

**Case No. 11-3060**

**In The United States Court of Appeals  
For The Sixth Circuit**

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

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

vs.

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

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; Related Appeals 10-4481 and 11-3059

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**Amicus Brief of Ohio Secretary of State Jon Husted In Support of the  
Hamilton County Board of Elections Urging Reversal of the District Court**

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## **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 reverse the decision of the district court. Secretary Husted asks for reversal on the following two grounds.

First, the district court's order violates Ohio law and principles of federalism, which recognize the supremacy of State law in determining whether a particular vote should be counted. *See, e.g., State ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008). It is well established that State law determines which ballots are to be counted in an election. In this very case, the Ohio Supreme Court has done that. *State ex rel. Painter v. Brunner*, Slip Op. No. 2011-Ohio-35. After thoroughly reviewing the evidence and restating the requirement under Ohio law that a ballot must be cast in the proper precinct to be considered valid, the Ohio Supreme Court ordered the Hamilton County Board of Elections to reject the contested ballots at issue in this case. However, the federal district court below issued a ruling that supplanted the Ohio high court on matters of Ohio law. The district court erroneously found sufficient evidence of poll worker error on those 149 ballots despite the Ohio Supreme Court's determination that the evidence was deficient under Ohio law.

The district court also compounded its error by finding that the failure to count those ballots violated the Equal Protection Clause of the Fourteenth Amendment. By doing so, the district court created a new equal protection problem by ordering ad hoc investigations – resulting in testimony, mini-trials, and statistical analysis – to determine whether poll worker error caused provisional ballots to be cast in the wrong precinct. However, this is exactly the sort of “standardless” process that the U.S Supreme Court struck down as violating equal protection. *Bush v. Gore*, 531 U.S. 98, 105-106 (2000).

Secretary Husted therefore respectfully asks this Court to uniformly apply Ohio law in Hamilton County by making sure that some provisional voters in Hamilton County are not granted extra-legal investigations have not been granted to other voters throughout the state.

### **STATEMENT OF FACTS AND THE CASE**

The Secretary adopts the Hamilton County Board of Elections’ statement of facts and the case.

## ARGUMENT

**I. First Assignment of Error: The district court erred in ordering the counting of provisional ballots in contravention of Ohio law and in violation of the principles of federalism.**

**A. Federal law recognizes the supremacy of State law in determining the validity of a ballot.**

“The States long have been primarily responsible for regulating federal, state, and local elections.” *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004). Ohio law recognizes that “a voter’s ballot will only be counted as a valid ballot if it is cast in the correct precinct.” *Id.* Contrary to this clear statement of the law, the district court has ordered ballots cast in the wrong precinct to be counted in this case. Furthermore, it ordered the Hamilton County Board of Elections to engage in an investigation that caused the board to interview several poll workers and send questionnaires to many others. Never has such an investigation been undertaken in Ohio.

In *Sandusky County*, this Court recognized that federal law only requires that a provisional ballot be given to an individual voter who affirms that he is eligible to vote and is registered to vote in the precinct in which he seeks to cast the ballot. *Id.* at 576. This Court overturned the district court’s decision that had determined that the State of Ohio must count any provisional ballot cast anywhere in the

county because such a determination was contrary to Ohio law.<sup>1</sup> The district court in *Sandusky County* made the same error that the district court in this case made. Namely, it ordered a vote that is illegal under Ohio law because it was cast in the wrong precinct be counted. Rather, “HAVA does not require that any particular ballot, whether provisional or ‘regular’, must be counted as valid. States remain free, of course, to count such votes as valid, but remain equally free to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted.” *Id.* at 578. This Court in *Sandusky County* court recognized that there is simply no contradiction in requiring all voters in a county to be given a provisional ballot and “then allowing the state to continue its practice of not counting votes cast outside of precinct.” *Id.*

**B. The Ohio Supreme Court, in a case concerning these same ballots, echoed that ballots cast in the wrong precinct must be rejected.**

The Ohio Supreme Court has definitively determined that under Ohio law, only provisional ballots cast in the proper precinct can be counted. *State ex rel. Painter v. Brunner*, 2011-Ohio-35. In that case – involving the same ballots at issue in our case – the Ohio Supreme Court specifically found that Ohio law “does not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted.” *Id.* at ¶ 35. Thus,

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<sup>1</sup> The Court recognized that Ohio was one of 27 States that mandated precinct voting.

the district court erred to the extent it determined poll worker error existed in this case to a sufficient level to count 149 disputed ballots.

In the *Painter* decision, the Ohio Supreme Court also recognized that the federal district court ordered the Hamilton County Board of Elections to conduct an investigation to determine if poll worker error contributed to various provisional ballots being cast in the wrong precinct. However, the Ohio Supreme Court reiterated a long standing principle of Ohio law that ““in the absence of evidence to the contrary, public officers, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.”” *Id.* at ¶ 50, quoting *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186 (1955). The Court then determined, again as a matter of Ohio law, that “the board members erred in relying on a statistical analysis comparable to the one we rejected in *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 208-09, 602 N.E.2d 644 (1992), to support their claim that poll-worker error occurred.” Thus, the Ohio Supreme Court determined that the evidence some members of the board of elections used to find poll worker error was not sufficient. This is a holding under Ohio law and cannot be overturned by a federal court.

However, the district court committed error in not recognizing the proper role of the Ohio Supreme Court’s role as final arbiter of Ohio law. Instead, it

reached a determination that sufficient evidence existed to prove poll worker error. Such a determination is one that is within the exclusive purview of the State courts since state law, not federal law, determines whether a particular ballot meets the legal requirements necessary to be a legal vote.

This Court must overturn the decision of the district court because the district court reached a conclusion under Ohio law that is contrary to the holding of the Ohio Supreme Court.

**II. Second Assignment of Error: The district court erred in finding that the failure to count the disputed 149 provisional ballots violates the Equal Protection Clause.**

The district court examined two groups of provisional ballots in its Equal Protection analysis: (1) the twenty-seven ballots cast early at the Board's office but in the wrong precinct because voters were given the wrong ballot [R-39 at 7]; and (2) the 149 ballots investigated by the Board and found by two of its members from statistical data to have been cast in the wrong precinct due to poll worker error [*id.* at 1]. The district court determined that the counting of the first group and the disqualification of the second group – where both groups of ballots were cast in the wrong precinct due to poll worker error – resulted in disparate treatment that “violates the fundamental premise that ‘equal weight [be] accorded to each vote and . . . equal dignity owed each voter.’” [R-39 at 8], citing *Bush v. Gore*, 531 U.S. 98, 104 (2000). However, the district court erred in two fundamental ways.

First, the district court misconstrues *Bush v. Gore* and the requirements of Equal Protection. Rather than ensuring the application of uniform standards, the district court's order actually turns the Equal Protection clause on its head by imposing disparate investigatory standards for determining poll worker error.

Second, the proper remedy for an equal protection violation is to stop counting votes. The district court's order compounds any purported constitutional problem by adding faulty ballots that do not comport with the mandates of equal protection or state law. Equal protection thus requires that all the contested provisional ballots in this case must be rejected.

**A. The district court's order violates the mandates of *Bush v. Gore* requiring consistent standards for counting votes.**

Though the facts may differ, this Court faces the same underlying constitutional question addressed in *Bush v. Gore*: whether the recount procedures adopted by another court (there, the Florida Supreme Court) "are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. at 105. Rather than safeguarding the franchise, the district court here made the same error as the Florida Supreme Court by mandating counting procedures that result in disparate treatment of ballots.

In *Bush v. Gore*, the Court held that the use of "standardless manual recounts" mandated by the Florida Supreme Court violated equal protection. *Id.* at

103. In ordering a recount, the Florida Supreme Court merely ordered counties to “consider the intent of the voter” without any “specific standards to ensure its equal application.” *Id.* at 105-106. As a result, “each of the counties used various standards to determine what was a legal vote.” *Id.* at 107. For example, Broward County used a more forgiving standard than Palm Beach County and uncovered almost three times as many new votes, “a result markedly disproportionate to the difference in population between the counties.” *Id.* Three members within one single county board applied different standards to define a legal vote, while a second county changed its evaluation standards during the counting process. *Id.* at 106. Therefore, the Court held that the Florida court’s order did not afford “a process with sufficient guarantees of equal treatment.” *Id.* at 107.

In the same way, the district court’s order creates equal protection problems by ordering a standardless investigative process to determine poll worker error for some provisional ballots, but not requiring that same process for other ballots. With respect to the first group of twenty-seven ballots, the Board determined solely from poll books, ballot envelopes, and help line records that voters were given the wrong ballot by poll workers. However, with respect to the remaining contested ballots, the Board (in the absence of judicial guidance) initiated a broader investigation by subpoenaing every poll worker where an incorrect precinct ballot was cast. When that proved unworkable, the Board then sent questionnaires to poll

workers. Two of the four members of the Board then adopted their own investigative process by conducting a statistical analysis to “prove” poll worker error in 149 ballots. This is exactly the type of standardless investigative process that the *Bush v. Gore* Court struck down for providing insufficient guarantees of equal treatment. Furthermore, in order to satisfy the requirements of *Bush v. Gore* and equal protection, the Court would have to order the same investigative process statewide. However, it would be impossible for the county boards to certify election results by the statutory deadlines if they were required to conduct full-blown hearings and to consider extraneous testimony and statistical analysis to investigate every allegation of poll worker error.

Thus, the district court erred in its equal protection analysis by ordering the counting of the 149 ballots.

**B. The district court applied the wrong remedy for correcting an equal protection violation.**

Even if an equal protection violation had occurred, the district court applied the wrong remedy in ordering the counting of all the provisional ballots in question. Rather, as construed by *Bush v. Gore*, equal protection mandates that all the disputed provisional ballots must be disqualified.

In *Bush v. Gore*, the Supreme Court recognized that an equal protection violation occurs when, as a result of a court order, ballots subject to a standardless

recount system in which voters both inside the same county and across the state are treated differently. The Court noted that, “[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy.” *Bush*, 531 U.S. at 111. Rather than compounding the problem by adding faulty ballots, the remedy formulated by the majority was to terminate the supervised recount. Unfortunately, the district court did not follow this remedy. Instead, it committed the same error made by the Florida Supreme Court.

As recognized by the Ohio Supreme Court, equal protection requires the Board to examine the 149 ballots with the same process used to determine poll worker error in the first group of twenty-seven ballots. *Painter*, 2011-Ohio-35 at ¶ 40. Namely, the Board’s examination must be limited to the provisional ballot envelope, help line records, and the poll book. If there is no evidence of poll worker error from these records, the ballots must be rejected. Any additional investigative procedures – like the statistical analysis used by two of the board members to determine poll worker error – would result in disparate treatment of voters.<sup>2</sup>

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<sup>2</sup> In contrast, the counting of any provisional ballots subject to the consent decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-CV 896, would not violate equal protection because any determination of poll worker error with respect to those ballots would be limited to examination of poll books, help line records, and provisional ballot envelopes. See SOS Directive 2011-05 (Jan. 12, 2011), attached as Exh. 1 to Appellant Hamilton County Bd. of Elections Emergency Mtn. for Stay.

The district court also compounds equal protection problems by ordering the Board to conduct an investigation and to count votes that are not authorized by Ohio law. As explained earlier, the Ohio Supreme Court has determined as a matter of Ohio law that the statistical evidence resulting from the investigation was insufficient to prove poll worker error. *Painter*, 2011-Ohio-35. As affirmed by this Court, while federal law controls the ability to *cast* a provisional ballot, “[t]he ultimate legality of the vote cast provisionally is generally a matter of state law.” *Sandusky Cty. Dem. Party*, 387 F.3d at 576. Federal courts and litigants cannot use the equal protection clause to escape the requirements of state law. *See, e.g., Roe v. State of Alabama*, 68 F.3d 404, 407-09 (11th Cir. 1995) (finding ballots which were defective under state law could not be counted under the equal protection clause where 49 similar ballots had been improperly counted in the first instance).

## CONCLUSION

For the foregoing reasons, Amicus Ohio Secretary of State Jon Husted respectfully requests that this Court reverse the decision of the district court.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

1. I certify that this Brief complies with the type-volume limitations of FRAP 32(a)(7)(B). The brief has been prepared in monospaced (nonproportionally spaced) typeface using a Times New Roman, 14 point font.
2. I also certify that this Brief complies with the page limited requirements of FRAP 29. Exclusive of the portions exempted by FRAP 32 (a)(7)(B)(iii), the Brief contains approximately 2,554 words.

*/s/ Richard N. Coglianese*

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Richard N. Coglianese

### **CERTIFICATE OF SERVICE**

This is to certify a copy of the foregoing Amicus Brief was served upon all counsel of record by means of the Court's electronic filing system on this 19th day of January, 2011.

*/s/ Richard N. Coglianese*

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Richard N. Coglianese