No. 12-4069/12-4070

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, et al.,	:	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division
Plaintiffs-Appellees,	:	
v.	:	District Court Case No. 2:12-cv-562
JON HUSTED, et al.,	:	
Defendants-Appellants.	:	

BRIEF FOR THE STATE OF OHIO

MICHAEL DEWINE
Attorney General of Ohio

RICHARD N. COGLIANESE*
**Counsel of Record*
FREDERICK D. NELSON
MICHAEL J. HENDERSHOT
STEPHEN P. CARNEY
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872
richard.coglianese
@ohioattorneygeneral.gov

Counsel for the State of Ohio

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STATEMENT REGARDING ORAL ARGUMENT

The State of Ohio values speed over the added benefit of oral argument in this case relating to the November election. Therefore, reluctantly and in deference to considerations of the calendar, the State does not request argument.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4) to conduct the preliminary injunction proceedings below.

Jurisdiction in this Court is proper under 28 U.S.C. § 1292(a)(1). The district court issued its preliminary injunction on August 27, 2012. Ohio's Secretary of State and the State of Ohio separately appealed on September 6, 2012. The State also moved to intervene in the Secretary's appeal.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred by entering a preliminary injunction on Plaintiffs' claim that Ohio's statute requiring that provisional ballots be cast in the correct precinct to be legal and counted violates equal protection and Due Process in not creating exceptions.

INTRODUCTION

The district court has ordered that for purposes of this year's general election, Ohio's explicit, generally applicable, and non-discriminatory law requiring voters to cast their ballots in the correct precinct effectively be suspended for various provisional ballots submitted in a precinct in which the voter is not registered.

Ohio's neutral statute that excludes *all* ballots cast in the wrong precinct, for whatever reason, is constitutional and rests on important interests already recognized by this Court and on overarching state interests of uniformity and the avoidance of post-election problems (including litigation) that consume resources, leave races in doubt, and require further court intervention in the election process. As the recent *Hunter* litigation reflects (in a case where officials erred in starting down the path of counting wrong-precinct ballots), without the neutral wrong-precinct exclusion, Ohioans face the prospect of prolonged provisional-vote-counting litigation after every election. Avoiding that fate further justifies the State's flat rule that excludes ballots cast in the wrong precinct.

The challenged preliminary injunction comes despite the district court's acknowledgement that "Ohio's Precinct-Only Eligibility Requirement Complies with HAVA [the federal Help America Vote Act]." Order, R. 67, at 5843.

It comes without any finding that Ohio's precinct voting system imposes any special burden on any protected class, and it comes despite the district court's finding that the Ohio Secretary of State "demonstrates, and Plaintiffs acknowledge, that the statistics from the past elections do not establish a consistently higher rate of rejected wrong-precinct ballots in urban counties relative to less populous counties." *Id.* at 5877 (emphasis deleted).

It comes despite this Court's observation that "[o]ne aspect common to elections in almost every state is that voters are required to vote in a particular precinct," and that for the federal government to overthrow the requirement of precinct-specific voting would be to work an unwarranted "revolution in America's voting procedures." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004).

It comes despite this Court's recognition that for reasons including the orderly administration of elections and preservation of the integrity of our democratic system, "[t]he advantages of the precinct system are significant and numerous." *Id.* at 569.

And it comes despite the constitutionally designated responsibility of the State of Ohio to structure and supervise its election processes. *See* U.S. Const., art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.");

see also id., art. II, § 1, cl. 2 ("[E]ach State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors.).

Indeed, in reaching its result that essentially nullifies significant parts of Ohio's law that votes must be cast in the correct precinct to be counted, the district court declared that "Ohio's precinct requirement, as a whole, is legitimate and relevant to the requirement that voters vote in their jurisdiction." R. 67 at 5871. And the district court further allowed that "[t]his is not an archetypical case of an invidious restriction, such as poll taxes, which are facially 'capricious.'" *Id.* (citation omitted).

Nonetheless, the district court ordered that for the purposes of the November 2012 general election, certain provisional ballots must be counted even where cast in the wrong precinct unless a county board of elections can "verify" with regard to any particular miscast ballot that a board poll worker "a) determined the correct precinct for the voter; b) directed the voter to the correct precinct; [and] c) informed the voter that casting the wrong-precinct ballot would result in all votes on the ballot being rejected under Ohio law;" and d) the voter refused to travel to the correct precinct[.]" *Id.* at 5886-87.

The Order below thereby effectively overwrites Ohio's express and uniform statutory provision that a provisional ballot "shall not be counted [if the] individual named on the affirmation is not eligible to cast a ballot in the precinct . . . in which

the individual cast the provisional ballot." Ohio Rev. Code § 3505.183(B)(4)(a)(ii).[1]

In arriving at this new provisional balloting regime, the Order first assumes or defines wrong-precinct-correct-location provisional balloting as automatically having resulted from poll worker error unless the local elections board establishes proof of actual voter malfeasance; then (after improperly discounting the State interest in strictly maintaining precinct balloting) the Order concludes that any such unintended error by poll-workers rises to the level of a federal equal protection and substantive due process violation, authorizing a federal judicial rewrite of the State's election laws.

But Ohio's uniform law violates no constitutional principles. It establishes no improper classification; moreover, it advances recognized state interests. And alleged negligence in the administration of even-handed election law, especially absent any showing of disparate impact, does not offend equal protection principles or give rise in this context to a due process violation. The federal

[1] Although the district court indicated that "Plaintiffs bring both facial and 'as-applied' equal protection challenges to Ohio's provisional ballot-counting laws," the court also stated that "Plaintiffs do not challenge Ohio Rev. Code § 3505.183(B)(4)(a)(ii)'s precinct eligibility requirement 'in all its applications'—only its provision disqualifying wrong-precinct ballots cast due to poll-worker error." *Compare* R. 67 at 5852 *with id.* at 5863. Any facial challenge, therefore, should have been rejected out of hand. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Constitution provides no basis to enjoin the application of Ohio's precinct voting law, and the judgment below should be vacated.

STATEMENT OF THE CASE AND FACTS

Like the law of most states, Ohio law mandates that only ballots cast in the correct precinct be counted. On June 22, 2012, a group of labor unions and a community organizing and advocacy group sued in district court claiming that Ohio's provisional ballot laws violate the Due Process and Equal Protection clauses of the United States Constitution. Compl., R. 1 at 2. The Plaintiffs claim that Ohio has a duty to count provisional ballots cast in the wrong precinct.

I. The district court granted a preliminary injunction that orders Ohio's elections officials to count certain votes cast in the wrong precinct.

Plaintiffs moved for a preliminary injunction to suspend specific provisions of Ohio's elections code that require a provisional ballot to be cast by a qualified elector in order for the ballot to be counted. Observing that "Plaintiffs sue on behalf of registered voters who [will] arrive in the correct polling place, and only through an intervening error violate the precinct requirement," R. 67 at 5871, the district court then held that Plaintiffs have a likelihood of success in establishing that Ohio's uniform law against counting ballots cast in the wrong precinct violates the equal protection and Due Process Clauses. The court granted a preliminary injunction requiring that the Secretary of State issue a directive stating that local

boards of elections "may not reject any provisional ballots cast by lawfully registered voters in the November 2012 general election for the following reasons:

1. The voter cast his or her provisional ballot in the wrong precinct, *unless* the poll worker who processed the voter's provisional ballot has:

a) determined the correct precinct for the voter;

b) directed the voter to the correct precinct;

c) informed the voter that casting the wrong-precinct ballot would result in all votes on the ballot being rejected under Ohio law; and

d) the voter refused to travel to the correct precinct and insisted on voting the invalid ballot;

and the [local] Board of Elections has verified that the precinct to which the poll worker directed the voter was the correct precinct for that voter. If the County Board of Elections cannot verify that the poll worker directed the voter to the correct precinct, the votes cast on the provisional ballot must be counted in all races and for all issues for which the voter would have been eligible to vote if he/she had cast the ballot in the correct precinct."

2. The provisional ballot envelope does not contain a voter signature or the voter's full printed name and/or the voter did not sign and/or print the voter's name in the correct place(s) on the ballot envelope, and the local board of elections has been able to determine that the voter is a registered voter. *See* R. 67 at 58836-87 (emphasis in original).

After the Order issued, the Defendant Ohio Secretary of State announced that he would contest the second issue relating to provisional ballot signature requirements, but that he would not further defend Ohio's statute precluding the counting of wrong-precinct ballots. The State of Ohio then moved the district court for Leave to Intervene to defend state law on that point. The district court did not rule on the intervention motion before the Secretary's appeal. The State also appealed from the judgment below and additionally sought leave from this Court to intervene in the appeal taken by the Secretary of State. This Court consolidated those two appeals, along with an appeal by voters whose intervention motion the district court denied, and established an expedited briefing schedule.

II. Ohio's election law provides for some voters whose eligibility is unclear on election day to be given a provisional ballot, and the ballot later is counted only if the voter was eligible to vote in the precinct in which she cast her ballot.

To qualify as an elector in the State of Ohio, one must be a citizen of the United States 18 years of age or older "who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days." Ohio Rev. Code § 3503.01(A). When a registered elector seeks to vote on election day, he "shall announce to the precinct election officials the elector's full name and current address and provide proof of the elector's identity in the form of a current and valid photo identification, a

military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document. . . ." Ohio Rev. Code § 3505.18(A)(1).

Recognizing that there may be times that a voter's name does not appear in the precinct's poll book, Ohio has allowed for provisional balloting since 1995. 1994 Ohio Laws 2516, 2536-41 (effective Jan. 1, 1995). Indeed, Ohio law affords significant provisional balloting opportunities, extending to circumstances not only in which a voter does not appear on the precinct's list of eligible voters, but also, for example, to circumstances where the voter previously requested a (separate) absentee ballot, cannot provide appropriate identification, or whose signature is found not to match that on the voter registration forms. R. 67 at 5834, n.4 (citing Ohio Rev. Code § 3505.181(A)(1)-(13).

Federal law requires States to allow for provisional balloting. As part of the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.*, Congress sought to address some of the issues that arose as a result of the 2000 presidential election. Congress mandated a provisional ballot system to provide a safety net when voters "arrive at the polling place believing that they are eligible to vote, and then [are] turned away because the election workers cannot find their names on the list of qualified voters." *Sandusky*, 387 F.3d at 569. Thus, HAVA "creat[ed] a system for provisional balloting . . . under which a ballot would be submitted on election

day but counted if and only if the person was later determined to have been entitled to vote." *Id.*

In fact, as this Court has held: "under HAVA, the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot is the affirmation contained in [42 U.S.C.] § 15482(a): that the voter is a registered voter in the jurisdiction in which he or she desires to vote, and that the voter is eligible to vote in an election for federal office." *Id.* at 574. That rule, allowing provisional ballots to be later validated, arises because: "the primary purpose of HAVA was to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers." *Id.*

Thus, in Ohio, as the district court noted, the local board of elections "later determines whether a provisional ballot is valid and required to be counted. If the Board is able to determine that the individual is eligible 'to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot,' the provisional ballot is counted." R. 67 at 5834 (citing Ohio Rev. Code § 3505.183(B)(3)(b)). The corollary also applies: "[I]f the Board determines that '[t]he individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot,' then 'the ballot envelope shall not be opened and the ballot shall not be counted.'"

R. 67 at 5835 (citing § 3505.183(B)(4)(a)(ii)). That is the central statutory subsection at issue in this case.

Ohio's system of defining a legal vote by requiring it to be cast in the proper precinct is far from unique: "One aspect common to elections in almost every state is that voters are required to vote in a particular precinct. Indeed, in at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct." *Sandusky*, 387 F.3d at 568. That system is consistent with the federal statutory regime: "[B]allots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes." *Id.* As the district court stated: "Ohio's Precinct-Only Eligibility Requirement Complies with HAVA." R. 67 at 5843 (emphasis omitted).

The district court below found that "[i]n the last presidential election in 2008, nearly every Ohio County reported at least one instance of rejecting a provisional ballot cast in the wrong precinct." R. 67 at 5856, n.28. The court further found that 14,355 provisional ballots were cast in the wrong precinct that year (including ballots cast at the wrong polling location or even in the wrong county). R. 67 at 5857; R. 9-2, Table 13 at 1384. With 5,773,777 voters casting

ballots in that election,[2] wrong-precinct provisional ballots thus amounted to less than one quarter of one percent of ballots cast in the State (0.248%), and right location/wrong precinct ballots were substantially less than that. *See*, *e.g.*, Oral Argument Tr., R. 69, at 35 (Plaintiffs' counsel: "To be clear about the types of ballots we're talking about, approximately half in the recent election were voters who did appear at the right location."); *see also,* R. 9-2, Tables 15-16 at 1387-88.

Local boards of elections train poll workers to carry out various duties on election day. Ohio Rev. Code § 3501.22. Poll workers must determine whether an individual is eligible to vote in a specific precinct, and direct them to the precinct in which "the individual appears to be eligible to vote." Ohio Rev. Code § 3505.181(C)(1). The Ohio Secretary of State has issued several directives related to the upcoming election. Among other matters, the Secretary requires "that all poll workers be trained (or retrained) within 60 days before the November 2012 election in directing wrong-precinct voters to the right place," and the Secretary also has detailed "how provisional ballots must be processed under Ohio law…." R. 67 at 5857-58.

This added training is expected to reduce further the number of wrong-precinct ballots. The district court observed that, "[a]fter the data are compiled

[2] Voter Turnout: Nov. 4, 2008, Official Amended Results, http://www.sos.state.oh.us/sos/elections/research/electresultsmain/2008ElectionResults/turnout110408.aspx.

from the upcoming election, the Court's final review of the full record may reveal an improvement in the numbers of wrong-precinct provisional ballots." R. 67 at 5858. The court reasoned that some wrong-precinct votes would still occur, and more important, it concluded that all, or virtually all, "wrong-precinct, right-location" ballots could be attributed to poll-worker error. "As a matter of law, if a person casts a provisional ballot in the wrong precinct, it is *always* going to be due to poll-worker error unless the poll worker has instructed the individual where the correct polling location is and that individual 'refuses to [go to the correct precinct]," R. 67 at 5838 (emphasis in original). The court further found that "[i]t is the particular burden imposed by Ohio's prohibition of wrong-precinct ballots on the rights of a 'discrete class of prospective voters'—those who arrive at the correct polling place but are misdirected due to poll-worker error—against which the State's asserted interests [in the conduct of its elections] must be weighed." R. 67 at 5864. Concluding that Plaintiffs had satisfied their burden for a preliminary injunction, the court issued its injunction for the 2012 general election requiring Ohio's elections officials to count the relevant wrong-precinct ballots. Specifically, the Court ordered Ohio's Secretary of State to issue a directive instructing the county boards of elections to count such votes.

SUMMARY OF ARGUMENT

The Constitution largely entrusts regulation of elections to the States, and Ohio, like many other States, has established a precinct voting system in which ballots to be counted as legal must be cast in the voter's correct precinct. That system not only comports with federal statute and with national norms as referenced by this Court in *Sandusky*, it also accords fully with the Constitution.

Ohio's explicit, neutral, and uniform statute providing that provisional ballots must be cast in the correct precinct to count as legal creates no equal protection problem. Indeed, it creates no classification susceptible of equal protection analysis. Plaintiffs' complaint that the statute does not authorize exceptions does not sound in equal protection at all: a State refusal to create classifications is not the same thing as manufacturing improper classifications.

Indeed, this case presents claims that amount to the opposite of those considered in *Hunter*: this is not a case where some wrong-precinct ballots are to be counted and others not absent reference to a preset rule; rather, the complaint here attacks the uniformity of Ohio's statute commanding that ballots be cast in the precinct in which the voter resides. And a prior consent decree that the same district court only recently has reaffirmed cannot be deemed to create a constitutional problem authorizing expanded court control over the State's election

administration; if the prior decree is constitutionally infirm, the remedy is to vacate that decree.

To the extent that the district court based its holding on the view that Ohio's definition of a legal ballot as having reference to the voter's precinct is somehow "unrelated to voter qualifications" and therefore invidious, the district court miscomprehended Ohio law. Several Ohio statutes specify that a legal voter must be a resident of the precinct in which he or she offers to vote.

Moreover, Ohio's uniform precinct balloting rule advances many State interests including the efficient administration of elections and the avoidance of post-election litigation. The district court also erred in refusing to give any weight whatsoever to a variety of "significant and numerous" factors that this Court in *Sandusky* identified as among the "advantages of the precinct system" and that support and are bolstered by the "right precinct" requirement in this context.

This is not the "exceptional case" that implicates election-related substantive due process concerns. As this Court noted two years ago in *Warf*, federal courts "'have uniformly declined to endorse action[s] under Section 1983 with respect to garden variety election irregularities'." Here, there is no allegation of willful conduct to undermine the elections process, and the Due Process Clause is not implicated.

Especially given the "strong interest" that States have in administering elections consistent with their governing law and compliant with federal requirements, the public interest weighs against the preliminary injunction. Most importantly, however, the injunction should be overturned because Plaintiffs have not established a likelihood of success on the merits.

This brief addresses only that portion of the injunction requiring the counting of wrong-precinct ballots. That order is not constitutionally compelled, and cannot stand. The separate brief of the Ohio Secretary of State appeals the portion of the injunction regarding provisional-ballot affirmations.

STANDARD OF REVIEW

A "preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citations and quotations omitted). This "extraordinary remedy . . . may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

This Court's review of a grant of a motion for preliminary injunction examines "the district court's legal conclusions *de novo* and its factual findings for clear error. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo*. . . . [T]he district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (citing *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007)).

ARGUMENT

The "extraordinary remedy" granted below cannot stand. Whether viewed through the lens of equal protection or substantive due process, Plaintiffs have no likelihood of success on the merits. Ohio's interest in counting only valid, legal ballots, in running a smooth election, and in minimizing post-election litigation easily justifies the statutory decision to exclude all ballots cast in the wrong precinct.

Ohio's law is a neutral requirement, announcing plainly in advance that ballots cast in the wrong precinct will be excluded, and it is constitutional. And Ohio's pre-election commitment to exclude wrong-precinct ballots avoids impromptu choices about those ballots in the turmoil after an election. That choice comports with the substantive due process requirement that an election process cannot be fundamentally unfair.

I. Ohio's neutral ban on *all* wrong-precinct voting does not violate equal protection.

Plaintiffs' equal protection claim does not truly involve any classification that could violate the equal protection standard. Consequently, Plaintiffs are left with due process, which is reviewed below. Ohio law—absent court-ordered rewriting—mandates that *all* votes cast in the wrong precinct should be rejected, regardless of poll-worker error or any other factual issue. Ohio Rev. Code § 3599.12; *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 794 (Ohio 2011)

(Ohio "statutes do not authorize an exception based on poll-worker error."); *Sandusky*, 387 F.3d at 568 (Ohio "use[s] a precinct voting system," so "a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct."). Indeed, the district court acknowledged, rightly, that Ohio law "treats all wrong-precinct ballots the same; none is counted." R. 67 at 5878. The only arguable "classification" in Ohio law might be the one between ballots cast in the wrong precinct versus in the right precinct, but *that* classification should easily survive.

As detailed below, this Court's decision in *Hunter* supports the State on this critical point. There, the board of elections improperly counted *some* wrong-precinct ballots, but not others, in violation of Ohio's bar—and *that* was the root of the problems. A flat ban, by contrast, *is not an equal protection violation.*

A. Ohio's neutral ban on all wrong-precinct voting does not create any classification that could violate the Equal Protection Clause.

This case turns on the fundamental threshold of equal protection analysis: Identifying the precise classification, and the precise disparate treatment at issue, before analyzing whether the challenged practice violates the Constitution. *See Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011); *Country Classic Dairies, Inc. v. Mont., Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) ("The first step in equal protection analysis is to identify the state's classification of groups."). Here, Ohio has not created a

classification that could constitute an equal protection violation, as dissecting Plaintiffs' claim shows.

The ultimate problem here—a ballot cast in the wrong precinct, caused by court-defined "poll-worker error," is ineligible to be counted—involves three stages of state action:

1. Ohio's statute declares invalid any ballot cast in the wrong precinct, with no exceptions for poll-worker error or other factual scenarios;

2. A voter arrives at the wrong precinct, and the poll-worker—in violation of Ohio law—fails to direct the voter to the right precinct; and

3. The board of elections, following Ohio law, rejects the miscast ballot.

Unless all three steps happen, no claim exists, and of course, the middle step is the *factual* and undesirable root of the problem. But poll-workers are human, and the day is hectic and harried.

Plaintiffs' claim, notably, is essentially a *facial* attack on Ohio's statutory ban on wrong-precinct voting, with a nod to its mechanical implementation by the boards—and Plaintiffs expressly do *not* challenge the poll-worker's error itself as the equal protection violation. The operative complaint asserts: "Ohio's strict provisional ballot law requiring disqualification of 'wrong-precinct' ballots without exception, as set forth in [statute] and in . . . *Painter*, violates the equal protection Clause. . . ." 2d Am. Compl., R. 63 at 5762. As Plaintiffs summed up their argument: "Ohio law violates the constitution by requiring county boards of

election to disqualify ballots after the election when the reason for that disqualification is . . . poll worker error." Oral Argument Tr., R. 69 at 28; *see also, e.g.*, *id.* at 77.

Aligning Plaintiffs' claim with the equal-protection framework reveals the fundamental flaw in their argument. Ohio's statute simply *does not classify* anyone *within* the category of wrong-precinct voters. It does not divide wrong-precinct voters into those who have characteristics X versus Y, or who took actions A or B. True, the statute divides those who vote in the wrong precinct from those who vote in the right precinct, but neither Plaintiffs nor the district court appears to target *that* classification. Nor, presumably, would that claim get very far.

Plaintiffs have the same problem in shifting to the "back end" stage when the board implements Ohio law: A board following Ohio law, by invalidating *all* wrong-precinct ballots, is likewise not classifying anyone *within* that group. To the contrary, a board following Ohio law *refuses* to classify when it refuses to divide such ballots "attributable to poll-worker error" from those that are not. Plaintiffs object not to a classification, but to a *refusal* to create a classification they deem required.

The district court was unclear on the primary classification it reviewed, but none of the possible candidates withstands scrutiny. The "refusal to classify" noted above is a non-starter. The district court did rely, in part, on Plaintiffs'

suggestion that Ohio unlawfully classifies when it *follows* the NEOCH consent decree and counts the subset of wrong-precinct ballots addressed there. *See* R. 67 at 5878. That NEOCH-based argument is addressed below at I-C, where the State explains that following a federal court order cannot be the basis of an equal protection violation. Another candidate: The district court's (and Plaintiffs') reasoning seems to suggest that the starting group is all voters who initially approach a poll-worker or approach the wrong precinct, with the classification being between voters who are properly advised (because they end up casting right-precinct ballots) and those who are led astray by what the district court defines as "poll-worker error" (because they cast wrong-precinct ballots). *See* R. 67 at 5864 (describing Ohio's law as affecting "a 'discrete class of prospective voters'—those who arrive at the correct polling place but are misdirected due to poll-worker error").

That last classification—between those given good versus bad advice—is flawed because that divide is created *by the errant poll-workers*, and as noted above, Plaintiffs expressly disclaimed that action as the basis for their claim. Such a claim, if pressed, would raise issues of negligent as opposed to intentional discrimination and other complications for Plaintiffs. But those issues do not arise here, because Plaintiffs forswear that path. *See, e.g.*, Oral Argument Tr., R. 69 at 83 ("We're challenging a law that requires the disqualification of provisional

ballots after the election when there is no legitimate reason . . . not to count them.").

When the board acts, it is, in a sense, operating in a factual scenario that *reflects* the classification accidentally created by poll-worker error, but it is not actually creating any classification. The poll-worker mistakenly divided voters into those who ended up right-precinct voters from those who ended up wrong-precinct voters. The board merely follows state law in counting ballots cast by group one but not group two, but again, that statutory classification is the right-precinct versus wrong-precinct classification. The boards' action actually avoids classification by not counting any wrong-precinct ballots.

Plaintiffs' attempt can be viewed, if not as an attempt to create a classification *within* wrong-precinct voters, as perhaps an attempt to *undo* the poll-worker's negligent classification, by having the board reunite the wrong-precinct voters with their initially-similarly-situated right-precinct counterparts. But that is not really an attack on board action, but on their "refusal to remedy" the poll-worker's error. And that has never been held to be an equal protection violation.

In sum, every attempt to pin down the relevant classification undercuts the existence of any sort of equal protection claim. Since no classification occurs, there can be no discrimination, as of course discrimination is the disparate treatment of two or more groups. ("No discrimination at all" also means there can

be no "invidious discrimination," as further detailed below at I-D.) Without distinct groups, it cannot occur. Ohio does treat all invalid ballots the same: It rejects them.

B. *Hunter* demonstrates that an absolute ban, as opposed to the risk of selective or debatable implementation, does not violate equal protection.

Both Plaintiffs and the district court have repeatedly described this case as a sequel to *Hunter*, 635 F.3d 219 (6th Cir. 2011). But, properly understood, *Hunter* does not support Plaintiffs at all. To the contrary, *Hunter* strongly supports the State here. That is so because *Hunter* did not involve Ohio's flat ban on wrong-precinct voting, but instead was firmly rooted in the board of elections' decision to count *some* wrong-precinct ballots, but not others. That improper counting of one batch of invalid ballots was the reason this Court found an equal protection violation.

At every turn, the *Hunter* court's reasoning shows that the problem there was created by the board's decision to ignore Ohio's flat ban and count *some* wrong-precinct ballots. The court detailed how some such ballots were counted, but not others. 635 F.3d at 224-26, 235-39. It agreed with the district court's conclusion that "the [Board's] differing treatment of the various provisional ballots cast in the wrong precinct raises equal protection concerns," because the board "ha[d]—without any specific statutory mandate—carved out situations in which it

will count provisional ballots cast in the wrong precinct." *Id.* at 236 (internal quotation and emphasis omitted). Again: "[T]he Board considered evidence of poll-worker error with respect to some ballots cast in the wrong precinct but not other similarly situated ballots when it evaluated which ballots to count . . ." *Id.* at 238; *see also id.* at 241 ("[G]iven that the Board chose to consider evidence of poll-worker error with respect to the first group of 27 ballots, the district court did not abuse its discretion in requiring the Board also to consider evidence of poll-worker error for similarly situated ballots.").

In addition, the *Hunter* court relied heavily on the fact that the board acted *in violation of Ohio's strict statutory ban against counting such votes.* The court "recognize[d] that Ohio law, now made explicitly clear in *Painter*, does not permit the consideration of poll-worker error with respect to ballots cast in the wrong precinct, but rather mandates that no ballot cast in the wrong precinct may be counted." *Id.* at 238. The court repeatedly noted that the board acted "[d]espite the requirements of state law." *Id.*

Further, the court explained how the board, by acting against state law, violated twin imperatives by (1) acting without established standards to guide them and (2) changing the established rules post-election. "In so doing, the Board exercised discretion, without a uniform standard to apply, in determining whether to count" the disputed ballots. *Id.* at 238. The court explained how changing the

rules post-election heightened the problem: "Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great. As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. . . . This particular postelection feature makes 'specific standards to ensure . . . equal application,' particularly 'necessary to protect the fundamental right of each voter' to have his or her vote count on equal terms." *Id.* at 235 (quoting *Bush v. Gore*, 531 U.S. 98, 106, 109 (2000)) (internal citations omitted).

Finally, the *Hunter* court explained how the board's conflict with Ohio law also undercut any claim to a state interest justifying the counting of some wrong-precinct ballots but not others. The "disparate treatment of voters here resulted, not from a 'narrowly drawn state interest of compelling importance,' but instead from local misapplication of state law." *Id.* at 238 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008)).

This case is *not* a sequel to *Hunter*. Nor is *Hunter* merely distinguishable and set aside. Instead, *Hunter* supports the State of Ohio. If a board follows Ohio law, and refuses to count *any* wrong-precinct ballots, then every *Hunter* factor cuts the other way. No baseline exists of counting some ballots but not others similarly situated. No problem arises of administrative discretion without state-law

guidance. Perhaps most important, no problem relates to arbitrarily moving the goalposts post-election.

The Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), further confirms that equal protection concerns, in vote-counting, center on changing the rules after the election, and there is no problem with having and following pre-existing bright-line rules that some people dislike. The court explained that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, the question was "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. Florida's officials were recounting without any uniform standard for accepting or rejecting contested ballots. *See id.* at 106. For example, Palm Beach County "began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal." *Id.* "[E]ach of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and

uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties." *Id.* at 107.

The Court contrasted that problematic practice with the many things that are *not* an equal protection violation, because they did not amount to applying inconsistent post-election standards. It noted that "[n]ationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot." *Id.* at 103. Yet, the Court did not find that situation unconstitutional. Instead, the Court simply stated that the legal definition of a vote on any particular balloting system must be consistent.

The State of Ohio fully complies with *Bush v. Gore's* consistency requirement. Provisional ballots must be cast in the correct precinct to be counted. Ohio statute treats all provisional ballots according to the same standard. If a provisional ballot is cast in the proper precinct—and it meets all the other requirements of Ohio's balloting law—the provisional ballot is counted. If the provisional ballot is cast in an incorrect precinct, it is rejected.

Indeed, the concerns driving *Hunter* and *Bush* are implicated *by the district court's Order*. As explained in Part I-C below, the Order, not Ohio law, creates

classifications, supplants Ohio law, and sets the stage for further problems post-election.

C. The NEOCH Consent Decree cannot be the basis for an equal protection violation.

As an alternative basis for an equal protection violation, the district court relied on the disparate treatment *required* by the same court's Consent Decree in *Northeast Oh. Coalition for the Homeless v. Husted*, No. 06-CV-896, 2012 U.S. Dist. LEXIS 94086 (S.D. Ohio July 9, 2012). That Decree requires the State to count the type of wrong-precinct ballots at issue here—cast at the right place, due to poll-worker error—but only for the subset of voters who lack Voter ID and use the last four digits of their social security numbers as identification. The court acknowledged that Ohio law "treats all wrong-precinct ballots the same; none is counted." Order at 48. But, the court said, by "[i]ncorporating the Decree, however, Ohio's ballot counting rules result in disparate treatment of similarly situated provisional voters." *Id.* at 48-49. That ruling is wrong, and is harmful in ways that go far beyond this case. This Court should firmly reject the notion that the State, in *following* a federal court order, violates equal protection in a way that warrants further court control over the State's election administration.

First, however it is viewed doctrinally, it simply cannot be that the State is guilty of discrimination when it follows a federal court order. It is not discrimination when the statute treats the two groups of voters—those subject to

the Decree and those not—differently, because the two groups are not similarly situated, when one group is subject to a court order and the other is not. Or, the state interest justifies the treatment, since the State has a strong interest—both compelling and compelled—in following federal court orders. Or, the earlier order granting the Decree amounts to issue preclusion in favor of the constitutionality of the treatment *created* by the Decree, as of course, a court approving a consent decree "must satisfy himself that the decree is consistent with the Constitution . . . ." *Kasper v. Bd. of Election Commr's*, 814 F.2d 332, 338 (7th Cir. 1987) (collecting cases). Adding all these factors together, it is hard to see how the State's obedience to a federal court order is itself a violation that warrants the relief sought here.

Second, the Consent Decree cannot be attributed to the State differently from other court orders on the notion that the "consent" aspect makes it the State's choice. *Kasper* and similar cases show that the Court, not just the consenting parties, is obliged to ensure that a consent decree is constitutional. *See id.; see also Cleveland Firefighters For Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737, 742 (6th Cir. 2012) ("The Constitution trumps a consent decree."); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 227 (6th Cir. 1993) (noting even classifications "approved as a part of a consent decree" must comply with the equal protection Clause). And of course, no government entity will want to enter a

Consent Decree again, if its consent will then be leveraged by the court to broaden the relief considerably the next day.

In addition, the State (and the Secretary of State) have withdrawn that consent, and are before this Court seeking to have the Consent Decree vacated because of its invalidity. *See NEOCH*, 2012 U.S. Dist. LEXIS 94086; on appeal 6th Cir. Case No. 12-3916. The same district court just re-affirmed its commitment to maintaining that Decree, against the State's wishes, on July 9, 2012, but just seven weeks later, the court used that Decree as the basis for granting much broader relief against the State here. That cannot be right.

Of course, *if* the Consent Decree creates an equal protection violation, the obvious solution is to *vacate the decree*, not de facto to expand it by piling on more re-writes of Ohio's law. *See, e.g.*, *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999 (6th Cir. 1992) (consent decrees that violate the equal protection Clause should be vacated). The district court rejected that sensible suggestion, relying on its claim that *Hunter* discredits that approach. In *Hunter*, some invalid ballots had already been counted, and this Court rejected the idea that those votes could be uncounted, and instead held that other similarly-situated invalid ballots should also be counted for equality's sake.

The district court's reliance on *Hunter* is misplaced. In *Hunter*, the invalid votes had already been counted, and there was no way to retrieve and "uncount"

them, because once the votes had been counted, they were mixed in with the other votes. *Id*. at 245. No one knew how many of the invalid votes had been counted for one candidate or the other, so the "uncounting" advocates had to urge statistical models for estimating how to do it. The real alternative before the court was not uncounting, then, but accepting the mistakenly-counted votes without counting others similarly situated, and thus accepting the inequality. In *that* context, the *Hunter* court said to move forward.

Here, in sharp contrast, both the NEOCH Decree and the Plaintiffs' claims are prospective as to *this* upcoming election; no one seeks to undo the past. The district court could have—and this Court can and should—vacate the NEOCH Decree rather than compound its error by piling *more* invalid votes onto the scales in Ohio. (The State clarifies that the Court in *this* case cannot vacate the Consent Decree on the invalidity grounds that are separately before the Court in the *NEOCH* appeal. But the Court here can declare that the Decree is no basis for further relief here, and if it finds that the Decree *creates* a constitutional violation, it can note that as a holding, leaving the district court on remand to address that. Meanwhile, if the *NEOCH* appeal leads to the Decree's vacatur, as it should, this part goes away.)

D. Ohio's neutral statute does not invidiously discriminate. Under Ohio law, a voter is not qualified if he votes in the wrong precinct.

The Order below concludes that "Ohio's prohibition on wrong-precinct ballots cast due to poll-worker error is 'unrelated to voter qualifications,'. . . because the voters have necessarily met … all the State's requirements for eligibility," and thus "invidiously discriminate[s]." R. 67 at 5870 (quoting *Crawford*, 553 U.S. at 189). The Order continues: "Ohio's precinct requirement, as a whole, is legitimate and relevant to the requirement that voters vote in their jurisdiction. The Plaintiffs sue on behalf of registered voters who arrive in the correct polling place, and only through an intervening error violate the precinct requirement. As a class, these voters have no deficiencies in their qualifications; thus, the State's expansion of the wrong-precinct prohibition to them is an invidious restriction." *Id.* at 5871.

The Order's conclusion here is wrong as a matter of law for at least two reasons. First, the Supreme Court in *Crawford*, after describing the sorts of deliberate and intentional discrimination that federal courts have found to be invidious in the voting context, such as the imposition of poll taxes or discrimination against members of the armed services, then went on to emphasize that: "In *Anderson v. Celebrezze*, . . . we confirmed the general rule that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*."

Crawford, 553 U.S. at 189-90 (opinion of Stevens, J.). And this Court found in *Sandusky* that Ohio's preclusion on the counting of wrong-precinct ballots serves "significant and numerous" State interests relating to the integrity and reliability of the electoral process.

Even more fundamentally, however, the district court wrongly concluded that the exclusion of wrong-precinct votes is "unrelated to voter qualifications" again misconstrues Ohio law. As this Court has determined: "Under Ohio law, . . . only ballots cast in the correct precinct may be counted as valid." *Sandusky*, 387 F.3d at 578. As the Ohio Supreme Court reaffirmed in *Painter*, the "plain language of several statutes so provides." 941 N.E.2d at 794; *see also Bell v. Marinko*, 235 F. Supp. 2d 772, 776 (N.D. Ohio 2002) ("One simply cannot be a 'qualified elector' entitled to vote unless one resides in the precinct where he or she seeks to cast [a] ballot."), *aff'd*, 367 F.3d 588 (6th Cir. 2004); *Summit Co. Dem. Central & Exec. Comm. v. Blackwell*, 2004 U.S. Dist. Lexis 22539 (N.D. Ohio 2004) at *26 and n.5 ("The Court finds those provisions allowing precinct judges . . . to challenge a voter's qualifications—such as citizenship, residency, and age—would likely pass constitutional muster. . . . For example, according to the Sixth Circuit's holding in *Sandusky*, an election official must retain the authority to refuse to allow a provisional ballot to be cast by an elector offering to vote in a precinct other than that in which the elector resides.").

Just as clearly, Ohio law explicitly references the right-precinct requirement as a voter "qualification." For example, Ohio Revised Code Section 3503.01(A) (at the outset of the "Qualifications" sections) recites that: "Every citizen of the United States who is of the age of eighteen years or over and who . . . is a resident of the county *and precinct* in which the citizen offers to vote, and has been registered to vote for thirty days, *has the qualifications of an elector . . .*." *See also, e.g.*, Ohio Rev. Code § 3505.181(E)(1) ("'Jurisdiction' means the precinct in which a person is a legally qualified elector"); Ohio Rev. Code § 3599.12(A)(1) ("No person shall . . . vote or attempt to vote in any . . . election in a precinct in which that person is not a legally qualified elector").

The district court's underlying premise that Ohio's statutory preclusion of wrong-precinct ballots is "unrelated to voter qualifications" is incorrect and the district court's finding of "invidiousness" therefore cannot stand. And as this Court has observed, "the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted." *Sandusky*, 387 F.3d at 576.

II. The State's strong interests here justify its neutral law.

The district court invalidated Ohio's law primarily on equal-protection grounds, and it alternatively found a due process violation. Each of those fails on its own terms, as shown above (equal protection) and below (due process). But if

the Court does reach the *Anderson/Burdick* balancing test, which the Supreme Court has developed for some categories of elections cases, that the district court used, Ohio's state interests meet that balancing test.

The Supreme Court has said that: "We have upheld generally applicable and evenhanded regulations that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebreze*, 460 U.S. 780, 788, n.9 (1983). Thus, the Court has recognized that the States have "important regulatory interests" in discharging their obligations to conduct elections, and has held that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the . . . Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 540 U.S. 428, 434 (1992) (*citing Anderson*). And this Court has held, in the context of examining "the longstanding precinct-counting system in place in more than half the States," that: "The advantages of the precinct system are significant and numerous. . . ." *Sandusky*, 387 F.3d at 578, 569.

When the district court engaged in this balancing, it regarded Ohio's interests in preserving its precinct voting system (as previously appraised by this Court in *Sandusky County*) as not "'sufficiently strong to require us to reject [Plaintiffs'] attack on the statute.'" R. 67 at 5865 (quoting *Crawford*, 553 U.S. at

204) (lead opinion of Stevens, Roberts, and Kennedy, JJ). But the district court's balancing manifestly underweights or does not weigh the state's interests.

Importantly, the balancing must be informed by the constitutional considerations that the U.S. Supreme Court has identified in requiring appropriate deference to the States' assigned responsibilities for conducting elections:

> The Constitution provides that States may prescribe 'the Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, Sec. 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. [citations omitted] Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' *Storer v. Brown*, 415 U.S. 724, 730 . . . (1974).
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' *Anderson* …, 460 U.S. 780, 788 . . .

Burdick, 504 U.S. at 433; *see also, e.g., Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("[I]t is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.") (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).)

A. *Hunter* shows a significant virtue of Ohio's flat ban: It avoids divisive, extensive post-election litigation over disputed facts and debatable standards.

As noted above, both *Hunter* and *Bush v. Gore* point up the courts' strong discomfort with changing the rules post-election, especially when the new "rules" allow for administrative discretion under unclear standards. And of course both *Hunter* and *Bush* show the practical reality of how complicated—and divisive to our polity—such overtime battles can be. Ohio's clear and uniform law reduces, if it cannot eliminate, the length, breadth, and depth of such battles.

Consider if Ohio's statute allowed for poll-worker error as an exception to the wrong-precinct ban. (After all, the district court's theory logically implies that Ohio's statute could have been valid only if it had already built in an exception scheme, preventing the "need" for a court-ordered one.) Any such exception, by necessity, must call for some form of factual inquiry to determine which voters were led astray by bad instructions from a poll-worker—i.e., the conversations must be reconstructed. And the Order's command that a board must "verify" certain findings in order to exclude wrong-precinct ballots does not purport to immunize such findings or preclude further attack on the same grounds by voters who cast provisional ballots at the wrong location or in the wrong part of the State (as Plaintiffs initially appeared to argue).

In *Hunter*, under the courts' orders and the then-Ohio Secretary of State's directives, the post-balloting investigatory plan underway involved not just review of the document trail, compare *Painter* at 23, but massive numbers of depositions of poll-workers and others, to try to reconstruct what happened, *Hunter v. Hamilton County Bd. of Elections*, No. 10-cv-820, 2012 U.S. Dist. LEXIS 15745, at *60-70 (S.D. Ohio Feb. 8, 2012) (*Hunter II*). Of course, if poll-workers testified to one thing, the obvious next step is to hale in the voter for his own recollection.

The worst part of that process is not the time and expense, or even the delay in finding out the result—though those are bad enough. As a result of a local failure to observe uniform Ohio law, the judicial seat in *Hunter* went unfilled for a year and a half. And subjecting poll-workers, and even voters, to depositions will surely not encourage citizens to do difficult poll-working duty or to vote.

And post-election litigation of course involves the knowledge that an election hangs in the balance. Administrative decisions—including *factual* determinations, and exploring people's memories—are made in the context of knowing that the outcomes could tip the election. *Hunter*, over one county's juvenile-court judgeship, involved multiple state and federal lawsuits and much discord and expense. Surely *Bush v. Gore: The Sequel* is an event no one wishes to see. That is the prospect, however, invited by the district court's Order.

Indeed, the Order, by saying that Ohio law is unconstitutional for lack of a poll-worker exception, indicates that every State with a wrong-precinct ban must have such an exception built into its statute, at least as to States having multi-precinct polling places. As this Court noted, in at least 27 States "a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct." *Sandusky*, 387 F.3d at 568.

It is no answer to say that the Order, by crafting a remedy that seeks to address when to count disputed ballots, resolves the matter of the constitutionality of Ohio law. The court ordered wrong-precinct ballots to be counted, unless certain verifications are accomplished. That "solution" is irrelevant to assessing *whether* Ohio law is invalid. The Court must determine *whether* a violation exists before weighing a remedy's scope, and the existence of a violation cannot turn on how Ohio's existing law compares to a potential court-ordered remedy.

In addition, the district court's remedy, no matter how well-meaning, cannot be expected to reduce the problem to zero. The Secretary of State has issued a form, along with a directive, that does the best that can be done to implement the Order. The form requires the poll-worker to fill out items including the voter's name, precinct, and refusal. *See* R. 77-2, Provisional Ballot Precinct Verification Form 12-D. But the reason why we are here is that people are human. Alleged poll-worker error can be shrunk by training and standards (as being implemented

for this upcoming election), but it will never go away completely. Nor will other allegations of poll worker error, valid or not. And the Order will give rise to more challenges of wrong-precinct disqualifications extending beyond even neighboring locations. Consigning election results to the maw of the litigation process even before the election has occurred should not be what our system envisions. Ohio's uniform precinct-based provisional ballot system is a reasonable design.

B. The State of Ohio has chosen to take advantage of the safe harbor provision, and that policy choice is an important governmental interest.

Ohio has a strong interest in not counting provisional ballots cast in the wrong precinct—even if the reason that they were so cast was due to poll worker error. During the first ten days after an election, boards of elections are busy attempting to determine whether individuals who cast provisional ballots were actually registered to vote. Ohio Rev. Code § 3505.183(B). In addition, the boards of elections are also busy collecting the absentee ballots that were postmarked the day before the election. Ohio Rev. Code § 3509.05(B)(1). They are also collecting all the ballots cast by individuals covered under UOCAVA. Beginning anywhere between the 11th day to the 15th day after an election, a board of elections must begin the official canvass. Ohio Rev. Code § 3505.32. The boards must finish their official canvass 21 days after the election. Ohio Rev. Code § 3505.32. This year, that date is November 27, 2012. After the boards complete their official

canvass, the Secretary of State must collect the vote totals and report them for statewide candidates and issues, including the vote totals for President.

Ohio has chosen specifically to take advantage of the safe harbor provisions that exist in federal law against challenges to a State's choice of Presidential electors. Ohio Rev. Code § 3515.041. The safe harbor date for a State's electors in the electoral college is December 11, 2012. 3 U.S.C. 5. And the State's electors in the electoral college must meet and cast their ballots at noon on December 17, 2012. Ohio Rev. Code § 3505.39.

This federally authorized choice does not permit sustained and prolonged investigation into whether particular provisional ballots were cast at the right polling location but incorrect precinct because of poll-worker error or because of a voter refusing to go to the correct precinct. Yet the Order envisions moving away from the State's uniform exclusion of wrong-precinct ballots and from Ohio's preclusion of "the improper investigation" of such ballots. *See Painter*, 941 N.E.2d at 798 (underscoring that pursuant to Ohio law—but contrary to the rebuttable presumption of poll worker error now established by the Order at issue here—it is "incorrect" to "presume poll-worker error in connection with . . . ballots cast in the wrong precinct but correct location in a multiple-precinct polling place"); *see also Hunter*, 635 F.3d at 239 (noting presumption of poll worker error is contrary to Ohio law). By fashioning a rebuttable presumption that presumes

poll-worker error in contravention of State law (despite its invocation of Ohio statute in the process), and by requiring an affirmative showing by local elections workers as a precondition to enforcing the rule against counting wrong-precinct ballots, the Order promotes litigation and delay that undermine legitimate State interests, including its use of the electoral college safe harbor.[3]

C. The district court's analysis improperly devalued the State interests that this Court has recognized in upholding Ohio's precinct balloting system.

The interests asserted by Ohio here in support of its precinct system of voting also include the same interests previously appraised by this Court in finding Ohio's approach consistent with federal statute. In *Sandusky*, this Court held:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent

[3] Somewhat cryptically, the Order below disclaims any such presumption of poll-worker error and indeed acknowledges that Ohio law permits no such presumption, while simultaneously invoking State law to impose the rebuttable presumption of poll-worker error. The district court said: "The Court's Order departs slightly from Plaintiffs' proposed preliminary injunction, to avoid imposing any presumption of poll-worker error. *See Painter*, at 16 (holding, 'election officials err in presuming poll-worker error')." R. 67 at 5886, n.75 (mandating the counting of wrong-precinct ballots unless local boards of elections can "verify" certain poll-worker actions). But the Order adopts a presumption of error when it assumes poll-worker error absent affirmative action by the local boards to "verify" that no "error" occurred. Under the terms of the Order, poll-worker error is presumed. R. 67 at 5887.

> election fraud; and it generally puts polling places in closer proximity to voter residences.

387 F.3d at 569.

The district court Order recognizes that "the Ohio precinct requirement does not pose an unreasonable burden on most voters," *id.* at 34, and observes that "[a]gain, Ohio's precinct requirement, as a whole, is legitimate and relevant to the requirement that voters vote in their jurisdiction," *id.* at 41. But the Order finds that "[a]s a matter of law, if a person casts a provisional ballot in the wrong precinct, it is *always* going to be due to poll-worker error unless the poll worker has instructed the individual where the correct polling location is and that individual 'refuses to travel to the polling place for the correct [precinct] . . .. Such an act would be an irrational and futile exercise by the voter . . .." *Id.* at 9. And it then orders that the State *must count* wrong-precinct ballots unless the State makes the designated affirmative showings, one ballot at a time. *Id.* at 56-57.

The effect of the Order thus is to tell the State that it may maintain its precinct-based voting system so long as it counts various wrong-precinct ballots. The State's only option for retaining the law that declines such wrong-precinct ballots is a process of evidentiary showings and verifications not likely to be possible in the press of a statewide general election. The district court notes that in the general election four years ago, more than 200,000 voters were permitted to cast provisional ballots, R. 67 at 5834, n.5; it does not analyze what the effect on

wrong-precinct voting and provisional balloting numbers will be of an Order that instructs voters and poll workers alike that certain wrong-precinct ballots shall be counted absent State verification actions.

As this Court recognized in *Sandusky*, however, and as the Ohio Supreme Court explained in *Painter*, it is central to Ohio's precinct-based elections system that "only ballots cast in the correct precinct may be *counted* as valid." *Sandusky*, 387 F.3d at 578; *Painter*, 941 N.E.2d at 794 (emphasis added). As the statistics cited by the district court reflect, it is the preclusion on counting wrong-precinct ballots by which the precinct voting system is maintained and enforced. Indeed, the Ohio Supreme Court in *Painter* specifically held that under Ohio law, the Secretary of State's instructions in that case ordering an investigation into whether any of the wrong-precinct ballots there had been cast as a result of poll-worker error "were erroneous because there is no exception to the statutory requirement that provisional ballots be cast in the voter's correct precinct." 941 N.E.2d at 794.

It is a misreading of *Sandusky* to believe that the case related exclusively to precinct balloting requirements as somehow divorced from the State's ballot counting rules, and this Court in detailing "the advantages of the precinct system" explicitly and repeatedly referenced Ohio's vote *counting* procedures. "Indeed," this Court observed, "in at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a *valid* ballot if it is cast in

the correct precinct." 387 F.3d at 568 (emphasis added); *see also, e.g., id.* at 576 ("the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be *counted*") (emphasis added); *id*. at 578 (HAVA should not "be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be *counted*") (emphasis added). The exclusion of wrong-precinct ballots from the vote count is at the essence of Ohio's precinct-based voting system.

Thus, in seeking to rework Ohio's vote counting statutes, the district court effectively obviates much of Ohio's precinct-based elections system. Because the district court's balancing assessment does not purport to weigh the State's interests in its precinct system as a whole, even though that is the system that is to some significant degree being overthrown, the overall balance manifestly understates Ohio's interests.

Moreover, the district court gives no weight in its balancing assessment to "[t]he first, third, and fifth 'advantages'" listed in *Sandusky*, calling them "irrelevant to the election restriction challenged here." R. 67 at 5867. These interests, the district court says, "are each legitimate ends met by the precinct system, but are not related to the law's restriction against counting wrong-precinct provisional ballots." *Id.* The district court is wrong.

- **The Order errs in setting at naught Ohio's significant interest as identified by this Court in *Sandusky* in capping "the number of voters attempting to vote in the same place on election day."**

The first *Sandusky* interest, of capping the number of voters attempting to vote at any particular place, relates precisely to the effective and orderly administration of elections. "[I]t is beyond question 'that States may, and inevitably must, enact reasonable regulations of . . . elections, and ballots to reduce election- … related disorder'." *Clingman*, 544 U.S. at 593 (citations omitted). The only rationale expressed by the district court for not counting this "significant" interest in its balance was that "[r]efusing to count correct location wrong-precinct provisional ballots does not affect the number of voters arriving at a given location, because by definition the ballots at issue were cast at the correct designated polling place." R. 67 at 5867, n.56. It is not at all clear why the interest identified by this Court in *Sandusky* in the orderly management of voter lines and paperwork should not apply to the relevant precinct tables and the poll workers stationed there, each with her own focus on identifying voters and processing ballots. Other than by *ipse dixit*, the district court does not say. The exclusion of this significant elections administration interest from the district court's balance was error.

- **The Order errs in discounting Ohio's significant interest as identified by this Court in *Sandusky* in allowing "each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies."**

The Order gives no weight to this significant Ohio interest, which the district court says is fully accommodated by its injunction for the State to count wrong-precinct ballots but to exclude "down ballot" precinct-specific votes. R. 67 at 5868. The Order thus counts as nil Ohio's interest in counting only votes cast in precincts in which voters are authorized to vote in all races and issues. And the district court's analysis glosses over the additional administrative burdens and complexities of remaking all wrong-precinct ballots. Ohio also has an interest in avoiding a circumstance in which voters are in effect given the option of surrendering their right to vote in "down ballot," precinct-specific races in exchange for the ability to cast "up ballot" votes in a (perhaps less busy) precinct other than their own. The interest identified by this Court in *Sandusky* is indeed "significant," and the Court below erred by giving it no weight.

- **The Order errs in setting at naught Ohio's significant interest as identified by this Court in Sandusky in allowing "each precinct ballot to list only those votes a citizen may cast, making ballots less confusing."**

The court finds that this interest is a "legitimate end[ ] met by the precinct system, but . . . not related to the law's restriction against counting wrong-precinct provisional ballots." R. 67 at 5867. The only explanation for this conclusion is

that "knowing one's provisional ballot might be disqualified due to the poll worker's mistake, if anything, only makes the provisional ballot *more* confusing to citizens." *Id*. at 37, n.56. Here again, the district court parts ways with *Sandusky*, where this Court observed that precinct-based ballots are "less confusing." 387 F.3d at 578. For the federal courts to order Ohio to structure a system under which, absent some affirmative evidentiary "verification" process by local boards and poll workers, citizens are free to cast wrong-precinct ballots, parts of which will count and parts of which, if so identified, will not count, can hardly lessen voter or vote-counting confusion. Again, the district court's failure to give any weight to this significant State interest was error.

- **The Order errs in rejecting Ohio's significant interest as identified by this Court in *Sandusky* in enforcing a precinct-based voting system that "makes it easier for election officials to monitor votes and prevent election fraud."**

The Supreme Court of the United States has been mindful that "not only is the risk of voter fraud real but that it could affect the outcome of a close election." *Crawford*, 553 U.S. at 196 (opinion of Stevens, J.). "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of

preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.*

This Court in *Sandusky* found that Ohio's law under which "only ballots cast in the correct precinct may be counted as valid" advances a "significant" State interest in making it "easier for election officials to monitor votes and prevent election fraud." In assessing that interest in this case, the district court did not weigh that interest. Indeed, moving toward a system in which (absent new and affirmative evidentiary "verification" actions by the boards) the total potential number of provisional ballots that must be counted is not capped by reference to the number of registered voters assigned to a given precinct, or capable of estimation at any time until after the polls have closed would, almost by definition, make it more difficult for elections officials to monitor and keep up with the voting process.

III. Ohio's uniform, non-discriminatory election system requiring that ballots be cast in the correct precinct does not abridge fundamental fairness, and does not present the "exceptional case" that would implicate substantive due process concerns.

The district court also briefly premised its injunction on a substantive due process violation. But Plaintiffs have no likelihood of success there either. The district court's analysis on this score (after citing two cases that did not *hold* that Ohio's wrong-precinct statutes violate substantive due process) simply notes the "fundamental unfairness" standard, and points back to its equal-protection analysis.

R. 67 at 5880-81. But a comparison of Ohio's system of rejecting wrong-precinct ballots with cases accepting or rejecting a substantive due process challenges show no comparison at all. Ohio's ex-ante, neutral decision to reject wrong-precinct ballots for any reason comports with this strand of substantive-due process.

The presumed poll-worker "error" anticipated by the district court provides no basis for the federal courts to reconstitute Ohio's electoral system and mandate the counting of particular future ballots that plainly would be illegal under Ohio law. As recently as two years ago, this Court confirmed the well-established rule that: "Federal courts . . . 'have uniformly declined to endorse action[s] under Section 1983 with respect to garden variety election irregularities.'" *Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 553, 559 (6th Cir. 2010) (*quoting Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978)). *See also, e.g.*, *Sandusky*, 387 F.3d at 576, 578 ("the ultimate legality of the vote cast provisionally is generally a matter of state law . . . . States remain free . . . to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted").

The Court below in fact acknowledged that "the Ohio Revised Code treats all wrong-precinct ballots the same; none is counted." R. 67 at 5878 (noting exception under earlier Court Decree with regard to right polling location voters who identify themselves by the last four digits of their Social Security number).

And the Court further found no disparate impact of that rule on protected classes, and held that "statistics from the past elections do not establish a consistently higher rate of rejected wrong-precinct ballots in urban counties relative to less populous counties." *Id.* at 5877 (emphasis omitted).

Warf upheld Kentucky action that voided absentee ballots in a way that "impacted eleven percent of the voting electorate" and "altered the outcome of the election and resulted in significant disenfranchisement." This Court also reiterated that "federal courts should not be asked to count and validate ballots and enter into the details of the administration of the election." *Warf*, 619 F.3d at 559.

Consistent with *Warf's* teachings, federal courts across the country have ruled that "Section 1983 is implicated only when there is 'willful conduct' that 'undermines the organic processes by which candidates are elected.' *Kozuszek v. Brewer*, 546 F.3d 485, 488 (7th Cir. 2008). . . . 'Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots,' [*Welch v. McKenzie*, 765 F.2d 1311, 1314 (5th Cir. 1985)], even if the 'garden variety' errors 'control the outcome of the vote or election.' *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). Examples of 'garden variety' irregularities include malfunctioning voting machines and the refusal to hold a manual recount, [*Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975)]; . . . human error resulting in miscounted votes . . . [*Gold v. Feinberg*, 101 F.3d 796, 801-02 (2d Cir. 1996)];

mishandling procedurally deficient absentee ballots to the detriment of a minority candidate, [*Welch*]; . . . [and] mechanical and human error in counting votes [*Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986)]; . . ." *Broyles v. State of Texas*, 618 F. Supp. 2d 661 (S.D. Tx. 2009).

That is not the case here, where the district court acknowledged that "Ohio's precinct requirement, as a whole, is legitimate and relevant to the requirement that voters vote in their jurisdiction." R. 67 at 5871. There is nothing fundamentally unfair about an ex-ante, neutral state law that—in the name of rational post-election administration—does not investigate, litigate, or consider ballots cast in the wrong precinct. The rejection rate for these ballots is less than 0.25% of ballots cast, and per Plaintiffs' analysis, roughly half that for right location/wrong-precinct provisional ballots. If Ohio's wrong-precinct statute flunks substantive due process for this error rate, few systems across the country would be immune.

Further, in finding that Ohio's precinct-based voting system violates due process, the district court relied primarily on a "conclusion" from a case to which no defendant here was a party. The Order says: "This Court's conclusion in *Hunter II*, that 'Ohio's precinct-based voting system . . . is fundamentally unfair and abrogates the Fourteenth Amendment's guarantee of due process of law,' establishes a likelihood of success on the merits for *this* claim." R. 67 at 5880 (emphasis added). As the Order previously notes, however, the district court in

Hunter II "was unable to make a final ruling on the plaintiffs' claims that the Board's failure to count the wrong-precinct ballots due to poll-worker error [under the particular circumstances of that case] violated the Due Process Clause because the plaintiffs had not provided notice for such challenges to the Ohio Attorney General's office." R. 67at 5848. Nor was the Secretary of State a party to that case, where the Defendant was the Hamilton County Board of Elections. And the "conclusion" there does not establish a predicate for the injunction here.

The district court also relies on *dicta* from this Court in *Hunter* (referenced by the Order as *Hunter I*.) That appellate panel, however, specifically noted that "[i]t is premature … to decide a due-process challenge to Ohio's election laws" uniformly excluding wrong-precinct ballots, in part because the parties there (not to mention the non-party State of Ohio or the Secretary of State) "have not fully briefed … this issue." 635 F.3d at 244. Further, this Court in *Hunter* found "discomforting" the prospect raised there by Plaintiffs who "assert[ed]" that the precinct ballot counting rule might "accrue to the detriment of a protected class." 635 F.3d at 244, n.24. Here, however, the district court found no such impact, and explicitly held that "statistics from the past elections do not establish a consistently higher rate of rejected wrong-precinct ballots in urban counties relative to less populous counties." R. 67 at 5877 (emphasis deleted).

And Plaintiffs have no due process claim if the constitutional problem is thought to lie with the acts of individual Ohio poll workers negligently directing voters to the wrong precinct. The requisite "'[w]illful conduct' means, at a minimum, that the defendants acted with the intent of subverting the electoral process or impairing a citizen's right to vote." *Parra v. Langdon Neal*, 614 F.3d 635, 637 (7th Cir. 2010) (citations omitted); *see also, e.g., Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 343 (7th Cir. 1987) ("Intent is an essential ingredient of a constitutional election fraud case under Section 1983."); *Bodine*, 788 F.2d at 1272 (rejecting § 1983 claim "because at most it alleged 'willful neglect' and not 'fraud or other willful conduct'"). The entire substantive due process thesis of the Order rests on presumed unintentional "poll worker error" in not ensuring that wrong-precinct voters cast their provisional ballots at the correct precinct: fraud or other willful conduct on the part of board of elections workers is nowhere alleged or established.

The United States Supreme Court has been clear that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (emphasis in original). "The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). Thus, in the

elections context, unintended "error" simply does not give rise to a substantive due process claim. *See, e.g., Shannon v. Jacobowitz*, 394 F.3d 90, 93 (2d Cir. 2005) ("Because Supreme Court jurisprudence plainly requires intentional conduct by state actors as a prerequisite for a due process violation, and because there was no such conduct here, we reverse . . . . Without question, courts have found due process violations in voting cases before, but each case involved an intentional act on the part of the government or its officials"); *Burton v. Georgia*, 953 F.2d 1266, 1268-69 (11th Cir. 1992) ("While federal courts closely scrutinize state laws whose very design infringes on the rights of voters, those isolated events that adversely affect individuals are not presumed to be a constitutional violation"); *Parra*, 614 F.3d at 637 (collecting 7th Circuit cases). "[C]ircuit courts faced with claims that election irregularities violated due process and equal protection rights 'have uniformly declined to endorse action under Section 1983 with respect to garden variety election irregularities'." *Broyles*, 618 F. Supp. 2d at 694 (citation omitted) (collecting cases).

IV. The remaining equitable factors and the public interest cut against granting a preliminary injunction.

The Court should vacate the preliminary injunction because Plaintiffs have not established a likelihood of success on the merits. A preliminary injunction entered "where there is simply no likelihood of success on the merits must be reversed." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir.

1997). Harms to the Plaintiffs, others, and the public do not rescue the fatal flaw of no likelihood of success on the merits. Indeed, harm to others and the public actually counsel *against* the preliminary injunction and favor its reversal.

Although post-election litigation should be rare, it is far preferable to a pre-election order that suspends a neutral law that simplifies administration of Ohio's election process. While post-election litigation will only likely result if it can change the outcome of a race (*Hunter* again), the injunction in place today virtually guarantees post-election litigation. For one, if the injunction operates through the upcoming election, that election will proceed contrary to state law. That is more likely to breed litigation than suppress it. *Cf. Burdick*, 504 U.S. at 433 ("there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."). For another, the injunction creates an exception to the suspension of the Ohio statute disqualifying wrong-precinct ballots. Nothing attracts lawyers and lawsuits like exceptions. Finally, litigation will likely spring from the consequence of the injunction mandating that local boards of election remake ballots (to attempt to eliminate "down ballot" votes). While the injunction claims to stamp out the results of certain anticipated errors, it invites others. When counting errors dilute votes or disqualify votes and those votes matter to an outcome, litigation will follow.

Moreover, the district court's oversight itself may harm the election. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006).

And, of course, "the state's interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional, is great." *Summit Co. Dem. Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). States do have a "strong interest" in carrying out their election laws, *Hunter*, 635 F.3d at 244, and "the balance of the equities . . . should give great weight to the public interest in minimizing federal court control of state election law and practice." *Id.* at 249 (Rogers, J., concurring).

The injunction is doomed by the lack of a likelihood of success on the merits. The public interest and other equitable factors erase any doubt.

CONCLUSION

The Court should vacate the preliminary injunction that restrains Ohio from honoring its statutory mandate to count only those provisional ballots that are cast in the correct precinct.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

s/Richard N. Coglianese
RICHARD N. COGLIANESE*
Counsel of Record
FREDERICK D. NELSON
MICHAEL J. HENDERSHOT
STEPHEN P. CARNEY
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872
richard.coglianese@ohioattorneygeneral.gov

Counsel for the State of Ohio

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2010.

s/Richard N. Coglianese
Richard N. Coglianese

CERTIFICATE OF SERVICE

I certify that a copy of this Brief for the State of Ohio has been served through the court's electronic filing system. Electronic service was therefore made upon all counsel of record on the same day.

s/Richard N. Coglianese
Richard N. Coglianese

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The State of Ohio designates the following filings as relevant to the appeal pursuant to Sixth Circuit Rule 30(b).

Record Entry Number	Date	Document
R. 1	6/22/2012	Complaint
R. 4	6/22/2012	Motion for Preliminary Injunction
R. 9	6/22/2012	Affidavit of David C. Kimball for Motion for Preliminary Injunction [4]
R. 28	7/06/2012	Defendant Husted's Memorandum Contra Motion for Preliminary Injunction [4]
R. 33	7/13/2012	Reply Memorandum in Support of Motion for Preliminary Injunction
R. 63	7/24/2012	Second Amended Complaint
R. 67	8/27/2012	*Plenary Opinion and Order*
R. 69	9/06/2012	Transcript of July 30, 2012, Proceedings
R. 76	9/11/2012	*Nunc Pro Tunc* Order
R. 77	9/12/2012	Amended Notice of Issuance of Directives