

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
FOR THE WESTERN DIVISION

TRACIE HUNTER, *et al.* :  
 : Case No.: 1:10-cv-820  
Plaintiffs :  
v. : Judge Susan J. Dlott  
HAMILTON COUNTY BOARD OF :  
ELECTIONS, *et al.* :  
Defendants :

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HAMILTON COUNTY BOARD OF ELECTIONS TRIAL BRIEF AND  
MEMORANDUM OPPOSING INJUNCTIVE AND DECLARATORY  
RELIEF

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JOSEPH T. DETERS  
PROSECUTING ATTORNEY  
HAMILTON COUNTY, OHIO

James W. Harper  
Thomas Grossmann  
David T. Stevenson  
Colleen M. McCafferty  
Assistant Prosecuting Attorneys  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
ddn: (513) 946-3159 (Harper)  
(513) 946-3120 (Stevenson)  
(513) 946-3058 (Grossmann)  
(513) 946-3133 (McCafferty)

Fax: (513) 946-3018

[james.harper@hcpros.org](mailto:james.harper@hcpros.org)

[dave.stevenson@hcpros.org](mailto:dave.stevenson@hcpros.org)

[tom.grossmann@hcpros.org](mailto:tom.grossmann@hcpros.org)

[colleen.mccafferty@hcpros.org](mailto:colleen.mccafferty@hcpros.org)

*Attorneys for Hamilton County Board of Elections*

**MEMORANDUM**

**I. Statement of the Case**

The history of this case is described in detail by the 6<sup>th</sup> Circuit panel. See *Hunter* at 3-17. A few factual inaccuracies requiring further explanation will be discussed herein.

**II. Procedural Posture**

The 6<sup>th</sup> Circuit remanded this case to this Court holding:

We leave it to the district court in the first instance, applying the uniformity requirements of *Bush v. Gore*, to direct the Board how to proceed regarding the 9 ballots unanimously determined by the Board to have been cast in the correct precinct, the 7 ballots unanimously determined by the Board to have been miscast because of poll-worker error, the 269 ballots cast in the correct location but wrong precinct in which the determination of poll-worker error remains disputed, and pursuant to the *NEOCH* Consent Decree, the *NEOCH* ballots.

*Hunter* at 41. The parties have agreed to a hearing on the merits.

**III. Issues before the Court**

**A. Standing**

The Plaintiffs' lack of standing is set forth in Defendant Board's Motion for Summary Judgment, which is incorporated herein by reference.

**B. State of Ohio is not a Party**

Plaintiffs have failed to comply with Fed. R. Civ. P. 5.1, which impairs the ability of the State of Ohio to defend the constitutionality of its laws:

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

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(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

The State of Ohio has not received notice of this case by Plaintiffs and the constitutional question has not been submitted to the Ohio Attorney General.

The State of Ohio also is not a party contrary to Fed. R. Civ. P. 19(a)(1), which states that a party must be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
  - (i) as a practical matter impair or impede the person's ability to protect the interest;

The State is an indispensable party in this case because the Plaintiffs' challenges extend beyond the actions of the Board and to the constitutionality of R.C. 3505.181. The 6<sup>th</sup> Circuit recognized that the constitutionality of Ohio election law is squarely at issue:

Plaintiffs present the argument that failure to count provisional ballots cast in an incorrect precinct due to poll worker error violates the Due Process Clause. Although *Painter* made clear as a matter of state law that there is no exception for votes miscast in an incorrect precinct due to poll-worker error, *Plaintiffs have asserted due-process challenges to the state law itself*, which prohibits counting provisional ballots cast in the wrong precinct, even where there is evidence that the error was ultimately caused by poll workers.

*Hunter* at 34 (emphasis added). The Board is an arm of the State, but its jurisdiction is limited to Hamilton County, Ohio. This litigation may impact how the Secretary of State and all county boards of elections conduct elections. Therefore, Plaintiffs cannot proceed to challenge R.C. 3505.181 and R.C. 3505.183 without state notice and involvement in this litigation.

### **C. Ohio Election Law**

#### **1. Voter Responsibility**

In Ohio, a voter must cast a ballot in the precinct in which they reside for the ballot to be valid. R.C. 3505.181(A). A voter may vote provisionally for a number of reasons, the

most common of which is change of address. Id. A provisional voter must complete an affirmation swearing that she or he is a registered voter in the jurisdiction in which she or he is voting and that she or he is eligible to vote in the election. R.C. 3505.182. No person shall “[v]ote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector.” R.C. 3599.12(A)(1). Whoever violates this section is guilty of a felony of the fourth degree. R.C. 3599.12(B). See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004). Thus, the voter is responsible to know what precinct to vote in and to vote only in that precinct.

## 2. Provisional Ballots

A provisional ballot is presumed to be invalid until shown otherwise. R.C. 3505.183. The Ohio Revised Code and the Secretary of State have proscribed a procedure for boards to follow to affirm a voter’s ballot is eligible for counting. A disputed ballot may only be counted if three election members agree. R.C. 3505.27 states:

If there is any disagreement as to how a ballot should be counted, it shall be submitted to the members of the board for a decision on whether or to what extent the ballot should be counted. If three of the members do not agree as to how any part of the ballot shall be counted, only that part of the ballot on which three of the members do agree shall be counted.

The only subsection of the Help America Vote Act of 2002, 42 U.S.C.A. § 15482, which addresses the issue of whether a provisional ballot will be counted as a valid ballot leaves that determination to the States. That subsection provides: “If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” 42 U.S.C. § 15482(a)(4). Id. at 565, 577. There is no exception under Ohio law for counting wrong precinct ballots. See *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 2008-Ohio-333, 117

Ohio St. 3d 76, 82 (the statute contains no exception, and the court cannot add one to its express language). Being eligible under State law to vote means eligible to vote *in this specific election and in this specific polling precinct*.

**D. Scope of the Hearing on the Merits**

1. The Preliminary Injunction has been Satisfied Except for Conducting the Recount

On November 22, 2010, this Court ordered the Board to “immediately begin an investigation into whether poll worker error contributed to the rejection of 849 provisional ballots now at issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” Doc. 13, p. 9. The Board sought guidance from the Ohio Secretary of State as to how to proceed with such an investigation. The Secretary issued Directives 2010-79, 2010-80, and 2010-87 and Advisory 2010-08<sup>1</sup> which collectively set forth a process by which the Board would question, either through a questionnaire or in person, poll workers from each precinct where the 849 wrong precinct ballots were cast. After discussion regarding the proper method in which to proceed, the Secretary established specific deadlines. On December 17, 2010, Directive 2010-87 was issued directing the Board to: a) issue subpoenas to poll workers no later than the close of business on December 20, 2010; b) complete the questioning of subpoenaed poll workers no later than December 23, 2010; c) issue questionnaires to all relevant poll workers no later than December 20, 2010 and request a response in 2 days; d) complete the Board review of all questionnaires received and testimony taken by December 27, 2010; and, e) meet no later than December 28, 2010 to

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<sup>1</sup> Advisory 2010-08 instructed the Board that “if a poll worker (or voter) cannot be reached or may not be available before the deadline the Board sets to conclude the investigation, then the investigation may proceed without the particular poll worker or voter.”

determine whether poll worker error occurred. The Board complied with the Directive, interviewed poll workers, reviewed poll worker questionnaires, met on December 28, 2010, and voted on which of the 850 wrong precinct provisional ballots to count. The Board is prepared to begin the recount and conclude this election. It has complied with the Order of this Court to conduct an investigation.

2. The Investigation is Complete

The 6<sup>th</sup> Circuit acknowledged that the Board conducted the investigation required of it and, more importantly, did so in accordance with federal law. The panel held: “We conclude that the Board’s review has met the requirements of *Bush v. Gore*.” *Hunter* at 30. The November 22 Order did not specify how the Board was to conduct its investigation, instead it was left to the Board and the Secretary. The 6<sup>th</sup> Circuit upheld the sufficiency and propriety of the Board’s review. See *Hunter* at 30 (“[t]he Board’s review of the wrong-precinct provisional ballots was guided by objective criteria provided by Secretary Brunner to effectuate the district court’s order.”).

Despite these clear statements by the 6<sup>th</sup> Circuit, Plaintiffs want to redo the investigation in this Court. The Board urges the Court to deny Plaintiffs attempt to conduct their own search for poll worker error at the hearing. Not only has the provisional ballot investigation in this election gone far beyond the time allotted for in Ohio law, but Plaintiffs’ now would like to investigate even further without cause. This is a waste of time and resources and creates an untenable precedent for boards of elections. The 6<sup>th</sup> Circuit was clear: the investigation was guided by objective criteria and comports with federal law.

3. The 6<sup>th</sup> Circuit Remanded this Case in part for Direction Regarding the 269 Ballots Cast in the Correct Location but Wrong Precinct

The Panel erroneously noted that whether poll worker error exists with regard to the 269 correct location, wrong precinct provisional ballots remains disputed. The Board decides

whether poll worker error exists and this determination has been made. On December 28, 2010, the Board voted two to two whether to count the 269 ballots. Ohio law provides that the vote of two Board members to count disputed ballots is insufficient. See R.C. 3505.27 (If three of the members do not agree as to how any part of the ballot shall be counted, only that part of the ballot on which three of the members do agree shall be counted.). In accordance with the Board's practice, it submitted the tie vote regarding the 269 ballots to the Secretary. Secretary Brunner, in her January 7, 2011 Tie Vote Letter, voted not to approve for counting those ballots "which are only defective to the extent they were cast in the right location but in the wrong precinct." Brunner's January 7, 2011 Tie Vote Letter was fully incorporated into Directive 2011-03. On January 10, 2011, Secretary Husted issued Directive 2011-04, which superseded Directive 2011-03.<sup>2</sup> Together Directives 2011-04 and 2011-05 explain that the Board is not to take any action to approve the 269 ballots based upon *State ex. rel. Painter v. Brunner*, 128 Ohio St.3d 17, 941 N.E.2d 782.

To summarize, the Board split two to two on whether to count the 269 correct location, wrong precinct provisional ballots. Next, Secretary Brunner voted not to approve the 269 for counting. Finally, the Secretary Brunner "no" vote was superseded by Secretary Husted who directed the Board not to count the 269 ballots because of *Painter*. Therefore, at no point were there 3 votes to count the 269 ballots. It is the position of the Board that the issue of poll worker error has been decided and there is no question as to the 269. Because three votes are necessary to approve ballots for counting, the 269 may not be counted.

4. 149 ballots identified by Board Member Faux

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<sup>2</sup> Secretary Husted quoted the Ohio Supreme Court's *Painter* holding: "Insofar as two of the board members appear to presume poll-worker error in connection with the 269 provisional ballots cast in the wrong precinct but correct location in a multi-precinct polling place, this is incorrect." Directive 2011-04.

It is possible the Plaintiffs will argue that the Board should count the 149 correct location, wrong precinct ballots identified by Board Member Faux at the December 28, 2010 Board meeting. In addressing these ballots it is important to remember two facts: a) the 149 ballots are a subset of the 269 ballots not approved for counting; and, b) the Board only voted on the 269 ballots as a group and never voted specifically on the 149 subset.

While Secretary Brunner ordered the Board to count the 149 ballots in Directive 2011-03, she did not have authority to issue this Order since the Board never specifically voted on the 149 ballots as a separate group of ballots. See R.C. 3501.11(X). Even if this Court thought that Secretary Brunner had the right to cull out the 149 ballots from the 269 and to vote to count them as a third vote for just those ballots along with the votes of Board Members Burke and Faux, Secretary Brunner's action was superseded by Secretary Husted in Directive 2011-04. Thus, if there ever were three votes to count the 149, there is not any longer. Moreover, the 149 were only voted on as part of the vote on the 269; the decision regarding the 269 is all that exists. Because the 269 ballots were not approved for counting, any subset of the 269 ballots was not approved for counting.

**E. Standard of Proof**

To the extent this Court disagrees with the Board and decides further investigation is warranted, the Board requests that the Court apply the following law.

1. Poll Workers Must have Violated Ohio Law

The NEOCH Consent Decree and Secretary Brunner's related Directives note that a NEOCH voter "may not be deprived of the fundamental right to vote because of a failure of a poll worker to follow Ohio law." In the next sentence, the Consent Decree states that "poll worker error may not be presumed." Doc. 8-1, p. 9; Directives 2010-73, 2010-74, 2010-79. Thus, the primary question is whether there is evidence that a poll worker did not follow

Ohio law. There is no such evidence in this case. On Election Day, poll workers gave voters information about where it appeared he or she was to vote. As such, even in the case of the 7 ballots where the poll workers admitted to an innocent mistake, this mistake is *not* a violation of Ohio law. And if there is no violation of Ohio law, there is no order or requirement to count the ballot.

In addition, to the extent that poll worker error is relevant, it will not be presumed and must be demonstrated through evidence. See *State ex. rel Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333. The Ohio Supreme Court in *Skaggs* further held that election officials err in presuming poll-worker error because “[i]n the absence of evidence to the contrary, public officers, administration officers and public authorities, within the limits of jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.” *Painter* at 22 citing *Skaggs* at ¶ 51. See also Fed. R. Evid. 301, 302.

As the chief election officer in Ohio, the Secretary of State may “[i]ssue instructions by directives and advisories in accordance with section 3501.053 of the Revised Code to members of the boards as to the proper methods of conducting elections.” R.C. 3501.05(B). Where the secretary of state's construction is reasonably supported by the pertinent provisions, and in accordance with well-settled precedent, the court must defer to that reasonable interpretation. *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 834 (S.D. Ohio 2008) citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 896 N.E.2d 979, 990 (2008).

Secretary Brunner repeatedly issued guidance to the Board establishing an objective standard for poll worker error and reiterated that poll worker error will not be presumed.

Directive 2010–73 stated that the “consent decree provides that an individual voting a provisional ballot using the last four digits of his/her social security number may not be deprived of the fundamental right to vote because of a failure of a poll worker

to follow Ohio law. However, poll worker error will not be presumed and must be demonstrated through evidence.”

Directive 2010-74 cited the holding in *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333 “in which the Ohio Supreme Court stated that in the absence of evidence to the contrary, poll workers will be presumed to have properly performed their duties, but that the outcome may be different when evidence is presented that poll workers failed to perform their statutorily-required duties.”

Directives 2010-79 and 2010-80 set forth “objective criteria for determining poll worker error”, including whether the poll worker followed federal and state law, directives of the Secretary of State, and the procedures/guidelines outlined in the Poll Worker Manual.

Advisory 2010-08 states “[a]s explained in Directive 2010-73, poll worker error will not be presumed and must be demonstrated through evidence. Directives 2010-79 and 2010-80 provide objective criteria for determining poll worker error.”

The Board complied with such guidance in conducting its investigation of the 849 ballots and found some evidence of poll worker error with regard to 7 of the 849 ballots, but did not find that the poll workers had violated Ohio law. Other than those 7 ballots (and 9 others approved for counting but not because of poll worker error), the Board did not find evidence to support a finding of poll worker error with regard to the remaining 833 ballots. Pursuant to Ohio law, poll worker error may not be presumed with regard to the 833 wrong precinct provisional ballots. See *Painter* at ¶ 50.

Absent direct evidence of poll worker error, Plaintiffs are speculating about why a voter cast a ballot in the wrong precinct. Plaintiffs rely on a statistical analysis that is not in evidence and does it not prove anything about poll worker error. Statistical analysis was rejected as evidence of poll worker error in the case of *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 602 N.E.2d 644 (1992). The Ohio Supreme Court held that, while a local board of elections was shown to have abused its discretion in rejecting certain petition signatures, such error cannot be extrapolated to prove that a larger number of signatures were improperly invalidated since there are a number of reasons why petition signatures may

be properly disqualified. Similarly, the fact that the Board found evidence of poll worker error with regard to 7 ballots cannot be used to establish that poll worker error directly resulted in 833 voters casting their ballot in the wrong precinct. This type of analysis does not create admissible evidence of poll worker error under Ohio law. See also *Hunter* at 27.

2. There Must be Clear and Convincing Evidence of Poll Worker Error

In Ohio, the standard of proof with respect to evidence of election irregularities is “clear and convincing.” *McMillan v. Astabula County Board of Elections* (1993), 68 Ohio St.3d 31; *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 58 Ohio St.3d 103. Clear and convincing evidence is defined as “[t]hat measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re Election of November 6* at 106.

**F. Eleventh Amendment Immunity**

The Board is immune from suit pursuant to the 11<sup>th</sup> Amendment to the United States Constitution for the reasons set forth in Defendant Board’s Motion for Summary Judgment, which is incorporated herein by reference.

**G. Equal Protection**

1. There is No Equal Protection Violation as to the Board’s Review and Counting of Provisional Ballots

The Board’s pre-November 16 investigation did not violate Equal Protection. The Board afforded the same level of review to all provisional ballots cast, with the exception of NEOCH ballots pursuant to Directive 2010-74. Therefore, “any equal-protection claim did not require an investigation – it merely required the same inquiry that the board had engaged in for its initial determination of the validity of provisional ballots.” *Painter* at ¶40.

The 31 approved ballots cast at the Board<sup>3</sup> and the rejected wrong precinct provisional ballots are not the same for equal protection purposes. As Judge Rogers explained:

It is not entirely clear whether the Board acted in accordance with Ohio law in counting the 27 votes, but either way the likelihood is not particularly strong that there was an equal protection violation under the principles of *Bush v. Gore*, 531 U.S. 98 (2000). The two wrong precinct groups of ballots are sufficiently different that Ohio law could permit counting the 27 votes on the ground that the error was much more clearly and ascertainably not attributable to the voter than in the election-day polling place situations. And if Ohio law does not permit counting the 27 votes, then the ballots were counted under a mistaken view of the law by the Board. In that circumstance, there should be a state law challenge to the votes erroneously cast, not a counting of a much larger number of votes countywide that were erroneously cast in a similar-but not exactly the same- way. Moreover, counting improperly cast votes county-wide, where the ballots include trans-county district and state races, raises serious Equal Protection concerns in having Hamilton County votes counted differently from those of other Ohio counties.

*Hunter*, J. Rogers concurrence at 42.

Thirty-one provisional voters at the Board of Elections, 800 Broadway, went to the correct location, but they were given the wrong ballot by Board staff. This mistake could only occur at 800 Broadway where the Board staff has access to ballots for all 680 precincts. The 31 voters did everything right and there is nothing the voter could have done to prevent this error. How the Board staff discovered the mistakes made at 800 Broadway is also relevant. The Board staff at 800 Broadway wrote the voter's precinct number on the provisional ballot envelope (as opposed to the ballots at each precinct which have the precinct identifier pre-labeled on the envelope). This notation by the staff provides *objective* evidence on the face of the envelope that error occurred in the case of the 31 ballots. A

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<sup>3</sup> Twenty-seven provisional ballots cast at the Board of Elections contained a ballot for the wrong precinct as evidenced by the provisional ballot envelope. Four additional provisional ballots cast at the Board of Elections contained a ballot for the wrong precinct even though the correct precinct was indicated on the face of the provisional envelope. There were a total of 31 "wrong precinct" ballots cast at the Board as opposed to the 27 referred to by the 6<sup>th</sup> Circuit.

review of the envelope alone established error because the wrong precinct number was on the ballots as compared to the precinct number which corresponds to the voter's name and address. No investigation for poll worker error was needed and none was conducted by the Board to find these mistakes.

In contrast, the 849 provisional voters went to the wrong precinct. Even if some poll worker error is related to those ballots, the voter had to have been involved in the error as well. The voter went to the wrong precinct and is at least equally culpable in not knowing his or her correct precinct number and location. This error is wholly or partially attributable to the voter. Voters, after all, have the responsibility to know their correct precinct and location. And, unlike busy poll workers who have little time to process ballots on Election Day, voters have ample time prior to Election Day to find out where his or her poll location and precinct is. This information is publically available at the Board and on the Board's website. Even if a poll worker gives a voter information as to his or her precinct location, this does not absolve the responsibility of the voter to know in which precinct he or she is entitled to vote. It would be regrettable if a poll worker made an unintentional error in this regard, this would not change the fact that the voter was negligent and this is a crucial distinction between the 849 and the 31 ballots.

2. The Board did Not Intend to Violate the Equal Protection Clause

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is an element of intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397 (1944). The argument that the Equal Protection clause prohibits "invidious" or "arbitrary" discrimination does not apply in this context since the Plaintiffs have not alleged that the Ohio election laws, on their face,

disproportionately burden a particular group. See *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10 (1968). “[T]he Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution.” *Id.* Intentional discrimination has not been alleged in this case, nor can it be proven.

### 3. An Equal Protection Violation, if any, has been Remedied

The 6<sup>th</sup> Circuit concluded that the alleged initial unequal treatment by the Board has been remedied when it completed the investigation ordered by this Court pursuant to Secretary Brunner’s directives. “Although there are time and resource limitations to the review that may be undertaken, the Board has implemented appropriate procedures to remedy its initial unequal treatment.” *Hunter* at 29.

### H. Due Process

Plaintiffs argue that Ohio’s provisional voting system is fundamentally unfair. Federal courts have uniformly declined to endorse actions under §1983 with respect to garden variety election irregularities. *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir.1978). Instead the 6<sup>th</sup> Circuit held that:

“[t]he Due Process clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state's voting system is fundamentally unfair.” *Brunner*, 548 F.3d at 478 (citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir.1978)). “[D]ue process is implicated where the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness.” *Griffin*, 570 F.2d at 1078. Such an exceptional case may arise, for example, if a state employs “non-uniform rules, standards and procedures,” that result in significant disenfranchisement and vote dilution, *Brunner*, 548 F.3d at 478, or significantly departs from previous state election practice, see *Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir.1995) (intervening where failure to exclude contested absentee ballots constituted a post-election departure from previous state practice); *Griffin*, 570 F.2d at 1079 (intervening where state court disrupted seven-year practice of voting by absentee and shut-in ballot). Federal courts, however, “have uniformly declined to endorse action[s] under [§] 1983 with respect to garden variety election irregularities.” *Griffin*, 570 F.2d at 1076; see also *Brunner*, 548 F.3d at 478 (“[T]he federal courts should not be asked to count and validate ballots and enter into the details of the administration of the election.” (citation and internal quotation marks omitted)).

*Warf v. Bd. of Elections of Green County, Ky.*, 619 F.3d 553, 559 (6th Cir. 2010). At issue in this case are a small number of provisional ballots rejected pursuant to state law because such ballots were cast in the incorrect precinct. These ballots are exactly the type of “garden variety” issues that arise in each election. In following state law and election procedures, the Board takes steps to prevent such issues by providing clear notices to voters at each polling place that one must vote in the precinct in which one lives, attempting to contact voters to update their registration, and providing training to poll workers. Despite the Board’s preparation for each election, irregularities occur, but the November 2010 election irregularities do not rise to the level of a constitutional violation.

The substantive Due Process rights of the 849 provisional voters were not violated when the Board voted to count the 31 ballots cast at the Board of Elections. As discussed above, the review process in determining whether to count was the same for all provisional ballots. Counting the 31 ballots did not afford those voters any additional rights.

The State of Ohio is not a party in this case. Nevertheless, Plaintiffs challenge whether Ohio provisional ballot laws, R.C. 3505.181 and R.C. 3505.183, comport with Due Process. “When a state promulgates a regulation which imposes a ‘severe’ burden on individuals’ rights, that regulation will only be upheld if it is ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059; *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). However, ‘the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.’ *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. Therefore, the court must first examine whether the challenged Ohio statute imposes a severe burden or is a reasonable and nondiscriminatory restriction. Next the court must examine Ohio’s asserted state interests

and determine if they are sufficiently weighty to justify the restriction imposed. *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005).

The burden placed on provisional voters is no greater than that placed on other voters during an election. All voters must vote in the precinct in which they live. Ohio law does not require more of provisional voters than regular voters – everyone must get to the correct location in order to properly cast a ballot so that they may vote for only the races and issues for which they are entitled to vote. The burden placed on provisional voters is no greater than that placed on other voters. “The Supreme Court has clearly stated that states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006), citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997). The requirements that provisional voters complete a provisional envelope and sign an affirmation statement as set forth in R.C. 3505.182 are reasonable and necessary for boards of elections to determine whether a voter is registered and eligible to vote and to prevent fraud. See R.C. 3505.183(B).

The Board, like the Secretary of State, has a substantial interest in conducting elections in a timely, consistent and efficient manner. See *Hunter* at 36. The State timeline for each election cycle is brief and narrowly tailored. Official canvasses of election returns must begin eleven to fifteen days after the election, and be complete within twenty-one days. R.C. 3505.32(A). If the race is subject to an automatic recount, the recount must begin within ten days after the official certification. R.C. 3515.03. An election contest must be filed in court within ten days of the recount. R.C. 3515.09. The court must fix the time for trial no less than fifteen days or more than thirty days after the petition is filed. R.C. 3515.10. Only one continuance of no more than thirty days can be granted. R.C. 3515.11. Any appeal of legal

questions to the Ohio Supreme Court must be filed within twenty days after the judgment of the court of appeals. R.C. 3515.15. This schedule allows boards of elections to conclude the most recent election and provides time to prepare for the next. Litigation of the nature presented in this case prevents the Board from complying with State mandates, which would have even greater consequences if a state-wide or federal election contest was challenged.

Plaintiffs also argue that the poll workers violated voters' procedural due process rights when the poll workers failed to follow the statutory pre-deprivation process of R.C. 3505.181(C). This is inaccurate for two reasons. First, it has not been proven that poll workers intentionally deprived voters of their right to vote. See *Snowden* at 8 (mere negligence is insufficient for §1983 liability). Second, Plaintiffs have failed to allege how the Board Members, in their official capacities, have violated voters' procedural due process rights. See Defendant's Motion for Summary Judgment.

Even if Plaintiffs could impute the poll workers' negligence to the Board members, Plaintiffs arguments would still fail to establish a Due Process violation. The Supreme Court held:

“(D)ue process is flexible and calls for such procedural protections as the particular situation demands,” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed .2d 484. Resolution of the issue here involving the constitutional sufficiency of administrative procedures . . . requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S. Ct. 893, 896 (1976). The right to vote is fundamental, but it is not without limits. See *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059 (1992). Poll workers should direct voters to the correct precinct, but the voter has an obligation to comply with state law as well. “At some point the benefit of an additional

safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.” *Matthews* at 348.

Plaintiffs conclude that the Board should provide a post-deprivation remedy of a meaningful hearing in order to protect wrong precinct voters’ rights to procedural Due Process. This argument is now moot. The Board has conducted a meaningful investigation into poll worker error as directed by this Court and confirmed by the 6<sup>th</sup> Circuit.

**I. Remedies available to the Court**

1. Uncount the 31; Uncount the 7; Count the 9 and Reject the 269

a. 31 – The Ohio Supreme Court in *Painter* held that wrong precinct ballots should not be counted and the Board erred in counting the 31

The Court’s January 12, 2011 order states: “No doubt the Board has had time to reconsider its decision to count these twenty-seven provisional ballots, but the matter cannot now be undone. The Board remade those provisional ballots in the correct precinct and counted them. And herein lies the crux of the matter: to count some provisional ballots disqualified because of poll worker error and not to count other provisional ballots disqualified because of poll worker error violates the fundamental premise that ‘equal weight [be] accorded to each vote and . . . equal dignity owed each voter.’ *Bush v. Gore*, 531 U.S. at 104.” (Doc. 39, p. 8.) Similarly, the 6<sup>th</sup> Circuit stated “[i]ndeed it is not clear to us whether the ballots that the Board unanimously voted to count at its December 28 meeting (the 7 votes determined in interviews with poll workers to have been miscast because of poll-worker error and the 9 votes determined by the Board’s review to have been cast in the correct precinct) have been counted irretrievably. The uncounting of the 31 ballots is, therefore, not a satisfactory remedy for the Plaintiff’s challenge.” These conclusions are inaccurate. The 31 ballots have been approved for counting and remade to the correct precinct, but have not yet been counted. Ohio law requires that “[n]o 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 under division (B) of this section for that election.” R.C. 3505.183(D). And since the recount has yet to occur, the matter can be undone.

The 6<sup>th</sup> Circuit held that uncounting the ballots cast at the Board “as a possible remedy is unsatisfactory” because “Plaintiffs allege that the Board rejected other similar categories of provisional ballots—those without a printed name (53), with only a partial name (9), and that were not signed (74) - without considering whether poll-worker error was involved.” *Hunter* at 37. This conclusion is inaccurate. As explained supra, the Board did not investigate for poll worker error with regard to the 27 ballots; it was obvious on the face of the ballot envelope. The poll worker’s mistake was discovered the same way that the Board found ballots without printed names and signatures by just looking at the ballot envelope. Similarly, with regard to the 4 ballots cast at the Board, poll worker error was clear when the staff removed the ballot from the provisional envelope and discovered it was for the wrong precinct.<sup>4</sup> The 31 have not been counted irretrievably since the ballots are identified due to the remake process. Therefore, the 31 may be removed or “uncounted” from the recount.

b. 7 – Under Ohio law and in accordance with *Painter*, the Board is not legally permitted to count wrong precinct ballots

These wrong precinct ballots were cast contrary to Ohio law. *Painter* held that the investigation undertaken by the Board is contrary to Ohio law and the results of that investigation (namely the 7 ballots for which there is some evidence of poll-worker error) should not be considered. *Painter* at ¶ 51. Secretary Husted concurred and directed the Board not to count the 7. Directives 2011-04 and 2011-05. The poll workers also did not violate

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<sup>4</sup> This type of mistake is unique to provisional ballots cast at the Board of Elections because the staff has access to the ballot for each Hamilton County precinct. In contrast, a precinct poll worker only has ballots for that particular precinct.

Ohio law when they, by mistake, gave incorrect information to the voters of these 7 ballots. The 7 should not be included in the recount. The 7 have not been counted irretrievably since the ballots have not been opened or remade and the recount has not started. Therefore, the 7 may be removed or “uncounted” from the recount.

c. 9 – There is no dispute as to the 9 ballots

These ballots were properly cast all along and should not have been part of this case. The Board voted unanimously to count these ballots. See also Directive 2011-05.

d. 269 – There are not three votes of the Board to count these ballots

The tie vote on whether to count these ballots was broken by Secretary Brunner in favor of not counting. January 7, 2011 Tie Vote Letter and Directive 2011-03.

2. Alternatively, Count the 31, 7, and 9 and reject the 269

As stated above, the 6<sup>th</sup> Circuit determined that the Board’s investigation was proper and complete. Therefore, the Court could order the Board to proceed with the recount according to the votes previously taken by the Board. This outcome, however, orders the Board to count ballots that the Ohio Supreme Court determined are illegal under Ohio law. *Painter* at ¶ 49.

3. Election Contest

The election of any person to any public office, submitted to the voters, may be contested by qualified electors of the state or a political subdivision pursuant to an election contest. The election contest procedure described in R.C. 3515.08 et seq. is the statutory process for determining the outcome of an election.

4. New Election

A remedy available to the Court is to order a new election to eliminate any uncertainty. See e.g. Kevin J. Hickey, Note, Accuracy Counts: Illegal Votes in Contested

Elections and the Case for Complete Proportionate Deduction, 83 N.Y.U. L. Rev. 167, (2008). This approach focuses on maintaining voter trust by never finalizing the election if there is any uncertainty. *Id.* As a result of an unreasonable amount of uncertainty, a new election is ordered. *Id.* This is the only appropriate remedy in this case as any order to count the wrong precinct ballots violates Ohio law and the decision of the Ohio Supreme Court in *Painter*. For this reason, the 1<sup>st</sup> Circuit in a similar case, *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), held that a new election and not the counting of illegal ballots was the proper remedy.

#### IV. Conclusion

For the reasons stated herein, Plaintiffs are not entitled to injunctive or declaratory relief. The Board met the requirements of the November 22 Order except that the recount has not yet been conducted. The Board finished its investigation of all provisional ballots at issue and voted whether to approve such ballots for counting. The Board is prepared to commence the recount, certify the eventual winner, and conclude this election as soon as directed by this Court.

In this case, the evidence will show that the Board complied with Ohio law in its review and approval of provisional ballots cast in the November 2 general election in Hamilton County. Further, the Board complied with Equal Protection and Due Process in its review and approval of provisional ballots both prior to the filing of this case and during its investigation ordered by the Court.

The Board seeks a final resolution of the November 2 election. It is also concerned about the precedential impact of this case on further elections. The Board urges the Court to consider the time and resource limitations that prevent it from conducting exhaustive and repetitive reviews of provisional ballots notwithstanding the law in Ohio, which directs that wrong precinct ballots are not to be counted.

Respectfully submitted,

JOSEPH T. DETERS  
PROSECUTING ATTORNEY  
HAMILTON COUNTY, OHIO  
BY:

/s/ James W. Harper

James W. Harper  
Thomas Grossmann  
David T. Stevenson  
Colleen M. McCafferty  
Assistant Prosecuting Attorneys  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
ddn: (513) 946-3159 (Harper)  
(513) 946-3120 (Stevenson)  
(513) 946-3058 (Grossmann)  
(513) 946-3133 (McCafferty)

Fax: (513) 946-3018  
[james.harper@hcpros.org](mailto:james.harper@hcpros.org)  
[dave.stevenson@hcpros.org](mailto:dave.stevenson@hcpros.org)  
[tom.grossmann@hcpros.org](mailto:tom.grossmann@hcpros.org)  
[colleen.mccafferty@hcpros.org](mailto:colleen.mccafferty@hcpros.org)  
*Attorneys for Hamilton County Board of  
Elections*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed on July 5, 2011 using the Court's  
CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ James W. Harper  
James W. Harper

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