

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

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

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

NORTHEAST OHIO COALITION FOR THE HOMELESS; OHIO DEMOCRATIC
PARTY

Intervenors – Appellees

v.
HAMILTON COUNTY BOARD OF ELECTIONS, et al.
Defendants

And

JOHN WILLIAMS
Intervenor – Appellant

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

**DEFENDANT/APPELLANT
HAMILTON COUNTY BOARD OF ELECTIONS
MOTION TO STAY MANDATE**

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The Hamilton County Board of Elections ("Board") moves this Court, pursuant to Fed. R. App. P. 41(d)(2), for an order staying the issuance of the mandate. On March 29, 2011, this court entered an order denying Board's request for a rehearing en banc of the panel decision entered on January 27, 2011. The mandate will issue on April 5, 2011 absent a stay. Intervenor-Appellant, John Williams, filed a Motion to Stay Mandate Pending Petition for Certiorari on April 1, 2011. The Board concurs with the arguments presented by Mr. Williams and incorporates his motion herein.

The Board seeks a stay pending its petition to the Supreme Court of the United States for a writ of certiorari. This case meets both requirements for a stay of the mandate set forth in 6 Cir. R. 41(a). First, the Board's writ of certiorari will present substantial questions of law in this case regarding the tension between federal and state law in election matters. Secondly, there is good cause for a stay to provide for further review of the legal issues presented and to prevent harm to the parties.

A. Substantial Questions of Law Presented

1. Whether *Bush v. Gore* supports the result in this case.

In light of the fact that the Supreme Court limited its opinion in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000) to the facts of the 2000 presidential

race¹, there is a substantial question as to whether the Court would affirm the application of *Bush v. Gore*, to local elections and mandate the counting of illegally cast ballots as a remedy to an alleged equal protection issue pursuant to the uniformity requirement.

Bush v. Gore dealt with legally cast ballots. Id. at 106. It ruled that states must have standards for what constitutes a legal vote which are uniform in application and not subject to multiple interpretations. Id. at 105-109. It is legally cast ballots that may not be accorded arbitrary and disparate treatment. Id. This matter, however, concerns the treatment given to classes of ballots apparently cast in violation of the uniform standards of Ohio law. Specifically, this case concerns ballots which, under Ohio law, are not to be counted because they were cast in the wrong precinct.

2. A circuit split exists regarding whether an election irregularity rises to the level of an equal protection violation.

It has long been established in other circuits that rejecting some ballots while approving others does not give rise to an equal protection claim on behalf of persons casting provisional ballots because run-of-the-mill election irregularities are not of constitutional dimension. See, e.g., *Roe v. State of Alabama*, 68 F.3d 404, 407-09 (11th Cir. 1995) (finding ballots which were defective under state law could not be counted under the Equal Protection

¹Id. at 109 (limiting the decision to statewide recounts ordered by a court where various recount procedures were used across counties).

Clause because others had been originally counted in the first instance); *Hutchison v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986) (circuit courts have as a rule declined to endorse actions under §1983 with regard to “garden variety election irregularities.”); *Powell v. Power*, 436 F.2d 84, 88 (2nd Cir. 1970) (state officials permitting voting by persons not qualified under state law); *Pettingill v. Putnam County R-1 School Dist.*, 472 F.2d 121(8th Cir. 1973) (same); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (isolated events that adversely affect individuals are not presumed to be a violation of the Equal Protection Clause). The reasons for this rule are obvious. As stated 30 years ago in *Gamza*: “If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.” *Id.* at 453.

3. Whether an equal protection violation permits a federal court to remedy such violation by ordering the counting of illegal ballots.

The panel bases its equal protection finding on the determination that the Board, acting illegally and in violation of Ohio election law, counted 27 absentee ballots cast at the offices of the Board prior to the day of the general election because Board staff handed out the wrong ballot. The Ohio Supreme Court previously held that it was incorrect for the Board to count those 27

ballots because they were cast in the wrong precinct under Ohio law. *State ex. rel Painter v. Brunner*, Slip Opinion No. 2011-Ohio-35 at 21, 22. Yet, the panel remands this case to the District Court presumably to determine which, if any, additional illegally cast ballots should be included in a recount. The equal protection clause has never been understood to mean that illegality must beget more illegality. See *Snowden v. Hughes* (1994), 321 U.S. 1, 8, 64 S.Ct. 397, 401 (unlawful administration by state officers of a non-discriminatory state law, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination); *Combs v. State of Tenn.*, 530 F.2d 695, 698 (6th Cir. 1976) (violation of a state statute or rule of practice does not, by itself, constitute deprivation of a right guaranteed by the Constitution of the United States). Contrary to this long established principle, the court here has “craft[ed] a remedy out of proportion to the asserted harm.” See *Busb* at 147 (dissent of Justice Breyer). Certiorari is warranted to determine whether a remedy in violation of Ohio law may be required by the equal protection clause.

4. Whether a federal court can order the counting of votes for a county election absent a finding of an equal protection violation.

The panel upheld the district court’s November 22, 2010 preliminary injunction which directed the Board “to 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.” Panel at 40. Under this order, the inclusion of such votes may occur prior to the district court’s final judgment on whether an equal protection violation has occurred. This is especially significant in light of the fact that one of the panel judges found “the likelihood is not particularly strong that there was an Equal Protection violation” in the first instance. Panel at 42.

Despite the fact that there is a conflict between panel judges and the Ohio Supreme Court as to the strength of the equal protection claims, the court appears to have ordered a final remedy for Plaintiffs-Appellees in that the Board is to include ballots in the recount upon its investigation at the preliminary injunction stage rather than after a full evidentiary hearing on the merits. Both of these inconsistencies increase the likelihood that the Supreme Court will hear this case.

5. Ohio state courts interpreting Ohio law decide which ballots should be counted.

Even though the panel agreed that “[i]t is within the province of the Ohio Supreme Court to determine whether Secretary of State Jennifer L. Brunner’s directives comply with *state law* governing election procedures”² and even though *Painter* held that “[t]he secretary of state’s postelection instructions

² Panel at 28 (quoting *Painter* at 21).

to the board of elections were not justified by Ohio law”³, the panel ultimately held that the investigation ordered by Secretary Brunner was proper under federal law. Panel at 30. Even if this investigation were permitted under federal law, the Ohio Supreme Court ruled it was improper under Ohio law. This ruling, under Ohio law, is not and could not have been contradicted by this Court. Likewise, the federal courts may not bless an illegal investigation of ballots under Ohio law and then mandate the counting of illegally cast ballots. This is contrary to the long established authority of the states to determine which votes are valid. See *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 477 (6th Cir. 2008) ([T]he Help America Vote Act of 2002 ... “conspicuously leaves ... to the States” the determination of “whether a provisional ballot will be counted as a valid ballot.” To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count under state law would deprive state courts of their long-established role as the “final arbiter on matters of state law.”).

The dissenters in *Bush v. Gore* emphatically recognized the need for deference to state courts in election matters. “In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”

³ *Painter* at 22-23.

Id. at 112. Justice Ginsberg was even more explicit when she stated: “There is no cause here to believe that the members of Florida's high court have done less than their mortal best to discharge their oath of office, and no cause to upset their reasoned interpretation of Florida law.” Id. at 136 (internal citation omitted). Judge Rogers echoed the need for judicial deference in this case and suggested that “[t]he law and the public interest support tailoring of federal equitable relief so as to conform as closely as possible to the Ohio Supreme Court’s interpretation of Ohio law.” Panel at 43.

6. Ohio law controls the question of whether poll worker error exists.

The District Court’s preliminary injunction issued November 22, 2010 required the Board to investigate certain provisional ballots, make a determination as to whether poll worker error occurred, and include ballots cast in the wrong precinct because of poll worker error within the recount of the Williams/Hunter race. The Board has already undertaken the investigation required by the district court. The Ohio Secretary of State, John Husted, following the law set forth in *Painter*, has ordered the Board to comply with *Painter* in determining the existence of poll worker error and in counting any additional ballots. The question of whether poll worker error exists and subsequently which ballots are to be counted are decisions of state, not federal law.

B. Good Cause for a Stay Exists

There is good cause for a stay to prevent irreparable injury to the parties and avert the harm that could be caused if the Board may not exercise its right to petition the Supreme Court. Irreparable injury may result in this case absent a stay because it is likely that the Hamilton County Juvenile Judge election will be decided before the significant legal issues set forth herein are resolved. Avoiding this potential injury is even more imperative considering that the trial court may order, as occurred in the past, the counting of provisional ballots, which counting cannot be undone.

Irreparable harm will also occur if the trial court orders the Board to conduct the recount in a manner contrary to the ruling in *Painter* or to the directives of the Ohio Secretary of State. The Board could be placed in the intractable position of having to violate multiple contradictory binding orders thereby subjecting Board members to contempt sanctions and removal from office.

Finally, there are far reaching ramifications for Ohio's precinct voting system based upon the panel decision. The panel writes that R.C. 3505.181 and 3505.183 arguably operate together in a manner that is fundamentally unfair to the voters of Ohio in abrogation of due process of law. Panel at 27, 34. Therefore, as a result of this case, the State of Ohio may be harmed by the need to substantially modify or eliminate its precinct based voting system. Ohio

boards of elections may face repeated challenges to election procedures hindering their ability to conduct elections in a timely and efficient manner.

For the reasons set forth above, Defendant-Appellant Board respectfully asks this Court to stay the issuance of the mandate to the District Court pending its petition for writ of certiorari to the Supreme Court of the United States.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on April 4, 2011 by electronic mail to all necessary parties and using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ James W. Harper
James W. Harper