper record be the official vote if there is a recount, so vendors are working on different systems to keep official voter records with VVPAT. Day 1 trial transcript, pp. 147-148.
- The Secretary of State intends to use HAVA money for DRE or precinct-count optical scan systems. Such non-notice systems would provide more options to voters in reducing error rates. Day 1 trial transcript, pp. 159-160.
- The Secretary of State has progressed with its procurement process, and wants to implement new voting technology by 2005. Day 4 trial transcript, p. 732.
- No vendor has passed a final security check in Ohio for new DREs. Day 4 trial transcript, p. 732.
- The Secretary of State did not approve and deploy optical scan in precinct count because he wanted the counties to retain the ability to choose what system they wanted. Also, simply choosing optical scan does not meet the requirements of HAVA because such a system does little in helping people with disabilities vote. Day 4 trial transcript, p. 752, 753.

- The Secretary of State has developed a very aggressive training program for poll workers and voters with the new voting equipment. Day 4 trial transcript p. 774-775.
- Vendors are required to send people to poll worker training sessions for hands-on training with every poll worker. Day 4 trial transcript p. 776.

#### Dr. John Lott Trial Testimony

- Dr. Lott examined 1992, 1996 and 2000 presidential election data, and looked at other political races besides the presidential race. Day 3 trial transcript p. 544.
- Dr. Lott examined the entire state of Ohio and not just three counties. Day 3 trial transcript, p. 545.
- According to Dr. Lott, Dr. Asher's report demonstrated that as you examine voting choices down the ballot, punch cards performed fairly well, and the nonvoted ballot rate went up relatively faster for other voting machines. Day 3 trial transcript, pp. 550-551.
- Dr. Asher's report demonstrates that going down the ballot, nonvoted ballot rates were much higher for other voting machines than punch cards. Day 3 trial transcript, p.551.
- According to Dr. Lott, one of Dr. Asher's tables was unusual because a large portion of the overvotes existed where three or more valid holes were punched. Dr. Lott would have liked to see how many had four, five or even more holes punched. Day 3 trial transcript, p.552.
- Punch cards had a lower nonvoted ballot rate than electronic or lever machines in the U.S. Senate races. As you move down the ballot punch cards increase at a slower rate than most other machines for nonvoted ballots. Day 3 trial transcript, p.561.
- Punch cards outperformed electronic machines in congressional races regarding nonvoted ballot rates. By looking to other races, the data demonstrates that focusing only on presidential races does not produce a complete picture because other races have such higher gaps of nonvoted ballots. Day 3 trial transcript, p.562.
- Based on Exhibit R, p. 17, wards that are more heavily concentrated with African Americans have no real obvious relationship with higher nonvoted ballot rates. Day 3 trial transcript, p.568
- For presidential races, punch cards tend to do relatively poorly, but as you go down the ballot, they improve relative to other voting machines. Punch cards indeed do extremely well across all five races with a low number of nonvoted ballots. Day 3 trial transcript, p.570.

- Dr. Lott's opinion is that by looking at the races of 1992, 1996 and 2000, punch cards produce fewer nonvoted ballots than either electronic voting machines or lever machines and virtually produced the same results as optical scan machines. Day 3 trial transcript, p.574.
- Dr. Lott's opinion is that African Americans cast relatively fewer nonvoted ballots than whites with punch card machines. Day 3 trial transcript, p.575.
- Dr. Lott concludes that a dropoff in non-voted ballot rates occurs as you move down the ballot, with different types of machines. Day 4 trial transcript, p. 679.
- Dr.Lott also concludes that punch cards experience a very small dropoff compared to other machines. Day 4 trial transcript, p. 679.
- African Americans tend to do well with Votomatic punch cards, as opposed to Datavote punch cards, as compared to whites and have fewer non-voted ballots. Day 4 trial transcript, p. 681.
- Dr. Lott concludes that Votomatic punch cards seem to do relatively better for African Americans compared to other races. Day 4 trial transcript, p. 683.
- Approximately 20% of Americans will be voting with punch cards in the 2004 general election. Day 4 trial transcript, p. 683.

#### Dr. Herb Asher's Testimony

- Dr. Asher's study of punch card ballots found that precincts with a higher concentration of poverty had much higher rate of nonvoted ballots than the average in Ohio. Day 4 trial transcript, p. 797.
- Factors such as race, education and poverty are predictor variables. Day 4 trial transcript, p.800.
- Punch card ballots with three or more votes for one political race is difficult to explain. Day 4 trial transcript, p.804.
- Ohio has a better-run election system than Florida, and if the Florida situation from the 2000 election would have happened in Ohio, the United States would not have been embarrassed. Day 4 trial transcript, p. 809.
- Dr. Asher's 1982 report shows that punch card voting has a higher ballot completion at the bottom of the ballot. Day 4 trial transcript, p. 813.
- In his report, Dr. Asher studied the Appalachian counties of Pike, Adams, Vinton, Meigs, Noble, Monroe, Jackson, Gallia in Ohio, which all have substantially higher Caucasian

populations compared to other Ohio counties. Day 4 trial transcript, p. 819.

- Adams County has a lower education attainment standard than Ohio's average, and its median income level is lower than the rest of the state as a whole. Day 4 trial transcript, p. 820.
- Jackson County has a lower population of African Americans, a lower educational level, a lower number of high school graduates, and a lower median income level than the rest of the state as a whole. Day 4 trial transcript, p. 821.
- Gallia County has a lower population of African Americans, a lower educational level, and a lower median income level than the state as a whole. Day 4 trial transcript, p. 821-822.
- Monroe County has a lower population of African Americans, a lower educational level, a lower number of high school and college graduates, and a lower median income level than the state as a whole. Day 4 trial transcript, p. 822.
- Pike County has a lower population of African Americans, a lower educational level, a lower education attainment standard, and a lower median income levels than the state as a whole. Day 4 trial transcript, p. 822-823.
- Vinton County has a lower population of African Americans, a lower educational level, a lower number of high school and college graduates, and a lower median income level than the state as a whole. Day 4 trial transcript, p. 823.
- Noble County has a lower population of African Americans, a lower educational level, a lower number of high schools and college graduates, and lower median income levels than the state as a whole. Day 4 trial transcript, p. 823-824.
- Meigs County has a lower population of African Americans, a lower educational level, a lower number of high school and college graduates, and lower median income levels than the state as a whole. Day 4 trial transcript, p. 824.
- In Pike, Adams, Vinton, Meigs, Noble, Monroe, Jackson, and Gallia Counties, where African Americans make up less than 1% of the population, something besides race caused nonvoted ballots, such as educational and income levels. Day 4 trial transcript, p. 825.
- One factor could never be the sole factor in error rate and the explanation to everything. Day 4 trial transcript, p. 826.

### III. Law and Argument

#### A. The Plaintiffs Have Failed To Put Forth Evidence Allowing Them To Bring This Case As A Class Action.

Although the Plaintiffs have sought to bring their claims as a class action, this Court should reject their attempt because the Plaintiffs have failed to prove the elements necessary for class action treatment. In order to appear as a class representative, the named plaintiff must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This rule “serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). Commentators understand this requirement to mean that “a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objective of those he purports to represent.” Wright, Miller & Kane, *Federal Practice and Procedure* § 1768 at 326 (2d ed. 1986).

The Plaintiffs in this case are incapable of being adequate class representatives. They simply lack standing to raise any of the claims in the complaint. The constitutional minimum of standing contains three elements, “injury in fact, causation, and the likelihood that the injury will be redressed.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Plaintiffs lack standing to advance their claims in this case, and, as a result, are not proper class representatives.

Although the Plaintiffs allege that they have been denied the right to vote through the use of punch card ballots in violation of the Voting Rights Act and the Fourteenth Amendment, they have already stipulated to the fact that they have not been denied the right to vote. (Factual Stipulations at ¶¶ 86-89). The Plaintiffs have failed to demonstrate any injury in fact. They are

not capable of individually claiming the injury of being denied the right to vote since they have stipulated to the fact that they have not been deprived of that right. As a result, they are not a proper class representative either. Since the Plaintiffs themselves have not been denied the right to vote, they cannot represent a class of plaintiffs who allegedly have been denied the right to vote.

**B. The Plaintiffs Have Failed To Prove Any Violation Of The Voting Rights Act Based Upon The Use Of Punch Card Ballots.**

The facts of this case, as proven during the trial, plainly demonstrate that the Plaintiffs are unable to prove that the use of punch cards violates the Voting Rights Act. The State of Ohio has extensively briefed the legal requirements of the Voting Rights Act and the Fourteenth Amendment in its memoranda on summary judgment and trial brief. At this point, the State reincorporates those legal arguments by reference. It will, however, briefly apply the facts as proven through the trial to show why the Plaintiffs have failed to prove a violation of either the Voting Rights Act or the Fourteenth Amendment.

As an initial matter, the Plaintiffs are bringing their Voting Rights Act claim as merely a vote denial claim, not as a vote dilution claim. Therefore, it is incumbent upon the Plaintiffs to prove that they have been denied the right to vote. Of course, since the Plaintiffs have stipulated to the fact that they have not been denied the right to vote, that alone means that the Plaintiffs have failed in their claim. However, on top of that, the Plaintiffs failed to show that punch card ballots are given exclusively to African-Americans or are disproportionately used in African-American precincts.

Instead, the evidence in this case clearly demonstrated that the Plaintiffs have failed to prove any violation of the Voting Rights Act. The Plaintiffs arrive at their Voting Rights Act

claim in a rather spurious manner. To begin with, they rely on exit polls in order to “prove” what percentage of Ohio’s population intended not to vote for President in 2000. (Kroph at 85-86). However, this exit poll data is national data, rather than Ohio data so, at the outset, it is impossible to determine what percentage of Ohioans intended not to cast a ballot for President in 2000. (Kroph at 121). Furthermore, this underlying data in the exit polls is taken weeks after the election. (Kropf at 208-216). And the exit pollsters themselves claim that between 3-5% of the people who told exit pollsters that they voted, in fact never appeared on the voter registration rolls as having cast a ballot. (Kropf at 216, Exh. SS). This evidence is wholly unreliable and cannot support the Plaintiffs’ claims. There is no way possible for this Court to reach any conclusion what percentage of Ohioans actually intended to not cast a ballot for President in 2000.<sup>2</sup>

Despite the shaky foundation of exit polls, the Plaintiffs then take this inexact science and theorize what the non-voted ballot rate should have been.<sup>3</sup> They then claim that this baseline must be accepted and used to prove that African-Americans cast more unintentional non-voted ballots than whites. They claim this despite the significant evidence to the contrary.

In their complaint, the Plaintiffs alleged that punch cards discriminate on the basis of race because African Americans have a higher residual ballot rate than whites do and they allege this is true from the top of the ticket to the bottom of the ticket. (Second Amended Complaint at ¶ 102). However, the Plaintiffs have completely abandoned this claim and ridiculed the Defendants’ attempt to litigate this case on the basis of the complaint itself. Instead of

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<sup>2</sup> This Court’s discussion with Dr. Kropf concerning Holmes County was most instructive. As Dr. Kropf was forced to admit, there may be certain specific local reasons why a substantial number of voters intentionally choose not to cast a ballot in a particular election. (Kropf at 232).

<sup>3</sup> See, e.g., Report Says Problems Led To Skewed Surveying Data, Jim Rutenberg, N.Y. Times, Nov. 11, 2004 (detailing some of the problems with exit polls during the 2004 election which led many to believe that John Kerry would easily defeat George W. Bush, despite the fact that Bush carried the popular vote by more than 3%). Attached as Exh. B.

introducing evidence in support of their allegations, the Plaintiffs used Dr. Engstrom to focus on the 2000 Presidential election in Hamilton, Franklin, Montgomery, and Summit Counties.

Engstrom's testimony, however, does not prove a Voting Rights Act Violation.

First, Engstrom admits that no one can draw any conclusion whatsoever from his report except as it relates to the 2000 Presidential election in four counties. (Engstrom at 501). Second, Engstrom's own data shows that whites in Summit County undervoted at a rate of between two and two and a half times *higher* than African Americans in Hamilton County. (Engstrom at 490-91).

Furthermore, although the Plaintiffs claimed that DRE technology is the panacea for all voting problems, Engstrom's testimony shows that it may not be the case. Franklin County uses DRE voting technology. Engstrom testified, however, that African Americans in Hamilton County undervoted at a rate lower than, equal to, and higher than African Americans in Franklin County. (Engstrom at 491-493). Engstrom's testimony further showed that the racial disparity in undervoting remained whether punch cards or DRE's were used. (Engstrom at 493). In fact, Engstrom's testimony showed that the racial disparity in undervoting was four times *higher* in Franklin County than it was in Hamilton County.<sup>4</sup> *Id.*

As opposed to this greatly limited study, Dr. John Lott comprehensively examined voting patterns in the State of Ohio. He reviewed the 1992, 1996, and 2000 elections and examined nonvoted ballots for all elections from the President down to the Ohio House of Representatives. (Lott at 544-45). Dr. Lott determined that the non-voted ballot rate, across years and offices, was

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<sup>4</sup> Engstrom testified that the racial disparity in Hamilton County was .22% while the racial disparity in Franklin County was .81%.

lower for punch cards than it was for electronic voting machines or for lever machines, and was virtually identical to optical scan systems.<sup>5</sup> (Lott at 574).

This conclusion was further bolstered by Dr. Herb Asher who determined punch card ballots tend to produce fewer undervotes as one moves down from the top of the ticket. (Asher at 813). Asher also determined that the counties with the highest nonvoted ballot rate in the 2000 Presidential election could not have possibly been caused by African Americans. (Asher at 819-825).

The final problem that the Plaintiffs have not been able to overcome in their Voting Rights Act claim is the lack of any evidence they produced going to the so-called Senate factors. As previously demonstrated, the Plaintiffs can prevail on this claim only by showing that based upon the totality of the circumstances, punch card voting machines deny African Americans the right to vote. They have failed to introduce any such evidence.

The closest the Plaintiffs get is to show that at a macro-level, the income and education in Summit, Hamilton, and Montgomery counties is similar to that of Franklin County. However, the Plaintiffs failed to produce any evidence whatsoever about the educational level or income level of the most heavy African-American precincts within each of those counties. Also, the Plaintiffs have failed to introduce any evidence whatsoever that African-Americans are a block voting group or that they have been unable to elect representatives of their choice in Ohio.

Since the Plaintiffs have completely failed to meet their evidentiary burden in this case, this Court should enter a defense verdict on the Plaintiffs Voting Rights Act claim.

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<sup>5</sup> Furthermore, although Dr. Kropf attempted to dispute Dr. Lott's findings, she eventually admitted that she obtained very similar numbers to him when she examined the down ballot races. She further admitted that if a machine disenfranchised people because of race, the result should be the same for the Presidential election as it was for the Statehouse. (Kropf at 939-946). Kropf's admissions doom Plaintiffs' claims as she acknowledges that African-Americans have a lower non-voted ballot rate on punch card machines than non-African-Americans do for various State races.

**C. The Plaintiffs Have Similarly Failed In Their Claim That The Use Of Punch Cards Violates The Fourteenth Amendment.**

The Plaintiffs have failed to introduce any evidence whatsoever that shows the use of the punch card ballot in Ohio violates the Fourteenth Amendment. The Plaintiffs have chosen to focus on one election year and one office. Although the Plaintiffs claim that they are approaching this Fourteenth Amendment claim as a Statewide claim, they cannot do so. First, they do not have a Plaintiff in each county so that they are not able to use evidence of the non-voted ballot rate in Ohio's Appalachian counties to "prove" errors with the punch card voting system.

Second, the Plaintiffs have failed to show that the Constitution requires notice voting technology. There is simply no legal basis whatsoever for the Plaintiffs to make this claim. The majority opinion in *Bush v. Gore*, 531 U.S. 98 (2000), simply found that it was unconstitutional for various Florida counties to use ever changing standards of what constituted a vote during the 2000 recount. Florida had used different voting technologies in the 2000 Presidential election. If the Supreme Court wished to find the use of different voting equipment across a state unconstitutional, it could have easily chosen to do that. Instead, it merely determined that the legal definition of a vote must be constant.

Justice Souter, in his dissent, addresses the Plaintiffs' argument directly.

It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

*Bush*, 531 U.S. at 134 (Souter, J., *dissenting*). It was not the fact that Florida had employed different voting systems that caused any type of problem. Instead, Justice Souter recognized that

the constitutional problem may arise when “identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics” have different standards for what constitutes a legal vote. *Id.* at 134-35.

In this case, the Plaintiffs have failed to produce any evidence whatsoever of a constitutional violation. There may be more accurate voting systems to accurately record the vote of each person in the Presidential race. That fact, however, does not make punch card ballots unconstitutional. Therefore, the Plaintiffs have also failed to prove their claim under the Fourteenth Amendment.

**D. The Plaintiffs Claims Are Moot.**

The State of Ohio has previously argued that the Plaintiffs claims against punch cards are moot based upon the passage of H.B. 262 and Ohio’s efforts to comply with the Help America Vote Act. The unrebutted testimony of Dana Walch showed that punch cards will likely be gone from Ohio in 2005. (Walch at 732). The Secretary of State is simply waiting for various voting machines to complete their final passage through various state and federal certifications.

Of course, Mr. Walch recognized that it is impossible for the Secretary of State to simply deploy an optical scan system in every county in the State of Ohio. First, counties must retain their own ability to choose the voting system they want. (Walch at 752-53; *see also* R.C. § 3506.02 giving boards of election, the county commissioners, or the local voters the ability to decide which voting system will be employed). Finally, Mr. Walch also correctly noted that the Help America Vote Act mandates that even if a county were to deploy optical scan systems, the county would be obligated to provide one DRE per polling place in order to guarantee a blind person could vote unassisted. (Walch at 753, 778-779, *see also* 42 U.S.C. § 15481(a)(3)).

Based upon this uncontradicted testimony, it is clear that the Plaintiffs have failed to state a live claim or controversy. The Plaintiffs want punch cards replaced in 2005. The Defendants are replacing punch cards in 2005. Therefore, there is no reason whatsoever for this Court to exercise any further jurisdiction over the Plaintiffs' claims.

### **III. Conclusion**

For the foregoing reasons, the State Defendants respectfully requests this Court to reject the Plaintiffs' claims and issue a defense verdict on all claims. State Defendants also adopt and incorporate any and all arguments, which may be applicable to their defense, posited in the post-trial briefs of the other Defendants herein, and respectfully request this Honorable Court to find in their favor and against the Plaintiffs on all claims pursuant thereto.

Respectfully submitted,

Jim Petro  
Attorney General

*/s/ Holly J. Hunt*

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**Certificate of Service**

I hereby certify that on November 15, 2004, a copy of foregoing *State Defendants' Post Trial Brief* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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