

**TENDERED
FOR FILING**

FEB 11 2011

Case No. 11-3060

In The United States Court of Appeals
For The Sixth Circuit

LEONARD GREEN, Clerk

TRACIE HUNTER,
COMMITTEE TO ELECT TRACIE M. HUNTER FOR JUDGE
Plaintiff-Appellee,

FILED

MAR 11 2011

NORTHEAST OHIO COALITION FOR THE HOMELESS;
OHIO DEMOCRATIC PARTY
Intervenors-Appellees

LEONARD GREEN, Clerk

vs.

HAMILTON COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants-Appellants,

and

JOHN WILLIAMS,
Intervenor-Appellant

Appeal from the United States District Court for the Southern District of Ohio
Case No. 1:10-cv-820; Related Appeals 10-4481 and 11-3059

**Amicus Brief of Ohio Secretary of State Jon Husted In Support of the
Hamilton County Board of Elections Urging *En Banc* Review**

Michael DeWine
Ohio Attorney General

Richard N. Coglianesse
Pearl M. Chin
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872; 614-728-7592 (fax)
richard.coglianesse@ohioattorneygeneral.gov
pearl.chin@ohioattorneygeneral.gov

Counsel for Ohio Secretary of State Jon Husted

Table of Contents

Table of Authorities	ii
Introduction and Statement of Amicus Interest	1
Summary of the Case and Decision	3
The Need for <i>En Banc</i> Review	4
Certificate of Service	unnumbered

TABLE OF AUTHORITIES

CASES

<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	1
<i>State ex rel. Painter v. Brunner</i> , 2011-Ohio-35.....	2, 3

STATUTES

O.R.C. § 3505.183(B).....	5
O.R.C. § 3505.183(B)(1).....	4
O.R.C. § 3505.183(B)(4)(a)(ii).....	2
O.R.C. § 3505.183(E)(1).....	4
O.R.C. § 3505.32(A).....	5
O.R.C. § 3515.03.....	5
O.R.C. § 3515.09.....	5
O.R.C. § 3515.10.....	5
O.R.C. § 3515.11.....	5
O.R.C. § 3515.15.....	5

INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Secretary of State Jon Husted is the State of Ohio's chief elections officer. R.C. 3501.04. In that role, he respectfully files this Amicus brief in support of the Hamilton County Board of Elections and asks this Court to grant *en banc* review of the panel's decision in this case. Secretary Husted respectfully submits that review by the full court is necessary because the decision, if allowed to stand, will make ballot counting and certifying results difficult. This decision threatens to prolong vote counting beyond the statutory deadline, injects uncertainty into the validation of provisional ballots, and risks destroying voter confidence and the integrity of the final outcome of elections. Furthermore, this case goes to the heart of the interplay between state and federal court determinations on the validity of particular ballots cast in an election. The panel decision, if not reviewed, will constrict legitimate authority of the State to determine whether ballots are valid and could cause further complications in elections administration that that may well result in more litigation.

The Secretary agrees with the analysis of Judge Rogers that here "the likelihood is not particularly strong that there was an Equal Protection violation under the principles of *Bush v. Gore*," and that if Ohio law was not applied correctly with regard to the counting of 27 ballots (a disputed issue upon which Judge Rogers takes no position), the remedy is "a state-law challenge to the votes

erroneously cast, not a counting of a much larger number of votes county-wide that were erroneously cast in a similar – but not exactly the same – way.” As Judge Rogers wrote, “counting improperly cast ballots county-wide, where the ballots include trans-county districts and state races, raises serious Equal Protection concerns in having Hamilton County votes counted differently from those of the other Ohio counties.” Opinion at 42.

Before the decision in this case, Ohio law, as set forth in the Revised Code and affirmed by the Ohio Supreme Court, held that a provisional ballot cast in the wrong precinct shall not be counted. *See, e.g.*, R.C. 3505.183(B)(4)(a)(ii); *State ex rel. Painter v. Brunner*, 2011-Ohio-35. By refusing to recognize an exception for ballots miscast due to poll worker error, Ohio law averts the problem of litigating the validity of each provisional ballot separately, which would pose obvious problems of proof and inevitably delay certification of election results.

The panel in this case has upended that state law, in a fashion that threatens to generate litigation for years to come. The panel seems to open the door to a limited “poll worker error” exception, while providing no administrative guidelines for such “correction” in the context of State law that does not permit such counting. And by premising its conclusion on the Equal Protection Clause, the panel created a scenario under which the remedial order at the county level creates

a potential as noted by Judge Rogers for a much larger second order Equal Protection violation state-wide.

En banc review is necessary to restore the primacy of state law in the governance of provisional ballots and to avoid the potentially disastrous consequences of this decision.

SUMMARY OF THE CASE AND DECISION

For the Court's purposes at this juncture, the case can be quickly summarized: 27 voters appeared at the Hamilton County Board of Elections to cast their votes, and those votes were recorded as having been cast in the wrong precinct. Believing the mistake could be explained only by error committed by board of elections employees, the Hamilton County Board of Elections voted to count the ballots (after amending the ballots so as not to count votes cast in races in which those electors were not eligible to participate).

The plaintiffs in this case are demanding that the board validate an untold number of provisional ballots cast in incorrect precincts at multi-precinct voting locations. The Board rejecting those ballots without investigating the possibility of poll worker error was consistent with Ohio law as set forth in *Painter*, supra. However, the Sixth Circuit Court of Appeals panel has agreed with the trial court that it would be an Equal Protection violation to count those 27 "board of elections error" ballots but not investigate other invalid provisional ballots. The appellate

panel remanded the case to the district court for an investigation, and left it to the trial court to determine the parameters of that investigation.

THE NEED FOR *EN BANC* REVIEW

This Court should grant *en banc* review of the panel's decision. First, the panel's order may create a scenario in which an election in this State could be subject to various hearings before a district court to determine, one by one, whether each provisional ballot should be counted.

Ohio law wisely leaves it to local boards of elections to determine the validity of a provisional ballot. *See*, R.C. 3505.183(B)(1). But as a result of the panel's decision, any allegation that two boards may be applying different standards of proof to the question of poll worker error, conducting investigations that differ in scope, or permitting different forms of evidence to prove poll worker error, could support claims of an Equal Protection violation and trigger a federal-court-ordered investigation into all those provisional ballots.

Such investigations could wreck havoc with Ohio's elections. Ohio law requires the boards of elections to complete their review of provisional ballots within ten days of an election. R.C. 3505.183(E)(1). It would be impossible to meet that deadline if it were routinely necessary to question every poll worker about every provisional ballot.

Timing in determining election winners is vitally important to the boards of elections. Official canvasses of 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, that 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 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. Finally, 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. All of these deadlines would become unachievable if the boards must abide by the panel's decision.

In addition, Ohio law limits what the boards may consider when evaluating a provisional ballot: a board of elections can examine only poll books, provisional ballot envelopes, and its own records. R.C. 3505.183(B). Yet in this case, the district court ordered a standardless investigation that was construed to encompass things such as deposing and sending questionnaires to all poll workers. The panel remanded this case to allow the defendants to provide evidence that poll worker error did not occur.

And issues of timing are not the most significant problem created by this decision. As Judge Rogers also noted, the Ohio Supreme Court had already considered these specific ballots, and carefully laid out a formula that allowed the board of elections to act in conformity with both that Court's decision and the November 22, 2010 decision of the district court. Opinion at 43. However, the panel opinion ordered the district court to hold a hearing and determine which provisional ballots should be counted, in a manner contrary to Ohio law.

Even if the panel was correct to find an Equal Protection violation, its proposed remedy compounds the problem, not corrects it. Provisional ballots are counted for all races in which the voter cast a ballot. Therefore, if the disputed provisional ballots at issue are counted, a new Equal Protection violation will arise, on a wider scale, because voters in Hamilton County will have additional opportunities to have their provisional ballots counted that voters in the rest of the State do not have. The solution to a local Equal Protection violation cannot be an Order extending the violation state-wide.

Unless this Court grants *en banc* review, Ohio's statutory scheme to determine elections cases quickly and efficiently will be superseded by cycles of depositions and trials before the board of elections in the first instance and district courts in the second instance. The boards will be further hampered in their ability to conduct elections because instead of preparing for the next election – which can

be held in February – they will instead be forced to preserve their equipment from a prior election because such equipment contains ballots that may be used as evidence in the prior elections litigation. Such a scenario is not contemplated under the Fourteenth Amendment and should not be used to further hamper the ability of the State or its counties in the conduct of elections.

Therefore, Secretary of State Jon Husted respectfully asks this Court to grant Hamilton County’s petition for *en banc* review.

Respectfully submitted,

Michael DeWine
Ohio Attorney General

s/ Richard N. Coglianesse

Richard N. Coglianesse (0066830)

Pearl M. Chin (0078810)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

614-466-2872; 614-728-7592 (fax)

richard.coglianesse@ohioattorneygeneral.gov

pearl.chin@ohioattorneygeneral.gov

Counsel for Ohio Secretary of State Jon Husted

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 11th day of February, 2011.

s/ Richard N. Coglianese

Richard N. Coglianese (0066830)

Assistant Attorney General