

Case No. 11-3059

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**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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO APPELLANTS'
EMERGENCY MOTIONS TO STAY**

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Northeast Ohio Coalition For
The Homeless 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 this appeal, that has a financial interest in the outcome? **NO**

/s/ Caroline H. Gentry
Signature of Counsel

January 18, 2011
Date

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Ohio Democratic Party
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 this appeal, that has a financial interest in the outcome? **NO**

/s/ Donald J. McTigue
Signature of Counsel

January 18, 2011
Date

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellee Hunter offers the following disclosures:

Plaintiff-Appellee Tracie Hunter is not a subsidiary or affiliate of a publicly owned corporation.

No publicly traded corporation has a financial interest in the outcome of this appeal.

/s/ Jennifer L. Branch
Attorney for Plaintiff-Appellee

Date: January 18, 2011

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
APPELLANTS' EMERGENCY MOTIONS TO STAY**

If the government misdirects a voter to the wrong precinct it is fundamentally unfair to reject that ballot simply because the voter followed instructions and voted in the wrong precinct – particularly where, as here, the government arbitrarily chooses to count some and reject others. The District Court correctly instructed the Board to count those ballots and the Board is refusing to do so. Nor is the Board counting provisional ballots as required by a pending consent decree. These delays must end. Plaintiff-Appellee Tracie Hunter and Intervenor-Appellees Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) (collectively “Plaintiffs”) oppose the Emergency Motions to Stay (“Motions”) filed on January 15, 2011 by Defendant-Appellant John Williams and on January 17, 2011 by Defendant-Appellant Hamilton County Board of Elections (collectively “Defendants”). Defendants seek to stay the operation of an order enforcing a preliminary injunction *that this Court has twice refused to stay*. Based on the reasoning of its prior decisions, and for the additional reasons set forth below, this Court should deny Defendants’ Motions to Stay.

Conspicuously absent from Defendants’ Motions is any recognition that *federal law*—namely, the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and the federal Consent

Decree entered in the *NEOCH* litigation— controls Plaintiffs’ claims. Defendants also ignore the Supremacy Clause in Article VI of the United States Constitution. Instead, Defendants wrongly insist that this case is governed solely by Ohio law and by the Ohio Supreme Court’s advisory opinion adopting a narrow and highly strained interpretation of the Equal Protection Clause that was not properly before that court (as no federal claims were asserted in that case) *and that the District Court had previously rejected*.

This Court should summarily reject Williams’ flagrant disregard for federal court orders and his transparent forum-shopping. State law does not govern the resolution of Plaintiffs’ federal-law claims. The two orders, properly read, do not conflict. The Ohio Supreme Court’s ruling on state law is not relevant because Plaintiffs do not assert any state-law claims. Its ruling on federal law is advisory because no federal claim was before it. And the District Court has the authority to interpret its own orders and need not defer to a state court’s interpretation of federal law. Therefore, the orders do not conflict. But if they do, then the Supremacy Clause plainly provides that the District Court’s Order shall govern.

Fortunately, the Board did conduct an investigation, albeit a limited and partial one, before the Ohio Supreme Court issued its opinion. Based on that investigation, the District Court properly ordered Defendant Board to count: (1) nine ballots that the staff discovered had actually been cast in the correct precinct,

and that were rejected because of staff error (Williams, but not the Board, appeals this order); (2) seven ballots that the Board unanimously voted to count after interviewing poll workers who admitted making errors (Williams and the Board appeal this order); and (3) 149 ballots that the Board tied 2-2 with respect to whether to count before Secretary Brunner ordered them to be counted (Williams and the Board appeal this order). While Secretary Husted subsequently disagreed with and reversed Secretary Brunner's order, that does not change the fact that the Board (i.e., two members of the Board and the Secretary of State) found error regarding these ballots and that they should be counted.

The District Court also properly enjoined the Board from following Directive 2011-04 and voting to reject all of the ballots that are the subject of the District Court's Order. Secretary Husted was ordered to issue that directive (which he subsequently modified in Directive 2011-05) by the Ohio Supreme Court, which ordered that none of the ballots be counted. The District Court had to enjoin the Board from complying with the Directive or else the Plaintiffs would have *de facto* lost this case, notwithstanding the preliminary injunction.

In addition, Defendant Board was properly ordered to comply with the *NEOCH* Consent Decree and Directives 2008-80, 2010-74 and 2010-79, which until now have not been challenged. (The Board, but not Williams, appeals this order). Ballots that fall within the provisions of that Consent Decree must be

examined for poll worker error and, if error is found, must be counted. Defendant Board can offer no justification for failing to comply with the Consent Decree and these Directives and there is no basis for staying the District Court's Order.

Finally, Defendants cannot meet their heavy burden of showing that they are entitled to a stay. As this Court previously held, Plaintiffs (not Defendants) are likely to succeed on the merits. The fact that Defendant Board risks being held in contempt for its refusal to follow the District Court's Order does not justify a stay pending appeal; instead, Defendant Board should comply with the Order. Neither Defendant will be irreparably harmed if the Board follows the District Court's Order and counts the 165 ballots. Nor will they be harmed if the Board investigates the *NEOCH* ballots. To the contrary, delaying that investigation will not serve the public interest and will cause substantial harm to the public and the Plaintiffs. And the public interest will be served by this Court's prompt rejection of Defendants' misguided assertion that state law prevents them from complying with a federal court order. This Court should deny Defendants' Motions.

I. STATEMENT OF FACTS.

A. Plaintiffs Asserted Federal Law Claims.

The issue in this case is whether federal law requires Defendant Board to determine whether certain provisional ballots that it rejected were deficient because of poll worker error and, if so, to count them. Plaintiffs argue that such a result is required by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and by a Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (the “*NEOCH* Consent Decree”).

Specifically, Plaintiffs allege that Defendant Board violated these provisions of federal law when it rejected 851 provisional ballots cast in the “wrong precinct” and 136 provisional ballots that lacked a printed name or signature without determining whether the voter’s error was attributable to poll worker error, but voted to count similarly-situated provisional ballots after concluding that there was poll worker error—including 27 “wrong precinct” ballots cast at the Board’s offices and 13 provisional ballots that lacked a printed name or signature.¹

On November 21, 2010, Plaintiff Hunter filed suit in the District Court against Defendant Board and its members. Plaintiff asserted a single claim under

¹ Plaintiffs refer this Court to their Merit Briefs filed in Case No. 10-4481 on December 21, 2010 for a more detailed discussion of these categories of ballots.

42 U.S.C. § 1983 for violation of her rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution. The next day, Plaintiffs Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) intervened based on their substantial legal interest in monitoring, interpreting and enforcing the *NEOCH* Consent Decree.

B. The District Court Issued A Preliminary Injunction And This Court Refused To Stay It.

The District Court granted Plaintiff’s Motion for Preliminary Injunction (R. No. 2) and ordered the Board to “immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” (R. No. 13).

The District Court issued its Order after finding that Plaintiff-Appellee had demonstrated that Defendant Board “does not treat all provisional ballots cast in the wrong precinct equally.” (R. No. 13 at 5). The District Court concluded that the Board “has—without any specific statutory mandate—carved out situations in which it *will* count provisional ballots cast in the wrong precinct.” (*Id.* at 7) (emphasis in original). As summarized by this Court, “[t]his disparate treatment—counting the 26 wrong precinct ballots based on poll-worker error during early voting without similarly investigating whether poll-worker error led to any of the

849 ballots being cast in the wrong precinct on election day—forms the basis for the injunctive order in this case.” (R. No. 19 at 3).

Intervenor Williams twice asked this Court to stay the District Court’s preliminary injunction, and twice this Court refused. Therefore, the Board commenced its investigation as required by the District Court’s Order.

C. The Board’s Investigation, Though Limited And Truncated, Yielded Evidence Of Poll Worker Error With Respect To 165 Of The Challenged Ballots.

The Board did not investigate all 849 of the provisional ballots at issue in the District Court’s Order. However, limited and truncated though it was, the Board’s investigation did provide evidence of poll worker error with respect to 165 provisional ballots that the District Court ordered to be counted. These ballots are described below.

1. The Board found that seven (7) ballots were cast in the wrong precinct due to poll worker error and unanimously voted to count all seven ballots.

On December 16 and 17, 2010 the Board interviewed 77 poll workers under oath. (R. 38-2 & 38-3). The most productive of these interviews was of the seven poll workers who actually processed and signed the provisional ballot at issue. Each of these poll workers testified that they had made a mistake in processing the ballot. Specifically, the poll worker misidentified the voter’s correct precinct. For example, one witness who worked in a polling place that hosted multiple precincts

testified that he processed provisional ballots and that he trusted the other poll workers on his team to look up the voter's address to make sure the voter was in the correct precinct. When he was confronted with the fact that the voter's correct precinct was at another location in the polling place, the witness admitted the poll workers made a mistake in not getting the voter to the right precinct table. (R. 38-3 at 7-11).

During the Board's interviews, other witnesses who worked at polling places that hosted multiple precincts were asked to look up addresses in the precinct finder book and find the correct precinct. Each of these witnesses admitted that on Election Day they looked up the address wrong and made a mistake about which precinct the voter was in. For example:

13 MR. BURKE: What I'd like you to
14 do, Mr. G, is go to the green book
15 and determine the correct precinct those
16 voters should have voted in.
17 CHAIRMAN TRIANTAFILOU: We saw that
18 on Election Day, about the way it was
19 turned upside down
...
7 MR. E G: 4715 -- I think
8 I made a mistake.
9 MR. BURKE: Say again please.
10 MR. E G: I made a
11 mistake, I guess, on that one. Should
12 have been 2F instead of 2G.
13 MR. BURKE: And on Election Day,
14 you were going through this same process
15 with a lot of people there?
16 MR. E G: Right.

17 MR. BURKE: Trying to get things
18 done in a hurry?
19 MR. E G: Right, just
20 wasn't too -- you know.
21 MR. BURKE: Understand. And then,
22 again, nobody --
23 MR. E G: You are right,
24 515 people waiting in line and so forth . . .

(R. 38-2 at 63-64). The witness went on to explain how he made the same mistake with two additional ballots. (*Id.* at 57-67). Another witness looked up the address for the Board members at the meeting and determined the voter was to vote in Cincinnati Precinct 4A. However, he got it wrong. When used correctly, the book indicated that the correct Precinct was 4C. It was clear the witness did not pay attention to the fact the voter's address was an even number. (R. 38-3 at 45-50).

At the Board Meeting on December 28, 2010, the Board unanimously voted to count all seven of these ballots. (R. 38-4 at 68-73).

2. The Board's investigation found that nine (9) ballots were properly cast in the right precinct.

The Board also found that nine (9) provisional ballots had been cast in the right location/right precinct all along. On November 16, Board staff improperly included these nine ballots in the group of 849 "wrong precinct" ballots. Due to *staff* error (not poll worker error), these nine ballots were rejected. The Board corrected this at the December 28 meeting and unanimously voted to count these nine provisional ballots. (R. 38-4).

3. The Board's investigation found that approximately 149 ballots were cast in the right location/ wrong precinct due to poll worker error in determining whether the street address was located inside the precinct.

Board members Burke and Faux presented evidence to the Board of their investigation into the addresses of approximately 56% of the 269 right location/ wrong precinct provisional ballots. Their analysis showed that:

- 31% of the 269 provisional ballots cast in the right polling place/ wrong precinct (approximately 83) were found to have been cast in the wrong precinct because the voters' addresses were located on the opposite side of the boundary street of the precinct in which the voter should have cast a ballot. This problem was illustrated during the Board interviews where poll workers were confused about the fact that an even house number on a street would be in one precinct and an odd house number on the same street would be in a different precinct. (R. 38-2 at 57-65, R. 38-4 at 76-80 & R.38-8 at Ex. 1).
- 15% of the 269 provisional ballots cast in the right polling place/ wrong precinct (approximately 40) were found to have been cast in the wrong precinct because the voters' addresses were located outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot. (R. 38-8 at Ex. 1).

- 10% of the 269 provisional ballots cast in the right polling place/ wrong precinct (approximately 26) were found to have been cast in the wrong precinct because the voters' addresses were located on streets that pass through the precinct in which the voter voted, but the addresses did not fall within the correct address range of the precinct in which the voter should have cast a ballot. (R. 38-8 at Ex. 1).

The Board voted on whether to count the entire group of 269 right polling place / wrong precinct ballots and tied 2 to 2. Secretary Brunner broke the tie in favor of rejecting the 269 group. However, she simultaneously issued Directive 2011-03 which directed the Board to count these three categories, which comprise 56%, or 149, of this group of 269 ballots. (R. 38-9). Secretary of State Husted then issued Directive 2011-04 which "superseded" Directive 2011-03 and directed the Board to reject all 849 ballots, including this subset. (R. 38-1).

D. Inexplicably, The Board Did Not Investigate The *NEOCH* Ballots.

Of the 849 provisional ballots at issue in the District Court's Order, the Board identified 21 ballots that fell under the *NEOCH* Consent Decree. (R. 38-5). Notwithstanding the fact that *two* federal court orders required it to investigate these ballots for poll worker error, the Board did not do so. Nor did the Board investigate 136 other ballots that fell under the *NEOCH* Consent Decree, namely, ballots that were rejected because they lacked a printed name or signature.

The Board failed to conduct this investigation even though it, like all boards of election in Ohio, was ordered by the Secretary of State prior to Election Day to investigate miscast *NEOCH* ballots for poll worker error before rejecting them. (R. 1-3). Directive 2010-74 directed the Board how to investigate poll worker error: *question poll workers*. The Board has not done this with regard to any of the *NEOCH* ballots, including the 21 that are a subset of the 849 rejected ballots.

E. The Ohio Supreme Court Issued A Writ Of Mandamus To Vacate Secretary Brunner's Directives 2010-80 and 2010-87.

Defendant John Williams filed a mandamus action in the Ohio Supreme Court on December 20, 2010. On January 7, 2011, the Ohio Supreme Court issued its Opinion. *State ex rel. Painter et al. v Brunner*, 2011-Ohio-35. The Ohio Supreme Court held 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.* ¶ 35. The Ohio Supreme Court further held that the Secretary of State's post election directives instructing the Board how to investigate the 849 ballots this Court ordered be investigated were erroneous under state law. *Id.* ¶ 36.

While the Court did not formally adjudicate the U.S. Constitutional claims Plaintiffs have made in the case at bar under the Equal Protection Clause and the Due Process Clause—nor could it do so, as those claims were not before it—it nevertheless purported to rule on the Equal Protection claim that was the subject of the District Court's Order *based on its interpretation of federal law* (not state law)

by holding that “any equal-protection claim did not require an investigation—it merely required the same inquiry that the board had engaged in for its initial determination of the validity of the provisional ballots.” *Id.* ¶ 40.

In essence, notwithstanding the fact that the issue had not been raised or briefed by the parties, the Ohio Supreme Court held that the District Court’s Order, which required an *immediate investigation*, was not in fact required by “an equal-protection claim.” *Id.* ¶ 40. The Ohio Supreme Court further held that the Supremacy Clause of the U.S. Constitution did not require it to follow decisions of the U.S. District Court or the U.S. Court of Appeals on federal statutory or constitutional law. *Id.* ¶ 46.

The Ohio Supreme Court therefore went beyond its interpretation of Ohio law (which is not relevant to this Court’s order) and purported to overrule the district court with respect to its interpretation of Plaintiffs’ rights under federal law and the United States Constitution. Specifically, the Ohio Supreme Court held that “any equal-protection claim would have merely required the same examination that the board conducted in – concluding incorrectly under Ohio law – that 27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted even though they were cast in the wrong precinct due to poll worker error.” *Id.* ¶ 49. The Ohio Supreme Court did not

explain its “equal-protection” holdings which, as stated above, were not briefed by the parties. *Id.*

Based on its holdings under both state and federal law, the Ohio Supreme Court concluded that the Board was not allowed to rely on any evidence obtained during the investigation ordered by the Secretary of State. *Id.* ¶ 51. Thus, the Board was ordered to rescind its decisions made pursuant to the Directives 2010-80 (R. 38-10) and 2010-87 (R. 38-6) and conduct the same “investigation” it had conducted before November 16. *Id.* ¶ 52. As noted by Secretary Husted, if the Board conducts the same “investigation” it conducted before November 16 then it will necessarily reach the same result, which will require it to reject all 850 ballots at issue in the District Court’s Order. (R. 38-1).

F. In Directive 2011-04, Secretary Husted Ordered The Board To Do No Further Investigation, Reject All Of The Ballots At Issue In This Lawsuit, And Certify The Results Of The Election.

Pursuant to the Ohio Supreme Court’s decision in *State ex rel. Painter*, Secretary of State Husted issued a directive that the Board “must determine now” that all 850 ballots are “invalid and shall not be counted.” (R. 38-1). This Directive—which Secretary Husted subsequently replaced with Directive 2011-05—contradicted not only the District Court’s Order but also the *NEOCH* Consent Decree. Therefore, Plaintiffs promptly asked the District Court to enjoin the Board from following it. (R. 38).

G. The District Court Granted Plaintiffs’ Motion In Part, Ordered Defendant Board To Count 165 Ballots And Investigate All Of The *NEOCH* Ballots, And Enjoined It From Complying With Directive 2011-04.

On January 12, 2011, the District Court issued an Order (R. 39) that granted in part and denied in part Plaintiffs’ Motion to Enforce Preliminary Injunction and Enjoin Defendant Board From Complying with Directive 2011-04 (R. 38). This appeal and Defendants’ motions to stay followed. In sum, the record shows repeated examples of government misdirecting specific voters but to date the Board has refused to count these ballots even though ordered to do so by the District Court.

II. LAW AND ARGUMENT.

A. Standard Of Review.

This Court has held that a party seeking to stay a preliminary injunction—here, Defendants—bears the burden of showing that: (1) the movant has a strong likelihood of success on the merits, (2) the movant would suffer irreparable injury absent a stay, (3) granting the stay will not cause substantial harm to others, and (4) the public interest will be served by granting a stay. *United States Student Ass’n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

This Court reviews the District Court’s factual findings for clear error and its legal conclusions de novo. *U.S. Student Ass’n Found.*, 546 F.3d at 380. Its review of the District Court’s “ultimate decision regarding injunctive relief is reviewed

under the ‘highly deferential’ abuse of discretion standard.” *Id.* The task for this Court, at this stage of the proceedings, is to decide whether Defendants are likely to be able to show that the District Court abused its discretion when it granted Plaintiffs’ motion to enforce its preliminary injunction. *Id.* As shown below, Defendants cannot meet this standard.

B. This Case Is Governed By Federal Law, Not State Law, And The District Court Has The Authority To Interpret Federal Law And Its Own Orders.

Notwithstanding Defendants’ exclusive reliance on state law, federal law governs here. Plaintiffs’ claims are brought under federal law, not state law. Plaintiffs’ constitutional claims are asserted under 42 U.S.C. Section 1983 and are not controlled or determined by reference to state law. Nor are Plaintiffs’ claims under a federal consent decree determined by state law. Federal law controls.

It is beyond question that the District Court is not bound by the Ohio Supreme Court’s ruling with respect to federal law. To the extent that the Ohio Supreme Court ruled on a *federal* claim that was not before it, that opinion was wholly advisory. Moreover, “[a] federal court owes no duty to abstain in deference to a state court when a federal constitutional question is at issue.” *Assoc. General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 740 (6th Cir. 2000). Federal courts, including the District Court, have the authority to interpret and enforce their own orders and are not bound by a state court’s interpretation of federal law.

C. Properly Read, The Two Orders Do Not Conflict; Even If They Do, The Supremacy Clause Unambiguously Provides That The District Court’s Order Trumps The State Court Order.

Properly read, the two orders do not conflict. The District Court issued its order under federal law (i.e., the Equal Protection Clause). The Ohio Supreme Court was presented with relators’ *state* law claims, namely, whether Secretary Brunner had exceeded her authority by issuing Directives 2010-80 and 2010-87 regarding the scope of the Board’s investigation, and whether mandamus should issue under state law to correct those Directives.

Despite the limited nature of the original proceeding, the Ohio Supreme Court held not only that a writ of mandamus should issue, but also that (1) state law does not recognize any exception for poll worker error, and (2) federal law (i.e., the Equal Protection Clause) limits the Board to conducting the same investigation that it conducted before the District Court issued its preliminary injunction. The first ruling is irrelevant because Plaintiffs did not assert their claims under state law. The second ruling is advisory because the parties could not assert, and did not assert, any federal claims in that proceeding. Since neither of these rulings is binding on the District Court, the two orders do not conflict.

To the extent that they do conflict, however, the Supremacy Clause requires that the District Court’s order shall control. It provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ...

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, Clause 2.

The Supremacy Clause means what it says, namely, that federal law trumps state law. “State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.” *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 695, 99 S.Ct. 3055 (1979); *U.S. v. State of Michigan*, 712 F.2d 242 (6th Cir. 1983).

In *Washington State Commercial Passenger Fishing Vessel Assoc.*, the United States Supreme Court held that it was absurd for the state to argue that the district court could not enforce its orders:

The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court. [citations omitted] Even if those orders may have been erroneous in some respects, ***all parties have an unequivocal obligation to obey them while they remain in effect.***

Id. 442 U.S. at 696 (emphasis added). The Court sanctioned the use of “stern measures” to require respect for federal-court orders. *Id.*

The Seventh Circuit recently reached the same result. In *Madej v. Briley*, 307 F.3d 665 (7th Cir. 2004), the district court had ordered a new sentence in a criminal death sentence habeas case. After the governor commuted the death sentence to life in prison, the state sought to vacate the habeas writ as moot. When the district court denied the request, the state refused to comply with the district court's order. On a writ of mandamus, the Court of Appeals held that the state should have complied with the federal order. The court held that under the Supremacy Clause “[n]o state court can countermand an order, issued by a federal court, implementing the Constitution of the United States.” *Id.* (emphasis added). The court chastised the prosecutor who chose to follow state law, not federal law and the federal court order:

Faced with conflicting orders—one issued by a federal court to implement the Constitution, and the other issued by a state court as a matter of state practice—the Attorney General of Illinois and the State's Attorney of Cook County preferred the latter over the former. ***This inverts the priority prescribed by the Constitution.***

Id. at 667 (emphasis added). The Court of Appeals issued a show cause order requiring the attorney who authored the legal briefs that ignored the Supremacy Clause to “show cause why we should not impose professional discipline.” *Id.*

In light of this authority, there can be no doubt that the Supremacy Clause requires the Board to follow the District Court's Order, not the Ohio Supreme

Court's order, to the extent that they are deemed to conflict (and properly read, they do not).

D. The District Court Properly Enforced Its Preliminary Injunction, Ordered The Board To Count 165 Ballots And Investigate Others, And Enjoined The Board From Following Directive 2011-04.

Based upon the above-described evidence, the District Court properly enforced its Order and the *NEOCH* Consent Decree by ordering the Board to count 165 ballots for which there was evidence of poll worker error, to investigate all of the *NEOCH* ballots (not just those in the group of 849 ballots) and then count any that were affected by poll worker error, and not to follow Directive 2011-04.

Indeed, the Board does not seriously challenge the District Court's Order with respect to the 9 ballots cast in the *correct* precinct (which order it does not even appeal) or the 7 ballots that it unanimously agreed were affected by poll worker error. Nor does the Board contest its obligations to investigate the *NEOCH* ballots or the fact that compliance with Directive 2011-04 would directly contradict the District Court's Order and the *NEOCH* Consent Decree. Williams does not mention the *NEOCH* ballots or explain why he is entitled to a stay of the investigation of these ballots.

Instead, the Board focuses its argument on 149 provisional ballots which, it insists, it never found to be impacted by poll worker error. This argument ignores the fact that the Board deadlocked on the issue and while Secretary Brunner broke

the tie against counting the entire 286 group of ballots in which these 149 are a subset, the Secretary directed the Board to count the 149. (R. 38-9). Given the Board's arguments, however, Plaintiffs will respond with a more detailed explanation of the evidentiary support for the District Court's ruling.

Defendants wrongly argue that the evidence that supports counting these 149 ballots is based on statistical analysis, which the Ohio Supreme Court rejected. The evidence of poll worker error for these ballots comes not from statistics, but from a review of the voter addresses by Board Member Caleb Faux. (R. 38-8). Mr. Faux offered to create a spreadsheet for the Board to review that included voter name, address, and correct precinct. (Ex. A, December 21, 2010 Board Meeting Transcript at 17-20). He wanted this information to determine if the poll worker erred in determining whether any of the 286 voters whose ballots were rejected for voting in the wrong precinct lived on the opposite side of the boundary street for the precinct in which they miscast their ballot:

19 One of the things that we certainly
20 have seen in the process of interviewing
21 the poll workers that we talked to last
22 week in reviewing the ballots that were
23 dealt with in those individual precincts
24 were repeated instances of a voter who
25 lived on a street that was the boundary

1 of a precinct. They literally lived
2 across the street from the precinct in
3 which they voted. Clearly the poll
4 workers themselves thought they were in

5 the right precinct. The voter thought
6 they were in the right precinct. It was
7 an issue of misreading the Precinct
8 Guidebook.
9 So, in my mind anyway, in order for
10 us to evaluate these in an orderly
11 fashion, it would be helpful to have the
12 addresses in question of these
13 provisional ballots that are still
14 outstanding. . . .

(*Id.* at 18-19). The Board allowed Mr. Faux to do this analysis to save the board staff from doing it. (*Id.* at 19:18- 20:16).

At the December 28 Board meeting, Mr. Faux announced the results of his analysis of the addresses of the 286 voters and explained that 31% of the voters lived on the opposite side of the boundary street of the precinct in which they voted:

5 Over 30 percent of these were
6 instances -- by my count 31 percent of
7 them were instances where the voter's
8 address fell on the street, on a street
9 that was the boundary of the precinct
10 that they voted in, their address
11 happened to be on the wrong side of the
12 street. These are instances where the
13 odd numbers or the even numbers made the
14 determination as to which was the correct
15 precinct.

(R. 38-4 at 77). He found that 50% of these 286 voters lived on a boundary street or a street that passed through the precinct where they voted – the poll worker just wrongly compared their address with the precinct’s addresses. (*Id.* p. 84-85).

None of Mr. Faux's analysis was statistical; he simply gave the overall numbers in the form of percentages of the 286 ballots instead of in absolute numbers. The District Court properly found that his analysis was evidence of poll worker error.²

Additionally, the Secretary of State ruled that the Board should count these 149 ballots. (Board's Motion, Ex. 9). The Secretary of State based her decision on Board members' submissions to her. (*Id.*; R. 38-8). Williams attempted to seek a writ of mandamus from the Ohio Supreme Court against the Board complying with Directive 2011-03 but the Ohio Supreme Court dismissed the action. (Ex. B, Entry dated January 10, 2011). Therefore it is disingenuous for the Board to argue that the District Court's order regarding these 149 ballots is directly contrary to the Ohio Supreme Court's decision. (Board Motion at 13-14). There is no Ohio Supreme Court decision directed to the 149 ballots.

² Moreover, even if the Ohio Supreme Court's analysis of the Equal Protection Clause applied—and it does not—Mr. Faux's analysis would comply with it. None of his analysis is based on poll worker interviews, questionnaires, or the Directives that the Ohio Supreme Court ruled were improper under state law. The Faux analysis consisted of looking at the voter's address and comparing it to the street guide for the precinct to see if the voter lived on a street that passed through the precinct where the poll worker determined (wrongly) they should vote. Burke testified in his affidavit that, for example, Madison Road passes through 22 precincts in Hamilton County. (R. 38-8 at Ex. 1). This type of investigation was approved by the Ohio Supreme Court. (Board Motion at Ex. 2).

E. Defendants Have Not Shown That They Have A Strong Likelihood Of Success On The Merits.

Defendants argue that they have a strong likelihood of success on the merits because (1) the Board did not violate the Equal Protection Clause, (2) federal courts cannot rule on election-related issues and elections are governed solely by state law, (3) the District Court lacks subject matter jurisdiction, (4) the *Rooker-Feldman* doctrine applies. None of these arguments is well-taken.

1. This Court held that *Plaintiffs*, not Defendants, have shown a likelihood of success on their Equal Protection Claim.

In his prior motion to stay the District Court’s preliminary injunction, Defendant Williams also argued that he had demonstrated a likelihood of success on the merits of Plaintiffs’ Equal Protection Claim. This Court disagreed, holding that “[w]e cannot conclude that the district court abused its discretion in determining that this disparate treatment [rejecting 849 wrong precinct ballots but counting 26 wrong precinct ballots] made it ‘likely enough that [the likelihood-of-success] factor weighs in favor of granting the preliminary injunction.’” (R. 19). This Court further held that “[t]his analysis weighs against Williams’ motion to stay the district court’s preliminary injunction.” The same analysis applies here.

2. The United States Supreme Court has repeatedly held that federal courts can rule on election-related issues under *federal law*, namely, the Equal Protection Clause.

Defendants’ contention that elections are wholly within the province of state courts and state law flies in the face of a long line of United States Supreme Court

cases, the most recent of which is *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000). The Supreme Court has repeatedly recognized that the Equal Protection Clause requires every state to treat its voters equally, and has affirmed *federal court* rulings that struck down state laws that violated that constitutional right.

In *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963), the Supreme Court affirmed a federal court injunction of a statewide election system that weighted votes cast in rural counties more heavily than votes cast in urban counties:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of “we the people” under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State ... underlies many of our decisions.... Every voter’s vote is entitled to be counted once. It must be correctly counted and reported.... [O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.

Gray, 372 U.S. at 379-881.

In *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 665-66, 86 S. Ct. 1079 (1966), the Supreme Court held that Virginia’s poll tax violated the Equal Protection Clause: “[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the

Fourteenth Amendment.... Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.”

In *Williams v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5 (1968), the Supreme Court affirmed the injunction of Ohio election laws that made it impossible for a third political party to place its candidates on the ballot, concluding that “no State can pass a law regulating elections that violates the [Equal Protection Clause]” and that “[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is invidious discrimination, in violation of the Equal Protection Clause.”

In *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969), the Supreme Court held that a state law that allowed only certain voters to vote on school issues (i.e., property owners and parents of schoolchildren) violated the Equal Protection Clause. Similarly, in *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752 (1970), the Supreme Court affirmed an order enjoining enforcement of a Maryland voter residency law that excluded individuals living on the grounds of a federal enclave, the National Institutes of Health:

Appellants argue that even if appellees are residents of Maryland, the State may constitutionally structure its election laws so as to deny them the right to vote. This Court has, of course, recognized that the States ‘have long been held to have broad powers to determine the conditions under which the right of suffrage may be

exercised.’ At the same time, however, there can be no doubt at this date that ‘once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.’

Evans, 398 U.S. at 422 (citations omitted).

In *Bullock v. Carter*, 405 U.S. 134, 140-41, 92 S. Ct. 849 (1972), the Supreme Court affirmed an injunction of a state’s primary election filing fee system that required candidates to pay substantial fees as a condition of running for election. The Court observed that “[a]lthough we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause.”

In *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995 (1972), the Supreme Court affirmed the injunction of a state law requiring voters to reside in the state for one year and in the county for three months as a condition to voting. The Court explained: “There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”

Most recently in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000), the Supreme Court reversed a state court’s decision ordering a recount on the grounds that its decision had violated the Equal Protection Clause by failing to identify and require uniform standards for accepting or rejecting the contested ballots:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having 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....

Bush, 531 U.S. at 104-08.

This long line of cases—only some of which are cited here—demonstrates that the Equal Protection Clause protects the fundamental right to vote in a wide variety of circumstances and demands that all voters be treated equally, with respect to both the casting *and the counting* of ballots. Defendants’ argument that federal law and federal courts have no place in Ohio elections is plainly wrong.

3. The District Court has subject-matter jurisdiction.

Defendants argue that the District Court lacks subject-matter jurisdiction because only states can determine which provisional ballots should be counted. This argument, too, flies in the face of well-settled law.

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of

suffrage has made this indelibly clear.” *Reynolds v. Sims*, 377 U.S. 533, 554-55, 84 S. Ct. 1362 (1964) (collecting cases). “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.*, 377 U.S. at 562.

It is well-settled that cases involving alleged violations of the constitutional right to vote are justiciable. *Baker v. Carr*, 369 U.S. 186, 207-26, 82 S. Ct. 691 (1962); *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 84 S. Ct. 526 (1964). “These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena.” *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S. Ct. 5 (1968).

The fact that states have the power to regulate elections does not insulate them from constitutional challenges. “[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.” *Williams*, 393 U.S. at 29. Indeed, federal courts have a duty to protect the constitutional right to vote even though elections are regulated by state law:

[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in *Gomillion v. Lightfoot*, supra: ‘When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is

used as an instrument for circumventing a federally protected right.’

Reynolds, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

4. The *Rooker-Feldman* doctrine is inapplicable where, as here, the federal lawsuit was filed first.

The *Rooker-Feldman* doctrine plainly has no application here. The United States Supreme Court has held that this doctrine is statutory, not constitutional, and that it applies only in cases “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005).

That clearly is not the case here. The District Court proceedings were filed, and the District Court’s Order was issued, *before* Intervenor Williams collaterally attacked the District Court’s Order by filing an original proceeding in the Ohio Supreme Court. Therefore, the *Rooker-Feldman* doctrine does not apply.

F. Defendants Will Not Suffer Irreparable Harm Absent A Stay And The Public Interest Weighs Against Granting A Stay.

Neither Defendant will be irreparably harmed if the Board follows the District Court’s Order and counts the 165 ballots. The fact that Defendant Board risks being held in contempt for its refusal to follow the District Court’s Order does not justify a stay pending appeal; instead, Defendant Board should comply with the Order.

Williams argues he was irreparably harmed by the district court's order directing the Board to count the 165 votes without a hearing or opportunity to be heard. The district court ordered the Board to comply with the original preliminary injunction by ordering the Board to count the provisional ballots that were miscast due to poll worker error. There is no dispute that the Board had not counted any additional provisional ballots since the preliminary injunction was issued.

Williams and his attorneys have been present for every Board meeting and were as aware as the district court that on January 11, 2011 when Plaintiffs' motion to enjoin was filed (R. 38) that the Board had taken no action to count any additional provisional ballots. Nor did Williams file any papers with the district court before, or after the January 12, 2011 order was issued. A separate hearing need not be held when all parties agree that an order has not been followed. On January 12, 2011 the District Court simply ordered that the work necessary to implement her order be completed promptly by the Board. This matter has been continually before the District Court and the Board of Elections and the January 12, 2011 order was simply a reminder by the District Court to get the work done immediately.

The case continues and Williams will be able to continue his participation.

Williams' claim of irreparable harm therefore has no merit.

Nor will the Defendants be harmed if the Board investigates the *NEOCH* ballots. To the contrary, delaying that investigation will not serve the public

interest and will cause substantial harm to the public and the Plaintiffs, as witnesses' memories will fade and a delayed investigation will make it less likely that the votes can be included in a final certification of the canvass and/or recount after a determination on the merits.

Williams makes the same irreparable harm argument that this Court twice rejected – that opening the envelopes and counting the ballots inside is irreparable harm. The parties learned after the briefing on the prior stay motions, that the Board does not in fact separate the ballots from the envelopes. It remakes the ballots, so that the original miscast ballot stays with the envelope and the remade ballot is counted. R. 38-4 p. 138. Therefore, no irreparable harm can occur based on that theory.

Finally, the public interest will be served by this Court's decision to allow the District Court to enforce its preliminary injunction and its rejection of Defendants' misguided and harmful assertion that state law prevents them from complying with a federal court order. This Court should let justice be done. The Defendants insist that the Board should reject ballots that were clearly miscast by the voter due to government error. That is wrong and must be remedied.

III. CONCLUSION

For the foregoing reasons, Defendants Emergency Motions for Stay should be denied.

Respectfully submitted,

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January 18th, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 18th, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this matter.

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1 HAMILTON COUNTY BOARD OF ELECTIONS
 2 DECEMBER 21, 2010 BOARD MEETING
 3 824 BROADWAY, THIRD FLOOR
 4 COMMENCING AT 8:15 A.M.
 5
 6
 7
 8 APPEARANCES:
 9 ALEX M. TRIANTAFILOU, CHAIRMAN
 10 TIMOTHY M. BURKE
 11 CHARLES H. GERHARDT, III
 12 CALEB FAUX
 13 DAVID STEVENSON
 14 SALLY KRISSEL
 15
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 18
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 22
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 24
 25

1 MORNING SESSION December 21, 2010
 2 CHAIRMAN TRIANTAFILOU: Okay. We
 3 will go ahead and call this meeting of
 4 the Board of Elections to order. We did
 5 properly notice this meeting pursuant to
 6 Ohio Revised Code Section 121.22.
 7 We, for the record, should reflect
 8 that we have been undergoing, undergoing
 9 may not be the right word.
 10 MR. BURKE: Might be.
 11 CHAIRMAN TRIANTAFILOU: We have
 12 been investigating and speaking with
 13 various poll workers regarding this
 14 question of whether or not poll worker
 15 error was committed in the balloting
 16 process in the last election. And we
 17 were set to continue that today, but it
 18 seems that on Friday, in the afternoon,
 19 we did receive a new directive from the
 20 Secretary of State that, fair to say,
 21 gave us a more direction and I think
 22 clarified and expedited the process, and
 23 I think we're here this morning to
 24 discuss the directive first.
 25 The record ought to reflect that we

1 do have a few poll workers who did honor
 2 their subpoena and are here today. With
 3 that, then, I think we should probably
 4 discuss the directive, which is the first
 5 item on our agenda.
 6 Maybe I'll continue to make a
 7 record and say that we circulated via
 8 e-mail -- well, I'd like to say for the
 9 record that on Saturday morning, after
 10 receiving the directive Friday, I
 11 circulated an e-mail to staff and fellow
 12 Board members talking about thoughts I
 13 had about complying with the directive.
 14 I think since that date, we have had some
 15 pretty significant agreement on the Board
 16 on issues of a questionnaire.
 17 We have prepared a questionnaire
 18 that we have done by agreement that will
 19 be sent out to every poll worker that has
 20 not yet been interviewed and those who
 21 did not appear on their subpoenas. But
 22 the only modification really from our
 23 original plan is it will go to the poll
 24 workers who worked the precincts where
 25 the 849 were cast, and not those poll

1 workers who were just in the polling
 2 location, so that ought to be clear.
 3 It seems that staff did get out a
 4 questionnaire yesterday by mail, and at
 5 this point I feel that we have done all
 6 we can do -- well, let me back up again
 7 and say that we did yesterday receive by
 8 e-mail a waiver to a portion of Directive
 9 2010-87, because I believe that the
 10 Secretary and her staff did recognize the
 11 difficulty that this Board had in
 12 complying with issuing subpoenas and
 13 questionnaires simultaneously, given the
 14 very narrow time frame that we have
 15 remaining in this investigation.
 16 So at this juncture I feel, and I'm
 17 happy to open it up, that we have done
 18 all we can do to comply with Directive
 19 2010-87, and that we still have some ways
 20 to go to comply fully and that is to
 21 receive questionnaires, review those
 22 questionnaires, and ultimately make a
 23 decision about these ballots by
 24 December 28. I think that's all I have
 25 at this point to put on the record about

1 Directive 2010-87.
 2 MR. BURKE: The only thing I would
 3 add to that is that I note that we're
 4 already starting to receive responses to
 5 the questionnaires by fax and e-mail.
 6 CHAIRMAN TRIANTAFILOU: Any
 7 thoughts from the Board, I think at this
 8 point, as to how we ought to review
 9 those? Should we just have staff make
 10 copies for the Board members so we can
 11 review them privately? Do we --
 12 certainly those are -- should we call a
 13 meeting to review them? What is everyone
 14 thinking on that regard, if we can come
 15 to some consensus about it.
 16 MR. FAUX: I personally, sir, would
 17 like the opportunity to review those
 18 prior to being in a formal Board meeting
 19 situation. We're going to have a lot of
 20 those and to be able to sit down and
 21 really digest what they say, I think
 22 would be helpful for us to receive them
 23 as soon as they can be delivered to the
 24 Board. If we could do that maybe in the
 25 form of PDF files?

1 CHAIRMAN TRIANTAFILOU: Is that a
 2 hardship on staff?
 3 MS. KRISSEL: I don't know how many
 4 we can fit to e-mail that way. We can
 5 try scanning them, or we can take what we
 6 get on Thursday and hand deliver them.
 7 MR. FAUX: I'll be able to come
 8 pick them up. But, yeah, I would like
 9 the opportunity to review those as they
 10 come in.
 11 CHAIRMAN TRIANTAFILOU: I guess the
 12 only thought I had was, can we -- should
 13 we agree to just get them each
 14 individually? I think they are all
 15 certainly public records, if they are
 16 not, I'm willing to release them, that
 17 way everyone can see what the
 18 questionnaires are saying. And perhaps
 19 we can just not have another Board
 20 meeting until such time that either
 21 something comes up between now and then,
 22 or schedule one for the 28th pursuant to
 23 the Directive to make an ultimate
 24 decision about the ballots.
 25 I guess my question is: Do we need

1 to meet to review the questionnaires in a
 2 setting like this, or should the four of
 3 us just get the questionnaires, review
 4 them and then come prepared to vote on
 5 the 28th? In my mind, I think that's the
 6 way I see it.
 7 MR. BURKE: I think there's another
 8 step in here, too. First of all, I do
 9 think that the Board members ought to get
 10 copies of the questionnaires. And,
 11 frankly, I would like to get them on a
 12 daily basis, given the amount that we're
 13 going to have to review them, I would
 14 like to have the opportunity to review
 15 them as we go along.
 16 But I would also like staff to
 17 review them as well and be in a position
 18 to point out to us where they think there
 19 are significant answers that we should be
 20 aware of. We rely on staff on an awful
 21 lot of recommendations, mostly we follow
 22 them, but I would like staff to be
 23 reviewing these as well and be in a
 24 position to tell us if they see something
 25 that's significant in these.

1 CHAIRMAN TRIANTAFILOU: I don't
 2 have any problem with that at this point.
 3 MS. SEARCY: Once they are returned
 4 to us electronically, they can be
 5 forwarded.
 6 MS. KRISSEL: Right. I think we
 7 will have to, though, figure out how we
 8 want to organize them to make sure that
 9 we know what's been sent and what hasn't
 10 been sent.
 11 MR. GERHARDT: Mr. Chairman, that's
 12 fine with me. I think we should get them
 13 in advance, and I don't have any issue
 14 with staff reviewing those that are
 15 received by the Board.
 16 CHAIRMAN TRIANTAFILOU: Okay. Good
 17 enough.
 18 MS. KRISSEL: Included in your
 19 packet is the questionnaire, and then to
 20 the people who were subpoenaed this week,
 21 right after the questionnaire is the
 22 little sentence that we put into the
 23 folks who were subpoenaed about
 24 appearances this week. We also
 25 telephoned, tried to reach as many poll

1 workers last night that we could that
 2 were being subpoenaed this week.
 3 CHAIRMAN TRIANTAFILOU: The other
 4 matter I think we should place of record
 5 is this question of tie votes that this
 6 Board has had. I think we had six tie
 7 votes last week. Sally and Amy, thank
 8 you for putting those into our Board
 9 packets. We had three tie votes on
 10 December 9th. We had three additional
 11 tie votes on December 11th. Just looking
 12 at what staff has prepared, looking at
 13 the tie vote on December 9th, this was
 14 regarding the investigation of
 15 provisional ballots and how that
 16 investigation should begin. That was one
 17 tie vote. The second one was a competing
 18 proposal made by myself and Mr. Gerhardt,
 19 that was the second motion on
 20 December 9th. And the third motion was
 21 this question of authorizing those
 22 ballots, which were right location but
 23 wrong precinct.
 24 At this point -- and by the way I
 25 will be delivering my position pursuant

1 to the Directive two days earlier than
 2 was previously required. I'll get that
 3 over to you Sally midday today. Mr.
 4 Gerhardt and I are making some final
 5 corrections.
 6 But anyway, it seems to me like on
 7 the two tie votes of the three on
 8 December 9th, two of them are moot. I
 9 thought we should make a record of that.
 10 I would also say that on December 11th
 11 while we're talking about this, we
 12 made -- Mr. Burke made a motion that we
 13 send questionnaires to poll workers, that
 14 was the first motion. The second one was
 15 a second motion made by Mr. Burke,
 16 letters go out and subpoenas go out to
 17 poll workers. The third motion was a
 18 scheduling motion.
 19 I would also, I also believe that
 20 those tie votes are also moot at this
 21 point, given that we have a schedule and
 22 we have, you know, we have a plan here of
 23 attack. Is there any disagreement on
 24 what I have stated?
 25 MR. BURKE: I agree. I think the

1 only tie vote that remains relevant is
 2 the tie vote on our motion to count the
 3 right church wrong pew ballots that are
 4 not otherwise defective.
 5 CHAIRMAN TRIANTAFILOU: All right.
 6 So I think what we ought to do then is
 7 probably just a question of parliamentary
 8 procedure, we wouldn't want those -- can
 9 we --
 10 MR. BURKE: I actually think that
 11 simply by, if you want a motion to agree,
 12 although I think we all represented that
 13 we believe the other five votes are moot,
 14 and we should so advise the Secretary.
 15 CHAIRMAN TRIANTAFILOU: Okay.
 16 Yeah, because there were portions of them
 17 that if she broke the tie in favor of one
 18 or the other certain, you know, dates for
 19 scheduling --
 20 MR. BURKE: Right.
 21 CHAIRMAN TRIANTAFILOU: I think I
 22 agree with you, and our preference ought
 23 to be just to declare them moot and that
 24 no tie break is required.
 25 So, can we take a vote then on

1 those five motions being moot? I'll go
 2 ahead and make the motion that we
 3 indicate to the Secretary they are moot.
 4 Mr. Stevenson is here, any thoughts about
 5 how we should procedurally proceed?
 6 MR. STEVENSON: I think the plan
 7 you have is wonderful.
 8 CHAIRMAN TRIANTAFILOU: Thank you.
 9 Thank you, Mr. Stevenson.
 10 Okay. I'll make that motion. Is
 11 there a second?
 12 MR. BURKE: Second.
 13 CHAIRMAN TRIANTAFILOU: All in
 14 favor then of declaring those five
 15 motions moot and not requiring a tie
 16 break, please indicate by saying aye.
 17 Aye.
 18 MR. BURKE: Aye.
 19 MR. GERHARDT: Aye.
 20 MR. FAUX: Aye.
 21 CHAIRMAN TRIANTAFILOU: It's
 22 unanimous.
 23 Other issues from the Board or
 24 staff?
 25 MR. BURKE: First issue is where

1 are we on knowing which, frankly, of the
 2 whole 859 ballots staff believes are
 3 otherwise fatally defective?
 4 MS. KRISSEL: Alex and Caleb both
 5 looked at the actual provisional ballots
 6 last week, and there were I think about
 7 12 that were determined that had no
 8 printed signature or no written signature
 9 from the voter. And under the previous
 10 guidelines, or the normal guidelines from
 11 the Secretary of State's office, those
 12 provisional ballots should not be
 13 counted.
 14 But -- and then there is a tub that
 15 needs review from the Board members.
 16 Specifically, issues like the person who
 17 was registered to vote in Franklin County
 18 but came down here to vote and gave their
 19 address as Georgia. So, there's some of
 20 those kinds of issues that we would be
 21 presenting to you for your decision.
 22 MR. BURKE: Is there a point -- can
 23 we do that either today or at some point
 24 before the -- I suspect the 28th is
 25 probably going to end up being a long

1 meeting. Is there some that we can
 2 eliminate prior to the 28th because of
 3 these fatal defects?
 4 CHAIRMAN TRIANTAFILOU: Here's what
 5 I would suggest, only because I have the
 6 position that we shouldn't vote on; that
 7 is, vote on any portion of the ballots
 8 without voting on the entire 849. I
 9 think the statute speaks to that issue.
 10 But what I would -- what I might
 11 suggest is a practical way to do it would
 12 be the staff to maybe create a spread
 13 sheet with the P numbers of their various
 14 ballots, if that's possible, the 849, and
 15 then --
 16 MR. BURKE: Maybe a brief
 17 description of what the problem is.
 18 CHAIRMAN TRIANTAFILOU: That's
 19 fine. And then --
 20 MR. BURKE: Because some I think we
 21 can readily agree on.
 22 CHAIRMAN TRIANTAFILOU: Agree. And
 23 there are some that during the
 24 investigative process that we agreed on,
 25 and I know we all identified those in our

1 notes, at least I have, and maybe that
 2 spread sheet would be a starting point
 3 for discussion for us to look and
 4 identify which ones we might have
 5 agreement on before the 28th, and I think
 6 that's appropriate.
 7 So, what do you think of that plan?
 8 If we put together a spread sheet with
 9 the P numbers of remaining ballots, and
 10 then we can either come back by here
 11 again, or you all can tell us which 12
 12 there were that Caleb and I kind of
 13 agreed on, put those next to the P
 14 number, and then we can have a starting
 15 point, we have eliminated for
 16 consideration, you know, a small amount.
 17 With the agreement, again, that we're not
 18 voting on any of these until we vote on
 19 all of them.
 20 MR. FAUX: First of all, I am not
 21 sure I'm prepared to make that agreement
 22 that we're not voting before we vote on
 23 all of them. I think that we certainly
 24 could, as a Board, go through the process
 25 of identifying which of these ballots are

1 not eligible to be counted for other
 2 reasons other than they are a precinct
 3 issue, which is the primary one we're
 4 still debating.
 5 As I recall, there was a tub that
 6 must have had maybe 40 or 50, just
 7 guessing, of ballots that had, as Sally
 8 indicates, a variety of issues that
 9 required more consideration and action
 10 before we could make a decision one way
 11 or the other. Those were instances I
 12 think where staff themselves didn't feel
 13 they could resolve that question. And
 14 those were questions that, again, did not
 15 have anything to do with the question of
 16 which precinct they were voted in; is
 17 that right?
 18 MS. KRISSEL: That's correct.
 19 MR. FAUX: So it seems to me that's
 20 a time-consuming process in and of
 21 itself, and for us to try and appropriate
 22 that into what we do on the 28th would
 23 make for a particularly long difficult
 24 meeting on that day. So, I would suggest
 25 that it would make some sense for us to

1 try and deal with those prior to the
 2 28th.
 3 CHAIRMAN TRIANTAFILOU: Mr.
 4 Stevenson, am I -- we might just have a
 5 good faith disagreement on the Board, but
 6 it's been my understanding all along that
 7 we should not -- and I understand that
 8 two members have voted on counting 286 of
 9 these, and I just -- it's always been my
 10 reading of the statute that we should be
 11 voting all provisionsal ballots, not just
 12 a portion thereof.
 13 MR. STEVENSON: I think the way the
 14 statute reads is that you shall not open
 15 them, count them until the determination
 16 of the eligibility of all the ballots has
 17 been made. I believe that's the way the
 18 statute reads.
 19 I don't know that there's a
 20 prohibition in the statute as to
 21 determining the eligibility of some and
 22 delaying the determination of the
 23 eligibility of others.
 24 CHAIRMAN TRIANTAFILOU: Well, it
 25 seems to me like we're not that far

1 apart. Does everybody agree that maybe
 2 we should at least begin with a spread
 3 sheet of 849, because we will have a vote
 4 on those. And I think based on our
 5 investigation and what we get back from
 6 the poll workers, I think we're going to
 7 have to look at individual ballots,
 8 location. So, does everybody agree that
 9 we ought to get a spread sheet with the P
 10 number of the ballots just as a starting
 11 point? Can we agree on that?
 12 MR. FAUX: I'm certainly willing to
 13 agree on that. Although, I would ask one
 14 other issue be addressed and that is --
 15 and I realize this is not a matter of
 16 public record and can't be made available
 17 to the public, but the address of the
 18 ballot in question I think is pertinent.
 19 One of the things that we certainly
 20 have seen in the process of interviewing
 21 the poll workers that we talked to last
 22 week in reviewing the ballots that were
 23 dealt with in those individual precincts
 24 were repeated instances of a voter who
 25 lived on a street that was the boundary

1 of a precinct. They literally lived
 2 across the street from the precinct in
 3 which they voted. Clearly the poll
 4 workers themselves thought they were in
 5 the right precinct. The voter thought
 6 they were in the right precinct. It was
 7 an issue of misreading the Precinct
 8 Guidebook.
 9 So, in my mind anyway, in order for
 10 us to evaluate these in an orderly
 11 fashion, it would be helpful to have the
 12 addresses in question of these
 13 provisionsal ballots that are still
 14 outstanding. I realize that's something
 15 that cannot be made available to the
 16 public, but it's certainly something made
 17 available to the members of the Board.
 18 CHAIRMAN TRIANTAFILOU: If putting
 19 together that spread sheet that contains
 20 the P number and the address of the voter
 21 saves staff from having to do an
 22 additional step, frankly, and leaves
 23 Caleb to do it, you know, I think we're
 24 probably okay with that, unless staff
 25 says that's a hardship. But it would be

1 helpful I think for all of us to know and
 2 not to look over your shoulder. But I
 3 think what you're proposing is P number,
 4 address of the voter -- what's that one?
 5 MR. BURKE: Right place.
 6 CHAIRMAN TRIANTAFILOU: Right
 7 place.
 8 MR. BURKE: I'd like to have that
 9 chart designated, which are the 286.
 10 CHAIRMAN TRIANTAFILOU: Okay. And
 11 the problem -- the only thing I would add
 12 would be the precinct where it was voted,
 13 so --
 14 MR. BURKE: Yeah.
 15 CHAIRMAN TRIANTAFILOU: Any problem
 16 with that, just putting that together?
 17 Mr. Stevenson, what I would ask you
 18 is by creating that document that
 19 contains sensitive information, as long
 20 as it's just shared with staff are we in
 21 compliance? Certainly we're looking at
 22 the ballots, what is the difference? I
 23 want to make sure there's not a problem
 24 with creating this additional document
 25 that contains that information.

1 MR. STEVENSON: So long as you
 2 redact the information that's protected
 3 under Federal and State law, if you
 4 release it, I don't have an issue with
 5 that.
 6 CHAIRMAN TRIANTAFILOU: That's kind
 7 of what I figured.
 8 MR. BURKE: As the chart is layed
 9 out, I'd actually like to see a couple
 10 columns that are left blank so that
 11 whatever notes we might want to put in
 12 them individually as we go through the
 13 ballot, there's room to do that.
 14 CHAIRMAN TRIANTAFILOU: Sure.
 15 Sally and Amy, I know at least for the
 16 second day of hearing, you were able to
 17 put a P number of the ballot with the
 18 precinct where it was and kind of give us
 19 that data. We're not creating too
 20 burdensome of a task here are we by
 21 asking?
 22 MS. KRISSEL: No.
 23 MR. BURKE: Okay.
 24 CHAIRMAN TRIANTAFILOU: I think
 25 that we would want to probably retain the

1 sort category as well as a column of how
 2 staff has sorted them in terms of our
 3 review of them. You know, you looked at
 4 several different bins when you were in
 5 here, issues like -- I don't know what's
 6 coming to mind right now, there were
 7 several different categories, and we put
 8 that category on as well.
 9 MR. BURKE: Were the categories
 10 some kind of problem category?
 11 MS. KRISSEL: Yes.
 12 MR. BURKE: I didn't contemplate
 13 that on the chart, but that's fine. And,
 14 frankly, if the staff thinks there are
 15 other categories that would be helpful to
 16 designate on the chart, I think that's
 17 fine.
 18 MS. KRISSEL: Well, there are -- I
 19 mean, you will have to make the decision,
 20 but there are similar categories, you
 21 know, like there are similar provisionals
 22 ballots that have the same category, so
 23 we put that category on it as well. I
 24 think we're saying the same thing.
 25 CHAIRMAN TRIANTAFILOU: Yeah, I

1 think you might have consensus on this.
 2 Is that fair to say?
 3 MR. BURKE: Yes.
 4 MR. FAUX: The only other thing I
 5 would ask, at least from my standpoint
 6 from being able to work for this, it
 7 would be helpful to have this in an
 8 electronic form, with the understanding,
 9 of course, that this is sensitive
 10 information, and we need to make certain
 11 it doesn't circulate beyond where it
 12 should be.
 13 MS. KRISSEL: Yeah.
 14 CHAIRMAN TRIANTAFILOU: Yeah, I
 15 agree, because I know that there was some
 16 standing public records requested about
 17 e-mails in that attachment, of course,
 18 because it will contain sensitive voter
 19 data, ought to be redacted to the extent
 20 it goes to the public.
 21 Look, I think we all know where we
 22 are headed and that is just a vote on
 23 these 849. I think if we get this
 24 document, it will just help us all about
 25 how we ultimately vote on various

1 ballots, because I know we have all
 2 identified certain ballots in the hearing
 3 process and will identify more. I think
 4 if we all four work on one document, it
 5 will at least make the 28th go somewhat
 6 more orderly.
 7 MR. BURKE: It just occurs to me as
 8 we're thinking about this, maybe the last
 9 couple of columns with some blanks in
 10 between should be count and don't count.
 11 Again, just how we keep notes ultimately,
 12 how the staff designates what we do.
 13 CHAIRMAN TRIANTAFILOU: That's
 14 fine. That's fine. Maybe staff can put
 15 out a draft of this thing, and then we
 16 can all kind of manipulate and make
 17 suggestions. Okay.
 18 Okay. Other business then to come
 19 before the Board, otherwise -- I did see
 20 somebody wanting to address the Board.
 21 Anything else from the Board at this
 22 point -- oh, the poll workers that are
 23 here, we have agreed to just have them
 24 answer a questionnaire at this point, so
 25 we're treating the balance of the poll

1 workers consistently. So, are we okay
 2 with that?
 3 MR. GERHARDT: Yes.
 4 MR. BURKE: Yeah.
 5 CHAIRMAN TRIANTAFILOU: Sally, it
 6 seems like you were passed a note, is
 7 there anything else we should worry
 8 about?
 9 MS. KRISSEL: Just a question: Do
 10 you have your copies of Note Pages, Help
 11 Desk Logs, Trouble Shooter Logs that you
 12 will review along with the
 13 questionnaires, or do you need additional
 14 copies of those?
 15 MR. GERHARDT: Yeah, we do. Yes,
 16 we do.
 17 MR. FAUX: Yes.
 18 CHAIRMAN TRIANTAFILOU: We have.
 19 MR. BURKE: We have a set. I do
 20 not have a set, but that's okay. I don't
 21 need to kill any more trees for that.
 22 MS. KRISSEL: I just want to make
 23 sure you have all the materials you need.
 24 CHAIRMAN TRIANTAFILOU: Okay.
 25 MR. BURKE: One other issue I would

1 like to bring up, and that's why I asked
 2 Sally to ask Dave to come over. There's
 3 a new lawsuit that was filed yesterday in
 4 the Ohio Supreme Court.
 5 MR. STEVENSON: Yes.
 6 MR. BURKE: Where do we go with
 7 that, and what's the position of the
 8 Prosecutor's office with regard to that?
 9 MR. STEVENSON: We know it's out
 10 there, Tim, we don't have -- at this
 11 point, I don't know that we have a
 12 position, nobody has really had time to
 13 read it.
 14 CHAIRMAN TRIANTAFILOU: We're not
 15 named, I don't think.
 16 MR. STEVENSON: Actually, we are.
 17 I did see that much. You know, frankly,
 18 it's really not our issue, it's the
 19 Secretary's issue. That's where the
 20 lawsuit is primarily directed.
 21 MR. BURKE: I didn't read
 22 everything, because I didn't have time
 23 this morning. I read Alex's affidavit.
 24 I know that there's a temporary
 25 restraining order being requested.

1 MR. STEVENSON: That decision will
 2 be made sometime on the 27th. That's
 3 when the response is due on the temporary
 4 restraining order.
 5 MR. BURKE: Okay. But I think
 6 sooner than that we need to address, and
 7 the Prosecutor's office needs to address,
 8 what is your position and who's being
 9 represented? I mean, it's the same
 10 question that we had earlier. I am not
 11 trying to start a fight over this, I'm
 12 just raising the question. Alex has
 13 taken a clear position in his affidavit.
 14 MR. STEVENSON: Umm-hmm.
 15 MR. BURKE: Where do we go with
 16 this?
 17 MR. STEVENSON: Tim, we represent
 18 the Board as a whole. I think that's the
 19 same position we have been in throughout
 20 these several weeks.
 21 MR. BURKE: Umm-hmm.
 22 MR. STEVENSON: You know, we
 23 have -- like I said, my summary reading,
 24 and it was a summary of the complaint, it
 25 seems to be directed primarily at the

1 Secretary's activities and not the
 2 Board's. While there is some -- while
 3 the Board is following what the Secretary
 4 has directed for reasons --
 5 MR. BURKE: Isn't the lawsuit
 6 asking that we be prohibited from
 7 counting votes?
 8 MR. STEVENSON: Yes.
 9 MR. BURKE: Then it's also directed
 10 at us as well as the Secretary?
 11 MR. STEVENSON: Yes. Right now
 12 your split on at least 286 of that.
 13 MR. BURKE: I understand, so what
 14 happens?
 15 MR. STEVENSON: What happens when?
 16 MR. BURKE: Well, does the
 17 prosecutor file any response to it?
 18 MR. STEVENSON: I don't know the
 19 answer to that right now, Tim. I can't
 20 give you an answer. And, frankly, the
 21 answer -- the response to that may be
 22 that we will do whatever the Court
 23 determines we should do. And, frankly,
 24 that may be where we're headed, I don't
 25 know the answer to that.

1 CHAIRMAN TRIANTAFILOU: Should we
 2 maybe just give you guys a chance to look
 3 at it?
 4 MR. STEVENSON: I can look at it
 5 this afternoon.
 6 CHAIRMAN TRIANTAFILOU: The only
 7 thing I have seen is my affidavit because
 8 I signed it, so I haven't seen the rest
 9 of it.
 10 MR. FAUX: Just a matter of
 11 curiosity, I haven't seen it either. I
 12 am not an attorney, but we are operating
 13 under the Directives of the Secretary of
 14 State, but we're also operating under the
 15 orders of Judge Dlott. So, I'm just
 16 curious if this lawsuit in front of the
 17 Ohio Supreme Court is directed at the
 18 activities and orders of the Secretary of
 19 State, how does that influence the orders
 20 of the Federal Court that we're also
 21 operating under?
 22 MR. STEVENSON: Well, I think --
 23 you know, it's a very interesting and
 24 dynamic question, Caleb. I think at the
 25 end of the day there's any number of

things that can come out of this. You
 could be back to where you were before
 Friday evening when the Secretary issued
 her latest directives. That's the one
 motion that the Board has approved. I
 don't know the answer to that. And I
 think that we will let the wiser people
 decide where we're headed on that.
 We have, you know, I think we could
 even debate whether the Secretary has an
 obligation or responsibility or even a
 legal authority to tell you how to abide
 by a Federal court order in a case in
 which she's not a party. But, right now
 we have what I would consider fairly
 competing interests here.
 MR. FAUX: Yes.
 MR. STEVENSON: You have a court
 order that directs you to do certain
 things. We can disagree about what the
 order says, because I don't think it's
 terribly clear whether we count 849 or
 286, but that's an opinion that I haven't
 been asked for and I am not going to
 render it. But the other thing you have

1 to keep in mind is you got a Secretary of
 2 State who is unwilling to wait for that
 3 process to play out --
 4 MR. FAUX: I understand.
 5 MR. STEVENSON: -- and, you know,
 6 she's technically your boss, more than
 7 technically, she is.
 8 CHAIRMAN TRIANTAFILOU: So To
 9 complicate -- in my opinion, my humble
 10 opinion, it's just a complicated, legal
 11 thicket that must unravel before we --
 12 MR. STEVENSON: It would be
 13 extremely good for all of us if somebody
 14 would just say, do your investigation,
 15 determine which ones are valid, and wait
 16 for the Sixth Circuit to make a ruling,
 17 but that's not going to happen.
 18 CHAIRMAN TRIANTAFILOU: Right.
 19 Okay.
 20 MR. BURKE: I would request that
 21 all of the Board members be advised
 22 promptly after your office has had the
 23 opportunity to review what was filed late
 24 yesterday, advise us as to what your
 25 position is with regard to the

Prosecutor's office going to respond on
 behalf of the Board; if so, what position
 do you propose to take?
 MR. STEVENSON: I don't have a
 problem with that, Tim, and I think
 that's fair. And, frankly, it will
 probably come before anything gets filed,
 and should come before, but --
 MR. BURKE: I think it has to
 happen quickly.
 MR. STEVENSON: I don't disagree.
 MR. BURKE: I know, Dave, and I
 don't think -- and, frankly, you know, it
 may be that the best alternative is for
 the Prosecutor's office to say, I think
 we need two attorneys to represent the
 different views of the Board.
 MR. STEVENSON: That's something
 that we will discuss.
 MR. BURKE: And that's something
 that I would request that you do, because
 clearly we have a different position
 among us as to where what we ought to be
 arguing to the Supreme Court.
 MR. STEVENSON: To the extent that

1 there ought to be an argument, I think
 2 you're right. So, I have --
 3 MR. BURKE: I, for one, think there
 4 should be an argument, but -- and
 5 obviously Alex thinks there should be an
 6 argument and has made it by virtue of his
 7 affidavit.
 8 MR. STEVENSON: The other thing I
 9 think you need to know is that Ms. Hunter
 10 has asked for an extension on her brief
 11 in the Sixth Circuit, so that may not --
 12 it was due today -- so that process may
 13 be slowed down a little bit, too.
 14 MS. BRANCH: I'll correct that,
 15 that's not -- that was an error. That
 16 was filed in the wrong case. It got
 17 withdrawn.
 18 MR. STEVENSON: I got it.
 19 MS. BRANCH: I know my Secretary
 20 filed the extension in the wrong case.
 21 MR. STEVENSON: Oh, so you're gonna
 22 have a brief this afternoon?
 23 MS. BRANCH: Yeah, it's ready to
 24 go.
 25 MR. STEVENSON: Okay. All right,

1 then ignore what I just said.
 2 MS. BRANCH: Yeah. My brief is
 3 ready to be filed, don't worry about
 4 that.
 5 MR. STEVENSON: The one that was
 6 electronically filed?
 7 CHAIRMAN TRIANTAFILOU: There has
 8 been reference to my signing an
 9 affidavit, the record should be clear
 10 also that you did provide testimony in
 11 Federal Court also.
 12 MR. BURKE: No question, no, and --
 13 CHAIRMAN TRIANTAFILOU: I didn't
 14 say you were --
 15 MR. BURKE: I am not quarreling
 16 with your right to do that. It just
 17 outlines again where we have a very
 18 different view of what happened. I think
 19 we all have the right to be heard and
 20 represented in the matter, and that's why
 21 I think we probably need two attorneys.
 22 MR. STEVENSON: I think we all
 23 ought to accept that we each have
 24 different views of all this whole
 25 process.

1 MR. BURKE: Absolutely, no
 2 question.
 3 CHAIRMAN TRIANTAFILOU: I think
 4 what's a fair question for sure is --
 5 and, again, we're in uncharted territory
 6 in almost every part of this. Should we
 7 ask the Prosecutor's Office what the
 8 propriety of providing separate counsel
 9 would be, or --
 10 MR. STEVENSON: Let me take --
 11 look, let me take a look at it before we
 12 get to the point where we're asking for
 13 opinions and having 2 to 2 votes on that.
 14 Let me take a look at it, and I'll
 15 discuss it with you guys this afternoon.
 16 CHAIRMAN TRIANTAFILOU: And maybe
 17 I don't know, I think you probably are
 18 not going to agree with this, but, I
 19 mean, look, we clearly know the two sides
 20 are going to fight this out in court,
 21 let's be honest about that. I mean,
 22 could we get to a situation where -- you
 23 don't have to agree, but could we get to
 24 a situation where maybe we just agree the
 25 Board stays out of it, much the way we

1 have as in the Sixth? I know we have
 2 been named, but, you know --
 3 MR. BURKE: I think you're right,
 4 we're not going to agree on that.
 5 CHAIRMAN TRIANTAFILOU: Okay.
 6 Well, let's let Dave take a look at it,
 7 maybe report back and if we need another
 8 Board meeting -- does that work?
 9 MR. BURKE: That's fine. And,
 10 obviously if something -- we could also
 11 go into executive sessions to discuss it,
 12 if that becomes appropriate.
 13 MR. STEVENSON: Sure.
 14 MR. BURKE: And maybe for the --
 15 well, you can figure out how you want to
 16 communicate with us this afternoon, maybe
 17 it's a conference call with the two of
 18 us, one from each party. And then we
 19 could collectively determine whether or
 20 not another meeting is necessary. And
 21 perhaps what we ought to do -- Alex, hear
 22 me out on this -- is recess today --
 23 CHAIRMAN TRIANTAFILOU: Okay.
 24 MR. BURKE: -- and continue the
 25 matter in progress with the agreement

1 that if we do decide to call another
 2 session, we provide public notice as
 3 quickly as we can, but it would be less
 4 than 24 hours. That's what I suggest we
 5 keep this meeting in recess as opposed to
 6 adjourning.
 7 MR. STEVENSON: That's fine.
 8 Understand, there is no response due from
 9 us until next Monday.
 10 MR. BURKE: I understand, but there
 11 are unique holidays in between.
 12 MR. STEVENSON: No kidding,
 13 including my birthday, so --
 14 MR. GERHARDT: That's a unique
 15 holiday.
 16 MR. STEVENSON: More than you know.
 17 But anyway, I have commitments this
 18 afternoon that are going to take me from
 19 about two till whenever to get done. If
 20 we could agree that we're not going to
 21 get back together until tomorrow morning,
 22 that would be helpful. Although, I can
 23 perhaps make a call at one o'clock today
 24 without a lot of trouble.
 25 MR. BURKE: I think, Alex, Dave, it

1 would be helpful if we might be able to
 2 do it early afternoon today, again, just
 3 because of everything else that's going
 4 to happen.
 5 MR. STEVENSON: I know.
 6 MR. BURKE: And if there is
 7 anything to be filed on Monday, some
 8 lawyer has to be in place to deal with
 9 that.
 10 MR. STEVENSON: Right.
 11 CHAIRMAN TRIANTAFILOU: I'm
 12 distracted, what was the last thing you
 13 said?
 14 MR. STEVENSON: One today on a
 15 conference call and perhaps --
 16 CHAIRMAN TRIANTAFILOU: That's fine
 17 with me.
 18 MR. STEVENSON: If we decide a
 19 meeting is necessary, tomorrow is fine.
 20 CHAIRMAN TRIANTAFILOU: One o'clock
 21 conference call is fine with me.
 22 MR. STEVENSON: Before noon,
 23 because I'm taking my kids bowling.
 24 CHAIRMAN TRIANTAFILOU: Who is
 25 gonna initiate the call, how are we going

1 to do that?
 2 MR. STEVENSON: I'll see if I can
 3 get somebody over there that knows more
 4 about phones than I do to get that done.
 5 MR. GERHARDT: I can provide --
 6 MR. BURKE: I can connect three of
 7 us easily.
 8 MR. STEVENSON: I'm sure we can do
 9 it in our office, I just don't know how.
 10 CHAIRMAN TRIANTAFILOU: We will
 11 figure it out. One o'clock then today,
 12 reconvene via conference call.
 13 MR. BURKE: Just the three of us, I
 14 think.
 15 MR. STEVENSON: Yeah, I think so.
 16 And Caleb and Chip, if they want to be
 17 involved, we can get that done, too.
 18 Well, yeah, we don't want to do that,
 19 because that's a prearranged meeting,
 20 too.
 21 MR. BURKE: Although, again, we're
 22 discussing litigation.
 23 MR. STEVENSON: Right. But, in any
 24 event, I am not going to be staying for
 25 the public comment section. I have a

1 court hearing at nine o'clock.
 2 CHAIRMAN TRIANTAFILOU: Should
 3 we -- and I'll put this on the record,
 4 should we take a vote on executive
 5 session now here, so as to not draw
 6 further litigation on public, on this
 7 Sunshine Law question? Because we
 8 clearly are going to be talking about
 9 litigation, we're going to talk about
 10 pending litigation. Do you have a
 11 problem with that?
 12 MR. BURKE: No -- you mean to
 13 permit the telephone conference?
 14 CHAIRMAN TRIANTAFILOU: Yes.
 15 MR. BURKE: That's fine by me.
 16 CHAIRMAN TRIANTAFILOU: I think if
 17 we do that pursuant to the law and then
 18 just take a roll call vote, we can have
 19 that conversation and make sure we're all
 20 limiting our conversation to the
 21 litigation only, so that way we're doing
 22 everything in the --
 23 MR. BURKE: I would move that two
 24 of us be authorized to engage in a
 25 conference call with the Prosecutor's

1 office for purposes of discussing pending
 2 litigation.
 3 CHAIRMAN TRIANTAFILOU: I'll second
 4 the motion.
 5 We need a roll call vote, that
 6 means you have to call our names here,
 7 Coleen, so go ahead.
 8 MS. OSSENBECK: Alex Triantafilou?
 9 CHAIRMAN TRIANTAFILOU: Aye.
 10 MS. OSSENBECK: Tim Burke?
 11 MR. BURKE: Aye.
 12 MS. OSSENBECK: Caleb Faux?
 13 MR. FAUX: Aye.
 14 MS. OSSENBECK: Chip Gerhardt?
 15 MR. GERHARDT: Aye.
 16 CHAIRMAN TRIANTAFILOU: Motion
 17 carries to authorize to have that
 18 executive session. Other issues?
 19 MS. KRISSEL: Do you want to set a
 20 time on the 28th?
 21 MR. BURKE: You need to be out of
 22 here, do you want to be part of the
 23 scheduling?
 24 MR. STEVENSON: I'm clear that day,
 25 so go ahead and set it.

1 CHAIRMAN TRIANTAFILOU: My
 2 suggestion was we do something in the
 3 afternoon, only because we know that
 4 gives us a chance to get the mail that
 5 morning. I have a noon appointment right
 6 now, that should last an hour, hour and
 7 15 minutes.
 8 MR. BURKE: Say one-thirty.
 9 CHAIRMAN TRIANTAFILOU: One-thirty
 10 is fine for me the 28th.
 11 MR. FAUX: That's fine with me.
 12 MR. GERHARDT: Yes, sir.
 13 MS. KRISSEL: Then we will send
 14 around a draft spread sheet, and if you
 15 could respond quickly, then we can get
 16 moving on that today.
 17 MR. BURKE: Whenever we finish this
 18 morning, I'd like to see what we have
 19 got, what you describe as "the tub."
 20 MS. KRISSEL: Umm-hmm.
 21 MR. BURKE: Anybody else want to
 22 take a look at that? I intend to do that
 23 before I leave today.
 24 CHAIRMAN TRIANTAFILOU: Okay. I
 25 have kind of done it already.

1 MS. KRISSEL: Okay.
 2 CHAIRMAN TRIANTAFILOU: Other
 3 issues?
 4 Okay. Ms. Branch -- anything from
 5 staff just -- go ahead, Ms. Branch.
 6 MS. BRANCH: Thank you. I am not
 7 sure I understand what you're doing with
 8 questionnaires. I have received a
 9 two-page questionnaire this morning, is
 10 this all that's going out or are there
 11 different questionnaires for different
 12 poll workers? For example, the
 13 Provisional Judge who actually signs the
 14 ballot, is that person getting a copy of
 15 the ballot envelope with their signature
 16 and being asked the same questions that
 17 they were asking the person last week:
 18 Is this your signature? Do you remember
 19 this voter? Do you find this voter to be
 20 in this precinct? Isn't that the wrong
 21 precinct if you look it up in the green
 22 book? That series of questions, is that
 23 being asked of the actual provisional
 24 voter to sign on each of these ballots?
 25 MR. BURKE: No, that's the only

1 questionnaire.
 2 MS. BRANCH: Are you bringing those
 3 people in to question them personally?
 4 MR. BURKE: No.
 5 MS. BRANCH: Why do you think,
 6 then, it is gonna get you to where you
 7 need to be after spending your two days
 8 last week realizing those questions were
 9 pretty productive and efficient? It
 10 doesn't take long.
 11 MR. BURKE: I don't know that it
 12 was efficient, but I agree they were
 13 productive.
 14 MS. BRANCH: I mean, efficient in
 15 just talking to the person that actually
 16 signed the ballot as opposed to talking
 17 to everybody.
 18 CHAIRMAN TRIANTAFILOU: We're doing
 19 our best to comply with the Directive
 20 that says we have to have it done by the
 21 28th. I think we all recognize that
 22 absolute impossibility of complying with
 23 a Directive that requires us to talk to
 24 that many people between now and then.
 25 Yesterday, via e-mail, this Board

1 got a waiver to the portion that says we
 2 must subpoena people, and essentially
 3 were told that a questionnaire was
 4 sufficient. We got a Board consensus
 5 around that questionnaire, which I would
 6 note for you is essentially Mr. Burke's
 7 questionnaire that was originally
 8 proposed with one additional question
 9 from us.
 10 We moved I think as rapidly as we
 11 could to agree. To our credit, we agreed
 12 to what Tim had proposed early on, just
 13 to make sure we get it out the door and
 14 comply with a Directive that requires to
 15 have it all done by the end of business
 16 today.
 17 MS. BRANCH: I guess my -- I guess
 18 I would like to make a request that you
 19 know who those folks are that signed the
 20 provisional ballot, would you please send
 21 to them an additional questionnaire with
 22 a copy of the ballot envelope, I guess
 23 the back and the front, so they can be
 24 reminded and recall that ballot and ask
 25 them the same four or five questions that

1 you all were asking last week, and add
 2 that to the mix of the questionnaires
 3 that you get back?
 4 CHAIRMAN TRIANTAFILOU: You know,
 5 and I mean this as respectfully as I can,
 6 I just think for us to take
 7 recommendations from an attorney
 8 representing one particular candidate in
 9 this election is just improper, and I --
 10 MR. HUNTER: You did it last week
 11 for Mr. Williams.
 12 CHAIRMAN TRIANTAFILOU: I don't
 13 recall that we did. And, frankly,
 14 we've -- some of what you originally
 15 proposed I think is in this questionnaire
 16 as prepared by Mr. Burke, so I would
 17 argue we have done some of that already.
 18 We have a course of action that's agreed
 19 upon by the Board at this point, I mean,
 20 that's where we're headed. I don't know
 21 that I would support any additional
 22 burden on staff, and any additional
 23 questionnaires be mailed out today.
 24 MR. HUNTER: But didn't the
 25 directive specifically state that you

1 were to ask the exact same questions that
 2 were posed to the individuals in person
 3 that were subpoenaed on December 16th and
 4 the 17th. It says: "The questions asked
 5 in the questionnaire should be the same
 6 questions that the Board asked poll
 7 workers during the in-person interviews
 8 on December 16th and 17th." I quote.
 9 CHAIRMAN TRIANTAFILOU: You know,
 10 we asked lots of questions. I think we
 11 did our best to put together the agreed
 12 upon questionnaires. You know, if you
 13 feel like we have not complied with the
 14 Directive, certainly you can challenge
 15 our Board's action with the Secretary.
 16 Ms. Hunter, again, we are -- we
 17 acted together in good faith to try to
 18 get questionnaires out, something we, you
 19 know, I continue to believe is a bad
 20 idea, but we're complying with the
 21 Directive as best we can. And we have
 22 Board agreement on how that ought to
 23 proceed. And I think to try to ask every
 24 question that was asked in this process
 25 and recreate that entire interview

1 process is complicated and difficult. I
 2 think the record ought to reflect that we
 3 have an agreement on the questionnaire at
 4 this point that we have gotten out to the
 5 voters -- or to the, excuse me, to the
 6 poll worker.
 7 MR. BURKE: And on this one I do
 8 agree with Alex, I also would not be
 9 comfortable with sending out copies of
 10 the provisional ballot envelopes. I know
 11 your intention is that they be going to
 12 poll workers, but I'm, under the
 13 circumstances, not comfortable doing
 14 that.
 15 MS. BRANCH: So, if you don't want
 16 to send questionnaires, why not build
 17 into the process a day of bringing in
 18 those people?
 19 MR. BURKE: Because I don't believe
 20 we can get through that, not -- the
 21 Directive also requires that everything
 22 be done by December 23rd. I think we're
 23 making a good faith effort to comply with
 24 the Directive, and I'm satisfied with
 25 what we're doing.

1 CHAIRMAN TRIANTAFILOU: The
 2 Directive is difficult to enact or to
 3 follow, so --
 4 Anything else Ms. Branch? You're
 5 entitled, and I want to give you a full
 6 opportunity to make a record.
 7 Mr. Smitherman?
 8 MR. SMITHERMAN: Hi, my name is
 9 Christopher Smitherman, for the record,
 10 I'm President of the Cincinnati NAACP.
 11 My last name is spelled
 12 S-M-I-T-H-E-R-M-A-N.
 13 My concern is that election ended
 14 on November 2nd, there were 11,000
 15 provisional ballots in play. And I heard
 16 Board Member Burke at each of the
 17 meetings that I have attended request
 18 from the staff that there be a review of
 19 those ballots and a determination around
 20 whether there was an error that's obvious
 21 that everyone can agree. There's a
 22 problem, and I'm back again today.
 23 Now, again, you looked at 11,000
 24 ballots in a week period. And here we
 25 are on December 21st with really no more

1 clarity around those 849 ballots. I'm
 2 curious on why there isn't a spread sheet
 3 today, based on what the Board Member Tim
 4 Burke had been requesting from the staff?
 5 Why today don't we have that information?
 6 CHAIRMAN TRIANTAFILOU: I would
 7 argue that we have a whole lot more
 8 information today than we had before.
 9 We've talked to 77 poll workers. Caleb
 10 and I came into this room actually and
 11 reviewed this tub of provisional ballots.
 12 And, you know, we sort of built a kind of
 13 consensus about which ones were fatally
 14 flawed, which are the ones you would say
 15 that Tim asked about.
 16 I think that staff, given the
 17 charged nature of this, is a little
 18 squeamish to sort of agree and make
 19 recommendations to us. I don't want to
 20 speak for staff, I'm looking to just give
 21 a fair assessment of it. I think staff
 22 says, you know what, you guys are the
 23 Board, you should make these decisions.
 24 I think you heard today that Sally
 25 gave us a number of about 20 that she

1 thinks are fatally flawed, that's our
 2 words for describing those that are
 3 otherwise not, you know, not valid. And
 4 I think we're all just headed towards the
 5 28th where we will ballot-by-ballot make
 6 a determination about which ones are
 7 valid and which ones aren't.
 8 MR. SMITHERMAN: Mr. Chairman, that
 9 was my next question, because you
 10 indicated at least five times during the
 11 meeting that your vote is going to be
 12 surrounding all 849, not
 13 ballot-by-ballot. So, I'm concerned that
 14 we're going to get to the 28th and
 15 there's going to be a tie vote on the
 16 28th about the condition of these ballots
 17 that are in question, because you're
 18 saying I am not going to look at them
 19 ballot-by-ballot. And my reason, as my
 20 reasonable mind says that we're here not
 21 advocating for the candidates, we're
 22 advocating for the voters, meaning there
 23 are people that showed up and voted and
 24 we're making a determination around their
 25 right to be counted in this election.

1 So that only can be done by looking
 2 individual-by-individual, not a
 3 collective vote, because everyone is not
 4 in the same boat. Could you please speak
 5 to that, your train of thought around
 6 voting about the 849 and not looking
 7 vote-by-vote.
 8 CHAIRMAN TRIANTAFILOU: Yeah, it's
 9 a matter of language at this point. It
 10 is my opinion, and we just may have a
 11 different interpretation of the law, I'm
 12 happy to give you the citation of the law
 13 that I believe applies. It's my opinion
 14 that we can't authorize the opening and
 15 counting of a portion of the 849. So
 16 when I say we're going to be
 17 ballot-by-ballot, yes, we will be able to
 18 do that, but by the close of our meeting,
 19 we will have made a vote about which
 20 one -- or which group of the 849 ought to
 21 be counted and which ones ought to not be
 22 counted. So the reason I can say we're
 23 going to go ballot-by-ballot on that day
 24 is because we will make a determination
 25 about all 849 in one meeting.

1 What I believe the law says though
 2 is that we should not -- for instance, if
 3 Tim and Caleb decided today those 20
 4 fatally flawed ballots ought to not be
 5 counted, I think we can't make that vote
 6 until we consider them as a whole. I
 7 just think that's what the Revised Code
 8 says, our lawyer is not here, that's just
 9 my reading of it.

10 So, I hope I'm making sense. But
 11 on the 28th, we will have gotten all the
 12 poll worker questionnaires. We will have
 13 reviewed our notes from the 77 poll
 14 workers we talked to, and we will all
 15 make a determination about whether or not
 16 we believe poll worker error exists,
 17 which is our obligation.

18 The second thing I want to say is
 19 you're absolutely right, we probably will
 20 have a whole series of 2 to 2 votes, and
 21 my guess is by the 29th or the 30th,
 22 Secretary Brunner will break our tie
 23 based on the record we make on the 28th,
 24 and that's kind of the process.

25 MR. SMITHERMAN: And I also would

1 I like to advise the Board publically that
 2 I think your lawyer does have a conflict
 3 of interest here, and that clearly there
 4 needs to be another lawyer involved in
 5 this process filing a brief. And I am
 6 not questioning anyone's motivation, I
 7 think the Chairman has filed a brief, and
 8 I think Mr. Burke has participated in
 9 legal proceedings.

10 CHAIRMAN TRIANTAFILOU: I didn't
 11 file a brief, just so your clear, I
 12 signed an affidavit.

13 MR. SMITHERMAN: You signed an
 14 affidavit.

15 CHAIRMAN TRIANTAFILOU: And Tim
 16 gave testimony under oath, so I saw it --

17 MR. SMITHERMAN: Sorry, as a lay
 18 person using legal language, both of you
 19 have participated in the legal process.

20 MR. BURKE: Absolutely.

21 MR. SMITHERMAN: So, I'm saying
 22 prior -- I want to weigh in prior to your
 23 public session publicly that I think this
 24 Board needs another lawyer, because
 25 ultimately I see as representing are the

1 voters, so not partisan politics, not
 2 where one side is or where the other side
 3 is, but clearly who is speaking to those
 4 ballots of which ones should be counted
 5 or not.

6 My last question is the Ohio
 7 Supreme Court weighs in on this issue, or
 8 do we have any idea on that timeline in
 9 relation to the 28th -- I'm sorry, yes,
 10 the 28th, the 29th, if we have tie votes,
 11 moving into January on when all this
 12 could wrap up, because things have to be
 13 filed and -- you're smiling, maybe you
 14 don't know that timeline.

15 MR. BURKE: When you're dealing
 16 with the Supreme Court, I know enough to
 17 know that they will establish the
 18 timeline, and every lawyer in this room
 19 understands that. But it appears from a
 20 very quick read of what portion I have
 21 had the opportunity to look at, that the
 22 effort in this lawsuit is to get the
 23 Supreme Court to act to block the
 24 counting of these ballots before the
 25 Secretary can act.

1 MR. SMITHERMAN: I got you.

2 MR. BURKE: Now whether they are
 3 successful in that or not, can't predict.

4 MR. SMITHERMAN: Thank you very
 5 much for answering my question.

6 CHAIRMAN TRIANTAFILOU: Thank you.
 7 Any further questions?
 8 Yes, sir.

9 MR. CHANDLER: Pastor Gregory
 10 Chandler with the AMOS Project and
 11 Interdenominational Ministerial Alliance.
 12 I want to make the comment, I must
 13 apologize I have to leave immediately
 14 afterwards, I have to get to a meeting.
 15 I wanted to speak to the kind of
 16 atmosphere and tenor of the meetings as I
 17 have been noticing them when I have been
 18 here and when I have not been here. This
 19 is Pastor Tracie Hunter. I don't know if
 20 you all know her, but she pastors a
 21 church here in the city. She's running
 22 for a position, judicial judge position.

23 And I have heard references in this
 24 meeting to her as if she's not known.
 25 She's being referred to as the third

1 person. And I think that's been very,
 2 very disrespectful in that John Williams
 3 has been here with his attorney, she has
 4 been here, they both have a right to be
 5 here in this room during these
 6 proceedings. They all need to be
 7 respected. She has done nothing wrong.
 8 There's been no illegal activity on their
 9 part. They used the court to address the
 10 grievance they might have, just the same
 11 as anyone else in here can do. If
 12 there's any wrongdoing, I would like to
 13 know about it. I believe that she
 14 deserves the kind of respect in these
 15 proceedings as anyone else would.
 16 There are two Biblical examples,
 17 and I don't have time to preach them, but
 18 I will just lay them out before you. And
 19 one of them being that Moses and Pharaoh
 20 had a relationship. Okay. The apostles
 21 of Jesus and the Sanhedrin had a
 22 situation in Jerusalem. Both were
 23 situations where God was trying to move
 24 minds and hearts to achieve an ultimate
 25 goal, and those who have fought against

1 what God was trying to do find themselves
 2 on the losing end of that situation.
 3 Okay. I'm just saying that I have
 4 a very strong sense that whatever
 5 happens, God is ultimately going to make
 6 sure that justice is done in the matter.
 7 And to the extent that any of you all are
 8 men or women of faith, that you will
 9 understand that the power to be is God,
 10 and he is overseeing all of this. And
 11 I'm really troubled by what appears to be
 12 this continued effort to try to use every
 13 possible effort to move these proceedings
 14 in one particular direction or another.
 15 I only ask that as we move forward,
 16 all of you together understand that we
 17 need to be respectful to one another. We
 18 need to understand what it is that we
 19 have been, you have been asked to do.
 20 And I think if we do that, then we're
 21 going to see a positive result come from
 22 all of this. Thank you for the
 23 opportunity to speak.
 24 CHAIRMAN TRIANTAFILOU: Sure.
 25 Ms. Hunter, if I have done

1 something or said something that
 2 disrespects you, I don't know what that
 3 is. I don't mean to. I have tried to --
 4 try our best to use language that's
 5 respectful and appropriate. I have
 6 listened to and answered all the
 7 questions we can listen and answer to.
 8 If that's your perception, you know, I
 9 don't know why that would be. And I
 10 guess I would apologize, but I am not
 11 sure what I'm apologizing for.
 12 I don't mean you any disrespect.
 13 We have met I think on one or two
 14 occasions over at First Watch. I don't
 15 know much about you otherwise, but you
 16 seem like a perfectly nice person. We
 17 have got a job to do here and, you know,
 18 we're doing it to the best of our
 19 ability. The democratic process
 20 sometimes leads us to have disagreements.
 21 You have seen those disagreements on this
 22 Board, my guess is you will see them
 23 again. That's just the way the democracy
 24 works.
 25 And we have -- you all have been

1 here and you have seen that we have done
 2 our best to follow the Directives of the
 3 Secretary. I thought a questionnaire was
 4 a terrible idea. The Secretary of State
 5 told us we should do one. We, as
 6 expeditiously as we could tried to do
 7 that. The Federal court order told us to
 8 do something I think State law does not
 9 mandate us to do. We have done our best
 10 to do that.
 11 So, this is just democracy playing
 12 out. And candidly, Mr. Smitherman, I
 13 think at the end of the day, I think the
 14 courts are gonna ultimately decide this
 15 thing, one way or another, whether it's
 16 Judge Dlott, whether it's the Sixth
 17 Circuit, whether it's the Supreme Court.
 18 And my goal, and I am not sure I'll
 19 be successful as Chairman of this Board
 20 will be to steer this Board away from
 21 this process at this point, do our
 22 statutorily mandated responsibility and,
 23 you know, ultimately wait for some higher
 24 authority in the courts, one way or the
 25 other, to give us some direction as to

1 what ought to happen, because that's how
 2 it all started.
 3 Go ahead, sir.
 4 MR. SMITHERMAN: I want to just ask
 5 the Board while you're here publicly
 6 about early voting. It's my
 7 understanding that if citizens come in
 8 the first seven days to cast votes in
 9 Hamilton County, that there aren't any
 10 provisional ballots because the pertinent
 11 voter is able to change their address,
 12 they are able to register to vote and
 13 vote on that day; is that true?
 14 MS. KRISSEL: It's a five-day
 15 period. There's a five-day period
 16 between the closing of voter
 17 registration, which is 30 days prior to
 18 the election, and opening of absentee
 19 voting, which is 35 days before the
 20 election.
 21 MR. SMITHERMAN: I'm actually just
 22 counting the weekend in that scenario,
 23 right, Saturday and Sunday. But is it
 24 five business days you're articulating?
 25 MS. KRISSEL: Yes.

1 MR. SMITHERMAN: And there's no
 2 voting on Saturday, typically, within
 3 those seven days. I mean, you typically
 4 don't have early voting on Saturday.
 5 Sometime in that period we have early
 6 voting on Sunday, and we have early
 7 voting on Saturday.
 8 MS. KRISSEL: I think we are
 9 generally open on the Saturday prior to
 10 the close of registration, so we normally
 11 are open on the Saturday.
 12 MR. SMITHERMAN: And that would be
 13 the fifth day?
 14 MS. KRISSEL: Yeah. I mean, I can't
 15 tell without looking at a calendar a
 16 specific election, but we always are open
 17 the Saturday prior to the close of
 18 registration, so that would be in that
 19 same time period.
 20 MR. SMITHERMAN: So, is that a
 21 Tuesday to Tuesday or is that a Tuesday
 22 to a Monday?
 23 MS. KRISSEL: Again, I have to see a
 24 calendar. I think it does count like,
 25 let's just look at this last one.

1 MR. SMITHERMAN: Thank you.
 2 MS. KRISSEL: So the close of
 3 registration was on -- well, this isn't a
 4 good one because we had a holiday. The
 5 close of registration was on the 12th,
 6 and we opened AV on the --
 7 MS. SEARCY: Registration was
 8 October 4th, and we opened AV the 26th or
 9 28th.
 10 MR. MALLORY: The 28th?
 11 MS. SEARCY: The 28th of September.
 12 It's actual days, not business days, you
 13 counted 30 days and 35 --
 14 MR. SMITHERMAN: So, how many days
 15 are between that date of when --
 16 MS. KRISSEL: So if it was the 28th,
 17 it was one, two, three four.
 18 MR. SMITHERMAN: There are four
 19 days where people could come here and
 20 cast votes.
 21 MS. KRISSEL: Well, five including
 22 the first day.
 23 MR. SMITHERMAN: Okay. So, five
 24 days where people could have cast votes
 25 at the Board of Elections, they could

1 have changed their address, they could
 2 have registered to vote and cast votes
 3 and, there were no provisional ballots?
 4 MS. KRISSEL: Yes.
 5 MR. SMITHERMAN: Were there any
 6 provisional ballots counted or put in the
 7 system in those five days?
 8 MS. KRISSEL: No.
 9 MR. SMITHERMAN: We identified one.
 10 We identified one we brought it to
 11 Mr. Mallory's attention.
 12 MS. KRISSEL: And it was corrected.
 13 MR. SMITHERMAN: It was corrected,
 14 right. So that's why I'm asking the
 15 question, because if I didn't know the
 16 voter and didn't bring him back to the
 17 Board of Elections to bring that clarity
 18 and make sure that he came back -- and
 19 Mr. Mallory did the right thing and
 20 allowed the person to cast their vote
 21 that wasn't provisional, it would have
 22 been a provisional ballot. And that's
 23 why I'm asking that question publicly, so
 24 if voters were to come from Lincoln
 25 Heights, come from Silverton --

1 MR. BURKE: Can somebody tell me
2 what happened? Why was there a problem?
3 MR. MALLORY: I can speak to that.
4 Well, we had one of our staff who wasn't
5 as familiar with the process of
6 provisional voting, someone came in and
7 they had a change and she processed him
8 as a provisional voter, and I said he's
9 not a provisional voter. I said there is
10 no provisional voting within this
11 five-day window because they can correct
12 and update their registration because it
13 hasn't closed yet. And then I went and
14 got him and processed him as a regular
15 voter, and we pulled the provisional
16 ballot out of the ballot box and voided
17 it.
18 MR. SMITHERMAN: I'm saying all of
19 that was handled properly. I want to
20 understand as I'm educating voters about
21 that early process, because part of I
22 think our strategy is to have people come
23 and cast votes within that window of time
24 so that we're not back here in 2011.
25 there's a Presidential race in 2012,

1 there's a mayoral in 2013, and we're
2 trying to bring these provisional ballots
3 lower to get to the solution so we're not
4 back here again.
5 MR. BURKE: I understand, and I
6 applaud that effort. I would only offer
7 this caution.
8 MR. SMITHERMAN: Thank you.
9 MR. BURKE: There was a very
10 serious effort to try to get an Election
11 Reform Bill through the legislature the
12 past two years; in the end, it didn't get
13 adopted it, just didn't move quickly
14 enough. Had that bill been adopted it
15 would have eliminated that period of time
16 where you could both register and vote.
17 My suspicion is, given what the makeup of
18 the new legislature will be, such a
19 provisional is likely to be adopted.
20 CHAIRMAN TRIANTAFILOU: Yes, sir.
21 Bishop Hilton.
22 BISHOP HILTON: Mr. Chairman and
23 the other Board members, just a couple of
24 questions. I heard you say that a
25 lawsuit was filed on last evening. And

1 my first question would be, who filed
2 that lawsuit to stop the votes from being
3 counted?
4 MR. BURKE: I am not sure who all
5 of the parties to it are. The one name
6 that I recognized because it happens to
7 be at the top is the leader of the Indian
8 Hill Tea Party.
9 BISHOP HILTON: So, the Tea party
10 and others have filed a lawsuit to stop?
11 MR. BURKE: Mr. Hilton, all I know
12 is I recognize that name in being in that
13 position. I am not sure who the other
14 parties are.
15 BISHOP HILTON: Okay, second
16 question. Did the Prosecutor's office;
17 namely, Joe Deters, have proper authority
18 from this Board to file an appeal on
19 Mrs. Hunter's original lawsuit?
20 CHAIRMAN TRIANTAFILOU: No. And, 20
21 in fact, you have to agree, this Board
22 split and Secretary Brunner told us not
23 to pursue the appeal on behalf of the
24 Board. Ms. Branch, you can correct us,
25 too, but I don't think this Board has

1 pursued the appeal of the Federal court
2 order issued by Judge Dlott?
3 MR. BURKE: There was initially a
4 very brief filing by the Prosecutor's
5 office, but --
6 MS. BRANCH: That was on a motion.
7 MR. BURKE: Correct.
8 MS. BRANCH: The Board has not
9 appealed.
10 MR. BURKE: There's been no brief
11 filed, and they are not a party to the
12 appeal.
13 BISHOP HILTON: And my third and
14 final thing is the questions and the
15 interviews was to come to a consensus as
16 to whether poll worker error has taken
17 place; is that correct?
18 MR. BURKE: Consensus is the word
19 that I don't think is probably accurate.
20 BISHOP HILTON: Okay. Well, change
21 the terminology.
22 MR. BURKE: What was clear is that
23 it was intended to allow all of us to
24 draw our conclusions as to whether or not
25 we could identify poll worker error. I

1 think there are other means at our
 2 disposal to identify poll worker error,
 3 and we're pursuing those as well.
 4 BISHOP HILTON: I think the example
 5 that Mr. Smitherman just brought up and
 6 Mr. Mallory just answered the question,
 7 is a clear demonstration of poll worker
 8 error.
 9 MR. BURKE: But that one got
 10 corrected. It was corrected early.
 11 BISHOP HILTON: It got corrected,
 12 but I think that's clear demonstration
 13 that poll worker error took place.
 14 That's all I'm saying.
 15 MR. BURKE: It exists, I agree.
 16 CHAIRMAN TRIANTAFILOU: You know
 17 what else you ought to know, Mr. Hilton,
 18 we counted a higher percentage of
 19 provisional ballots than we have in
 20 recent history, is that right, Sally?
 21 MS. KRISSEL: That's correct.
 22 CHAIRMAN TRIANTAFILOU: So, the
 23 provisional ballots that come before us
 24 each and every time -- and by the way,
 25 95 percent of the time we're doing this

1 nobody is watching, you all have an
 2 interest now and that's terrific, but you
 3 should know that we counted more
 4 provisional ballots this time than we
 5 have ever counted before.
 6 That's not me offering an opinion
 7 about any of this, it's just me telling
 8 you we're improving this as we go. We
 9 have one close race now so that the
 10 spotlight is on us, but we counted more
 11 provisional ballots now than we have in
 12 the past.
 13 Yes, ma'am?
 14 MS. FARRIS: Erica Farris. I have
 15 a question. My first question is
 16 regarding the Directive 2010-87, and that
 17 second paragraph at the end it says:
 18 Additionally -- it says: "Additionally
 19 Judge Dlott's order is not limited to
 20 provisional ballots cast in the wrong
 21 precinct but correct polling location,
 22 but to the existence of poll worker error
 23 in general regarding the casting of
 24 provisional ballots."
 25 And what I heard today seems to

1 relate to that last sentence, where
 2 the -- you said that ballots, provisional
 3 ballots that didn't have signatures or
 4 printed names, in the prior directive
 5 Secretary of State specifically said that
 6 if the voter who voted provisionally did
 7 not sign the name or print their name and
 8 the poll worker signed the ballot stating
 9 that everything was correct, that that
 10 was poll worker error and should be
 11 counted.
 12 CHAIRMAN TRIANTAFILOU: We're going
 13 to look at all those ballots and make a
 14 determination.
 15 MS. FARRIS: But you all said you
 16 were not counting those today.
 17 MR. BURKE: We didn't say that, we
 18 asked the staff what they saw as poll
 19 worker error -- I'm sorry, what they saw
 20 as other fatal flaws they said they saw
 21 that we have not voted on anything yet.
 22 MS. FARRIS: Okay. But that is --
 23 CHAIRMAN TRIANTAFILOU: Right.
 24 MS. FARRIS -- the understanding
 25 that the Secretary of State did say that

1 if those provisional ballots did not have
 2 a provisional ballot voter's signature or
 3 a printed name, and the poll worker
 4 signed that ballot envelope stating that
 5 they certified everything was correct
 6 that that should be counted as poll
 7 worker error, and that vote should be
 8 counted.
 9 And my second point is, I just like
 10 to ask you, Alex, when did you get
 11 contacted and when did you file an
 12 affidavit for that Ohio Supreme Court
 13 case?
 14 CHAIRMAN TRIANTAFILOU: I am not
 15 going to answer your question, with all
 16 due you respect. I am not going to
 17 answer about my personal behavior and my
 18 activities.
 19 MS. FARRIS: You answered it not as
 20 Chairman of the Board of Elections, but
 21 as a personal citizen?
 22 CHAIRMAN TRIANTAFILOU: I am just
 23 not going to get into what I did. Look,
 24 what I'm going to tell you by my signing
 25 the affidavit is, much like Mr. Burke was

1 called by Ms. Branch to testify in
 2 Federal court --
 3 MS. FARRIS: That's right.
 4 CHAIRMAN TRIANTAFILOU: -- he
 5 voiced his opinion about the status of
 6 the law in Ohio that day. Tim has
 7 consistently done that, and I respect his
 8 position, although I may disagree with
 9 it. He offered that testimony, I was --
 10 I offered my testimony by form of an
 11 affidavit, and I'm --
 12 MS. FARRIS: Why are you not
 13 wanting to -- is that public information
 14 when you did -- did you do it as
 15 Chairman?
 16 CHAIRMAN TRIANTAFILOU: Where I go
 17 and what I do is I'm not sure is --
 18 MS. FARRIS: Let me just ask this
 19 question, my final question.
 20 CHAIRMAN TRIANTAFILOU: Sure.
 21 MS. FARRIS: Did you do the
 22 affidavit as Chairman of the Board of
 23 Elections, or as Alex, personal citizen?
 24 CHAIRMAN TRIANTAFILOU: You know
 25 didn't have to do it in any capacity

1 other than a person who has knowledge.
 2 And I made the affidavit, reviewed it
 3 carefully to be sure it was what I
 4 believed to be the facts. And just as
 5 Mr. Burke gave testimony, I gave my
 6 testimony in a written format, and I
 7 am --
 8 MS. FARRIS: Was it signed as
 9 Chairman of the Board of Elections, can
 10 you answer that question?
 11 CHAIRMAN TRIANTAFILOU: I would
 12 have to look at the last page of it. I
 13 don't know that I signed my name as
 14 Chairman of the Board of Elections. If I
 15 did, you know -- I don't think it
 16 matters, but either way.
 17 MS. FARRIS: It matters to
 18 citizens. It does matter, just so you
 19 know. It might not matter to you, but it
 20 does matter to the voters and the
 21 citizens of Hamilton County.
 22 CHAIRMAN TRIANTAFILOU: Does it
 23 matter to you that, and I am not picking
 24 on, Tim --
 25 MS. FARRIS: I am not picking on

1 you. I am not picking on Tim, you have
 2 the right to express your opinion. I'm
 3 just asking a factual question. I am not
 4 picking on you.
 5 CHAIRMAN TRIANTAFILOU: Sounds like
 6 you are, no offense.
 7 MS. FARRIS: I'm really not. I'm
 8 telling you I'm not. I just purely
 9 wanted to know that. Thank you.
 10 MR. BURKE: Okay. Let me be clear,
 11 I don't begrudge Alex filing an
 12 affidavit.
 13 MS. FARRIS: I don't either.
 14 MR. BURKE: In addition to
 15 testifying in Court, I filed a memorandum
 16 in the Sixth Circuit on my behalf and
 17 Caleb's behalf. I asked nobody's
 18 permission to do that --
 19 MS. FARRIS: You don't need to.
 20 MR. BURKE: -- but I wanted to
 21 express our position, and to make it
 22 clear that the prosecutor, if he was
 23 going to speak, was not speaking on
 24 behalf of Caleb and myself. And, Alex, I
 25 didn't feel it necessary to ask Alex or

1 Chip for their permission to do that, and
 2 obviously they didn't need my permission
 3 for Alex to do what he did.
 4 MS. FARRIS: Yeah, I am not
 5 implying that.
 6 CHAIRMAN TRIANTAFILOU: Thank you.
 7 MR. SMITHERMAN: I think the energy
 8 around the voting -- and this is for me,
 9 too, is the understanding of the
 10 partisanship around whether we count or
 11 we don't count; whether that's the
 12 Democrats or whether it's the
 13 Republicans. And that, looking at that
 14 from our position, at least -- let me
 15 take responsibility -- looking at my
 16 position, I don't think that should be
 17 part of the process.
 18 I mean, what we're trying -- I'm
 19 thinking the Board of Elections is about
 20 counting votes and making sure that when
 21 Americans show up and cast votes, no
 22 matter your political affiliation, that
 23 you're about the business as a Board
 24 collectively to make sure they are
 25 counted, because we don't know, the State

1 of Ohio could go either way as far as
 2 power-ship. So, I'm thinking this Board
 3 is about making sure that legal votes
 4 that are cast are counted.
 5 So if we agree that 100 of these
 6 out of 800 should be counted, I'm
 7 thinking today we would be able to
 8 determine that looking at 849 votes that
 9 are in question, and November 2nd was the
 10 election, if that is the motivation, what
 11 are we here trying to do, and I think
 12 that's part of the frustration.
 13 And Number 2, acknowledging for the
 14 record, right, in 100 years there's never
 15 been an African-American Juvenile Court
 16 judge. So, I am not going to sit here as
 17 the President of the NAACP and not voice
 18 concern if I see a situation where
 19 something could be taken away from
 20 someone in this particular situation that
 21 lawfully and legally won, and all we're
 22 asking the Board to do is count the
 23 votes. I mean that's where we are.
 24 Now I have been approached about
 25 creating a fourth seat, so I have

1 gotten --
 2 CHAIRMAN TRIANTAFILOU: Third seat.
 3 There are two, a third.
 4 MR. SMITHERMAN: Creating a third
 5 seat.
 6 CHAIRMAN TRIANTAFILOU: Yeah, there
 7 are two now.
 8 MR. SMITHERMAN: A third seat. Or
 9 let's look at the County Commissioners
 10 and how funding is happening, and maybe
 11 we can, whoever wins this, maybe we can
 12 come and create something else. I don't
 13 need to receive those phone calls from
 14 anybody, because this process isn't over.
 15 And I don't have any business to have any
 16 of those kinds of discussions with
 17 anybody, and I just want to say that
 18 publicly.
 19 My response to the person that
 20 called me was, well, maybe you want to
 21 wait for that, because Mr. Williams might
 22 need a seat. But to call the President
 23 of the Cincinnati NAACP and start having
 24 conversations about the creation of a
 25 another Juvenile Court seat because this

1 process is getting ugly, was troubling to
 2 me, and I think it speaks to where we
 3 are. You know, all we're trying to --
 4 all I'm trying to do at the NAACP, if one
 5 candidate won over another candidate,
 6 let's have it be done. And I'm walking
 7 away feeling that the process is over,
 8 let the candidates fight it out like you
 9 are saying, Chairman, in Court. But I
 10 think this Board owes the public a
 11 referee call, meaning your decision as
 12 men on which votes should be counted and
 13 which ones shouldn't be counted, before
 14 it goes to court, or I think you haven't
 15 done your fiduciary responsibility. I
 16 think to defer it back to the court,
 17 quite frankly, Mr. chairman is a cop out.
 18 CHAIRMAN TRIANTAFILOU: No. Can I
 19 address several things that you said?
 20 MR. SMITHERMAN: Yes.
 21 CHAIRMAN TRIANTAFILOU: We will
 22 make that decision on the 28th. You can
 23 bet there will be some tie votes, and you
 24 can bet Secretary Brunner will break the
 25 tie votes, that's the process. We will,

1 as men, do what you just called upon us
 2 to do. I want to say two other things.
 3 MR. SMITHERMAN: Okay.
 4 CHAIRMAN TRIANTAFILOU: I too have
 5 been asked about the creation of a third
 6 judgeship. And I was asked yesterday in
 7 a semi-public meeting of supporters about
 8 this, and I believe in smaller
 9 government. So I don't believe in the
 10 creation of one more government job,
 11 unless I feel like it's absolutely
 12 necessary. I'm familiar with the dockets
 13 over at Juvenile Court, as you know, I
 14 served myself on the bench. I don't see
 15 at this moment a need for a third
 16 judgeship.
 17 The people who are talking to me
 18 about that, I rejected as well, so we
 19 agree. The second thing, and this is
 20 something we have not talked about often
 21 in this Board, and I feel like it's what
 22 I'm fighting for at least. You said --
 23 and you said it yourself, we should count
 24 legal votes. That's what this has got to
 25 be about. If we count one vote that

1 ought not be counted pursuant to State
 2 law, that takes away your right because
 3 somebody voted in a race that should not
 4 have legally voted. That is
 5 fundamentally our problem.
 6 And the second thing, now this
 7 could open up an entirely different can
 8 of worms, but I don't believe -- I
 9 believe strongly that precinct voting is
 10 the appropriate method of voting. That
 11 means that if you live in a particular
 12 precinct, you vote in that precinct. I
 13 will tell you, in your particular polling
 14 location, what if a flood of people came
 15 into your polling location, making it for
 16 a longer line, you can't get to work, the
 17 orderly system of voting is important to
 18 maintain the integrity of the vote.
 19 The battle that you're seeing play
 20 out right now is about precinct voting
 21 and it's appropriated. And I understand
 22 your position very plainly, I just hope
 23 you will give mine the same respect, and
 24 that is that I believe that voting in a
 25 correct precinct in that system as our

1 legislature passed it is appropriate.
 2 Now there's just a difference, and
 3 I mean, look, we'll -- I think we will
 4 take a vote and the Secretary will break
 5 it on whether or not there was poll
 6 worker error, but that's a question that
 7 we just have to determine. And I hope
 8 you appreciate where I'm coming from.
 9 MR. SMITHERMAN: I do,
 10 Mr. Chairman, and I thank you for your
 11 response.
 12 CHAIRMAN TRIANTAFILOU: Sure.
 13 MR. BURKE: Let me just follow up
 14 on what the Chair just said, and now I
 15 think we're probably both repeating
 16 arguments we've made a number of times
 17 already. It is our belief that,
 18 particularly in those cases where a voter
 19 went to the location we told them to go
 20 to, that our website told them to go to,
 21 that as long as they are an otherwise
 22 qualified voter, their vote should be
 23 counted, even if they ended up at the
 24 wrong table. Because for them to have
 25 ended up voting at the wrong table, would

1 have required our poll workers not to
 2 have done their jobs correctly.
 3 And none of our poll workers
 4 deliberately did their jobs incorrect. I
 5 mean, those of you who were here and
 6 heard the testimony the two days we took
 7 it last week, when poll workers were
 8 confronted with the fact that here and
 9 there they made an error, it was clear --
 10 you could see their faces where we were,
 11 they were upset, whether they were
 12 Republican or Democratic poll workers.
 13 When they realized they made a mistake in
 14 how they read the address, they were
 15 upset that as result of their error
 16 somebody's vote had not been counted.
 17 That's why we moved to count all of the
 18 otherwise qualified votes cast in the
 19 right place.
 20 And that's a position that we have
 21 already briefed to the Secretary of State
 22 for her to break that tie, and their
 23 memorandum in opposition to that will be
 24 coming to the Secretary shortly. Whether
 25 she will break the tie on that before or

1 after the 28th, I don't know, but I find
 2 it a little more difficult to deal with
 3 the voter -- and we saw some of these the
 4 other day who came to a polling place
 5 that were in the wrong place and they
 6 knew it, but wanted to vote anyway. I
 7 can't justify counting those votes,
 8 because -- I don't disagree with Alex
 9 that the precinct system combined with
 10 the early voting system or voting here at
 11 the Board, those two combined I think is
 12 a good way and generally works pretty
 13 well. But when somebody gets, as we keep
 14 calling it, the right church and the
 15 wrong pew, their vote ought to be
 16 counted.
 17 CHAIRMAN TRIANTAFILOU: I want to
 18 say one other thing to you, Christopher,
 19 because you represented yourself as head
 20 of the NAACP, and I just want you to hear
 21 this. When we voted, we originally voted
 22 to reject these 849 provisional ballots,
 23 I don't know if you understand that
 24 history, but we voted originally to
 25 reject those 849 ballots. That caused

1 Ms. Branch, well within her rights on
 2 behalf of Ms. Hunter, to file a Federal
 3 court action to change that particular
 4 portion of what we had done, okay. When
 5 we did that, Christopher, do you
 6 understand that none of us had any idea
 7 what candidate it would affect, what race
 8 that candidate would be and what
 9 happened? We had no idea.

10 I am fighting to defend that
 11 decision that I made. I don't see any of
 12 this, any of it through a racial lense.
 13 It's been hard, frankly, for myself and
 14 Chip to stand here and hear some of the
 15 things we have heard. We're not seeing
 16 it that way. We're defending what we
 17 believe to be the law in Ohio as we see
 18 it. We made that vote to reject the 849
 19 as we have in previous election cycles
 20 until Ms. Branch did what she is
 21 rightfully able to do and that is
 22 challenge our actions in Federal court,
 23 okay, but I had no idea it would reflect
 24 that. And for me to change my position
 25 now, or to somehow alter a position based

1 on, you know, some public outcry from any
 2 particular group would be unfair.

3 And I want to tell you one other
 4 thing. We had a meeting in this room
 5 where the Mike Wilson campaign, you know
 6 who he is, the Mike Wilson campaign, head
 7 of the Cincinnati Tea Party left highly
 8 upset with us, highly upset. Very upset
 9 with our conduct. Go check out Mike
 10 Wilson's wife's Face Book page when she
 11 called me a sissy because of my vote on
 12 this Board, harshly critical.

13 And we had the same position that
 14 we have now, and that is our position
 15 with Mike Wilson was there's a State
 16 scheme for how vote challenges are to be
 17 handled, and we have a good faith -- we
 18 made the argument then that we're not
 19 going to change our position because Mike
 20 Wilson's team was upset. Let's be frank,
 21 you think the Republican Party wants to
 22 upset the Tea Party, Christopher? We
 23 did, we took it from those guys for about
 24 48 hours until they started to understand
 25 our argument.

1 We have been consistent. We think
 2 State law is the appropriate place to
 3 resolve this, so we're not sitting here
 4 six, seven, weeks after the election,
 5 that's just what we think. The other
 6 side is entitled to a different opinion,
 7 the courts will figure that part of it
 8 out. That's kind of where we stand.

9 I'm talking to you because we know
 10 each other, that's been our position, and
 11 you're welcome to disagree with it.

12 MR. SMITHERMAN: No, I appreciate
 13 the explanation and the time you took to
 14 explain it to me. My position as the
 15 President of the NAACP is to be open and
 16 honest about our acknowledgment that the
 17 first African-American to be in this
 18 position is significant to us. We're not
 19 neutral about that, we have never had
 20 anyone that close. So I'm saying if she
 21 legally won, right, all we're here to say
 22 is if she legally won, then we want to
 23 make sure that that is protected, right,
 24 that's what we're here looking at. This
 25 would be as paramount to our institution

1 locally, quite frankly, as the first
 2 African-American elected as President of
 3 the United States of America, no matter
 4 who it is.

5 So these are, and you and I have
 6 had private conversations about those
 7 milestones being significant. We have a
 8 lot of African-American juveniles that go
 9 through the court, and we want to make
 10 sure that the Court reflects the make up
 11 of the county, so this is a very, very
 12 important race that we're observing. And
 13 it is not to impugn the Chairman's
 14 thoughtfulness as he reviews the process,
 15 we're here as everyone reviewing and
 16 making sure that all laws and every legal
 17 ballot that can be counted be counted.

18 MR. GERHARDT: Mr. Chairman?
 19 CHAIRMAN TRIANTAFILOU: Go ahead,
 20 Mr. Gerhardt. Mr. Smitherman and
 21 everybody else who's here, unless we go
 22 through this process, as painful as it
 23 is, we can't ensure that the outcome of
 24 this race is appropriate. I mean, I
 25 agree with you. And unless we defend the

1 rules that pertain to elections in Ohio,
 2 however it comes out in this race, then
 3 how can anybody accept what happens in
 4 future races?
 5 I mean, there were rules that were
 6 in place on Election Day that everybody
 7 understood and we are debating how those
 8 should be applied at this point, and
 9 nobody would want to be here right now,
 10 I mean, this isn't a pleasant
 11 environment. It's not a good place to
 12 be, but unless we go through this, as
 13 tortured as it might be, then the
 14 integrity can be called into question in
 15 the future.
 16 And if Mr. Williams were down by 23
 17 votes as opposed to up by 23 votes, we
 18 would have to go through the same
 19 process. And, you know, I hope the same
 20 people would be fighting about the same
 21 issues, because unless we do that, again,
 22 you know, we won't be able to be sure
 23 once the votes are counted.
 24 So, you know, again I go back --
 25 you know, I see the looks on people's

1 faces. I see the body language, I see
 2 you know, people being critical. I see
 3 guffaws and hands-to-head, and I can't
 4 believe that they are saying this or
 5 doing that. But unless we go through
 6 this fight, then with not only this
 7 election but everything after this would
 8 be questionable. So, you know, I don't
 9 know what else we can do, but to defend
 10 the law as we know it and proceed
 11 forward, and, you know, as confusing as
 12 it might be, I think we are on that path.
 13 CHAIRMAN TRIANTAFILOU: I want to
 14 give somebody else a chance.
 15 Ma'am, did you want to --
 16 MS. FOLTZ: Thank you so much. My
 17 name is Roslyn Foltz, and I just need to
 18 revisit something that sounds very basic.
 19 I know what the law is, but is there
 20 discretion that's allowed County Boards
 21 of Elections under the law to investigate
 22 poll worker error, and it's up to the
 23 local Board to decide whether or not they
 24 are going to exercise that discretion? I
 25 mean, this goes back, you know, weeks and

1 weeks ago, but I just want to make sure
 2 that I'm understanding that fundamental
 3 premise, is that kind of the bright line
 4 that divides the opinion on the Board?
 5 CHAIRMAN TRIANTAFILOU: Well -- and
 6 if I misstate this or if there's a
 7 difference of opinion from the Board,
 8 they certainly can answer. When we
 9 started this process, before the Federal
 10 court action, we had a directive and a
 11 Federal consent decree, which is a
 12 different court decision telling us that
 13 we should review -- "should," never said
 14 "shall," it said we should review for
 15 poll worker error where citizens used the
 16 last four digits of their social security
 17 number as their form of identification
 18 and they were in the right place at the
 19 wrong table. So, there was a small group
 20 of ballots that we should have done that
 21 about, according to the original
 22 directive.
 23 Then there was a Federal Court
 24 action here. Secretary of Brunner
 25 followed up her interpretation of that

1 Federal court order and expanded that
 2 investigation into poll worker error into
 3 the 849, and that's the process you are
 4 seeing play out right now. Does that
 5 answer the question?
 6 MS. FOLTZ: Yes.
 7 CHAIRMAN TRIANTAFILOU: Yes, sir.
 8 MR. CORBIN: Hi, my name is Avery
 9 Corbin. I have been here quite a while,
 10 and I want to go back to the time that
 11 you were counting initially the
 12 provisional ballots that the staff
 13 brought to you and said that there 849
 14 ballots that we should reject for one
 15 reason or another, and everybody agreed
 16 based on the staff's recommendation, and
 17 so those 849 was gone.
 18 And as we come closer, it was
 19 revealed that out of that 849, there is
 20 some issues. After the Court order you
 21 directed your staff to make a list out of
 22 those 849 of which ones that we should
 23 look at, and I think 200-plus came out,
 24 that was based on Mr. Burke's motion.
 25 So, I hear integrity and doing the right

1 thing, et cetera, et cetera, so after it
 2 was brought to your attention that we've
 3 erred, we, as a Board, we should have
 4 probably looked at these 849 ballots a
 5 little more close, and even our staff has
 6 pulled out two plus, I don't remember the
 7 number right off the top of my head. So
 8 Mr. Burke made a motion, hey, let's count
 9 those, because I guess we did err in not
 10 looking at that. So when you talk about
 11 doing the right thing, isn't that the
 12 right thing?
 13 CHAIRMAN TRIANTAFILOU: Not if we
 14 don't fine error. You think there's
 15 error beyond those 286. The position
 16 I'll submit to the Secretary today is
 17 we're not there yet. But on the 28th we
 18 will make a decision as to whether or not
 19 we thought there was error. So I get
 20 your question -- I get your question, but
 21 the law tells us we have to find error by
 22 clear and convincing evidence, you know.
 23 If we find that error in good faith, we
 24 will vote to count the ballots; if not,
 25 we won't vote to count ballots that State

1 law tells us to.
 2 I mean, I hope you understand,
 3 State laws tells us you vote in the wrong
 4 place, your ballot doesn't count. It's
 5 on the outside of that provisional
 6 envelope, let's not forget that. We
 7 rejected the 849 because they were voted
 8 in the wrong precinct, which is an
 9 illegally cast, improperly cast ballot.
 10 That's what the law tells us. Now, you
 11 know, there's been these exceptions,
 12 that's what we're working through.
 13 That's what we're working through.
 14 And I just want to illustrate one
 15 other thing for you. If you could just
 16 vote in any precinct, you know, what's to
 17 keep a group from flooding into any
 18 particular community in this community
 19 and flooding the polls and make it so you
 20 have to wait longer in line and vote just
 21 hundreds of provisional ballots. We're
 22 fighting to maintain the system.
 23 MS. HUNTER: With all due respect
 24 then, we should make sure that we have
 25 single precincts as opposed to

1 multi-precincts, because that's where the
 2 problem arose. And let's not forget if
 3 you can prove poll worker error, you must
 4 count the vote. So the issue is that
 5 there was poll worker error, because the
 6 manual clearly states that it is the
 7 responsibility and the duty of the poll
 8 worker to make sure that every single
 9 voter is directed to the right precinct.
 10 CHAIRMAN TRIANTAFILOU: I
 11 understand. I certainly understand. And
 12 let me tell you, Ms. Hunter, and what is
 13 ironic, you and Mr. Williams probably
 14 totally agree there ought to be single
 15 precinct voting, and that may be what
 16 comes out of this process. And, you
 17 know, I think -- at least I have heard,
 18 Tim, from lots of people across the
 19 state, but everybody is watching what's
 20 happening here. We will try to do
 21 better, and maybe we go to single
 22 precinct voting, that way you don't have
 23 a choice. If you go to one place, that's
 24 where you vote. That's expensive, it's
 25 different, but you know what, maybe --

1 look, I mean, we should be on a course of
 2 continuing improvement, and if all of
 3 this stands for something, maybe it
 4 ultimately means we do change the way
 5 that works. And I appreciate your
 6 position.
 7 Yes, sir.
 8 BISHOP HILTON: Is there a clear
 9 definition among the Board of poll worker
 10 error? If that definition is clear, I
 11 don't see how you're gonna come to a 2 to
 12 2 split on the 28th.
 13 CHAIRMAN TRIANTAFILOU: The Supreme
 14 Court of the United States splits 5 to 4
 15 regularly, people read things differently
 16 and, you know, we will look at it and we
 17 will go from there.
 18 BISHOP HILTON: So, there's no
 19 definition?
 20 CHAIRMAN TRIANTAFILOU: The
 21 definition will be what the Secretary
 22 decides. If we split 2 to 2 on some
 23 ballots -- and I'm just telling you now
 24 we will likely split 2 to 2 on some
 25 ballots come December 28th, and Secretary

1 Brunner who has issued a directive, will
 2 break that tie before the end of the
 3 month, and we will have the decision
 4 made.
 5 BISHOP HILTON: It doesn't make
 6 sense for the four of you to try to come
 7 up with the definition before the 28th.
 8 Does that make sense?
 9 CHAIRMAN TRIANTAFILOU: The reason
 10 that scares me, and I think Tim would
 11 agree, as lawyers, if we come up with a
 12 definition, then both sides or lawyers or
 13 courts will say you came up with that on
 14 your own, that ought to come from the
 15 legislature.
 16 MR. BURKE: And, Bishop, in
 17 addition to that, we already have a line
 18 in the sand between the two sides over
 19 part of the definition of poll worker
 20 error, and we're clearly not going to
 21 agree on anything.
 22 BISHOP HILTON: Okay.
 23 CHAIRMAN TRIANTAFILOU: Yes, sir,
 24 in the back. I know had you've had your
 25 hand up a while, sir.

1 PASTOR O'NEAL: Pastor Rousseau
 2 O'Neal, President of Faith Community
 3 Alliance and Pastor of Rockdale Baptist
 4 Church. I would like to defend and
 5 prosecute at the same time. Poll workers
 6 have been getting beaten pretty bad and
 7 the training thereof, but if you come
 8 down here and see those poll workers,
 9 none of them meant to do any of the
 10 above. And being a former poll worker, I
 11 understand the training that goes forth,
 12 and I appreciate the efforts that you
 13 have done.
 14 And when I first came down to the
 15 very first meeting and saw the 849, just
 16 as you pointed out, tossed out, I knew
 17 right then all of them were poll worker
 18 errors, every one, because I have done it
 19 myself. And you said the place, you said
 20 that earlier "the place." Now they were
 21 in the right place. It had nothing to
 22 do -- they didn't realize they were at
 23 the wrong table, and to not count the
 24 vote is almost heresy.
 25 Another thing is, I appreciate

1 hearing you guys today. This is the
 2 first time you been so clear, I don't
 3 know what happened, but thank you. But
 4 that is about the extent of what I just
 5 want to say, every error is poll worker
 6 error. And then when they came down
 7 here, the one lady tried to apologize
 8 and, Alex, you didn't want to accept her
 9 apology. But in reality, since I knew
 10 every error was a poll worker error and
 11 they all felt very humble, like you said,
 12 Tim, and the one lady apologized because
 13 they are representing all of us who have
 14 done it before, every error is our error.
 15 If you want to change this, I can
 16 understand about different sites, but the
 17 cost would escalate off the roof. It
 18 would be a lot cheaper if you just had
 19 one person at each poll place and their
 20 only job was to direct them to the right
 21 table, that was their only job, you save
 22 a bundle and save us a lot of headache.
 23 God bless.
 24 MR. BURKE: Pastor, just -- I
 25 generally agree with you, as you know, we

1 have sometimes not, but --
 2 PASTOR O'NEAL: Yeah, you're wrong.
 3 MR. BURKE: I knew he would get
 4 that in. We did see a couple examples
 5 where it was not poll worker error, even
 6 in the testimony we took the two days
 7 last week. There were at least two cases
 8 that I can think of off the top of my
 9 head where it was the voter's fault. One
 10 of those voters happened to also be a
 11 poll worker who was from the west side of
 12 town and decided she didn't want to drive
 13 back to her precinct, and she was going
 14 to vote where she was working as a poll
 15 worker. She did not have the right to do
 16 that.
 17 PASTOR O'NEAL: And the poll worker
 18 allowed her to cast that provisional
 19 ballot, correct?
 20 MR. BURKE: You're right about
 21 that.
 22 PASTOR O'NEAL: There you go, I'm
 23 right. Remember, that, Joe, write it
 24 down.
 25 MR. BURKE: That vote, I do not

1 believe is going to be counted because
 2 that poll worker had no right to vote
 3 where she voted.
 4 CHAIRMAN TRIANTAFILOU: And that's
 5 not -- that's not poll worker error
 6 because they allowed them to vote. Our
 7 poll workers are instructed to let people
 8 vote provisionally, even if they insist
 9 on voting in the wrong place. Here's
 10 one, probably one of the few where we're
 11 going to agree.
 12 MR. BURKE: Alex is actually
 13 correct. What the poll worker needs to
 14 do is advise the voter that if they vote
 15 their vote will not be counted.
 16 PASTOR O'NEAL: That's the part the
 17 poll worker needs to advise, correct?
 18 MR. BURKE: Correct.
 19 PASTOR O'NEAL: And she did not or
 20 he did not do that, poll worker error.
 21 MR. BURKE: We don't know the
 22 answer to that. We do know in the case
 23 of the 95-year-old guy who insisted on
 24 voting, he was told if he voted there his
 25 vote would not be counted, and he

1 insisted on voting there anyway. At
 2 least that's how I remember it.
 3 CHAIRMAN TRIANTAFILOU: One or two
 4 more comments, because I know we all have
 5 to go.
 6 Yes, ma'am.
 7 MS. JASON: My name is Shirley
 8 Jason. I try not talk too much when I
 9 come down here, but today I just want to
 10 express these things. It's just like
 11 with any corporation, you have leadership
 12 at the top and you have them employees,
 13 or whatever, and you train your
 14 employees. When your employees are not
 15 performing, then it is up to the person
 16 that -- or people at the top of your
 17 organization to make sure that they are
 18 in line.
 19 There has been this conversation
 20 about poll workers and poll workers'
 21 training has been going on that I am
 22 aware of for the past year. There has
 23 been a lot of communication with
 24 different organizations out in the
 25 community pertaining to and making sure

1 that all individuals that are working the
 2 polls, that they are properly trained.
 3 So, therefore, if we're sitting up here
 4 talking about poll worker error, then we
 5 have to go back to the root of the
 6 situation, which is the poll worker
 7 training.
 8 And so if they have not been
 9 thoroughly trained, regardless if you say
 10 we give them three hours of training or
 11 four hours of training, but if you do not
 12 know whether this person has actually
 13 trained and is ready to perform their
 14 responsibility, then ultimately it goes
 15 back to who they are representing. So if
 16 you have this conversation dealing with
 17 poll worker error, they are coming up
 18 under the Board of Elections and you all
 19 as a Board, as being the Board
 20 representatives overseeing this and
 21 seeing that we constantly here for weeks
 22 have been talking about the same issue of
 23 poll worker error, when is the Board of
 24 Elections going to take responsibility
 25 for the fact that these poll workers

1 possibly was not thoroughly trained up
 2 under their jurisdiction?
 3 MR. FAUX: Mr. Chair, if I might
 4 respond? I have been quiet in this
 5 discussion up until now. First of all,
 6 we had nearly a quarter million ballots
 7 cast in the Hamilton County this last
 8 election. We're talking now about 849
 9 out of nearly a quarter of a million.
 10 So -- and there were also I believe
 11 something like 11,500 provisional
 12 ballots. We heard mentioned earlier that
 13 86 percent of those have already been
 14 counted. So the numbers that we're
 15 talking about here, first of, all are
 16 relatively a small percentage of the
 17 overall.
 18 I think it's clear from what we
 19 have seen that there probably is some
 20 need to improve on our training
 21 procedures and to make certain that poll
 22 workers working on Election Day
 23 understand what needs to happen. But I
 24 also think that we certainly have seen a
 25 lot of evidence, by and large, our poll

1 workers try very hard to do their job
 2 properly, and in almost every instance,
 3 they succeed. The fact of the matter is
 4 when you have an event take place, which
 5 is as large and complex as Election Day
 6 is, mistakes are going to happen. And
 7 that's just part of the nature of the
 8 beast a little bit, and then we have to
 9 figure out how to deal with it.

10 I think it's also important to
 11 recognize this issue that we're arguing
 12 about here over the question of wrong
 13 precinct is not new to this election.
 14 This is something that we have debated in
 15 this Board on many occasions prior to
 16 this. It's been certainly my feeling and
 17 Mr. Burke's feeling that in instances
 18 such as we're talking about here do
 19 represent ballots that should be counted.
 20 Our colleagues on the other side
 21 obviously believe that under current
 22 State law they should not be counted.

23 It's because of the closeness of
 24 this election that this issue, which has
 25 been there for a long time which has been

1 talked about over and over and over
 2 again, has finally been brought to a head
 3 and, hopefully, in the end it's going to
 4 be addressed and be addressed properly.
 5 It's a difficult process, as Mr. Gerhardt
 6 said. Personally, I think that we should
 7 have addressed it before we got to this
 8 point.

9 MS. JASON: Honestly -- and don't
 10 get me wrong, I understand and I know
 11 that it's hard coming in here on a
 12 day-to-day basis looking out at us and,
 13 as you said, the expressions on the face,
 14 it tells a lot. But at the end of the
 15 day, regardless of what position you sit
 16 in, if you have an organization, your
 17 organization is only as good as the
 18 leadership at top. And if you have an
 19 organization and you know, as you said,
 20 that elections continue to take place,
 21 and if there is a continual breakdown as
 22 the result of these elections because we
 23 continue to bring up the same subject
 24 matters, then it behooves you all not to
 25 sit up there and look at what really is

1 the problem. If the conversation
 2 continues to be about poll worker error,
 3 then why isn't it the issue that the
 4 correct procedures for their training so
 5 that they know how to do their job come
 6 Election Day is very simple?

7 MR. BURKE: Let me take a crack at
 8 this.

9 MR. CLARK: Okay.

10 MR. BURKE: First of all, the Board
 11 staff which organizes and conducts the
 12 training is constantly attempting to
 13 improve that training, and they made
 14 dramatic changes in the training earlier
 15 this year to improve it even further.
 16 The Board staff also does review on a
 17 regular basis the performance of poll
 18 workers, and where they identified a poll
 19 worker who just isn't with it, that poll
 20 worker gets replaced.

21 What we saw in much of the
 22 testimony on Thursday and Friday wasn't
 23 poll workers who weren't trying to follow
 24 the directions, in fact, they generally
 25 were, and what they testified to was

1 following the right procedures. Where
 2 the problem developed wasn't in lack of
 3 training, because they were trained
 4 correctly, it was in the human error of
 5 trying to identify whether a particular
 6 address was inside a particular
 7 geographic area, that precinct.

8 They went to the books they should
 9 have gone to, at least one of which can
 10 be very difficult to read in terms of
 11 looking at address lists and is it
 12 between 127 and 155 or between 128 and
 13 156, odd or even side of the street, and
 14 maybe there are ten different sets of
 15 addresses on the same street and the poll
 16 worker simply misread the book. And
 17 that's --

18 MS. JASON: With all due --
 19 MR. BURKE: -- and that's just
 20 human error.

21 MS. JASON: Nature, I understand.
 22 But with all due respect, when I can
 23 specifically have conversations with
 24 individuals, and especially the precinct
 25 executive who was overseeing the poll

1 over in Silverton, and they are
 2 specifically --
 3 MR. BURKE: We know --
 4 MS. JASON: -- saying that they
 5 sent them to whatever table, just pick a
 6 table and go over there.
 7 MR. BURKE: Clearly error, no
 8 question about that. And there was a
 9 breakdown there in what those poll
 10 workers understood, assuming that those
 11 facts are accurate. Certainly we have
 12 heard that from a number of people,
 13 although not as sworn testimony here. I
 14 hope that gets acknowledged in the
 15 questionnaires from the folks in
 16 Silverton.
 17 But from the testimony that we
 18 heard, it wasn't that kind of breakdown,
 19 it was simply a misreading of those
 20 addresses where the biggest problems
 21 appeared to have occurred.
 22 MS. JASON: It is still error.
 23 MR. BURKE: I don't disagree, it
 24 clearly is error. And the poor voter who
 25 thought they were at the right table

1 shouldn't be punished because of that. I
 2 agree.
 3 CHAIRMAN TRIANTAFILOU: This
 4 gentleman has had his hand up for a long
 5 time. State your name, sir.
 6 MR. BERRY: My name is William
 7 Berry. I live in the Bond Hill area.
 8 And Friday, the day -- the week of
 9 voting, my wife and I received one card
 10 saying they changed our voting place. I
 11 said, this is unusual.
 12 So, I came down here to vote. So
 13 that means, you know, just like a social
 14 security card, you and your wife got two
 15 different numbers. So, since you sent us
 16 that one card with Mr. and Mrs. Berry,
 17 that means one vote didn't get counted;
 18 am I right or wrong? And I still have
 19 that card, when I came down here I showed
 20 it to some people.
 21 CHAIRMAN TRIANTAFILOU: Bring it to
 22 the Board, because that's not one of our
 23 cards. The Board of Elections didn't
 24 send out a card that late.
 25 MR. BURKE: Did it have both your

1 name and your wife's name on it?
 2 MR. BERRY: Yes. And they told us
 3 to vote, I don't have any children in
 4 school, I forgot, they changed it from
 5 Reece's Place (phonetic) over to this new
 6 school, that I didn't even know anything
 7 about, but I came down here to vote. I
 8 still have that card.
 9 MR. GERHARDT: Mr. Chair -- right
 10 now?
 11 MR. BERRY: No, I didn't bring it
 12 with me, because I was running late.
 13 CHAIRMAN TRIANTAFILOU: We want you
 14 to bring that card down, because we have
 15 reason to believe that voters got some
 16 misinformation through the mail about
 17 where they should vote. We only know
 18 that as rumor at this point.
 19 MR. GERHARDT: Mr. Chairman, could
 20 we have a member of staff -- Mr. Berry,
 21 is that your name?
 22 MR. BERRY: Yes, sir.
 23 MR. GERHARDT: Get with Mr. Berry
 24 before he leaves today, and arrange --
 25 MR. BERRY: I'll get back to you

1 today.
 2 MR. GERHARDT: Do we have a copy of
 3 that here at the Board, his card? Do you
 4 know with whom you met?
 5 MR. BERRY: People that was
 6 standing outside.
 7 MR. GERHARDT: Somebody here at the
 8 Board?
 9 MR. BERRY: And took a picture of
 10 that, that's all I can say.
 11 CHAIRMAN TRIANTAFILOU: Okay.
 12 Thanks.
 13 MR. BERRY: I'll bring it back
 14 today.
 15 CHAIRMAN TRIANTAFILOU: Yes, sir,
 16 your name?
 17 MR. JASON: Noah Jason, Silverton,
 18 Ohio. Would it be poll worker error if
 19 the person in charge of running that
 20 precinct and you know that person left
 21 that precinct for two, three, possibly up
 22 to four hours with no one in charge and
 23 running it, okay, would those provisional
 24 votes be counted? Would that be
 25 considered poll worker error?

1 CHAIRMAN TRIANTAFILOU: Just
 2 because somebody left the polling
 3 location? People take breaks.
 4 MR. JASON: The person in charge of
 5 running the precinct, voting precinct,
 6 and that person left.
 7 CHAIRMAN TRIANTAFILOU: Everybody
 8 the poll workers are entitled to a break,
 9 aren't they? But I would have to know
 10 more, I mean, you're asking me --
 11 MR. BERRY: If they left and left
 12 their position for two, between two to
 13 four hours, would that be considered poll
 14 worker error? Because now for two to
 15 four hours of voting you don't -- you
 16 have everybody directing anybody to any
 17 table.
 18 CHAIRMAN TRIANTAFILOU: Now you
 19 added a new fact the second time.
 20 MR. BERRY: All right, what?
 21 CHAIRMAN TRIANTAFILOU: That
 22 anybody is directing anybody to any table
 23 is different than what you said the first
 24 time.
 25 MR. JASON: I'm sorry. The person

1 that was left in charge, whomever they
 2 designated, was sending anybody to any
 3 table, would that be considered poll
 4 worker error, just on those
 5 circumstances?
 6 CHAIRMAN TRIANTAFILOU: We have to
 7 take a vote on these things. I want to
 8 see what the evidence was, I think that's
 9 our obligation.
 10 MR. JASON: If you have evidence
 11 that someone left that was in charge of
 12 running the precinct polls?
 13 CHAIRMAN TRIANTAFILOU: If I found
 14 out that somebody took a break only,
 15 only, no, that to me is not clear
 16 evidence of poll worker error. Now if I
 17 find somebody in the polling location --
 18 and I am not going to go down this road
 19 because it's a slippery slope. If we
 20 find that somebody was in the polling
 21 location left and then while they were
 22 gone it was a free-for-all and you voted
 23 whatever table because there wasn't
 24 somebody in charge, that's a bigger deal,
 25 that's more clear evidence.

1 MR. BERRY: Okay. And would you
 2 find that information out by simply
 3 asking the questionnaires that you have
 4 sending out, instead of face-to-face
 5 conversation with that particular poll
 6 worker?
 7 CHAIRMAN TRIANTAFILOU: My proposal
 8 was we do the face-to-face conversation.
 9 The Secretary of State came in and said,
 10 get this thing done by the 23rd, get it
 11 done by the 28th, the kids in Hamilton
 12 County deserve a Juvenile Court judge and
 13 that's what we're doing. So, we had to
 14 stop doing the face-to-face.
 15 MR. BERRY: All right.
 16 CHAIRMAN TRIANTAFILOU: All right,
 17 folks, we're about two hours. Thank you
 18 all. I'm going to go ahead and make a
 19 motion that we adjourn. Anything else?
 20 MR. BURKE: Recess.
 21 CHAIRMAN TRIANTAFILOU: Recess,
 22 that's right. Recess. Do I have a
 23 second?
 24 MR. GERHARDT: Second.
 25 CHAIRMAN TRIANTAFILOU: All in

1 favor of recess? Aye.
 2 MR. BURKE: Aye.
 3 MR. GERHARDT: Aye.
 4 MR. FAUX: Aye.
 5 CHAIRMAN TRIANTAFILOU: Any
 6 opposed? Thank you.
 7 (Meeting recess at ten a.m.)
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CERTIFICATE

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I, BARBARA LAMBERS, RMR, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in stenotype and thereafter transcribed the within 116 pages, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 22nd day of December, 2010.

BARBARA LAMBERS, RMR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio

The Supreme Court of Ohio

FILED

JAN 10 2011

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio ex rel. John W. Painter and
John Williams

Case No. 2010-2205

IN MANDAMUS AND PROHIBITION

v.

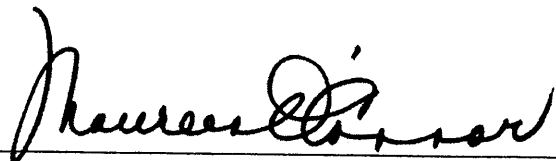
ENTRY

Jennifer L. Brunner, Secretary of the State
of Ohio, and the Board of Elections of
Hamilton County, Ohio

On January 7, 2011, we granted a writ of mandamus to compel the secretary of state to rescind Directives 2010-80 and 2010-87 and to compel the board of elections to rescind its decisions made pursuant to those directives and to instead review the 850 provisional ballots that are the subject of Judge Susan Dlott's order in *Hunter v. Hamilton Cty. Bd. of Elections*, S.D. Ohio (W.D.) No. 1:10-CV-820, and are not subject to the consent decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio (E.D.) No. C2-06-896, with exactly the same procedures and scrutiny applied to any provisional ballots during the board's review of them leading up to its decision on November 16, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary.

Shortly after we granted the writ, the secretary of state issued a tie-breaking decision and directive relating to the December 9 and December 28 tie votes of respondent Hamilton County Board of Elections. This cause is now before the court upon relators' January 10, 2011 amended complaint for a writ of mandamus challenging the secretary's January 7 tie-breaking vote and directive and their motions for expedited issuance of alternative writ and for temporary injunctive relief,

Upon consideration thereof, it is ordered by the Court that because the applicable procedural rules do not authorize a postjudgment right to file an amended complaint in the same case to attack a decision that was filed after judgment was entered, the amended complaint in mandamus is dismissed.



Maureen O'Connor
Chief Justice