

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

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

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

Plaintiff-Appellee,

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

Intervenors-Appellees,

v.

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

Defendants-Appellants

JOHN WILLIAMS,

Intervenor-Appellant

**RESPONSE OF INTERVENOR-APPELLEE
NORTHEAST OHIO COALITION FOR THE HOMELESS
TO APPELLANTS' PETITIONS FOR *EN BANC* REVIEW**

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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

February 25, 2011
Date

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**RESPONSE OF NORTHEAST OHIO COALITION FOR THE HOMELESS
TO APPELLANTS' PETITIONS FOR *EN BANC* REVIEW**

If a government worker erroneously tells a voter to vote in the wrong precinct, it is fundamentally unfair to later throw out that vote and disenfranchise the voter because of the government's error—especially where, as here, the government decides to count some, but not all, of those ballots. Based on these facts, 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.

Intervenor-Appellee Northeast Ohio Coalition for the Homeless (“NEOCH”) agrees that the issues addressed by the panel are of exceptional importance. But that does not mean that this Court should review *en banc* its decision. The panel's opinion was thorough, well-supported, and well-reasoned. Indeed, concurring Judge Rogers “agree[d] largely with much of the majority opinion.” As shown below and in other Appellees' briefs, Appellants' claims of error are not supported or well-taken. And none of the Appellants have contested the order requiring the Board of Elections to comply with the *NEOCH* consent decree. Accordingly, the petitions for *en banc* review should be denied.

Due to the slew of arguments raised in the petitions for *en banc* review and the amicus briefs, Appellees have divided them by subject matter. This response

will address the federalism-related arguments made by petitioners and *amici*, and the other responses are incorporated by reference.

A. It Is Well-Settled That Federal Courts Not Only Can, But Should, Exercise Jurisdiction And Apply Federal Law In Election Cases.

Petitioners and *amici* contend that only states, not federal courts, have authority over elections. They also assert that state law necessarily controls which ballots should be counted. Both arguments fail under long-established case law.

1. Federal courts can and should exercise jurisdiction over election cases.

It is well-settled that cases involving alleged violations of the constitutional right to vote are justiciable in federal court. *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); *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S. Ct. 5 (1968) (“These cases do raise a justiciable controversy under the Constitution”).

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 an affirmative 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 v. Sims, 377 U.S. 533, 566, 84 S. Ct. 1362 (1964) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

2. Federal law does and should apply in election cases.

Appellants’ contention that elections are wholly governed by state law is similarly contradicted by a long line of Supreme Court authority. *Reynolds*, 377 U.S. at 554-55 (“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.”) (collecting cases). The Supreme Court has consistently held that the Equal Protection Clause requires states to treat its voters equally, and has repeatedly struck down *state laws* that violated right:

- *Gray v. Sanders*, 372 U.S. 368, 381 83 S. Ct. 801 (1963) (striking down a statewide-election system that weighted rural-county votes

more heavily than urban-county votes because under the Equal Protection Clause “[e]very voter’s vote is entitled to be counted once.... [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.”).

- *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 665-66, 86 S. Ct. 1079 (1966) (striking down Virginia’s poll tax because “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause”).
- *Williams v. Rhodes*, 393 U.S. 23, 34, 89 S. Ct. 5 (1968) (striking down Ohio election laws that operated to exclude third-party candidates and explaining that “no State can pass a law regulating elections that violates” the Equal Protection Clause).
- *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969) (striking down a state law that allowed only certain voters to vote on school issues (i.e., property owners and parents of schoolchildren) because it violated the Equal Protection Clause).
- *Evans v. Cornman*, 398 U.S. 419, 422, 90 S. Ct. 1752 (1970) (striking down a Maryland law that denied the right to vote to residents of the

National Institutes of Health because although “States ‘have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.’... 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”).

- *Bullock v. Carter*, 405 U.S. 134, 140-41, 92 S. Ct. 849 (1972) (striking down a state primary system that required candidates to pay substantial fees as a condition of running for election and explaining 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.”).
- *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995 (1972) (striking down a restrictive state residency law and stating that “[i]n 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.”).

These cases demonstrate that the Equal Protection Clause protects the right to vote even in state elections. Appellants' vehement insistence that federal law and federal courts have no place in Ohio elections is plainly wrong.

B. *Painter's* State-Law Holding Does Not Control The Outcome Of Plaintiffs' Federal Claims.

Petitioners and *amici* also insist that the panel was required to defer to the Ohio Supreme Court's holding in *State ex rel. Painter et al. v. Brunner*, 2011-Ohio-35—a case that Appellant Williams filed one month after Appellee Hunter filed this lawsuit in federal court—that *state* law does not allow wrong-precinct ballots to be counted under any circumstances. *Id.* ¶ 35.

That holding, however, is inapposite here. Plaintiffs have argued that the ballots at issue must be counted under federal constitutional law, not state law. And in the event that these laws conflict, the Supremacy Clause of the United States Constitution plainly provides that federal constitutional law shall control.¹ *E.g.*, *Madej v. Briley*, 307 F.3d 665 (7th Cir. 2004) (holding that “[n]o state court can

¹ The Supremacy Clause states 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.

countermand an order, issued by a federal court, implementing the Constitution of the United States.”). As the Seventh Circuit explained in that case:

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). There is simply no basis to argue, as Appellants do, that the panel was required to defer to *Painter*'s state-law holding.

C. Nor Does *Painter*'s Federal-Law Holding Control The Outcome Here, As The Panel Correctly Held That *Painter* Could Not Resolve, And Did Not Resolve, The Plaintiffs' Federal Claims.

In *Painter*, even though no federal claim was before it, the Ohio Supreme Court nevertheless purported to rule on the Equal Protection claim asserted by Plaintiffs in this case, and to limit the District Court's November 22 Order, by stating 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.” 2011-Ohio-35, ¶40. The *Painter* court also held that the Board's investigation must be limited in this manner. *Id.*, ¶52.

Neither the District Court nor the panel was required to defer to *Painter*'s federal-law holding. As an initial matter, this holding is wholly advisory because there was no federal claim in that case. Plaintiffs in this case intervened as

defendants in *Painter* and did not assert any claims at all, much less any federal claims. Simply put, the Equal Protection claim was not properly before that court.

Nor can a state court bind a federal court on issues of federal law. Instead, both the District Court and this Court have the authority to decide issues of federal law themselves, in the first instance, and are not required to defer to a state court's interpretation of federal law (or, as in this case, a federal-court order). For all of these reasons, the panel correctly decided that it was not bound by the Ohio Supreme Court's holding to the extent that it was based on federal law.

D. There Is No Conflict With *Sandusky Cty.* or *Skaggs*.

Finally, Appellants argue that the panel decision conflicts with this Court's prior decisions in *Sandusky Cty.* and *Skaggs*. This argument is also not well-taken.

1. There is no conflict with *Sandusky Cty.*

In *Sandusky Cty. Dem. Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), the plaintiffs alleged that the Help America Vote Act ("HAVA") was violated by an Ohio Secretary of State directive that required poll workers to deny a provisional ballot to any voter who could not prove that he or she resided in a precinct. This Court held that: (1) HAVA created an enforceable right under Section 1983, (2) plaintiffs had standing, (3) the challenged directive violated HAVA, (4) HAVA

only permitted Ohio voters to cast their votes in their precincts of residence, and (5) HAVA did not require that wrong-precinct ballots be counted.

Appellants point to the last holding and argue that *Sandusky Cty.* prohibits counting the challenged wrong-precinct ballots in this case. This argument is plainly wrong. Plaintiffs have not argued, and the panel did not hold, that HAVA requires the ballots to be counted. This holding of *Sandusky Cty.* is inapposite.

Nor did *Sandusky Cty.* hold, as Appellants contend, that federal courts can play no role in elections cases. To the contrary, *Sandusky* affirmed such a role by holding that federal courts, acting under the authority of federal law (HAVA and 42 U.S.C. § 1983), can and should protect the right to vote by providing a federal remedy when state action trespasses upon that right. 387 F.3d at 572 (holding that HAVA creates “a federal right enforceable against state officials”). Accordingly, *Sandusky Cty.* supports rather than conflicts with the panel decision in this case.

2. There is no conflict with *Skaggs*.

In *State ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008), plaintiffs challenged the removal of a state-court action that contested the Ohio Secretary of State’s finding that certain provisional ballots should be counted under state law. This Court remanded the case after holding that the complaint did not raise any issues of federal law (indeed, it expressly disclaimed any reliance on federal law)

and so was not removable under 28 U.S.C. § 1331. *Id.* at 477. The Court properly declined to reach the merits of the plaintiffs' state-law claims. *Id.* at 474.

Skaggs is also wholly inapposite here. Unlike the plaintiffs in *Skaggs*, these Plaintiffs have asserted federal claims. Moreover, *Skaggs* did not even reach the merits. Therefore, the panel decision also does not conflict with *Skaggs*.

E. Conclusion.

For these reasons, Appellants' petitions for *en banc* review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25th, 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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