



those provisional ballots to accept and count has been in all respects as set out in those statutes and rules, and has been determined by unanimous bipartisan votes of the Hamilton County Board of Elections.

Plaintiff does not seek to maintain the *status quo*. Rather she seeks to change those rules after the fact. And to change rules that govern federal and state elections across the state of Ohio ostensibly for only one race in one of Ohio's 88 counties. The reality, of course, is that she is asking this Court to alter the way in which provisional ballots are to be treated not just in this race but in all future races all across Ohio. The implications of that change – and the burdens it will engender for future elections – are significant and have nowhere been factored into Plaintiff's analysis.

Moreover, Plaintiff cannot demonstrate any of the factors that are required for injunctive relief. On likelihood of success on the merits, her complaint assumes, without evidence, widespread poll-worker error, a presumption exactly contrary to that of controlling law in Ohio. *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333 (“[I]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the 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”). The element of irreparable harm is completely missing where Ohio has a carefully crafted statutory mechanism in place for raising issues of irregularities in elections – which is to be instituted after the certification that Plaintiff seeks to preclude. R. C. §§3515.08, *et seq.* And the balancing of the equities cannot ignore the rights and interests of voters and candidates who are entitled to have the results of this election certified in the prescribed time period.

## II. JURISDICTION AND VENUE

3. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4). Venue is proper under 28 U.S.C. §1391 and Local Rule 82.1 (c)

Denied.

### III. PARTIES

4. Plaintiff Tracie Hunter is a resident of Hamilton County, Ohio. She is a registered voter in Hamilton County, Ohio. She is a candidate for Hamilton County Juvenile Court Judge in the November 2, 2010 general election.

Admitted.

5. Defendant Hamilton County Board of Elections (“BOE”) is the Ohio Secretary of State’s representative for county election matters in Hamilton County, Ohio (ORC § 3501.06). The Hamilton County Board of Elections is responsible for determining which provisional ballots shall be approved for counting in an election. The Board is sued for injunctive relief only

Admitted.

6. The chair and members of the Hamilton County Board of Elections (BOE) are responsible for determining which provisional ballots shall be approved for counting in an election. The chair and members are sued in their official capacities only.

Admitted.

### IV. FACTS

#### A. The Juvenile Court Election Results

7. Tracie Hunter is a candidate for election to the office of Hamilton County Juvenile Court in the November 2010 general election. The BOE reported on election night that a total of 279,489 votes were cast in the County wide race for Juvenile Court. Ms. Hunter garnered 109,512 of the votes. Her opponent received 112,359 votes. Ms. Hunter was behind by 2,847 votes as of the unofficial and incomplete count that night.

Admitted.

8. After election night the BOE reported that there were approximately 1,500 additional ballots to be counted: eligible absentee ballots that had arrived after November 2, 2010 and unscanned ballots that were damaged or unable to be scanned on election night. In addition, more than 11,000 provisional ballots had been cast in Hamilton County and those needed to be reviewed and counted.

Admitted.

9. During two Board meetings on November 16, 2010 and November 19, 2010, the Board voted on all the provisional ballots and the unscanned and the late arriving absentee ballots. The Board approved over 9,000 provisional ballots and rejected about 2,000 provisional ballots.

Admitted.

10. On the evening of November 19, 2010, the BOE announced on its website the new totals for the Juvenile Court race. There were 289,791 votes cast. Tracie Hunter's total rose to 114,966 votes. Her opponents total was 114,989 votes. Ms. Hunter closed the gap from 2,847 votes to 23 votes. Thus, as of today she is only 23 votes behind her opponent.

Admitted.

11. This narrow gap makes her eligible for an automatic recount. But a recount reviews only the votes determined eligible before the official count is certified. Thus a recount will not address the problem in this case – the failure to count the ballots of voters who voted in the wrong precinct due solely to poll worker error.

Denied.

B. The Provisional Balloting System in Hamilton County

12. All duly registered and eligible voters in Hamilton County were permitted to vote in the November 2010 general election. O.R.C. § 3505.18.

Admitted.

13. If a voter is unable to cast a regular ballot, a voter is permitted to cast a provisional ballot for a multitude of reasons, including, the voter's name does not appear on the voting list at the precinct, or the voter is unable to provide proper identification, or the voter is challenged, or the voter has requested an absentee ballot, among others. O.R.C. § 3505.181 (A).

Admitted that R.C. §3505.181 sets out requirements related to provisional ballots and refers to that provision for its terms. Further answering, denies the allegations not specifically admitted to be true.

14. A provisional ballot cast in the wrong precinct is not to be opened or counted. O.R.C. § 3505.181 (C). However, if a voter believes she is in the correct precinct but the poll worker believes the voter is in the wrong precinct, the poll worker has a duty to direct the voter to the correct precinct. The poll worker can also allow the voter to cast a provisional vote at the current precinct, but the poll worker must warn the voter that if the current precinct is the wrong precinct, the ballot will not be counted. The poll worker must give the voter the telephone number of the board of elections. O.R.C. § 3505.181 (C) (1). The statute does not address whether or not a ballot is to be counted if poll worker error causes the voter to incorrectly vote provisionally, i.e., in the wrong precinct.

Admitted that R.C. §3505.181 sets out requirements related to provisional ballots and refers to that provision for its terms. Further answering, denies the allegations not specifically admitted to be true.

15. There are several other polices and practices that allow otherwise invalid provisional ballots to be counted if there is poll worker error.

Denied.

16. The Ohio Secretary of State issued Directive 2010-74 on November 1, 2010 regarding guidelines for determining the validity of provisional ballots. Exhibit A attached. Directive 2010-74 orders Boards of Election to count a provisional ballot, even though it was cast in the wrong precinct, under the following circumstance: the voter was in the correct polling location, but voted in the wrong precinct; the voter used as identification the last four digits of his social security number as identification and there was poll worker error:

“In determining the eligibility of a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification, the board staff must attempt to determine whether a potentially disqualifying flaw in the ballot is attributable to poll worker error. An otherwise qualifying provisional ballot may not be rejected for reasons that are attributable to poll worker errors.”  
Directive 2010-74 p. 7.

Admitted that Directive 2010-74 sets out procedures related to provisional ballots and refers to that directive for its terms. Further answering, denies the allegations not specifically admitted to be true.

17. Directive 2010-74 goes on to provide some examples where provisional ballots shall not be rejected due to poll worker error at pp. 11-12. For example, if a voter declines to sign the provisional ballot affirmation, the poll worker must indicate the voter's declination on the poll worker verification form. However, when the voter fails to sign the provisional ballot affirmation statement but the poll worker signs the verification statement that the voter has completed the affirmation and fails to verify that the voter declined to complete the affirmation, the Board has a duty to further investigate and question the poll worker.

“If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day. Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement provide objective evidence that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B.” Directive 2010-74 p. 11.

Admitted that Directive 2010-74 sets out procedures related to provisional ballots and refers to that directive for its terms. Further answering, denies the allegations not specifically admitted to be true.

18. Another example of poll worker error is when there are notations in the poll book indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts (sometimes referred to as “right location, wrong table” or “right church, wrong pew”). The Secretary of State directed Boards of election to investigate these provisional ballots. “Because it is a poll worker’s duty to ensure that the right location, wrong precinct, applies only to voters using the last four digits of their social security the voter is directed to the correct precinct” the Board can use the notations as evidence that the poll worker did not properly carry out her duties. In that case the board should “either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board’s instructions for ensuring that voters were directed to the correct precinct.” Directive 2010-74 p. 12.

Denied.

19. Likewise, the Board should make the same inquiry if there are multiple provisional ballots cast in the correct location but wrong precinct. Id.

Admitted that Directive 2010-74 sets out procedures related to provisional ballots and refers to that directive for its terms. Further answering, denies the allegations not specifically admitted to be true.

20. The Ohio Supreme Court held in *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 2008-Ohio-6333 (2008) that it was not reasonable for the Secretary of State to change how provisional ballots are to be counted after some counties have already counted the ballots. However, the court indicated that the Secretary of State would be reasonable in prohibiting the rejection of provisional ballots cast due to poll worker error if there is evidence of poll worker error. The Supreme Court acknowledged that the statutory scheme for casting, processing, and counting provisional ballots was “far from lucid” and called on the General Assembly to amend the laws so every vote is counted. Id. at 527.

Admitted that the Ohio Supreme Court in the *Skaggs* decision addresses procedures related to provisional ballots and refers to that opinion. Further answering, denies the allegations not specifically admitted to be true.

21. The General Assembly has not amended the provisional balloting statutes since *Skaggs*. Absent any amendments, the Secretary of State and local Boards of elections are left without statutory guidance to determine how to count provisional ballots.

Denied.

22. The Hamilton County Board of Elections has created a practice of investigating if there is poll worker error and if poll worker error is found, of accepting provisional ballots.

Denied.

23. At the Board meeting on November 16, 2010, the Board spent three hours carefully scrutinizing the provisional ballots to determine whether they should be counted. About 8,260 provisional ballots were approved for counting without any significant discussion. The remaining provisional ballots were investigated, discussed, examined, and voted on by the Board to determine if they should be counted.

Admitted.

24. Provisional ballots are sealed in an envelope where the voter has to fill out an affirmation saying she solemnly swears or affirms that "I ... solemnly swear or affirm that I am a registered voter in the jurisdiction in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot. . . ." Voters sign the affirmation under the pains and penalty of falsification. O.R.C. § 3505.182.

Admitted that R.C. §3505.182 sets out requirements related to provisional ballots and refers to that provision for its terms. Further answering, denies the allegations not specifically admitted to be true.

25. The BOE carefully examined the provisional ballot envelopes to determine whether the provisional ballot was correct or should be rejected. In many cases the board members asked questions of the board staff, read the notes on the provisional envelopes, read the notes in the pollbooks, and inquired if there was a call on the BOE help line on election day regarding this voter.

Admitted.

26. In all cases where the provisional ballot had a mistake and the BOE found poll worker error, the BOE voted to approve the provisional ballot to be counted. For example, 26 provisional ballots had been cast in the wrong precinct. The ballots had been cast at the Board of Elections downtown. The Board members asked their staff how could a voter come down to the Board to vote and be handed the wrong ballot. The answer was poll worker error. The staff recommended the votes be counted. Legal Counsel to the BOE opined that the recommendation was appropriate. The Board unanimously voted to approve these provisional ballots, even though the ballots were cast in the wrong precinct. Exhibit B attached (transcript of 11-16-10 Board meeting) pp. 40- 46.

Denied.

27. There were 685 provisional ballot envelopes where the poll worker filled in contradictory information stating both that the voter did provide identification and stating the voter was required to provide additional information to the Board. The Board staff investigated the voters to make sure they were registered voters and recommended the votes be counted even though the voters did not bring identification to the Board. BOE Legal counsel agreed that

this circumstance fell within the Secretary of State's directive on poll worker error. The Board agreed to unanimously approve these ballots. Exhibit B pp. 29-33.

Denied, for lack of information.

28. The Board staff investigated ten ballots where the voter had not signed the envelope and found that the voter should not have been required to vote a provisional ballot. Because the poll worker must have erred in making the voter vote a provisional ballot, the ballot was accepted by the Board even though the envelope was not signed. Exhibit B pp. 71-72.

Denied.

29. At the November 19, 2010 board meeting the staff found additional ballots where poll worker error was found. The staff opened several provisional envelopes where the envelope listed the correct precinct but when the envelope was opened the ballot inside was for the wrong precinct. The Board unanimously agreed to count the ballots even though they were cast in the wrong precinct because of poll worker error.

Denied.

#### C. Poll Worker Error in This Case

30. The Board rejected 849 provisional ballots because the voter voted in the wrong precinct. Some of the voters in this group voted in the correct polling location but voted at the wrong table (wrong precinct). Board member Faux stated that he was concerned that the reason somebody would end up voting at the wrong table "had more to do with directions they were given by the inside poll workers than it did with their own ineptitude." Nevertheless the Board did not separate out of the 849 provisionals those ballots cast in the right location but at the wrong table. Nor did the Board investigate whether there was poll worker error. In other situations the Board asked staff questions, checked the pollbook, and inquired if there were calls to the help line. In this situation the Board did none of that. The Board unanimously voted to reject all 849 ballots. Exhibit B pp. 24- 40.

Denied.

31. The Board did not follow the Secretary of State's directive in the situation of the right location, wrong precinct, where the Board is directed to contact the poll workers to determine whether they followed the board's instructions for ensuring voters were directed to the correct precinct.

Denied.

32. Counsel for Ms. Hunter asked the Board to reconsider the 849 votes it rejected and consider poll worker error, as it had with other provisional ballots. The Board declined. Exhibit B pp. 46-49. Counsel raised the issue again at the Board meeting on November 19, 2010 and the Board again declined.

Denied.

33. Plaintiff and her counsel also sought access to the provisional ballot envelopes, poll books, names of provisional voters and precincts where they voted but were denied access by Defendants on the grounds that the information sought was not a public record before the Board certifies the results. Exhibit C (letter from Joe Deters November 19, 2010).

Denied for lack of information.

34. The Board also rejected a number of provisional ballots where the voter either did not print their name on the affirmation on the envelope but signed the envelope or printed their name but did not sign the envelope. The Board rejected these ballots without determining whether the poll worker error was involved.

Denied.

35. The Board rejected a number of additional provisional ballots for various reasons without determining whether there was poll worker error.

Denied.

36. The BOE is scheduled to meet Tuesday November 23, 2010 at 9:00 a.m. to certify the election results. Because the margin of victory in the Juvenile Court race is less than one half of one percent of the votes cast, the BOE must order a recount of the race.

Admitted.

37. If the BOE certifies the results and orders a recount, without including the additional provisional ballots that were rejected due to poll worker error, Plaintiff Tracie Hunter will suffer irreparable harm in that all the votes cast in the race will not be counted.

Denied.

38. The BOE has arbitrarily and knowingly denied citizens of Hamilton County to right to vote in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution by refusing, without any reasonable basis, to investigate whether poll worker error caused some voters to vote at the right polling place but at the wrong table while otherwise investigating similarly situated circumstances where poll worker error caused a voter to vote in the wrong precinct. The BOE has arbitrarily and knowingly denied citizens of Hamilton County the right to vote in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution by arbitrarily allowing some provisional voters the right to vote when the error in the ballot was caused by the poll worker, but denying other provisional voters the right to vote when the error in the ballot was caused by the poll worker.

Denied.

39. Defendant Hamilton County Board of Election's system of rejecting provisional ballots is so unfair that it denies or fundamentally burdens Ohioan's fundamental right to vote. Denying a provisional voter his or her right to vote is a severe burden on that voter's right to vote.

Denied.

40. Defendant BOE has shown that it has an interest in counting the votes of provisional voters when there is poll worker error. It also has an interest in making sure there is no fraud in casting a vote. When balancing these interests with the provisional voter's severe burden of having their vote rejected, the BOE's decision to reject these votes without considering poll worker error is not narrowly tailored to serve the BOE's interest.

Denied.

D. Need for Injunction

41. There is no adequate remedy at law that would enjoin the Defendants from certifying the election or that would order Defendants to include certain rejected provisional votes in the certification before a recount.

Denied.

42. Plaintiff has demonstrated a substantial likelihood of success in this matter. The Board has acted arbitrarily by refusing to investigate poll worker error when voters cast a ballot in the right polling place but at the wrong table or precinct and has acted without due process by rejecting these ballots without narrowly tailoring its rejection of provisional ballots to those that were cast in error due to some reason other than poll worker error.

Denied.

43. Plaintiff has demonstrated a substantial likelihood of success in this matter. The Board has acted arbitrarily by refusing to investigate poll worker error when voters cast a ballot in the right polling place but at the wrong table or precinct and has acted without due process by rejecting these ballots without narrowly tailoring its rejection of provisional ballots to those that were cast in error due to some reason other than poll worker error.

Denied.

CLAIM FOR RELIEF

First Claim – 42 U.S.C. §1983 - - United States Constitution

44. Defendants, acting under color of law, have violated rights secured to the Plaintiff by the Fourteenth Amendment to the United States Constitution including the right to due process of law and the right to equal protection under the law.

Denied.

**AFFIRMATIVE DEFENSES**

1. The court lacks subject matter jurisdiction over this claim.
2. Plaintiff's complaint fails to state a claim upon which relief may be granted.

3. Plaintiff has an adequate remedy at law through the carefully crafted mechanism set out in Ohio Revised Code §§ 3515.08, *et seq.*

Respectfully submitted,

/s/ R. Joseph Parker

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### **CERTIFICATE OF SERVICE**

I certify that this Amended Answer 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/ Beth A. Bryan

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