

EXPEDITED REVIEW REQUESTED

APPEAL NO. 10-4481

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

TRACIE HUNTER, Committee to Elect Tracie M. Hunter for Judge,

Plaintiff – Appellee

**NORTHEAST OHIO COALITION FOR THE HOMELESS; OHIO
DEMOCRATIC PARTY,**

Intervenors – Appellees

v.

HAMILTON COUNTY BOARD OF ELECTIONS, et al.,

Defendants

and

JOHN WILLIAMS,

Intervenor – Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 1:10-cv-00820
The Honorable Susan J. Dlott

REPLY BRIEF OF INTERVENOR-APPELLANT JOHN WILLIAMS

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**U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Under 6th Cir. Rule 26.1, Intervenor-Appellant John Williams makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?
NO.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO.

Executed on January 4, 2010.

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INTRODUCTION

Intervenor-Appellant John Williams established in his opening brief that the trial court's preliminary injunction is wholly improper. The trial court erred in taking up this case in the first instance, erred in finding that an Equal Protection violation likely occurred, and erred in entering a preliminary injunction. In response, Plaintiff Hunter ("Hunter") and her supporting Intervenors Northeast Ohio Coalition for the Homeless and Ohio Democratic Party (collectively, "NEOCH") rely mostly on unsubstantiated and extra-record assertions while ignoring much of Mr. Williams' legal argument.¹ But what is now apparent, even if one were to accept Appellees' assertions as true, is that there was no constitutional violation committed by the Hamilton County Board of Elections here and that Mr. Williams has been rightly certified as the winner of this election in accordance with the Board's determination, which it made prior to the unjustified investigation into poll worker error that it undertook under the district court's order.

¹ Indeed, much of the "evidence" that Plaintiff cites was attached to R.20 Motion for Order to Enforce Preliminary Injunction Order, which was filed after the trial court issued the preliminary injunction and therefore was not considered by the court. (*See* Hunter at 38, Designation of Relevant District Court Documents.)

ARGUMENT

I. The District Court Erred in Taking Up This State Elections Case in the First Instance

Mr. Williams established that this matter does not belong in federal court to begin with. The Constitution “leaves the conduct of state elections to the states,” and even where jurisdiction exists, abstention may be required to give the state courts “the first chance to bring the state [action] into compliance with constitutional law.” *See Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 553, 559 (6th Cir. 2010) (citations and internal quotations omitted) and *Gottfried v. Medical Planning Servs., Inc.*, 142 F.3d 326, 333 (6th Cir. 1998) (citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)), respectively. Plaintiff even recognizes that the “federal courts should not be asked to count and validate ballots and enter into the details of the administration of the election.” (Hunter at 18, quoting *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008)). Yet Plaintiff ignores those words and asks the federal courts to do exactly what this Court has said they cannot – delve into the administrative investigation of wrong-precinct provisional ballots and count certain ballots. (R.13 Order at 8.)

This case is premised on state law questions – to the extent the trial court had jurisdiction, it should have abstained to allow the state courts resolve its state elections laws. In her response brief, Plaintiff tries to disavow the state law

premise of her claims. Plaintiff alleges that Mr. Williams is “re-characterizing” her claims so as to manufacture a state law issue and states that “there is no state law in question.” (Hunter at 19.) Plaintiff’s position is belied by the allegations in her Complaint. (*See, e.g.*, R.1 Complaint, ¶¶17, 19, 31.) And now in her brief, Plaintiff alleges specifically that the investigation that the Board undertook for poll worker error was “inadequate.” (Hunter at 26.) But the adequacy or inadequacy of the Board’s investigation is a state law question, especially given that Plaintiff does not purport to make any argument that local boards of elections must investigate for poll worker error, in general, to satisfy some undefined federal constitutional minimum.

Intervenor NEOCH likewise recognizes that the state law questions underlie Plaintiff’s claims. For example, NEOCH believes that Plaintiff’s allegations concern a failure by the Board to follow Ohio law: “[Plaintiff] ... argues that Defendant Board failed to follow Secretary of State Directive 2010-74 by failing to examine and investigate [the rejected wrong-precinct provisional] ballots for poll worker error.” (NEOCH at 3.) Further, NEOCH itself contends that “Defendant Board did not comply with Ohio law governing the counting of ‘wrong precinct’ provisional ballots” (*Id.* at 19); “Defendant Board did not comply with Directive 2010-74 which implements the *NEOCH* Consent Decree” (*Id.*); “[the Board] voted to count all of the ballots even though neither Directive 2010-74 nor any other

provision of Ohio law mandated that it do so” (*Id.* at 28); and “Defendant Board failed to comply with Directive 2010-74 and therefore failed to follow Ohio law” (*Id.* at 36).

The reality is that this case is about state law. That fact is made further evident by the actions of the Ohio Secretary of State. Immediately after the district court’s order, the Ohio Secretary of State issued multiple directives related to what constitutes poll worker error, how to investigate for poll worker error, and whether ballots should be counted in the event of poll worker error, presumably under Ohio state law. (*See* Hunter, Addenda 1 (“Directive 2010-87”) and 2 (“Directive 2010-79”).) According to the Ohio Secretary of State, such directives were issued “in order to conduct the investigation ordered by Chief Judge Susan Dlott in *Hunter v. Hamilton Cty Bd. of Elections*, S.D. Ohio Case No. 1:10-cv-00820.” (Hunter, Directive 2010-87.) It is not evident from the face of the Complaint or Plaintiff’s merits arguments that any of those issues relate to federal law or the U.S. Constitution. What is evident is that these issues should be resolved within the state system and the procedures specifically set up under Ohio law for election contests.

Pullman and its progeny established that federal courts may be required to abstain even where jurisdiction exists. Intervenor NEOCH argues that the *Pullman* doctrine is inapplicable in this case because Plaintiff has not expressly asserted a

state law cause of action or challenged the constitutionality of a state statute.

(NEOCH at 35.) But that is irrelevant. What is important is whether resolution of a state law uncertainty² may obviate the constitutional concerns that Plaintiff did raise. *See Gottfried*, 142 F.3d at 331.

Mr. Williams established in his opening brief that the alleged constitutional concerns could be obviated by the state court's interpretation of Ohio provisional ballot laws. Plaintiff does not address this point other than to argue that there is no state law in question, which is simply untrue as shown above. (Hunter at 19.) This case does not belong in federal court.

Indeed, even the district court has now recognized that there is some role reserved for state law and state courts in this case. First, Plaintiff sought a post-injunction order from the district court to direct, with specificity, how to investigate the disputed ballots. (R.20 Emergency Motion to Enforce Injunction at

² That state law uncertainty in this case is shown in part by the conflicting Ohio Secretary of State statements before the Court. In a letter from the Ohio Secretary of State to Cuyahoga County Board of Elections in 2009, the Secretary of State states that wrong-precinct provisional ballots cannot be counted, even if the "identification envelopes ... contain notations indicating that the poll worker(s) directed the voter to the wrong precinct." (Merit Brief of Amicus Curiae Ohio Republican Party (hereinafter "ORP"), Ex. 1, at 1.) The Ohio Secretary of State concludes that "[t]he law does not provide any exception when the ballot is cast in the wrong precinct due to poll worker error." (*Id.*) This directly conflicts with the Ohio Secretary of State's directives issued following the trial court's order in this case. Now the Secretary of State says, for example, that "[a]ny of the 849 provisional ballots for which there is evidence that poll worker error caused the voter to cast the ballot in the wrong precinct shall be counted as provided in Judge Dlott's order." (Hunter, Directive 2010-87 at 3.)

4-5 (“Plaintiff requests this Court to issue an order directing the Board of Elections to investigate poll worker error by: (1) Reviewing all paperwork ... (2) Contacting all poll workers ... (3) Contacting provisional voters ...”).) But the trial court refused to enter that order.

Second, after Mr. Williams and another relator initiated proceedings in the Ohio Supreme Court to reject the Ohio Secretary of State’s attempts to direct the investigation in a manner that violates state law, Plaintiff sought the district court to enjoin the state court proceedings. (R. 29 Emergency Motion to Enjoin State Court Proceedings.) In rejecting that attempt, the trial court found: “It is within the province of the Ohio Supreme Court to determine whether Secretary of State Jennifer L. Brunner’s directives comply with state law governing election procedures, and this Court will not enjoin the Ohio Supreme Court from doing so.” (R.32 Order at 1.) In reality, this entire proceeding belongs in the state system.³

³ The Ohio Supreme Court case is styled *State ex rel. Painter v. Brunner*, Ohio S. Ct. Case No. 2010-2205. Relators argue that the Ohio Secretary of State has tried to force the Board to conduct an investigation that would violate state law. Importantly, relators assume the viability of the district court’s order at issue in this appeal but argue that the Secretary of State’s actions were not necessary to ensure compliance with that order and violate state law. Of course, should this Court reverse the district court’s original order, the entire investigation would become moot.

II. The Hamilton County Board of Elections Did Not Violate the Constitution In Conducting Its Investigations For Poll Worker Error With Respect To Provisional Ballots

A. There Is No Dispute That Wrong Precinct Ballots Should Not Be Counted Under Ohio Law.

Mr. Williams showed that under Ohio law, ballots cast outside of the proper precinct in Ohio are not to be counted, whether due to voter error, poll worker error, or something else. Indeed, this is the position that the Ohio Secretary of State's office took explicitly in late 2009. (*See* ORP, Ex. 1 at 1-2 (wrong-precinct provisional ballots “cannot be counted, even when an error by the poll worker caused the ballot to be cast in the wrong precinct”; “[t]he law does not provide any exception when the [provisional] ballot is cast in the wrong precinct due to poll worker error”).) Appellees do not dispute this point, except to say that some level of “special” treatment must be afforded to some voters as part of the NEOCH Consent Decree.⁴ But that small exception is not a part of Ohio law per se – it is not something that the Ohio legislature has ever adopted, for example. And the

⁴ Intervenor NEOCH says that the Ohio election code “does not address” poll worker error, which is just another way of acknowledging that there is no exception in Ohio law for counting geographically miscast provisional ballots for poll worker error. (NEOCH at 7.) Intervenor NEOCH also suggests that the Ohio Supreme Court recognized that poll worker error might be a basis for erroneous ballots in *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982, 991 (Ohio 2008) (NEOCH at 9.) But the Court did not address the miscasting of ballots in the wrong precinct (which presents a different situation than provisional affirmations) and the Court did not remand that case for any further proceedings. The Ohio Secretary of State's office certainly did not draw the same conclusion in 2009 that NEOCH does now. (*See* ORP, Ex. 1.)

NEOCH Consent Decree itself is explicitly subject to Ohio state law that might affect its terms. Consent Decree, Doc. 210, *Northeast Ohio Coalition for the Homeless v. Brunner*, No. 2:06-cv-896 (S.D. Ohio April 19, 2010), at 6 (“Those changes in Ohio law [to the Ohio voter identification laws or the Ohio provisional ballot laws] will supersede this consent decree and this decree will be automatically amended by operation of law to include those statutory changes.”).

But what is important is that, as a threshold matter, there cannot be an Equal Protection violation in this type of case given this background. Under Ohio law, none of the provisional ballots that were cast in the wrong precinct should have been counted. But simply because some of the miscast votes were counted does not mean that all miscast votes must be counted. That is the essence of the court’s decision in *Roe v. State of Alabama*, 68 F.3d 404 (11th Cir. 1995), which was discussed at length in Amicus Ohio Republican Party’s brief. *See also Vandiver v. Hardin County Board of Education*, 925 F.2d 927, 931 (6th Cir. 1990) (declining to “compound” an initial classification error because “the equal protection clause is not designed to remedy inadvertent distinctions, even among similarly situated persons”).

It is also telling on this point that every single one of the Equal Protection cases that NEOCH cites to support its argument involved a statewide law or, in the case of *Bush v. Gore*, statewide court decision. (NEOCH at 22-26.) But that is not

the situation here – which does not involve, for example, a statewide poll tax (*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)), election filing fee system (*Bullock v. Carter*, 405 U.S. 124 (1972)), or other statewide concern. It involves the actions of one county board of elections in one election implicating one local judicial race. As this Court noted in *Warf*, “[o]nly in extraordinary circumstances will a challenge to a state [or local] election rise to the level of a constitutional deprivation.” 619 F.3d at 559 (quoting *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (internal quotation omitted)). This case does not rise to that level.

B. The Board Did Not Violate Equal Protection

In any event, the Board’s actions here regarding poll worker error and provisional ballots did not violate Equal Protection. Plaintiff asserts that Williams is incorrect in saying that any classification in this case ought to be judged under a rational basis standard. Plaintiff questions Williams’ citation of *Burdick v. Takushi*, 504 U.S. 428 in support of that proposition. (Hunter at 27.) But that criticism is misplaced. *Burdick* simply shows that not every state action that touches on voting ought to be subject to heightened scrutiny under the Fourteenth Amendment. And consistent with that view, courts have applied rational basis review to Equal Protection claims related to voting while relying on *Burdick*. See, e.g., *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (rejecting Equal

Protection and Due Process challenges to touch-screen voting system). And Plaintiff leaves untouched Williams' citation to this Court's decision in *Mixon v. State of Ohio*, 193 F.3d 389, 402 (6th Cir. 1999), which applied rational basis scrutiny in a voting case.

Importantly, Plaintiff makes no actual argument as to why heightened scrutiny ought to apply here.⁵ Plaintiff argues that the Board's "arbitrary provisional balloting process" places a heavy burden on a provisional voter's right to have her vote counted. This case is not about the provisional balloting process. The question in this case is whether some voters impermissibly received a higher level of investigation for poll worker error than others received. It is at least one step removed from the votes themselves. Indeed, even Plaintiff acknowledges that the ballots themselves were treated the same once poll worker error was found – they were counted. So this case deals solely with how the investigation was conducted. This is not a case for heightened scrutiny. And even if heightened scrutiny were to apply, the Board's actions would meet that standard as shown below – namely, because the 849 wrong-precinct ballots were given the same investigation as the 26 ballots cast at the Board.

⁵ Plaintiff seems to rely generally on *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008). But that case, which involved a reversal of a trial court's granting of a motion to dismiss, does not identify the applicable scrutiny.

Williams specifically showed, regarding the group of voters that the trial court focused on in its order, that there was no constitutional problem with respect to how the 849 wrong precinct provisional voters were treated in relation to the 26 voters from the Board of Elections, given that the same investigation was conducted for both and that the unique circumstances at the Board led to the Board's conclusion regarding poll worker error.⁶ Plaintiff asserts that some number of the 849 received no review at all for poll worker error (Hunter at 23), but the undisputed record shows that this is false. (R.18 Hearing Tr. at 93, 98.) All of the envelopes were reviewed for poll worker error – a meaningful investigative step that is recognized by the Ohio Secretary of State.⁷ And Plaintiff has never alleged that the Board would have refused to conduct any additional investigation if warranted by an examination of the envelope.

⁶ In its brief, NEOCH references that 851 wrong-precinct provisional ballots were rejected and 27 ballots cast at the Board of Elections were counted. (*See, e.g.*, NEOCH at 27-32.) Williams (and Plaintiff) consistently refer to 849 wrong-precinct provisional ballots and 26 ballots cast at the Board because those are the numbers recited by the district court in its order and the ballot numbers provided in the testimony at the preliminary injunction hearing. (*See, e.g.*, R.13 Order at 3; R.18 Hearing Tr. at 90, 95.) It appears from the Board of Elections hearing transcript that 850 wrong-precinct ballots were rejected and 27 ballots cast at the Board were counted. (*See* R.1, Exhibit 3 at 35, 40-45.) But, the exact numbers notwithstanding, the important questions here relate to how these ballots were categorically treated.

⁷ *See* Directive 2010-74, at 12 (attached to R.1 Complaint as Exhibit A) (“Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts”).

Plaintiff misapprehends Williams' argument regarding the unique circumstances that surround early voting at the Board. Williams is not arguing that those circumstances per se would justify any differential treatment; rather, those unique circumstances explain why the Board was able to conclude, based on the exact same investigation that was given to the 26 voters as was given to the 849 voters, that no other explanation other than poll worker error could explain the miscast votes at the Board.

Importantly, Plaintiff does not dispute that the 849 voters received the same level of poll worker error investigation as the 26. Instead, she claims that this elevates "form over substance," which is, if nothing else, a concession that the "form" was the same for all. What she asserts is that this form of investigation was "inadequate." (Hunter at 26.) But the adequacy or inadequacy of the Board's investigation in the abstract cannot be the issue here and certainly cannot form the foundation of an Equal Protection violation. Hunter makes no argument that the Constitution requires a local board of elections to conduct a baseline level of investigation into poll worker error that would be "adequate." And if the argument is that the investigation is "inadequate" under Ohio law, then this case does not belong in federal court to begin with (as Williams argues *supra* at Section I).

With regard to the Board's decision to follow the additional investigatory steps required by the NEOCH Consent Decree, Plaintiff simply makes no

argument. Plaintiff makes general reference to certain additional steps that the Board took regarding “other” miscast ballots (Hunter at 13, 26), but it is clear that those are the specific steps that were taken by the Board with respect to the subset of voters covered by the NEOCH Consent Decree. Importantly, Plaintiff appears unwilling to argue specifically that those steps constitute an Equal Protection violation, nor does Plaintiff address any of the arguments that Williams has made on this point.

Plaintiff and NEOCH make reference to other alleged decisions by the Board to count votes that were miscast as a result of poll worker error. But those ballots (with the exception of the ballots cast at the Board, discussed above) were not ballots that should have been rejected for failure to be cast in the correct precinct. (*See* NEOCH at 12-13.) Those ballots had other issues – not related to whether the ballot was cast in the correct precinct. Plaintiff fails to establish that ballots not cast in the wrong precinct should form the basis for an Equal Protection violation for ballots that are cast in the wrong precinct. The hallmark of an Equal Protection violation is the arbitrary, differential treatment by the government of similarly-situated people. *See Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) (“The [Equal Protection] Clause embodies the principle that all persons similarly situated should be treated alike” (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985))). The relevant

universe of ballots here are the provisional ballots that were rejected for failure to be cast in the correct precinct.

Indeed, as NEOCH concedes (at 29), neither the trial court's decision nor this Court's stay decision, both of which Plaintiff cites at length, discussed any ballots other than wrong precinct ballots when ruling on Plaintiff's likelihood of success on the merits. In any event, there is no evidence to suggest that there was any investigation of these other provisional ballots (which were counted by the Board) that was not prompted by an initial examination of the envelope (the same level of investigation given to all ballots initially).

Intervenor NEOCH also discusses (at 15) additional categories of rejected votes (beyond the wrong precinct votes), presumably to suggest that there is a constitutional deficiency with regard to how those votes were treated. Significantly, however, NEOCH suggests that the real problem with regard to these votes was the Board's alleged failure to comply with "Decree and Directive 2010-74" from the Ohio Secretary of State—which is a state law deficiency only. (NEOCH at 15.) Moreover, neither Plaintiff nor NEOCH cites any testimony from the preliminary injunction hearing suggesting that they presented evidence on any of these other alleged improperly rejected votes other than the wrong precinct votes. Indeed, Plaintiff explicitly states that the 849 wrong-precinct ballots are the only ones at issue here: "It is this group of 849 rejected ballots that are at issue in

this case.” (Hunter at 4 (internal citation omitted).) And, of course, the trial court, based on what Plaintiff asserted at the hearing, relied on the wrong precinct votes, not any other allegedly improperly rejected votes, in her ruling.

C. The Board Did Not Violate Due Process

Plaintiff claims that she has made a viable Due Process claim. Plaintiff argues that the Board’s provisional balloting system somehow “burdens” her right to have all of the votes counted in this election and the voters’ rights as well. (Hunter at 30.) But that argument proves too much. Any restriction on who can cast a ballot, under that theory, would be a burden on a candidate and a prospective voter. Plaintiff must do more than articulate some vague interest in having votes counted to maintain a Due Process claim. *See Warf*, 619 F.3d at 559 (“the Due Process clause is implicated, and §1983 relief is appropriate, in the exceptional case *where a state’s voting system is fundamentally unfair*”) (emphasis added) (internal quotation omitted).

On the other hand, the Board (as Plaintiff at least partially concedes) has a compelling interest in preventing voter fraud, complying with Ohio law by not counting ballots that are miscast, and complying with the NEOCH Consent Decree. When weighed against Plaintiff’s vague allegation of burden, it is apparent that there is no viable Due Process claim in this case.

D. Plaintiff Has Presented No Evidence That Poll Worker Error Caused a Vote to Be Miscast

Plaintiff concedes that there was no evidence of poll worker error presented to the district court. (Hunter at 27.) Instead, Plaintiff makes a vague reference to the investigation that the Board conducted under the Secretary of State's recent directives, which are now being challenged in the Ohio Supreme Court. But that evidence was never before the district court. Plaintiff suggests that what the district court had was "circumstantial evidence" that 286 right location/wrong precinct votes were miscast due to poll worker error. But that "evidence" is nothing more than the conjecture from Plaintiff's counsel that poll worker error occurred. That conjecture ignores the evidence in the record (the only evidence on this subject) that a voter insisted on casting a ballot in the wrong precinct after being informed of that fact by the poll worker. (Hearing Tr. at 95:4-8 "the poll worker had recorded that they instructed this voter that they were casting their ballot in the incorrect precinct and tried to direct the voter to the correct precinct but the voter refused and wanted to vote their provisional ballot and casted it in that precinct.") And that conjecture ignores the fact that poll workers in Ohio are presumed to have carried out their duties correctly. *Skaggs*, 900 N.E.2d at 989-91.

III. The Trial Court Erred In Entering the Injunction.

Even aside from the merits argument, trial court erred in entering the injunction given that the other injunction factors likewise weigh against Plaintiff.

A. Plaintiff Cannot Establish Irreparable Harm.

Plaintiff argues that she would be harmed absent an injunction because she would not have an adequate remedy at law and that an election contest is not an adequate remedy. But Plaintiff does not cite to any court that has ever determined that an Ohio election contest is an inadequate remedy. Not only is it adequate, the Ohio State Supreme Court has said it is “*exclusive* remedy for the corrections of errors, frauds and mistakes occurring in elections.” *State ex rel. Shriver v. Hayes*, 76 N.E.2d 869, 872 (Ohio 1947) (emphasis added); *see State ex. rel Byrd v. Board of Elections of Summit County*, 417 N.E.2d 1375, 1377 (Ohio 1981).

Plaintiff also argues that the elections contest is not appropriate because this case involves only what she calls “easily identifiable systematic error.” (Hunter at 32.) But the character of the alleged error has nothing to do with whether the legal remedy itself is adequate, and Plaintiff cites nothing to suggest that it does.

Plaintiff also argues the propriety of the elections contest as an adequate remedy because she says she has “limited means” and says that an “election contest takes too long.” Neither supposed reason is supported by anything in the record or by any authority. As to timing issue, in *Byrd*, the Ohio Supreme Court held that the purpose of specific limitations in the election contests statutes is to provide “promptness” and that there is a “public interest in having election contests speedily determined.” *Byrd*, 417 N.E.2d at 1378, 1380. There is no factual

support for the contention that an election contest takes too long, or in fact, would take any longer than a trial on a permanent injunction in the district court.

B. Plaintiff Cannot Establish that Injunction Is in Public Interest.

Plaintiff states the obvious: that there is a public interest in fairly treating all voters and counting valid ballots. But to the extent there is any discrepancy as to whether that was done in this case, Ohio has a comprehensive statutory process to address any issues. It is a process that does not involve seeking a federal court to enjoin the local Board and to order that certain votes be counted where poll worker error exists regardless of what the state law says. That statutory process is an election contest and the state has apparently deemed that process to be the fair and correct way of proceeding – for the benefit of the candidates and the public at large. It simply cannot be that proceeding other than set forth by Ohio law is in the public interest, unless, of course, it is necessitated by the constitution, but Plaintiff has not taken that position with respect to the state-proscribed election contest.

Moreover, Williams also noted that the injunction in this case is not in the public interest because it will result in unequal treatment, not remedy unequal treatment. Plaintiff does not address this issue. The Directives from the Ohio Secretary of State that Plaintiff attaches to her brief illustrate the point. Based on the trial court's injunction, the Secretary of State has directed the Board to mail questionnaires to poll workers, subpoena poll workers for testimony, etc., with

respect to those same ballots that Plaintiff argued received an “inadequate” or deficient review. (Hunter, Directives 2010-87 and 2010-79.) None of this took place with regard to any counted or rejected ballots previously. (R. 18 Hearing Tr. at 92-93, 102.) Where at one time Plaintiff complained that certain provisional ballots were not getting the same investigation as others, those ballots are now getting more investigation than the rest. The investigation that the Board is supposed to conduct under Plaintiff’s view is much more extensive than any investigation that any other provisional voter in Hamilton County received. The question becomes whether an Equal Protection issue is being created by reviewing some provisional ballots in light of subpoenaed testimony, others in light of responses to questionnaires, and still other provisional ballots based solely on the information previously before the Board. The entire basis for Plaintiff’s challenge and the rationale for the trial court’s order was supposed to be that all voters be treated equally – which is exactly what had previously occurred with regard to investigations into poll worker error.

CONCLUSION

For the reasons given above, this Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). Exclusive of the exempted portions, as provided in Fed.R.App.P 32 (a)(7)(B)(iii), this brief contains 4,885 words. The brief was prepared in proportionally spaced typeface using Microsoft Word in 14 point Time New Roman font. As permitted by Fed.R.App.P 32 (a)(7)(C), I have relied upon the word count of this word-processing system in preparing this certificate.

Dated: January 4, 2010.

/s/ John B. Nalbandian

John B. Nalbandian

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on January 4, 2010 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ John B. Nalbandian _____

John B. Nalbandian