

**Case No. 11-3059
Case No. 11-3060**

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

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

Plaintiff-Appellee,

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

Intervenors-Appellees,

v.

HAMILTON COUNTY BOARD OF ELECTIONS, et al.,

Defendants

JOHN WILLIAMS,

Intervenor-Appellant

**DEFENDANT-APPELLEES
CALEB A. FAUX AND TIMOTHY M. BURKE'S
BRIEF IN SUPPORT OF THE DISTRICT COURT'S ORDER**

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DEFENDANT-APPELLEES
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BRIEF IN SUPPORT OF THE DISTRICT COURT'S ORDER

At the heart of American democracy is the right to vote and the right of otherwise qualified voters to have their votes counted. Even with all of the twists and turns of this case, that, in the end, is what this litigation is all about.

Should otherwise qualified voters who go to the correct polling place, but because there are multiple precincts in that same polling place, lose their right to have their vote counted because the poll workers at that polling place failed to direct these voters to the correct table? If the answer to that question is yes, then the right to meaningfully participate and be heard through the ballot is lost, not through the fault of the voters, but simply because the poll workers did not do what they are trained to do and failed to get the voters to the right table (precinct).

The Hamilton County Board of Elections recognized the injustice of such a result when it found that 31 voters who voted during the early voting period at the Hamilton County Board of Elections had been given the ballot for the wrong precinct when they voted at the Board of Elections. Rather than deprive those 31 voters of their right to vote because our staff made a mistake, the Board unanimously voted to authorize bipartisan teams to remake those ballots for the current precinct and count their votes. We should do the same with all the "right

church, wrong pew” voters whose votes are at issue in this case, lest they be deprived of due process and equal protection rights.

While the Ohio Supreme Court suggested in its opinion of January 7, 2011 in *State ex rel Painter, et al. v. Brunner*, Slip Opinion No. 2011-Ohio-35, that the Board was wrong to have counted those 31 voters’ ballots, it is our belief that boards of elections, here in Hamilton County and across the State of Ohio, ought to have the ability to correct errors plainly committed by their professional staffs and election day poll workers and enfranchise rather than disenfranchise the affected voters.

As Board of Elections members, Mr. Faux and I are sworn to uphold the Constitution and we feel compelled to follow Judge Dlott’s determination that not counting the “right church, wrong pew” votes violates equal protection – an issue the Ohio Supreme Court never addressed.

As much as this dispute has traveled between this Court, the District Court, the Ohio Supreme Court, and through two different Secretaries of State, little in the way of a record has been developed in Court. When 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.

It must be kept in mind that allowing these votes to be counted only serves to enfranchise otherwise completely qualified voters. As the Board did with the 31 voters mentioned above, the “right church, wrong pew” voters’ ballots would be remade to the correct precinct in which they should have voted and the voters therefore would only vote for those state house, senate and congressional candidates for whom they are entitled to vote. Thus, no improper votes would be counted.

Correcting ballots in such a fashion is not at all unusual. It happens all the time in order to correct damaged or torn ballots, or ballots with stray marks on them which may prevent the ballot from being “read” accurately, or ballots which for one reason or another aren’t being read by the ballot readers. Corrections are done to ensure qualified voters have their votes counted.

Depriving “right church, wrong pew” voters of their rights to have their votes counted, and the equal protection and due process violations that would cause, is ostensibly predicated on state law and how that law has been interpreted by the Ohio Supreme Court. *See* R.C. 3503.182, 3505.183(B)(4)(a)(ii) and 3599.12(A)(1). It never used to be this way. For many years, when our Board of Elections found a provisional ballot cast in the wrong precinct, our Board staff,

using a bipartisan team, remade the ballot to the correct precinct. Only after then-Secretary of State Ken Blackwell issued a directive prohibiting that, and the legislature ultimately enacted that into law, did that practice end.

Curiously, the language of R.C. 3505.181(c)(2)(a), which had been noted by the Ohio Supreme Court in *Painter*, provides that “if an individual *refuses to travel* to the polling place for the correct jurisdiction . . . provisional ballot cast by that individual shall not be opened or counted.” (Emphasis added.) In the case of the “right church, wrong pew” voters, they did not refuse to travel to the correct polling place. They came to the correct polling place. But in a multiple-precinct polling place consisting of 2, 3, 4 or even 5 precincts in the same church basement, gym or community center, the poll workers did not direct the voter to the correct table, failing to follow their training and instruction, and handed the voter a ballot for the wrong precinct. Just as the Board of Elections determined that the 31 voters who were given the wrong ballots by our Board staff at the Board of Elections should have their ballots corrected and their votes counted, so too should the ballots of the blameless “right church, wrong pew” voters be counted. Regardless whether the Board should or should not have counted the other 31 voters’ ballots, the fact is that it did. The same rights and the same relief that the Board accorded to those 31 voters should now be accorded equally to the “right

church, wrong pew” voters. That is the essence of equal protection under our Constitution.

Given the number of other parties who will be more fully briefing this matter, suffice it to say that the Hamilton County Prosecutor’s Office does not speak for Appellees Faux and myself, the 2-member minority on the Hamilton County Board of Elections. The appellants do not speak for Mr. Faux and myself because, at bottom, they argue for permission to ignore the Constitution, which we regard as the supreme law of the land. That would be contrary to our oath. It also would run counter to the great history of voting rights in this country, a history notable for the intervention of federal courts that applied the Constitution unflinchingly, even when doing so trumped state and local laws and the decisions of state courts that would have had the effect of denying minorities equal voting rights. We urge this Court to align itself with that noble history by denying the requested stay.

We believe that it is the obligation of the Board of Elections to enfranchise voters so that their right to have their votes counted is not lost because of the vagaries of poll workers and board staff failing to correctly perform their job. Generally, our Board staff and poll workers do a superb job, but like all of us, they are human and mistakes do happen. When they make mistakes, those mistakes should be corrected and the voters should not be penalized. The overwhelming

number of votes are properly cast and counted, but mistakes do occur and in a race as close as this one, the end result should not be determined by where those errors happened the most.

/s/ Timothy M. Burke

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2011, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record in this matter.

/s/ Timothy M. Burke

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