

EXPEDITED REVIEW REQUESTED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TRACIE HUNTER, <i>et al.</i>,	:	CASE NO. 10-4481
	:	
Plaintiff-Appellees,	:	
	:	
v.	:	DEFENDANT-APPELLANT
	:	JOHN WILLIAMS’
HAMILTON COUNTY BOARD OF	:	EMERGENCY
ELECTIONS, <i>et al.</i>,	:	MOTION TO STAY
	:	
Defendants,	:	
	:	
and	:	On appeal from S.D. Ohio
	:	Case No. 1:10-cv-820
John Williams,	:	
	:	
Defendant-Appellant.	:	

John Williams, certified as the winner of the Juvenile Court race in Hamilton County, Ohio, at the November 2, 2010 election, moves this Court, pursuant to Appellate Rule 8(2)(a)(i) for an order staying the effect of the District Court’s November 22 order granting a preliminary injunction. This is an emergency motion, and Mr. Williams seeks expedited review under 6th Cir. IOP 27(b). At issue on this appeal is whether a federal court can order a local board of elections to reconsider decisions it has previously made as to which provisional ballots

should be counted and which ones are invalid under Ohio law and therefore not to be counted. That was the effect of the order of November 22, 2010 granting a preliminary injunction. Order, November 22, 2010 at p. 9 (District Court, Doc. 13).

The lower court's order would require that the Hamilton County Board of Elections undertake an investigation as to whether provisional ballots cast in that election – previously determined by a bipartisan unanimous decision of the Board to be invalid under Ohio law – be reconsidered and counted. This motion is made directly to the Sixth Circuit because a motion to the trial judge would be impractical as she is presiding over a jury trial this week.

Defendant-Appellant Mr. Williams requests a stay of the order for the following reasons. First, Mr. Williams will suffer irreparable harm if the stay is not granted. Once these provisional ballots are opened and counted, there is no way for these votes to be uncounted. Second, Mr. Williams has a likelihood of success on the merits. Ohio law plainly provides that ballots cast in the wrong precinct do not count. O.R.C. §§3505.181(C), 3599.12(A)(1). Third, granting the stay will not result in substantial harm to others. In fact, quite the opposite is true. The residents of Ohio are entitled to know that their votes are treated the same as every other person's vote. If this Court denies the stay, that will not occur. Votes cast in Hamilton County, Ohio will be treated differently than votes cast in every

other Ohio county. Fourth, the public interest will be served by granting the stay because, again, public interest in elections mandates that votes be treated equally.

I. Statement of Facts

On November 2, 2010, voters from Hamilton County cast ballots in numerous races, including the race to determine who would be the next Juvenile Court Judge for Hamilton County Court of Common Pleas. Approximately 230,000 ballots were cast in that race. After absentee ballots and ballots cast at the polling places were counted on election night, Mr. Williams led the race by a margin of roughly 3,000 votes. 11,000 provisional ballots remained to be counted.

The Hamilton County Board of Elections (the “Board”) went to work verifying which of the 11,000 provisional ballots were valid under Ohio law were therefore to be counted. In so doing, the Board followed Ohio law. As this Court has recognized, a basic requirement of Ohio law is that voters cast their ballots in the precinct in which they reside:

One aspect to 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 County Democratic Party v. Blackwell, 387 F.3d 565, 568 (6th Cir. 2004) (emphasis added).

Under that law, Ohio Secretary of State Jennifer Brunner issued Directive 2010-74 (Pltf's Complaint, Exh. A; the "Directive") which plainly sets out the requirement:

If the person who cast the provisional ballot is either **not registered to vote or is not eligible to vote in the particular election** in question (*e.g.*, if the vote is cast in the wrong precinct), then pursuant to R.C. 3505.183(B)(4)(a)(i) and (ii), **the board may not count that ballot.**

(Emphasis in the original).

There is one and only one exception to that mandate. Consistent with a consent decree entered into between the Plaintiffs and the Ohio Secretary of State in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio, No. 2:06-cv-896, the Board is to count those provisional ballots cast in the wrong precinct so long as: (1) the voter uses the last four digits of his/her social security number for identification; (2) the ballot was cast in the wrong precinct of a multi-precinct polling location; and (3) the ballot was cast as a result of poll worker error. Secretary of State, Directive 2010-74, at n.2.

The Board followed the law and held a public meeting on Thursday, November 19, 2010, where it voted on which provisional ballots would be counted. Consistent with the Directive, the Board voted 4-0 not to count those provisional ballots that were cast in the wrong precinct unless all of the above three criteria were met.

After all valid provisional ballots were determined, they were opened and counted,¹ and Mr. Williams had 23 more votes than Ms. Hunter.

On Sunday, November 21, 2010, Ms. Hunter filed a complaint and motion for injunctive relief seeking to require the Board to reconsider its prior determinations and count ballots that it had previously determined as invalid because they had been cast in the wrong precinct. The Southern District of Ohio held a hearing the following evening and granted Ms. Hunter's motion for preliminary injunction and ordered that the Board investigate the 849 provisional ballots to see if those ballots were cast in the wrong precinct because of poll worker error, and, if so, ordered that those ballots be counted in the Hunter/Williams race. Order at p. 9.

II. Argument

To determine whether a preliminary injunction should be stayed pending appeal, the court considers the same four factors as those for issuance of the preliminary injunction. *See Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These factors include: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant

¹ Under Ohio law, no provisional ballots are to be counted until all provisional ballots have been reviewed and it is determined which ones are valid. R.C. 3505.183(0) ("No provisional ballots shall be counted in a particular county until the Board determines the eligibility to be counted of all provisional ballots cast in that county").

would suffer irreparable injury absent a stay; 3) whether granting the stay would cause substantial harm to others; and 4) whether the public interest would be served by granting the stay. *Id.* Mr. Williams satisfies all four factors.

1. In the absence of a stay, Mr. Williams will suffer irreparable harm.

Mr. Williams will suffer irreparable harm if the stay is not granted. The Order of the District Court unequivocally provides that the Board must investigate these 849 ballots for demonstrated poll worker error, and if error is found, **count these ballots**. Order at p. 9 (emphasis added). In order to count these ballots, the Board must open the provisional ballot envelopes and intermix these ballots to protect the secrecy of the votes cast. O. R. C. §3505.183 (“No person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot”); Directive, 3 (“It is also imperative that board members and staff remain cognizant at all times of the importance of maintaining the secrecy of the votes cast by a provisional voter, and act accordingly when opening and removing provisional ballots from their envelopes”). Thus, disputes related to whether provisional ballots should be counted must be resolved before they are actually counted. Otherwise Mr. Williams will not be able to contest the counting of the provisional ballots.

In short, opening the provisional ballots would ring a bell that cannot be unrung. No legal remedy can change this fact. Thus, stay of the injunctive relief is

necessary to maintain the *status quo* pending this Court's consideration of the appeal.

2. Mr. Williams is likely to succeed on the merits.

Ms. Hunter is not entitled to the remedy that the District Court ordered. Ohio law clearly provides that the ballot of a person who votes in the correct polling location, but wrong precinct is not entitled to be counted. O.R.C. 3505.181(C); 3599.12(A)(1). The consent decree entered into in *Northeast Ohio Coalition for the Homeless v. Blackwell* (“*NEOCH*”) provides the sole exception to that rule. Provisional ballots cast at the proper polling location, but wrong precinct may be counted under the following very limited circumstances: 1) the person uses the last four digits of the social security number as identification; 2) the person voted at the correct polling location, but wrong precinct; and 3) the person cast their vote at the wrong precinct as a result of demonstrated poll worker error. No authority under Ohio law provides that a person using something other than the last four digits of his or her social security number may have their vote counted if they vote at the wrong precinct, even if they are in the right polling location.

This Court has previously considered the same question in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). The District Court in Sandusky County had ordered the Board to do exactly what the Court below has ordered – count provisional ballots cast in the wrong precinct. At issue was a

directive issued by then-Secretary of State Ken Blackwell related to provisional ballots. The district court issued a preliminary injunction requiring Secretary Blackwell to issue a revised directive that: (1) permitted any voter to cast a provisional ballot upon affirming that he or she is eligible to vote and is registered to vote in that county; (2) required poll workers to notify any voter making this affirmation of his or her right to cast a provisional ballot, even if the poll worker determined that the voter does not reside in the precinct in which they are voting; and (3) required that the provisional ballots cast by a voter in the county in which he or she is registered to vote must be counted even if cast in the wrong precinct. *Id.* at 571.

The Sixth Circuit, applying Ohio law, reversed the portion of the preliminary injunction that required that votes be counted even if cast in wrong precinct. *Id.* at 578 (“Under Ohio law, then, only ballots cast in the correct precinct may be counted as valid”). *See also Bell v. Marinko*, 235 F. Supp. 2d 772 (“One simply cannot be a ‘qualified elector’ entitled to vote unless one resides in the precinct where he or she seeks to cast his ballot”). In so doing, the court recognized that Ohio law plainly and unambiguously provides that only those votes cast in the proper precinct will be counted. *Id.* at 576 (citing O.R.C. § 3503.01, which provides that an eligible voter “may vote at all election in the precinct in which the

citizen resides” and O.R.C. 3599.12(A)(1) which makes it a crime for a voter to knowingly vote anywhere except in the precinct in which he or she resides).

Under *Sandusky*, this appeal necessarily raises the significant question of whether it was appropriate for the District Court to even hear this matter. This is a matter unique to state law – under Ohio law, should provisional ballots cast in an Ohio election be counted. Even if the District Court’s jurisdiction could somehow be extended to permit a resolution of state law issues among non-diverse parties, the District Court effectively rewrote the Ohio Election Laws and the consent decree entered into in *NEOCH*. This judicial rewrite, made in violation of multiple canons of statutory instruction, is improper. As this Court has stated, “the judiciary’s job is to enforce the law [that the legislature] enacted, not to write a different one that judges think superior.” *Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005).

Ms. Hunter’s argument and the District Court’s assessment that not counting these provisional ballots violates equal protection is likewise without merit. Ms. Hunter’s argument rests from the Board’s determination to accept 28 provisional ballots cast in person at the Hamilton County Board of Elections because of poll worker error, regardless of the identification used. Ballots cast at the downtown Cincinnati location of the Board of Elections are, by definition, not ballots cast in the voter’s own precinct. Yet they are plainly legal. A determination to accept

those ballots has nothing to do with accepting ballots that are cast in the wrong precinct; they were cast in no precinct. Even if that had not been the case and one were to question the propriety of the Board's decision on those 28 ballots, two wrongs do not make a right. Just because the Board erroneously counted those votes does not mean that all provisional ballots cast in the wrong precinct should be counted as well.²

The District Court's granting of the preliminary injunction also fails to address the fact that Ms. Hunter has an adequate remedy under the law. Under the carefully crafted legislative mechanisms set out in O.R.C. §§3515.09, *et seq.*, Ms. Hunter can challenge the elections results after the certification and automatic recount of the results by filing an election challenge. Under that proceeding, the Ohio court can fashion the exact remedy that Ms. Hunter seeks – the counting of the disputed provisional ballots.

This very type of situation was addressed by the Ohio Supreme Court in *In re Election of Member of Rock Hill Board of Education*, 76 Ohio St. 3d 601, 669 N.E.2d 1116 (Ohio 1996). In *Rock Hill*, a statutory elections challenge was made based on the exclusion of twenty-four absentee ballots that were rejected by the local board of elections. The Ohio Supreme Court upheld the lower court's order

² This argument also demonstrates that irreparable harm will occur if these ballots are counted. Mr. Williams has no mechanism to challenge these votes as there is no way of identifying these ballots.

that the twenty-four ballots be counted stating “the trial court was correct in ordering the counting of the twenty-four ballots” when they improperly excluded under state law. 76 Ohio St. 3d at 608, 669 N.E.2d 1116 at 1123.

Given that Ms. Hunter has a statutory remedy, she is not entitled to injunctive relief because she has an adequate remedy available to her at law. The District Court's Order does not even address the fact that Ms. Hunter has a statutory remedy under Ohio law that gets her the exact relief that she requested.

3. Granting the stay will not cause substantial harm to others.

The District Court recognized in its Order that the Board has 81 days to amend its certification of the election results. Order at 8. Furthermore, the District Court noted that because there is an automatic recount already required in this race, “there is already a cushion of time in which the Board can re-examine the denied provisional ballots.” Order at 8. Staying the District Court’s order for a short time in order for the Sixth Circuit to hear the appeal will not substantially harm any party.

4. The public interest will be served by granting the stay.

The public has an interest in ensuring that only those votes properly cast in an election are counted. The public also has an interest in knowing that their vote will be counted in the same manner as every other vote statewide. *See Bush v. Gore*, 531 U.S. 98 (2000). Under the District Court's order, the exact opposite will happen. Provisional ballots cast in Hamilton County Ohio will be treated differently from those cast in the other 87 counties.³

In *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 900 N.E.2d 982, 2008-Ohio-6333, the court addressed the exact relief sought by Ms. Hunter. Plaintiffs sought a mandamus seeking to compel the Secretary of State to issue a new directive that provisional ballots containing partial affirmation be counted. The Secretary of State had previously issued a directive to the county board of elections stating that provisional ballots containing an improper affirmation would not be counted. The race for the 15th Congressional seat between Mary Jo Kilroy and Steve Stivers was extremely close. An attorney for the Kilroy campaign sent an email to several members of the Franklin County Board of Elections challenging the board's position that provisional ballots containing a partial affirmation should be counted. The Secretary of State then issued a later directive

³ The irony of this situation should not be lost on the Court. Ms. Hunter claims a violation of equal protection while simultaneously requesting a remedy that itself violates equal protection.

on November 20, 2008 that all ballots that contain only a partial affirmation should be counted. By that time, several counties had already applied the previous directive and certified their results. The Ohio Supreme Court found that this later directive was invalid stating “[t]his selective modification of instructions, particularly at the request of one of the candidates for office, concerning provisional ballots was fundamentally unfair.” *Id.* at ¶57. The Court went on to state that “[b]y changing her instructions for one county but not for others after the election at the request of one candidate, the secretary of state failed to ensure that the same rules would be applied to each provisional voter of every county in the state. The other counties have now certified their election results based on the secretary’s original instructions, those results cannot be modified.” *Id.* at ¶58.

Just as in *Skaggs*, Ms. Hunter is asking for a selective modification of instructions to be applied to only one judicial race in one county. Nine Ohio counties had already certified their election results as of the time Ms. Hunter filed her action. All have done so now. None, besides Hamilton County have applied the criteria that Ms. Hunter seeks to have applied in her race. Such an action is contrary to the interests of the public.

III. Conclusion

For the reasons set forth above, the Defendant Intervenor, Mr. Williams respectfully asks this Court for a stay of its preliminary injunction pending the outcome of the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on November 23, 2010 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ John B. Nalbandian
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