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Case Nos. 10-4481, 11-3059, 11-3060

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

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**FILED**

MAR 11 2011

LEONARD GREEN, Clerk

**TRACIE HUNTER, et al.,  
Plaintiffs-Appellees,**

v.

**HAMILTON COUNTY BOARD OF ELECTIONS  
Defendant-Appellant,**

and

**JOHN WILLIAMS,  
Intervenor-Appellant.**

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**Appeal from the United States District Court for the  
Southern District of Ohio  
Case No. 1:10-cv-820**

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**AMICUS CURIAE BRIEF OF THE CINCINNATI BRANCH OF THE  
NAACP IN OPPOSITION TO APPELLANTS' PETITIONS FOR  
REHEARING *EN BANC***

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 10-4481,11-3059

Case Name: Hunter v. Hamilton County Bd of Elect

Name of counsel: Alexander M. Spater

Pursuant to 6th Cir. R. 26.1, Cincinnati Chapter of NAACP

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

### CERTIFICATE OF SERVICE

I certify that on February 28, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alexander M Spater / PT

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**6th Cir. R. 26.1**  
**DISCLOSURE OF CORPORATE AFFILIATIONS**  
**AND FINANCIAL INTEREST**

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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## I. INTRODUCTION

The National Association for the Advancement of Colored People (“NAACP”) opposes a review *en banc* of the panel’s decision. The NAACP requests that the trial court be permitted to fashion a remedy to ensure that qualified voters for a political race in Hamilton County are not disenfranchised because of poll worker error.

## II. PANEL DECISION

A panel of this Court concluded “[t]hat there is a sufficiently strong likelihood of success on an equal-protection claim to weigh in favor the district court’s grant of a preliminary injunction.” *Hunter, et al. v. Hamilton County Bd. of Elections, et al.*, Case Nos. 10-4481; 11-3059/3060 at p. 24 (6th Cir. Jan. 27, 2011) (“Opinion”). The panel based its decision in substantial part on the decisions by the Hamilton County Board of Elections 1) to count 27 provisional ballots that were cast at wrong precincts at the Board of Elections because of poll worker error and 2) to reject the 269 votes that were cast in the wrong precincts at correct polling locations in multi-precinct voting locations because of poll worker error.

The panel held that the Board of Elections “considered evidence of the location where the ballots were cast in concluding” that the 27 votes that were cast at the Board of Elections office “[w]ere miscast as a result of poll-worker error.” *Id.* The Board concluded that “[t]he cause of casting the ballots in the wrong precinct must

be poll-worker error because, under the Board's logic, 'the voter had no choice but to walk up to just one person.'" *Id.* at 25. The panel held that the disparity in treatment occurred because the Board of Elections did not consider the location of the uncounted 849 provisional ballots; for instance, that it did not separate out the 269 ballots that were cast in multi-precinct polling locations. As the panel stated, the voters who cast ballots at the multi-precinct polling locations "[w]ent to the correct location and the poll workers were required to direct voters to the correct precinct," like the voters who cast provisional ballots at the Board of Elections office. *Id.* As the panel concluded, "[f]or the 27 provisional ballots cast at its office, the Board considered the location where the ballots were cast as evidence of poll-worker error, but for the 269 provisional ballots cast at the right polling location but wrong precinct, the Board did not." *Id.* at 26.

The panel also stated that the Board of Elections treated the 27 voters differently than the other provisional voters because of a "[l]ocal misapplication of state law," that "[d]oes not permit the consideration of poll-worker error with respect to ballots cast in the wrong precinct...." *Id.* But there was still an Equal Protection violation because "[t]he Board exercised discretion, without a uniform standard to apply" in counting the 27 votes cast at the Board of Elections office and rejecting the 269 votes cast at multi-precinct locations. *Opinion*, at 27.

The panel also found that there were Due Process concerns for disenfranchising voters who are directed to the wrong precinct by poll workers. The panel stated that, “[t]o disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair.” *Id.* at 35. The panel, however, concluded that this due process issue of whether to disenfranchise voters who were victims of poll worker errors should be considered in the first instance by the trial court. *Id.*

The panel held that the trial court did not abuse its discretion in granting the preliminary injunction on November 22, but vacated the order of January 12. *Id.*, at 38.

Judge Rogers concurred in the judgment and “largely” agreed with “much of the majority opinion.” *Id.* at 42. Judge Rogers questioned whether there “[i]s a strong likelihood of success” on the merits of the Equal Protection claim, but he did not state that the trial court’s injunction of November 22 was erroneous or should be vacated. *Id.* Judge Rogers stated that, “[a]ssuming that the district court’s November 22 order properly determined the likelihood of success on the Equal Protection claim, however, I agree that the court’s January 12 order must be vacated for the reasons given by the majority.” *Id.* at 43. Judge Rogers also pointed out that the Ohio Supreme Court “[c]ontemplated *compliance* with the district court’s November 22 order” and advised the trial court on how to fashion future orders that were consistent

with its November 22 order and the “roadmap outlined by the Ohio Supreme Court” in *State ex rel. Painter v. Brunner*, 2011-Ohio-35, 2011 WL 115596 (Ohio 2011); Opinion, pp. 42-43 and n.1, Rogers, J., concurring (emphasis in Opinion).

### **III. WHY THE NAACP OPPOSES GRANTING *EN BANC* REVIEW**

The NAACP opposes granting *en banc* review of the panel’s decision. This Court must deny the petitions for rehearing *en banc* and allow the trial court to fashion a remedy to implement the preliminary injunction of November 22, 2010, as the panel ordered.

#### **A. The Possible Disenfranchisement of African Americans**

The NAACP is particularly concerned with the possible disenfranchisement of African American voters if rehearing is granted and the trial court’s decision reversed. Following the trial court’s November 22, 2010 order, Timothy Burke and Caleb Faux, Hamilton County Board of Elections Board members, conducted an investigation of the 849 voters who cast provisional ballots in the wrong precincts. Their study concluded that 249 of the provisional voters voted in the correct voting location but in the wrong precinct, which they referred to as the “right church, wrong pew voters.” Faux and Burke have stated in a brief to this Court that:

[w]hen such a record is developed, it will become clear that the great majority of the ‘right church, wrong pew’ voters, who so far have been denied the right to have their vote counted, **are in the poor, less well-educated minority, frequently African American precincts of**

**Hamilton County.** In short, the penalty for arriving at the right polling place, but being directed by poll workers to the wrong table, has a disparate impact on the poor and minorities.

Defendant-Appellees Caleb A. Faux and Timothy M. Burke's Brief in Support of the District Court's Order, *Hunter v. Hamilton County Board of Elections*, Case Numbers 11-3059, 11-3060 (6th Cir. Jan. 19, 2011), pp 3-4.(emphasis added) Furthermore, the panel of this Court stated in this case that "[p]laintiffs assert that 'the polling places where most of the error-infected provisional ballots were cast are in African American areas of Hamilton County.' It appears, then, that the exclusionary rule in this case may accrue **to the detriment of a protected class.**" Opinion, p. 35, n. 24. (citation omitted) (emphasis added).

**B. Remand Will Allow For Further Investigation**

The NAACP believes that on remand there should be an investigation in the trial court to determine whether the voters whose provisional votes have been rejected come from African American communities, which would constitute an additional violation of the Equal Protection Clause. There might also be a determination of whether disenfranchising persons who cast ballots at the correct location but incorrect precinct because of poll worker error violated the Due Process Clause of the Fourteenth Amendment.

**C. An Equal Protection Violation May Occur Absent Purposeful Discrimination**

The Petitioners and amici in support of the petitions argue that there can be no Equal Protection violation, because there was no intentional, purposeful discrimination. However, the Supreme Court decision in *Bush v. Gore*, 531 U.S. 98 (2000), which must control the analysis in this case, requires no purposeful discrimination. As the panel stated, the Supreme Court decision in *Bush v. Gore* held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” Opinion, p. 21, quoting *Bush v. Gore*, 531 U.S. at 104-105. See, Opinion, p. 21, n. 13. Therefore, as the Supreme Court and the panel in this case concluded, there is a violation of Equal Protection if election processes result in “‘arbitrary and disparate treatment’ of votes”-i.e. if an arbitrary decision by election officials results in counting some votes and not counting other votes that are similarly situated. This Court has used the same Equal Protection analysis in a recent voting rights case, a fact ignored by petitioners and amici in their discussions of whether the Board’s processes resulted in an Equal Protection violation. See, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) and Opinion, p. 21.

In this case, the Hamilton County Board of Elections chose to count the votes of 27 people who voted provisional ballots at the Board of Elections but did not vote in the proper precinct but chose to not count the votes of 269 people who voted in the

correct location but in the wrong precinct. Both sets of voters are similarly situated. The 27 and 269 voters went to the correct voting location, and both sets of voters voted in the wrong precinct because of poll worker error. The poll workers at the voting locations were required to direct voters to the proper precinct. If the voter's precinct was in the building in which the voter showed up to vote, the voter could only have voted in the wrong precinct because of poll worker error. More succinctly stated, if the poll worker had done his or her job, he or she would have directed the voter to the proper table.

This case is similar to *Bush v. Gore*, because the difference in counting votes was post-election; the differential treatment was based on administrative decisions by boards of elections; and the boards exercised discretion, without any uniform standards, in deciding which votes to count. See, Opinion, p. 22.

**D. The Panel's Decision is Not Contrary to Ohio Supreme Court Decisions**

Contrary to what petitioners and amici assert, the panel's decision is not contrary to decisions of the Ohio Supreme Court. The panel took it for granted, as the Ohio Supreme Court held in *State ex rel. Painter v. Brunner, supra*, that Ohio law did not permit poll worker error to allow Boards of Elections to count votes that were cast in a precinct in which the voter did not reside. The panel then decided that the Board's counting some votes based on a misapplication of state law and not counting

other votes constituted an Equal Protection violation. The Ohio Supreme Court did not decide whether there was an Equal Protection violation, only that counting the votes was contrary to State law. In fact, Judge Rogers in his concurring opinion pointed out that the decision in *Painter* was not contrary to the lower court's finding an Equal Protection violation and that the Ohio Supreme Court in *Painter* "explicitly contemplated *compliance* with the district court's November 22 order."

**E. Disenfranchising Voters, Particularly Minority Voters, is not a Minor Matter**

Furthermore, that this case involves only hundreds of votes when hundreds of thousands of votes were correctly counted does not minimize the Equal Protection violation. There are still hundreds of voters who went to the correct voting location whose votes would not be counted if the district court's November 22 decision is overturned. Those hundreds of voters are entitled to have their votes counted, particularly because their votes might determine the outcome of the election.

Contrary to what petitioners and the amici assert, the decision of the panel does not have statewide implications, unless other boards of elections decide to treat similarly situated voters differently. This case involved one election in one county in Ohio, and the votes are final in the rest of the State. As the Supreme Court stated in *Bush v. Gore*, its decision, as was the panel's decision in this case, was "limited to the present circumstances, for the problem of equal protection in election processes

generally present many complexities.” *Bush v. Gore*, 531 U.S. at 109.

The argument that the panel’s decision in this case would lead to a “flood of election-related litigation” has no basis in fact and is typically made when a litigant is dissatisfied with a court’s pronouncement on constitutional issues. In fact, the decision would provide direction to boards of elections to not arbitrarily deny whole groups of persons the fundamental and equal opportunity to exercise their right to vote.

Disenfranchising an entire group of voters, particularly if the group is minority, is not *de minimus* (see amicus of Ohio Republican Party, p. 5), and boards of elections must be careful not to disenfranchise a whole group of voters based on an arbitrary decision by a board of elections.

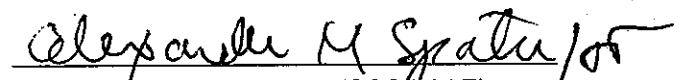
Contrary to what petitioners and amici in support of the petitions assert, “uncounting” the 27 votes will not solve the Equal Protection problem. Hunter presented the trial court with evidence that 686 provisional ballots that had contradictory information regarding voter identification were counted and that there were other ballots that were counted, although poll worker error was responsible for defects in the ballots. See, Complaint, Exhibit B (transcript of Board of Elections meeting), pp 29-32, 71-72 and Opinion, p. 37. As the panel stated, “unlike the 27 ballots cast at the Board of Elections, these other categories of ballots that were

counted cannot be identified and uncounted.” Furthermore, it is fundamentally unfair to try to remedy a violation of Equal Protection in voting by disqualifying additional voters. A more equitable solution would be to count the votes of persons who voted at the right location and who had been rejected because of the mistakes of Board employees. This is particularly so when the rejection of the provisional votes in question might discriminate against African Americans.

#### IV. CONCLUSION

A rehearing *en banc* must be denied. This Court should allow this case to be remanded to the trial court to fashion a remedy as ordered by the panel, determine whether the decision to disqualify voters based on poll worker error discriminated against persons on account of race, and whether Ohio law that allows boards of election to disenfranchise citizens because of errors committed by their employees violates the Due Process Clause of the Fourteenth Amendment. As the panel noted, it should be for the trial court in the first instance to consider and decide whether Ohio law violates the Due Process Clause.

Respectfully submitted,



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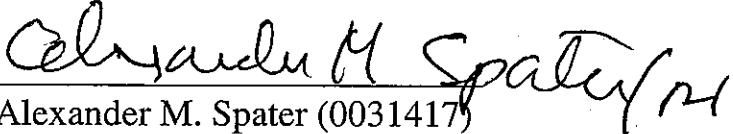
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**FED.R.APP P.29(c) CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 29(c), the undersigned certifies (1) that the foregoing brief was not authored in whole or in part by a party's counsel, (2) that none of the parties or their counsel contributed money intended to fund the preparation or submission of the foregoing brief, and (3) that no person contributed money intended to fund the preparation or submission of the foregoing brief.

  
Alexander M. Spater (0031417)

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion to File Amicus Curiae Brief of Cincinnati Branch of the NAACP in Opposition to Appellants' Petitions for Rehearing *En Banc* was filed with this Court on the 28th day of February, 2011. Notice of this filing will be sent to the attorneys of record by operation of the Court's electronic filing system.

  
Alexander M. Spater (0031417)