

EXHIBIT A

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

**TENDERED
FOR FILING**

FEB 10 2011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

TRACIE HUNTER, et al.,
Plaintiffs-Appellees,

FILED

MAR 11 2011

v.

LEONARD GREEN, Clerk

HAMILTON COUNTY BOARD OF ELECTIONS,
Defendant-Appellant,

and

JOHN WILLIAMS,
Intervenor-Appellant.

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

**AMICUS CURIAE BRIEF OF OHIO REPUBLICAN PARTY IN SUPPORT
OF APPELLANTS' PETITIONS FOR REHEARING *EN BANC***

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INTRODUCTION

This is a case of exceptional importance that cries out for *en banc* review. There exists a disturbing trend in Ohio in which litigants run to federal court to seek relief for garden variety election irregularities. This case continues that trend and underscores the need for judicial restraint. Otherwise—as has now become painfully obvious—federal courts will operate as *de facto* super-boards of election, reviewing every facet of a state election and directing boards of elections which votes it must and must not count.

By transforming a minor error of state law into a constitutional violation, the panel's opinion not only follows this unfortunate path, but makes the Sixth Circuit an outlier in federal equal protection jurisprudence. Virtually every other circuit court of appeals has followed the settled rule that ***garden variety election irregularities where there is no intentional, purposeful discrimination do not rise to the level of a constitutional violation.*** Indeed, this is the law in the:

- First Circuit: See *Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 828 (1st Cir. 1980) (rejecting equal protection claim where ballots were counted even though arguably not cast in accordance with Puerto Rico law); *Rossello-Gonzalez v. The Puerto-Rico Electoral Commission*, 398 F.3d 1 (1st Cir. 2004) (rejecting federal claims based on the way the Commission counted ballots in a local election);
- Second Circuit: See *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970) (finding no constitutional violation for mistakenly allowing 1,232 non-Democrats to vote in the Democratic primary where margin of victory was 150 votes); *Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996) (finding human error in the counting of ballots does not rise to the level of a constitutional violation);

Shannon v. Jacobwitz, 394 F.3d 90, 95-96 (2d Cir. 2005) (indicating that one must show a state actor acted intentionally to impair a citizen's right to vote before a constitutional question arises); *Gelb v. Bd. of Elections of the City of New York*, 155 Fed. Appx. 12 (2d Cir. 2005) (finding that the Board's erroneous interpretation of state law did not lead to a finding that the Board had acted intentionally for the purpose of discriminating against write-in voters);

- Fourth Circuit: See *Hutchinson v. Miller*, 797 F.2d 1279, 1283, 1286-87 (4th Cir. 1986) (Wilkinson, J.) ("circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities"); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (rejecting constitutional claim for worker's "simple negligence" that caused ballots' noncompliance with state law);
- Fifth Circuit: See *Gamza v. Aguirre*, 619 F.2d 449, 453-54 (5th Cir. 1980) (holding that negligence and "human error" in counting votes not actionable in federal court because "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"); *Welch v. McKenzie*, 765 F.2d 1311, 1317, *vacated on other grounds and remanded*, 777 F.2d 191 (5th Cir. 1985) (rejecting equal protection claim based on illegal casting of 115 absentee ballots where only 19 votes separated candidates); *Johnson v. Hood*, 430 F.2d 610, 612-13 (5th Cir. 1970) (holding that arbitrary rejection of 10 ballots in election decided by six votes was a garden variety election irregularity that does not implicate federal constitutional claim);
- Seventh Circuit: See *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 343 (7th Cir. 1987) (Easterbrook, J.) (board's "slapdash job of administering [election] law" does not transform election disputes into a federal constitutional claim absent intentional discrimination); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270 (7th Cir. 1986) (no validity to § 1983 claim after applying "well settled" law for election "malfunctions" in suit involving accuracy of vote count); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975) (Section 1983 only implicated when there is "willful conduct . . ."); *Parra v. Neal*, 614 F.3d 635, 637-38 (7th Cir. 2010);
- Eighth Circuit: See *Pettengill v. Putnam Cty. School District, Unionsville, Missouri*, 472, F.2d 121 (8th Cir. 1973) (rejecting claim that board violated plaintiff's equal protection rights by counting illegally cast votes);

- Ninth Circuit: See *Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998) (“garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election”); and
- Eleventh Circuit: See *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) (finding that the fact that a “small number of contested ballots (forty-nine) slipped through is of no consequence” and not an equal protection violation); *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986) (court rejected equal protection claims where a massive “crossover” vote in the Alabama Democratic primary resulted in over 14,000 illegally cast votes being counted).¹

En banc reconsideration is also warranted because the panel’s opinion is inconsistent with this Court’s prior decision in *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991).

ARGUMENT

A. There Is No Equal Protection Violation

The district court’s finding of an equal protection violation is premised entirely on its comparison of 27 provisional ballots cast prior to Election Day at the Board’s office with 849 provisional ballots cast in the wrong precinct on Election Day in neighborhood polling locations. When considering these two categories of ballots shortly after the election, the bipartisan Hamilton County Board of Elections (“Board”), having determined that the situations were sufficiently different, unanimously decided to count the 27 ballots and not to count the others.

¹ The Third and Tenth Circuits do not appear to have addressed this issue directly. However, a district court in the Third Circuit recently refused to interfere in an election dispute over the counting of absentee ballots, in part because there was no allegation or evidence of intentional misconduct). See *Oh v. Philadelphia Cty. Bd. of Elections*, 2008 U.S. Dist. LEXIS 101656, *12-13 (E.D. Pa., Oct. 31, 2008).

Although the district court found these categories of ballots to be similar, it ultimately concluded that the 27 ballots were mistakenly counted. (R.13, Nov. 22, 2010 Order, p. 2; *see also* R.39, Jan. 12, 2011 Order, p. 2.) Regardless of whether the Board is correct (i.e., the ballots are dissimilar) or the district court is correct (i.e., the ballots are similar and the 27 cast at the Board were mistakenly counted), the result is the same—there is no equal protection violation.

1. Equal Protection Jurisprudence Is Not Implicated Where Provisional Ballots Are Not Similarly Situated.

In his concurrence, Judge Rogers properly concluded that the only two categories of ballots that were the subject of the district court's orders—the 27 ballots cast at the Board of Elections prior to election day and the “much larger number of ballots”² cast in neighborhood polling locations on election day—were not similarly situated for purposes of equal protection analysis. (Opinion (“Op.”), p. 42, “The situations were sufficiently different that a bipartisan elections board unanimously counted the votes in the former situation, but did not count the votes in the latter situation.”) That the 27 ballots cast at the Board of Elections were not similarly situated to the others was so inescapable to the bipartisan Board that it voted 4-0 to count them and voted 4-0 not to count the other provisional ballots at issue. Thus, these two groups of ballots are sufficiently dissimilar so as to conclude

² Judge Rogers did not specify whether he was referring to the 850 ballots initially at issue or a subset of these ballots, such as the 269 ballots cast in polling locations with multiple precincts.

that the equal protection clause does not require them to be treated the same.

2. There Is No Equal Protection Violation Because There Has Been No Showing Of Intentional, Purposeful Discrimination.

Even assuming *arguendo* that the two groups of ballots at issue were similarly situated, the equal protection clause is still not implicated. The Supreme Court held over 60 years ago that the maladministration of an election by state officials is not an equal protection violation absent a showing of *intentional, purposeful discrimination*. See *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

In *Snowden*, the United States Supreme Court held that the equal protection clause generally does not protect citizens from unfair applications of neutral state laws: “*an erroneous or mistaken performance of [a] statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.*” *Id.* at 8 (emphasis added). The Supreme Court went on to explain the “more” that is required is *intentional or purposeful discrimination*:

The unlawful administration by state officers of a *state statute* [that] is 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 shown to be present in it an element of intentional or purposeful discrimination.* * * * A discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination.

Id. (emphasis added).

The panel decision suggests that *Snowden* is no longer good law or that it has been weakened by subsequent decisions. (Op., p. 21, n. 13, “[W]e reject

ORP's argument that there can be no violation of the Equal Protection Clause here without intentional discrimination"). But in the decades since *Snowden* was decided, this principle has become bedrock equal protection law.³ In fact, *Snowden* has been favorably cited or relied upon by federal courts 200 times in the last decade alone.

This Court has followed *Snowden* on numerous occasions, likewise holding that a mere violation of state law does not constitute a violation of equal protection. *See, e.g., Charles v. Baesler*, 910 F.2d 1349, 1357 (6th Cir. 1990) ("Charles may be correct in arguing that the government and its officials in fact singled him out due to their sloppy administration of the contractual promotion system and their misapplication of state and local law. Such negligence is a far cry, however, from intentional invidious discrimination") (citing *Snowden*).

In dismissing the argument that intentional or purposeful discrimination is required to establish an equal protection violation here, the panel specifically relied

³ *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 262, 265 (1977) (holding proof of discriminatory intent or purpose is required to show a violation of equal protection); *see also Sylvania Development Corp. v. Calvert County, MD*, 48 F.3d 810, 825 (4th Cir. 1994) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim."); *Rickett v. Jones*, 901 F.3d 1058 (11th Cir. 1990) ("No human institution is perfect Occasional or random errors in application of state law will occur; but such errors do not constitute state policy, and they do not offend the equal protection clause of the federal Constitution. Merely negligent conduct is insufficient to support a claim for denial of equal protection.").

upon *Williams v. Rhodes*, 393 U.S. 23, 30, 34 (1968) and *Bush v. Gore*, 531 U.S. 98, 104-05 (2000), as cases in which “a showing of intentional discrimination [was] not required.” *Id.* But intentional discrimination was not required in those cases because *Snowden* was not implicated. These cases are simply inapposite to the present controversy.

State election statutes may be challenged under the Equal Protection Clause either on their face or as applied by state officials. As the Court held in *Williams*, the Equal Protection clause only prohibits “invidious” discrimination, not “every minor difference in the application of laws to different groups.” *Williams*, 393 U.S. at 30. Thus, state statutes that, on their face, disproportionately burden a minority group’s right to vote raise particular concerns about invidious discrimination and are subject to strict scrutiny. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 172, 183 (1978); *Williams*, 393 U.S. at 31.

But if a statute is facially neutral, it is subject to a lesser degree of scrutiny, and will not violate the Equal Protection Clause unless there is evidence of intentional, purposeful deprivation of the right to vote. *Green Party of the State of New York v. Weiner*, 216 F. Supp. 2d 176, 186-87 (S.D.N.Y. 2002). *Snowden* holds that establishing this type of claim requires clear affirmative evidence of intent since “uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents intentional or

purposeful discrimination.” *Snowden*, 321 U.S. at 8. Mere negligence or incompetence by state election officials, absent evidence of intent, does not constitute an equal protection violation. *Washington v. Davis*, 426 U.S. 229 (1976).

Accordingly, the panel’s disregard of *Snowden* and reliance on *Williams* and *Bush* is erroneous. *Williams* did not concern a case of “unlawful *administration* by state officers of a state statute [that was] fair on its face, resulting in its unequal application.” Rather, it was a facial challenge to a state statute and, thus, sought to eradicate invidious discrimination present in the statute itself. *Williams* did not implicate *Snowden*, which only concerns whether there has been a misapplication of an otherwise fair and neutral state statute.

Reliance on *Bush* is also misplaced. In *Bush*, the Supreme Court was not concerned with a state *statute* at all, neutral or otherwise. It was concerned with a state court’s issuance of a statewide recount standard that did not have minimal procedural safeguards for fairness. *Bush*, 531 U.S. at 109. Thus, *Bush* is outside the *Williams* line of cases (dealing with a facial challenge to a state statute) and the *Snowden* line of cases (dealing with a challenge to an erroneous performance of a duty under an otherwise fair state statute).⁴

⁴ *Bush* is also distinguishable because the Supreme Court made clear that that case was decided on extraordinary facts, and thus its holding “is limited to the present circumstances”—a standardless statewide recount in a Presidential election. *Bush*,

Where, as here, the situation concerns a state official's erroneous application of a neutral state *statute*,⁵ the intent requirement of *Snowden* applies. Accordingly, in order to demonstrate a likelihood of success on her equal protection claim, Hunter was required to submit clear evidence tending to show the Board's decisions regarding which provisional ballots to count was the product of intentional or purposeful discrimination, not a mere mistake.

But no intentional or purposeful conduct was alleged in the Complaint; Hunter only alleged the Board had acted "arbitrarily and knowingly" in failing to investigate why certain provisional ballots were cast in the wrong precinct. (R.1, Compl., ¶ 38.) And the record is clear that the Board's decision was not based on an unlawful intent to discriminate, but on an honestly-held interpretation of Ohio law. (R.18, Tr., pp. 88-132.) Indeed, the district court's January 12 order held the Board had acted with good intentions. (R.39, Jan. 12 Order, at 6, 8.) Accordingly, since no intentional discrimination exists, and at most a mistaken misapplication of Ohio law, the Board's conduct does not amount to an equal protection violation.

B. Counting More Unlawful Ballots Creates Larger Equal Protection Problems.

Noticeably absent from the panel's opinion is any authority indicating it is

531 U.S. at 109; *see also The Green Party of the State of New York*, 216 F. Supp. 2d at 193 (referring to *Bush* as something of a "one-day ticket").

⁵ Ohio statutes that provide ballots must be cast in the correct precinct include: R.C. §§ 3503.01(A), 3505.182, 3505.183(B)(4)(a)(ii) and 3599.12.

appropriate to remedy a claimed equal protection problem by ordering state officials to count *more* unlawful ballots, and thus to further violate state law. In fact, doing so is exactly what the *Bush* Court said was improper.

By ordering the counting of invalidly cast provisional ballots, the district court has turned a minor case of disparate treatment into one of statewide proportion. Despite acknowledging that votes cast in the wrong precinct do not count under Ohio law, the district court ordered that 849 provisional ballots cast in the wrong precinct should be investigated and counted if they were so cast as result of poll worker error. (R.13, Order, p. 9.) *See also State ex rel. Painter v. Brunner*, slip op. 2011-Ohio-35, 2011 Ohio LEXIS 20 (Jan. 7, 2011). But ordering the counting of hundreds of additional invalidly cast ballots only trades a small equal protection problem for a larger one.

The Hamilton County Juvenile Court Judge race was not the only race on the provisional ballots at issue. Those ballots contained other races that were part of the November 2010 election, such as races for United States Senator and Governor. The 269 provisional ballots no doubt contain votes for these other “up ticket” races. By requiring investigation for poll worker error and counting of votes cast in the incorrect precinct, the district court failed to consider whether other counties in Ohio treated provisional ballots the same way. Statewide equal protection problems arise where Hamilton County investigates and counts these

other ballots and other Ohio counties do not. Even the panel majority appeared to agree this creates a *Bush* type of disparate treatment problem. (Op., p. 32.)

The panel chose to dismiss this obvious problem out of hand. The panel held that this unequal treatment of Hamilton County ballots vis-à-vis other counties in Ohio was not a problem because no other 2010 statewide race was close and the election is now over. (Op., p. 32.) This shocking conclusion suggests that the Court is willing to remedy the 27 ballot equal protection problem by treating tens of thousands of other provisional ballots cast around Ohio less favorably so long as the election is not close. *Cf. Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1359, 1380-81 (S.D. Fla. 2004).

Although not an election case, this Court's decision in *Vandiver v. Harden County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991) is instructive and should be followed. The *Vandiver* plaintiffs alleged that a board of education violated the equal protection clause by requiring a student to pass an equivalency examination in order to earn credit for his religious home schooling program. This exam was required by state law, but had not always been followed. The record reflected that the principal had not required previous transferring students to take an equivalency examination on the mistaken belief that the students were transferring from accredited schools. In rejecting plaintiffs' equal protection claim, this Court held:

Though the decision to grant credit for prior course work to other transferees thus appears to have been based upon a mistake of fact, *we*

*see nothing in the equal protection clause which requires us to compound the principal's error by forcing the school district to grant a similar exception in Brian's case now that the error has been discovered. * * * the equal protection clause was not designed to remedy inadvertent distinctions, even among similarly situated persons.*

Id. at 931 (emphasis added).

The district court and the panel ignored this well established body of law in holding that additional invalid ballots must be counted to “remedy” the 27 ballots that were counted based on a mistaken view of Ohio law. The remedy ordered by the district court does not actually fix the alleged disparate treatment at issue; it just makes the error worse.

C. The Decision In This Case Will Have A Disastrous Effect On Future Elections.

The panel has effectively held that any mistake of state law in the administration of an election—no matter how *de minimis* and no matter how innocent—will result in an equal protection violation. In other words, election officers are held to a strict standard of perfection.⁶

⁶ See *Powell*, 436 F.2d at 88 (internal citations omitted) (“ . . . while [federal law] may outlaw purposeful tampering by state officials with the conduct of a primary election * * *, we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error.”); *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) (“The problem with the district court’s standard is that *any* departure from state law would give rise to a constitutional claim. . . . if local government decisionmakers correctly applied a facially neutral resolution in hundreds of cases and erroneously applied it in a single case, they could never again apply it correctly without violating equal protection.”).

Thus, in future elections, one can reasonably foresee that candidates on the losing end of close elections—those where the candidate’s margin of defeat is less than the number of uncounted provisional votes—will go searching for instances where county boards of election handled provisional ballots in a manner they believe inconsistent with state law. They will then challenge the acceptance or rejection of other ballots—both in the same county and perhaps throughout Ohio—based on a claim that they are similarly situated.

It is not hard to see how every fairly close state election will become a federal lawsuit. And candidates will cite this case as the authority for that course of action. After all, for the losing candidate, what is the risk in attempting to make a “federal case” out of a close electoral loss?

D. What This Court Could Do

1. Ohio Law Provides An Adequate Remedy To Hunter.

Generally, federal courts are unlikely to interfere in a state election dispute where there is an otherwise adequate state law remedy. *See Gold*, 101 F.3d at 802; *Hutchinson*, 797 F.2d at 1284; *Angel v. Fairfield*, 793 F.2d 737 (5th Cir. 1986); *Pettengill*, 472 F.2d at 123; *Roberts v. Wamser*, 883 F.2d 617, 623 (8th Cir. 1989).

Where ballots are counted merely under a mistaken view of state law, the remedy is an election contest to remedy the mistake of state law. Under Ohio law, following a recount, the losing candidate may proceed to contest the results of an

election. R.C. 3515.08-16. In fact, this is a speedy remedy that if pursued by Hunter would have permitted this race to be resolved by now. *See* Ohio R.C. 3515.10. The Ohio Supreme Court has held that this election contest procedure is “the specific remedy provided by statute for the correction of all errors, frauds, and mistakes which may occur in a [state] election.” *State ex rel. Shriver v. Hayes*, 76 N.E.2d 869, paragraph two of the syllabus (Ohio 1947); *see also In re Election of Member of Rock Hill Board of Education*, 669 N.E.2d 1116, 1123 (Ohio 1996).

Hunter has an adequate state law remedy—an election contest—that obviates her federal constitutional claims. Judge Rogers correctly noted that where differential treatment is “predicated on a mistaken view of the law,” “there should be 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.” *Id.*

2. Conform The Remedy To *Painter*.

Assuming *arguendo* that the district court’s November 22, 2010 order was correct, another alternative is for this Court to order the district court to follow the guidance provided by the Ohio Supreme Court in *Painter*. The November 22 order merely ordered the Board to investigate the 849 provisional ballots and count those that were voted in the wrong precinct because of poll worker error, but left to the State to determine how to conduct that investigation and what constitutes poll

worker error. In *Painter*, the Ohio Supreme Court provided explicit instruction on how to comply with the district court's order. It indicated the Board should conduct the same investigation it performed in deciding to count the 27 ballots cast at the Board's headquarters—examine poll books, help-line records, and provisional ballot envelopes. *Painter*, 2011-Ohio-35, *21-22.

As Judge Rogers correctly noted, federal courts should strive to minimize their control of state elections. This goal could be met—while remedying the alleged disparate treatment at issue—by merely “conforming any further relief . . . to the roadmap outlined by the Ohio Supreme Court.” (Op., pp. 43-44.) Following this course respects federalism while providing the narrowest way to remedy the problem at hand.

Respectfully submitted,

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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—other than the Ohio Republican Party, its members, or its counsel—contributed money intended to fund the preparation or submission of the foregoing brief.

/s/ Anne Marie Sferra

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been filed electronically with this Court, via the Court's CM/ECF system, on February 10, 2011. Notice of this filing will be sent to the attorneys of record by operation of the Court's electronic filing system.

/s/ Anne Marie Sferra

Anne Marie Sferra