

**CASE NO. 10-4481, 11-3059, and 11-3060**

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

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

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

**Intervenors-Appellees**

**v.**

**HAMILTON COUNTY BOARD OF ELECTIONS, et al.,**

**Defendants-Appellants**

**JOHN WILLIAMS,**

**Intervenor-Appellant**

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On Appeal from the United States District Court  
For the Southern District of Ohio  
Western Division

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**Response in Opposition of Plaintiff Tracie Hunter to Appellants  
Petitions for Rehearing *En Banc***

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellee 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  
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Date: February 25, 2011

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## INTRODUCTION

The law in Ohio is now crystal clear. The Ohio Supreme Court has held that Ohio law allows government election workers to nullify otherwise legitimate provisional votes simply by handing out the wrong ballot or directing the voter to the wrong precinct and there is nothing that a voter, court or local board of elections can do under state law to remedy the situation. The only remedy that remains is the U.S. Constitution which protects voters from having their votes arbitrarily thrown out by government workers without equal protection and due process of law. The panel correctly decided that Plaintiffs have shown a likelihood of success on their Equal Protection Claim and affirmed the District Court's November 22 preliminary injunction.

While Plaintiff agrees that the constitutional issues addressed by the panel are of exceptional importance, that does not mean this Court should review the panel decision *en banc*. The panel's opinion was thorough, well-supported, and well-reasoned. Indeed, concurring Judge Rogers "agree[d] largely with much of the majority opinion." Appellants' claims of error are not supported or well-taken. In fact part of the panel's decision ordering the Board of Elections ("Board") to comply with the *NEOCH* consent decree, has not been challenged by any party. Accordingly, the petitions for *en banc*

review should be denied. Due to the number of arguments raised in the petitions for *en banc* review and the amicus briefs, Appellees have divided the issues by subject matter. This response will address the equal protection arguments made by petitioners and *amici*.

**A. Statement of Facts**

A through history of the facts is contained in Appellees' two Merit Briefs and the panel's opinion. However several misstatements of fact are contained in Appellant's petitions which need to be addressed. The Board corrected worker error regarding *more* ballots than the 27 cast at the board of elections. The Board established a practice of investigating whether poll worker error caused a ballot to be miscast and if worker error was found, then counting the miscast ballots:

- The Board counted the 27 miscast ballots (and later 4 additional miscast ballots) it found were miscast due to "poll worker error." (R. 1-3, Transcript November 16, 2010 meeting p. 40-42).

- The Board counted 685 provisional ballots that should have been rejected because the poll workers indicated on the ballot envelope that the voter needed to provide additional identification to the Board, which the voter never provided. However, the Board staff recommended that the votes be counted because the poll workers indicated elsewhere on the envelopes

that the voter did have proper identification. The Board's legal counsel agreed that the poll workers' contradictory statements were an example of "demonstrated poll worker error" such that the Board could process the ballots. (R. 1-3, Board Transcript, pp. 29-33).

- The Board counted 10 ballots that should have been rejected because the voter did not sign the provisional ballot envelope. The Board investigated and found there was no reason for the poll workers to have made the voters vote a provisional ballot. (R. 1-3, Transcript of November 16, 2010 Board Meeting, pp. 71-72).

Additionally, as a result of the district court's order, the Board's subsequent investigation found 7 rejected ballots were cast in the wrong precinct due to poll worker error. The poll workers admitted their mistake under questioning by the Board. The Board also found that 9 rejected ballots were cast in the right precinct and should not have been rejected. The Board found that its workers incorrectly thought those ballots were cast in the wrong precinct. One Board member further investigated the 269 ballots cast in the wrong precinct and found 149 were miscast due to poll worker error in determining which precinct the voter's street address was located. (Appellees Second Merits Brief p. 11-13).

Contrary to the Board's statement (Board Petition p. 5-6) the Board did not conduct the same level of investigation for all the provisional ballots it reviewed. The ballots were given differing levels of scrutiny and investigation. Sometimes the staff presented the results of their investigation to the Board; other times the Board asked the staff for more information. (R. 1-3, Transcript November 16, 2010 meeting). In some cases, but not all, the Board members asked questions of the Board staff, read the notes on the provisional ballot envelopes, read the notes in the pollbooks, and inquired if there was a call on the Board help line on Election Day regarding this voter. (R. 1, Complaint ¶ 24; R. 1-3, Board Transcript, pp. 90, 105, 106, 111-112, 113, 119, 101-102, 103, 122-124, 136, and 131). For the 27 ballots that the Board accepted despite being cast in the wrong precinct, the Board merely looked at the face of the ballot envelope to determine the ballot was miscast due to board worker error. (R. 1-3 p. 40-42).

**B. The Panel Properly Affirmed The Equal Protection Ruling.**

Appellant Williams argues that the Board's counting the 27 miscast ballots can not be the basis for an equal protection violation because it was an "isolated error." (Williams Petition pp. 7-10). As shown above, the Board had a practice of correcting worker error so a ballot would be counted. The Board admitted this practice when it stated that it "was

looking for reasons to count ballots.” Board Petition p. 5. As set out above, the Board’s actions to correct errors by its workers regarding the 27 wrong ballots given to voters at the Board, the 685 ballots wrongly identified as needing further identification, and the 10 unsigned ballot envelopes that were wrongly required to be cast provisionally can hardly be labeled “isolated.”

The panel correctly determined that this case was not an example of constitutionalizing random administrative error. Rather, here there was a systemic failure. The Board refusal to treat similar groups of ballots miscast due poll worker error reflects “unguided differential treatment” of “similar evidence of poll worker error” within a single district pursuant to a review “after the election.” Opinion 27. The panel correctly demonstrated why these facts support an equal protection remedy whereas other examples tendered by the Defendants may not:

We think it unlikely that “a corresponding interest sufficiently weighty” for equal-protection purposes justifies the Board’s decision to refuse to consider similar evidence of poll-worker error with respect to similar provisional ballots. Rather, disparate treatment of voters here resulted, not from a “narrowly drawn state interest of compelling importance,” but instead from local misapplication of state law. This discriminatory disenfranchisement was applied to voters who may bear no responsibility for the rejection of their ballots, and the Board has not asserted “precise interests” that justified the unequal treatment. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see *Crawford*, 553 U.S. at 189–91 (explaining the balancing approach applied to constitutional challenges to election regulations under

*Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Norman*, 502 U.S. 279, and *Burdick*, 504 U.S. 428).

Opinion p. 26 (citations omitted).

The cases Williams relies on do not support his argument. In *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995), the court 49 ballots slipped through and were counted did not create an equal protection claim because they were “of no consequence.” *Id.* at 408. They were of no consequence because the margin of victory in the two races in question was much greater than 49 votes. *Id.* fn. 4. In *Gamza v. Aguirre*, 619 F. 2d 449 (5th Cir. 1980) the complaint alleged that an “unintended error” caused some votes to be counted for the wrong candidate due to human error. The Fifth Circuit held that without intent to violate the voters constitutional rights the plaintiffs did not state an equal protection claim. *Id.* 454. *Gelb v. Bd. of Elections of City of N.Y.*, 155 Fed. Appx. 12, 14-15 (2nd Cir. 2005) similarly required the plaintiff to show that the defendants actions were for the purpose of discriminating against a class of voters. The panel correctly rejected the argument that intentional discrimination needs to be proven since the Supreme Court has held that equal protection violation can be shown through evidence of invidious and arbitrary discrimination. Opinion fn. 13; NEOCH First Merit Brief p. 37-39.

Williams also argues that *Bush v. Gore* does not apply to this case. Williams Petition p. 9-10. However, as the panel correctly explained, *Bush v. Gore* reiterated that equal protection requires “nonarbitrary treatment of voters.” *Bush v. Gore*, 531 U.S. 98, 105, 121 S.Ct. 525 (2000). “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.” *Id.* at 104-05. Since Plaintiff has “alleged this species of unequal treatment” *Bush v. Gore* is properly applicable in this case. Opinion p. 17.

**C. The Panel’s Affirmance Of The District Court’s Order To Investigate And Count Any Additional Ballots Miscast Due To Poll Worker Error Was The Proper Remedy.**

Williams argues that the district court should have simply uncounted the 27 ballots. Williams Petition p. 10-12. The Board does not go this far, but does argue that if the ballots should not have been counted the district court should have ordered it. Board Petition p. 12. Both arguments fail for two reasons. First, no party ever sought this remedy in the district court or on appeal. During questioning at oral argument the Board’s attorney would not concede that his client wanted to uncount the 27 votes. Williams counsel never offered this as a remedy during questioning at oral argument. Therefore, it is too late to raise this remedy to the *en banc* court. Second, the panel properly recognized that simply uncounting the 27 ballots would not

resolve the equal protection violation because the 685 questionable identification ballots were counted, so were the 10 unsigned ballots. None of these ballots are segregated or retrievable so they can not be uncounted. (R.1 Complaint ¶¶ 26-29; R-3 transcript). Additionally the panel explained that it is a preferable equitable remedy to enfranchise voters then to ignore the results of the investigation undertaken. Opinion pp. 37-38. The investigation included the 7 ballots miscast due to admitted poll worker error and the 9 ballots that were cast in the right precinct. To uncount these 16 ballots, discovered during the Board's investigation, would be inequitable.

Williams cites *Vandiver v. Hardin Cty. Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991) for support. *Vandiver* held that a principal who treated a transfer student differently than plaintiff did not violate the equal protection clause when he mistakenly thought the transfer student had gone to an accredited academy. *Id.* at 931. This holding is inapposite to this case. The Board of Elections did not make a mistake – it purposefully tried to count all votes and rectify government worker errors so as not to disenfranchise voters. The Board purposefully treated one set of miscast ballots (the 27, the 685, and the 10) differently from the rest (850). The Board made no mistake such as the principal made in *Vandiver*.

Williams finally argues that any investigation that is ordered should be limited to whatever materials the Board had when it examined the 27 ballots. Petition p. 12. The panel rightfully rejected this argument leaving the decision as to what review is necessary under equal protection to the district court to decide in the first instance since no party has yet to present this argument to the district court. Opinion p. 31.

**D. The Panel Decision Did Not Create Greater Equal Protection Problems**

The Board argues that the Secretary of State's directives setting an objective standard of review of provisional ballots violates *Bush v. Gore* because the standard applies only to Hamilton County, Ohio. The Board argues that the directives created an equal protection violation because the rest of the counties did not follow these directives. Board Petition p. 11-13. These arguments misconstrue the holding in *Bush v. Gore*. The concern in *Bush v. Gore* was that some counties in a state wide recount for President would use a different standard to determine voter intent than others. This is not a statewide race. Since only the Hamilton County Board needed to comply with the new directives because only the Hamilton County Board created an equal protection violation, there can be no concern that other counties used a different standard. No other County was ordered to investigate and count ballots that were miscast because the board workers

gave voters the wrong ballots or made other errors. As the panel stated, “the district court’s order applied to only one jurisdictional entity – Hamilton County – and one race – Hamilton County Juvenile Court Judge.” Opinion p. 31. Thus there cannot be a statewide equal protection concern.

Furthermore, the panel correctly held that no party challenged in the district court that the Secretary of State’s directives required *more* than what Equal Protection required. The panel did not fault the district court for “providing the state wide berth to design and implement the specific procedures for complying with the district court’s order.” Opinion p. 31. The panel found that the Secretary of State’s directives issued objective standards, in compliance with *Bush v. Gore*. Opinion p. 30-31. Therefore, the panel held that the district court did not err in considering the evidence that resulted from the application of these standards. Opinion p. 31.

**CONCLUSION**

For these reasons, Appellants’ petitions for rehearing *en banc* should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify all Counsel for all parties to this Appeal, were served with a copy of this pleading by email service on February 25, 2011.

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