

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER, et al.,	:	Case No. 1:10-cv-820
	:	
Plaintiffs,	:	
	:	Chief Judge Susan J. Dlott
vs.	:	
	:	
HAMILTON COUNTY BOARD OF	:	<u>PLAINTIFF HUNTER'S</u>
ELECTIONS, et al.	:	<u>MEMORANDUM IN OPPOSITION</u>
	:	<u>TO DEFENDANT BOARD'S</u>
Defendants.	:	<u>MOTION FOR SUMMARY</u>
	:	<u>JUDGMENT (Doc. 94)</u>

I. THE BOARD AND BOARD MEMBERS ARE NOT IMMUNE FROM PLAINTIFFS' CLAIMS.

At the eleventh hour, the Board has discovered the Eleventh Amendment. In its Motion for Summary Judgment, the Board argues that it is protected by the Eleventh Amendment as an arm of the state. (Doc. 94 at 2.) Further, Defendants submit that they are also entitled to summary judgment because they have immunity from retroactive injunctive relief and retroactive declaratory relief. (Doc. 94 at 2-4.) The Board's immunity arguments fail because: (1) the Board is not an arm of the state; (2) it has waived any right to Eleventh Amendment immunity by defending the case on the merits; and (3) Plaintiffs do not seek retroactive relief. Plaintiffs seek prospective declaratory and injunctive relief to prevent constitutional violations if the canvas of election returns is deemed final before the Board complies with applicable law, including this Court's prior Orders and the NEOCH consent decree. Federal law is clear that the individual Defendants in their official capacities are not immune from suit seeking prospective relief. Moreover, as fully set out below, the new arguments raised by the Defendants do not provide a basis to dismiss the due process claims.

A. The Board is Not an Arm of the State.

The State undoubtedly has immunity from suit based on the nature of its sovereignty under the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706, 713 (1999). This immunity protects the State from suits by its citizens and by citizens of another State, while also applying this protection to actions against State officials sued in their official capacities for money damages. *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005). This sovereign immunity applies to more than just the State; it also applies to any government entities that act as “arm[s] of the State.” *S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 419 (6th Cir. 2004)(quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Sovereign immunity does not, however, extend to what the Supreme Court has termed “political subdivisions” – i.e., counties and municipalities. *Id.* (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-51 (1994)).

Both the Supreme Court and the Sixth Circuit have offered considerable guidance in distinguishing between an “arm of the state” and a “political subdivision.” In evaluating this distinction between specific entities, the Supreme Court has considered four factors: (1) the State’s liability for a judgment against the entity; (2) the language used by state statutes and state courts when referring to the entity, the degree of control over the entity, and the State’s veto power over the entity’s actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the “entity’s functions fall within the traditional purview of state or local government.” *Ernst*, 427 F.3d at 359 (citing *Hess*, 513 U.S. at 44-51). The Sixth Circuit itself has used a similar set of criteria when evaluating whether an entity is an “arm of the state” or a “political subdivision,” which includes: “(1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of

control the state maintains over the entity; and (4) the source of the entity's funding." *S.J. v. Hamilton County, Ohio*, 374 F.3d at 420. Both the Sixth Circuit and the Supreme Court have stressed that the first factor, whether the State faces legal liability for a judgment, is the most important factor in the analysis. *Ernst*, 427 F.3d at 358. It is, however, not the only factor. *S.J.*, 374 F.3d at 421 ("the sovereign immunity doctrine is about money *and* dignity-it not only protects a State's treasury, but also "pervasively ... emphasizes the integrity retained by each State in our federal system.") (emphasis in original) (quoting *Hess*, 513 U.S. at 39).

In this case, relief is under the complete control of the local officials and no state money will be spent to comply with this Court's order. Any order to count specific ballots can be followed by the local board and staff and need not trigger any involvement of the state. Any order directing the local board as to a process it must follow to determine poll worker error can likewise be followed by local board and staff and need not trigger any involvement of the state.

The statutes governing the creation and operations of county boards of election are set out at Ohio Revised Code Sections 3501.06 through 3501.17. None of these statutes expressly allocates liability to the state or counties in the event of a lawsuit for injunctive relief. In these situations, courts have turned to the statutes creating and governing such institutions to evaluate how funds are appropriated, whether the state or the municipality bears the cost of operations, and whether or not the entity can directly allocate or tap into state funds. *See, e.g., Hess*, 513 U.S. at 37-38. When such an analysis is applied to the Board in the context of this case, it is evident from the governing statutory framework that the State would not be liable for a judgment imposing an injunction against the Defendant Board.

1. Source of Agency Funding; Financial Exposure of State.

A review of the statutory framework governing the county boards of elections shows that the financial onus for elections is placed almost exclusively on the county. The county bears the costs of establishing the physical facilities operated by the board (O.R.C. § 3501.10), the compensation of board members (O.R.C. § 3501.12), and the vast majority of the costs and expenditures in conducting its operations (O.R.C. § 3501.17(A-E, H-I)). Funds are appropriated through the county either directly from the county treasury, where payment is made like any other county expense, or from an elections revenue fund established by county commissioners. O.R.C. § 3501.12 (“Upon presentation of any such voucher or payroll, *the county auditor shall issue a warrant upon the county treasurer* for the amount thereof as in the case of vouchers or payrolls for county offices and the treasurer shall pay such warrant.”)(emphasis added); O.R.C. § 3501.17(A) (“The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid.”); O.R.C. § 3501.17(I) (“[T]he board of county commissioners may, by resolution, establish an elections revenue fund.”); O.R.C. § 3501.10(A) (“The board of elections in any county may, by resolution, request that the board of county commissioners submit to the electors of the county [. . .] the question of issuing bonds for the acquisition of real estate and the construction on it of a suitable building with necessary furniture and equipment for the proper administration of the duties of the board of elections.”).

There are only two limited scenarios where the State bears any expense in the activities of a board of elections, neither of which is relevant here. The first of these situations is when a precinct is open “solely for the purpose of submitting to the voters a statewide ballot issue.” O.R.C. § 3501.17(F). In this instance, the county still pays the initial operations costs and must

then seek reimbursement from the State. The second cost borne by the State is the advertisement of statewide ballot issues. O.R.C. § 3501.17(G). These are the only financial obligations of the State in regard to the operation of elections and they are not implicated in this case as it involves the selection of a local Hamilton County Juvenile court Judge. The primary Eleventh Amendment test, therefore – whether the State will have to satisfy a judgment – is not met when applied to the Board of Elections in this case seeking injunctive relief.

2. Whether State Law Declares the Entity an Arm of the State.

Another factor analyzed under Eleventh Amendment jurisprudence requires an examination of the statutory framework governing county boards of election. This factor is neutral in this case. Ohio Revised Code Section 3501.01 defines a “board of elections” as “the board of elections appointed in a county pursuant to section 3501.06 of the Revised Code.” Section 3501.06 sets out the procedure for how the board is created, stating that a board of elections shall “consist[] of four qualified *electors of the county* [. . .] as *the secretary [of state’s] representatives*.” (emphasis added.) This language does little to help the current analysis because it identifies that four board members are officials of the county, while also stating that they serve as representatives of the State. State law effectively defines boards of elections as individuals that are both county and State officials, in some capacity, at the same time. This element of the analysis weighs neither for nor against a finding that the Defendant Board is not an arm of the state.

3. Control by State over Entity.

A third factor is the degree of control maintained by the State over the entity. The relevant statutory framework invests control of most major decisions regarding the boards of elections with the State. It is the Secretary of State who initially appoints the four members of

such a board (O.R.C. § 3501.06), certifies any individuals selected to fill a vacancy on such a board (O.R.C. § 3501.0), and who “summarily remove or suspend any member of a board of elections” (O.R.C. § 3501.16). Most of a board’s duties are also set out explicitly in Section 3501.11 of the Revised Code, leaving little discretion to such entities in determining how they will operate.

The control given to the State, however, is not absolute. The Ohio Revised Code extends some discretion regarding the operations of the various boards of elections. For instance, a board of elections in each county has significant discretion in selecting a chairperson, a director, and a deputy director. O.R.C. § 3501.09. The county and its board have discretion in determining where to establish the board’s facilities. O.R.C. § 3501.10. The county and its board also are given discretion to take the initial steps in filling vacancies on a board of elections if any of the four members goes absent. *See* O.R.C. § 3501.07. In the abstract and standing alone, this factor would weigh in favor of holding the Board to be an arm of the state. But this case involves actions to comply with an order in this case that can be taken by the local board without any involvement of the State; actions the local board clearly is empowered to take. Since the State will not be exposed by an order imposing relief in this case and the other factors do not require an opposite result, the Defendant Board of Elections is not an arm of the state.

The cases cited by Defendant do not require a different result. *Tronsen v. Lucas County Bd. Of Elections*, Case No. 3:06CV7089, 2007 WL 978101, p. *6 (N.D. Ohio 2007)(pro se suit by office seeker who claims that “suits against the state are allowed” so issues were not effectively briefed); *Hulme v. Madison County*, (S.D. Ill. 2001)(suit against the *State* Board of Elections was barred by sovereign immunity; did not involve local board); *Casey v. Clayton*

County, GA, Civ. Action No. 1:04-CV-00871-RWS, 2007 WL 788943 (N.D. Ga. 2007)(arises under Georgia law).

B. The Board Waived Any Right to Eleventh Amendment Immunity.

In the event that this Court determines that the Board is an arm of the state, the Board cannot on the eve of trial attempt to raise immunity where it already voluntarily invoked the jurisdiction of the federal court by defending the case on the merits. *See Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003)(state waived the defense of Eleventh Amendment immunity in § 1983 action where the state, instead of asserting Eleventh Amendment immunity, defended the suit on the merits—engaging in substantial discovery and filing a motion for summary judgment); *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 476 (6th Cir. 2006) (“If a State refuses to invoke its sovereign immunity as a threshold defense, usually by way of motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, it cannot credibly be heard to complain about the indignity of the federal courts resolving the merits of its case...”); *In re Corporacion de Servicios Medico Hospitalarios de Fajardo*, 123 B.R. 4, 6-7 (Bankr.D.P.R.1991)(defendant waived any Eleventh Amendment immunity by waiting until the eve of trial to first raise defense, after having participated in extensive pretrial proceedings).

A State may waive Eleventh Amendment sovereign immunity through its own conduct: by legislation, by removing an action to federal court, or by appearing without objection and defending on the merits. *Nair*, 443 F.3d 469, 474; *see also Lawson v. Shelby County, TN*, 211 F.3d 331 (6th Cir. 2000)(State may waive protection of Eleventh Amendment by consent in the form of a voluntary appearance and defense on the merits in federal court); *Neinast v. Texas*, 217

F.3d 275, 279 (5th Cir. 2000)(observing that courts have found waiver where the state evidenced an intent to defend the suit against it on the merits).

In determining whether there has been a waiver, courts evaluate the extent to which a state has participated in the lawsuit. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365 (3d Cir. 1997) (collecting cases), *aff'd*, 527 U.S. 666 (1999). They recognize that waiver should be unequivocal but that “[i]t may evidence that waiver ... through action other than an express renunciation.” *Neinast*, 217 F.3d at 279. In *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), the court, addressing the concept of waiver by participation, explained as follows:

Although the waiver must be unambiguous, we have never held that an express written waiver is invariably required. On the contrary, we have recognized that a state may waive its Eleventh Amendment immunity by conduct that is incompatible with intent to preserve that immunity.... [A] waiver of Eleventh Amendment immunity has been found when the state's conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity. *See, e.g., Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (defendants' conduct during litigation “indicates consent to this suit and an acceptance of the federal court's jurisdiction”). ...

Hill, 179 F.3d at 759.

The Complaint, filed November 21, 2010, named the Board, Chair and members in their official capacities as defendants. (Doc. 1.) Defendants filed an Answer to Plaintiff Hunter's Complaint on May 3, 2011 (Doc. 56). In their Answer, Defendants do not raise sovereign immunity, nor make any claim that Plaintiff seeks retroactive relief in violation of the Eleventh Amendment.¹ Defendants did not raise sovereign immunity in the Joint Final Pretrial Order

¹ The boiler plate defense in paragraph 7 and repeated in paragraph 8 is vague and only reserves the right to raise a defense that becomes available during discovery: “Defendant Board hereby provides notice that it intends to assert and rely upon all of the affirmative defenses, avoidances, counterclaims, cross-claims, third party claims, immunities, avoidances, and set-offs which may

(submitted to chambers June 29, 2011). Defendants waited until the eve of the Final Pretrial Conference to file a Motion for Summary Judgment, 12 days before trial, which began on July 18, 2011. (Doc. 94.) Moreover, the Board has defended both the case on the merits before this Court and on appeal before the Sixth Circuit Court of Appeals. Furthermore, Defendants have engaged in broad discovery and extensive pretrial proceedings. If permitted to assert this belated defense, the Board will have effectively “proceed[ed] to judgment without facing any real risk of adverse consequences.” *Ku*, 322 F.3d at 433 (quoting *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring)). Accordingly, in evaluating the extent to which the Board has participated in the lawsuit to date, it is clear that the Board waived its immunity and cannot now raise such a defense to either the particular due process claim, or the entire case.

C. Plaintiffs Request *Prospective*, Not *Retroactive Relief*.

Even if the Court concludes that Defendants have not voluntarily invoked the jurisdiction of the federal court by defending the case on the merits, Defendants’ immunity arguments still fail. In their Motion, Defendants blatantly mischaracterize the relief sought by Plaintiffs in this case. (Doc. 94 at 3-6.) Plaintiffs request prospective, not retroactive relief. Defendants’ arguments with regard to retroactive relief are therefore irrelevant. In its Order enjoining the Board from complying with the statutory deadline to amend the certification of the election results, (Doc. 47), the Court explained that the Board failed to comply with the Court’s November 22, 2010 and January 12, 2011 Orders. (Docs. 13 and 39, respectively.) The Court granted Plaintiffs’ request and enjoined the application of the statutory deadline, prohibiting any

become available or apparent during the course of discovery or trial. Defendant Board reserves the right to amend its answer for the purpose of asserting such defenses.” (Doc. 56.) Nothing occurred during discovery to alert the Defendant to the fact it could raise a sovereign immunity defense.

certification of the election results from the race from going into effect until further order of the District Court, “because Plaintiffs’ right to equal protection under the Fourteenth Amendment of the U.S. Constitution **will be violated** if the canvas of election returns is deemed final before the Board complies with this Court’s prior Orders.” (Doc. 47) (emphasis added).²

One exception to Eleventh Amendment immunity applies when a state official is sued in his official capacity for injunctive relief. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474-75 (6th Cir. 2008)(citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 n. 8 (6th Cir. 2007)). The test for determining whether the *Ex parte Young* exception applies is a “straightforward” one. *Id.* (citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). The court considers whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Id.* *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003). The focus of the inquiry remains on the allegations only; it “does not include an analysis of the merits of the claim.” *Id.* (citing *Verizon*, 535 U.S. at 646; *Dubuc*, 342 F.3d at 616). Where plaintiffs characterize their prayer for injunctive relief as a prospective § 1983 action alleging disenfranchisement in the election process, state officials are not entitled to sovereign immunity. *League of Women Voters*, 548 F.3d at 475.

Although prospective relief awarded against a state officer “implicate[s] Eleventh Amendment concerns,” *Green v. Mansour*, 474 U.S. 64, 68 (1985), the interests in “end[ing] a continuing violation of federal law,” *ibid.*, outweigh the interests in state sovereignty and justify an award under § 1983 of an injunction that operates against the State’s officers or even directly

² Defendants’ argument that the Board cannot be held liable for the actions of pollworkers is also irrelevant. (Doc. 94 at 6.) It is clear that the relevant inquiry for Plaintiffs’ requested prospective relief is whether the Board, its Chairman and members comply with applicable law before certifying this election to prevent constitutional violations.

against the State itself. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 282 (1986); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Ex parte Young*, 209 U.S. 123 (1908). “The constitutional privilege of a State to assert its sovereign immunity....does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. *Alden v. Maine*, 527 U.S. 706, 754-55 (1999); *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989)(“Under a settled course of decision, in contexts ranging from school desegregation to the provision of public assistance benefits to the administration of prison systems and other state facilities, we have held the States liable under § 1983 for their constitutional violations through the artifice of naming a public officer as a nominal party”) (J. Stevens, dissenting); *Williams v. Com. of Ky.*, 24 F.3d 1526 (6th Cir. 1994)(plaintiff’s § 1983 claims against officers in official capacities for declaratory and prospective injunctive relief for alleged violation of due process and free speech rights guaranteed by First and Fourteenth Amendments was not barred by Eleventh Amendment, even though analysis of state law was necessary).

Thus, under the *Ex parte Young* doctrine, Plaintiffs were permitted to sue the Board, Chairman, and members in their official capacity to enjoin prospective action that would violate federal law. *League of Women Voters*, 548 F.3d at 475; *Carten v. Kent State University*, 282 F.3d 391 (6th Cir. 2002); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610 (6th Cir. 2003). Here, the named officials have an integral role in providing equal protection and due process in elections and, specifically, in ensuring that such constitutional requirements are met before certifying this election. In their official respective capacities, Chairman Triantafilou, and members Burke, Faux and Gerhardt are clearly proper party defendants in a suit seeking prospective injunctive and declaratory relief as to this election.

D. The Due Process Claims Should Not Be Dismissed.

As fully set out in Plaintiff's proposed Findings of Fact and Conclusions of Law (Doc. 114) and Trial Brief (Doc. 92), Plaintiffs have asserted substantial claims under the Due Process Clause. Both this Court and the Sixth Circuit have acknowledged these claims as having a likelihood of success. *See* Doc. 38 at 7 and *Hunter*, 635 F.3d at 243-44. Defendants improperly claim that the due process argument rests on the violation of state law by poll workers who fail to correctly determine a voter's precinct. It is clear from the briefing on file in the case that the due process claims are much broader than that and do not rest solely on the violation of state law by poll workers.

Defendants also claim that the Board cannot be liable under §1983 because "poll workers are not named defendants ... [and] there is no evidence that a government custom or policy led to any adverse action against the Plaintiffs." (Doc. 94 at 6.) The poll workers do not need to be named as defendants in order to secure liability against the Defendants. Plaintiffs have established that the Defendants have a custom or practice of failing to supervise poll workers with respect to their duty to process provisional voters in accordance with state law. This custom stretched over all of the elections preceding the general election on November 2, 2010. During those previous elections the percentage of provisional votes rejected as cast in the wrong precinct varied between 8 – 10%. *See* Pltf. Ex. 2017. This high percentage of wrong precinct provisional ballots put the Defendants on notice of a problem that needed investigation and remedy.

The evidence shows that the problem was caused by poll workers who failed, on a regular basis, to follow their training. Simply targeting the poll workers at precincts that generated high numbers of wrong precinct ballots would have been a reasonable response to the problem. But

the Defendants did nothing. They did not test the poll workers who made errors and they did not supervise their work, thus causing voters to be subjected to these poll worker errors in elections year after year, including in the November, 2010 general election.

A government custom of failing to train or supervise may well be the moving force behind constitutional violations suffered by Plaintiffs. See *City of Canton v. Harris*, 489 U.S. 378 (1989)(claim stated where custom that police shift commanders had discretion to make decisions on whether prisoners needed medical care but those commanders were provided no training or guidelines with which to make those judgments). This theory was recently approved in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). In that case a plaintiff wrongfully convicted of armed robbery due to a *Brady* violation. The Court held that a single incident was insufficient to establish the necessary pattern of similar constitutional violations needed to support liability on a failure to train theory. The evidence in this case, on the contrary, includes testimonial evidence that poll worker error was tolerated for years even though it was clearly causing hundreds of ballots to be rejected at every election. Throughout the years the Defendants did not test poll workers on their provisional ballot proficiency. See *Hockenberry v. Village of Carrolton*, 110 F.Supp.2d 597 (N.D.Ohio 2000)(Deny summary judgment to village where evidence shows only one training course on police procedures, no testing on those procedures).

Nor did the Defendants supervise the poll workers or evaluate their performance with respect to provisional voters even though wrong precinct ballots were alarmingly common. This issue will be thoroughly briefed in the post trial brief but see generally, *Hagans v. Franklin County Sheriff's Office*, No. 2:08-cv-850, 2011 WL 2173696, at *11 (S.D. Ohio June 2, 2011)(taser training); *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006)(exculpatory evidence training); *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (Dlott, J.)(training on risk of “agitated delirium with restraint”); *Abdi v. Karnes*, 556 F.Supp. 2d 804(S.D. Ohio 2008)(training on arrest of

mentally ill suspects.). With respect to failure to supervise, see e.g., *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989)(supervision of correctional officers who manage disabled prisoners); *Campbell v. City of Springboro, Ohio*, No. 1:08-cv-737, 2011 WL 1575525, at *36, *37 (S.D. Ohio Apr. 26, 2011)(training and supervision of officer responsible for canine deployment); *Montes v. County of El Paso, Tex.*, No. EP-09-CV-82-KC, 2010 WL 2035821, at *16, *17 (W.D. Tex. May 18, 2010)(supervision of officers who use force); *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009)(failure to take and investigate complaints about wrongdoing by officers); *Estate of Fields v. Nawotka*, No. 03-CV-1450, 2008 WL 746704, at *8, *9 (E.D. Wis. Mar. 18, 2008)(failure to establish review process for officers who use deadly force).

In sum there is adequate evidence of a custom of failing to train/test and supervise poll workers and that was the moving force behind the poll worker error that caused voters to miscast their ballots in the wrong precinct and therefore the due process claims should not be dismissed. Accordingly, the Board's immunity arguments clearly fail because they do not undermine the due process claims and: (1) the Board is not an arm of the state; (2) the Board waived any right to Eleventh Amendment immunity by defending the case on the merits; and (3) Plaintiffs seek prospective, not retroactive relief.

II. MS. HUNTER, NEOCH AND ODP HAVE STANDING TO PURSUE THEIR CLAIMS.

In its Motion for Summary Judgment (Doc. 94 at 6-8), the Board devotes two pages of argument to the proposition that Ms. Hunter, NEOCH, and ODP all lack the requisite Article III standing to pursue their claims. This proposition is incorporated by reference in the Board's Trial Brief. (Doc. 88 at 1.) Mr. Williams wisely chose to forego making these contentions in his Trial Brief. The Board's standing arguments are utterly without merit.

A. Candidates Have Standing To Assert Constitutional Claims Relating To The Conduct Of Elections, Just As President Bush Did In *Bush v. Gore*.

The sole argument that the Board advances to claim that Ms. Hunter lacks standing – an argument that is unsupported by citation to any case law on point – is that “the alleged injury is not traceable to the candidate.” (Doc. 94 at 7.) How a candidate in a race separated by 23 votes is not prospectively “injured” by the Board’s improper disenfranchisement of hundreds of provisional voters is anyone’s guess, and is a concept left unexplained by the Board in its Motion. As a direct, individual participant in the electoral process, Ms. Hunter has a concrete, direct, and personal stake – as a candidate – in the outcome of her constitutional challenges to the Board’s unequal treatment of provisional ballots in Hamilton County.

The Board also fails to mention, much less distinguish, any of the Supreme Court’s broad pronouncements on the standing of candidates to bring election-related disputes. *Davis v. Federal Election Comm.*, 554 U.S. 724, 733-735 (2008)(candidate had standing to challenge disclosure requirements and contribution limitations under Bipartisan Campaign Reform Act); *Cook v. Gralike*, 531 U.S. 510, 531 (2001)(Rehnquist, C.J., concurring in the judgment)(“no one questions the standing” of candidates with respect to ballot-access provisions). *Buckley v. Valeo*, 424 U.S. 1, 7-8, 12 n.11 (1976)(per curiam). Most notable, perhaps, is the Board’s failure to discuss *Bush v. Gore* in this context. In that case, as the Board well knows, a candidate brought an Equal Protection challenge to the method of investigating and counting ballots in his race that had yet to be counted. Ms. Hunter, too, raises constitutional challenges to the Board’s unequal treatment of uncounted provisional ballots. If the United States Supreme Court believed that President Bush lacked standing to pursue his claims, then the Court was bound to say so, for it is well established that justiciability issues such as standing are jurisdictional, and courts are to raise them even when not briefed by the parties. *See Allen v. Wright*, 468 U.S. 737, 750-52

(1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Obviously, the Supreme Court allowed President Bush to pursue his outcome-determinative constitutional challenges, and this Court should continue to allow Ms. Hunter to pursue hers, as the Sixth Circuit has already ordered.

B. Parties To Consent Decrees “Unquestionably” Have Standing To Seek Enforcement Of Those Decrees.

The Board also asserts that both NEOCH and ODP lack standing. (Doc. 94 at 7-8.) Absent from the Board’s discussion of these parties, however, is any mention of the Consent Decree that both NEOCH and ODP intervened in this action to enforce. As NEOCH and ODP’s Intervenor Complaint makes clear, NEOCH and ODP intervened in Ms. Hunter’s action seeking an order “requiring Defendants to comply with the terms of the Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 06-cv-896 (S.D. Ohio) (Marbley, J.) and Secretary of State Brunner’s Directive 2010-74, with respect to the provisional ballots at issue in this case.” (Doc 8-1 at ¶ 2.) It is undisputed that both NEOCH and ODP are parties to that Decree. (Doc. 8-1 at ¶¶ 5-6.)³ And as the Southern District

³ To the extent that the Defendants may rely on the Sixth Circuit’s Opinion five years ago in *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) to question NEOCH’s standing here in *this* case, such reliance would be utterly misplaced. In that Opinion, issued in an expedited appeal from a temporary restraining order issued only days before the November 2006 election, the record before the Sixth Circuit consisted only of NEOCH’s unverified complaint against the Secretary of State. As such, no factual record had yet been developed with respect to NEOCH’s standing. On remand, NEOCH developed that factual record and District Judge Marbley later issued a detailed Opinion and Order denying, in relevant part, the State’s motion to dismiss NEOCH’s case for lack of standing. *See* Opinion and Order, *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06-cv-00896 (Marbley, J., Sept. 30, 2008). Judge Marbley concluded that NEOCH “demonstrated all three requirements for organizational standing with respect to Counts Three, Four, Eight, Nine, Ten, Twelve, and Thirteen of their Complaint.” *Id.* at p. 15. In the same Opinion and Order, Judge Marbley declared that NEOCH was a “prevailing party” entitled to an award of attorneys’ fees. *Id.* at pp. 18-19. Although the State sought reconsideration of Judge Marbley’s September 30, 2008 Opinion and Order, the State did not challenge that portion of Judge Marbley’s Order relating to NEOCH’s standing. *See* Motion for Reconsideration, *NEOCH v. Brunner*, No. 2:06-cv-00896, Doc. 191. And although the State later appealed Judge Marbley’s orders to the Sixth Circuit, that appeal was dismissed for lack of prosecution when

of Ohio has recently noted, parties to consent decrees “unquestionably” have standing to enforce them. *Ragland v. City of Chillicothe*, No. 2:10-cv-879 (S.D. Ohio March 16, 2011), at *2. As such, the Board’s discussion of NEOCH’s discovery responses is beside the point, as is the Board’s claim that ODP has failed to allege that it represents any voters who voted in the election at issue. The Board has already produced in discovery information regarding its investigation of certain provisional ballots that it identified as being subject to the requirements of the *NEOCH* Consent Decree.⁴ Thus, the Board’s eleventh-hour assertion that the parties to that very Decree lack standing to pursue their claims in this action should be summarily rejected.

Furthermore, anticipating that the Board, in its Reply in Support of Summary Judgment, will argue that Plaintiffs NEOCH and ODP lack standing to enforce the *NEOCH* Consent Decree because the Decree allegedly violates the Ohio Constitution, the NEOCH and ODP Plaintiffs briefly address this assertion here.⁵ In its Response to Plaintiffs’ Trial Brief, the Board, for the first time, and after numerous concessions that the Board must follow the *NEOCH* Consent Decree, asserts that the *NEOCH* Consent Decree violates the Ohio Constitution, and therefore, Plaintiffs NEOCH and ODP lack standing to enforce it. (Doc. 122 at 12.) First, it is the law of

Judge Marbley entered the consent decree that NEOCH intervened in *this* case to enforce. *See id.* at Docs. 210 and 211. Accordingly, Judge Marbley’s determination that NEOCH possessed the requisite Article III standing to pursue its case against the Secretary of State – the case which ultimately led to entry of the consent decree at issue here – has not been questioned by the Sixth Circuit.

⁴ *See* “Timeline of Events Surrounding Hunter v. BOE Litigation” (Deft Ex. 1001), at 3 (discussing Board Staff’s original interpretation of the *NEOCH* Consent Decree, as clarified by the Secretary of State); *id.* at 7 (“Affirm order to investigate pursuant to NEOCH Consent Decree.”); *id.* at 8 (“Staff prepares NEOCH spreadsheet listing P#, reason for rejection and precinct voted-in for discovery purposes.) *See also* “November 2, 2010 General Election Steps the Board took to comply with NEOCH Consent Decree (Joint Ex. 4); November 2, 2010 General Election Not Counted Provisional Ballots Voters Provided Only the Last Four Digits of SS# As Form of ID” (Joint Ex. 3).

⁵ Plaintiffs NEOCH and ODP reserve the right to address this issue more fully in a surrepley and/or post-hearing brief, if the Board indeed raises it in its Reply.

the case as set forth by the Sixth Circuit that the Consent Decree “remains and should be followed.” *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (6th Cir. 2011)(affirming this Court’s January 12, 2011 order that the Board investigate all ballots subject to the *NEOCH* Consent Decree for poll worker error and count those ballots as required by that Consent Decree); *see Consolidation Coal Co. v. McMahon*, 77 F.3d 898 (6th Cir. 1996)(under the law-of-the-case doctrine, court is precluded from reexamining issue previously decided by same court, or higher court, in same case). Second, this is an improper collateral attack on the validity of the *NEOCH Consent Decree*. As recognized by the Supreme Court of Ohio in *State ex rel. Painter v. Brunner*:

[C]ollateral or indirect attacks on judgments are disfavored. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 22. A collateral attack is “ ‘an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.’ ” *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681, quoting *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 458, 47 N.E. 541.

128 Ohio St.3d 17, 941 N.E.2d 782, 797 (Ohio 2011). Third, the *NEOCH* Consent Decree is not constitutionally defective. The United States Supreme Court has long held that a federal court may enjoin a state officer from executing a state law in conflict with the constitution when such execution will violate plaintiff’s rights. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *Terrace v. Thompson*, 263 U.S. 197 (U.S. 1923)(enforcement of an unconstitutional state law will be enjoined in order to protect property rights and the rights of persons against injuries otherwise irremediable). For many years local governments and government officials have been sued for constitutional violations and have been properly bound by consent decrees to prevent the execution of conflicting state law. *See Brown v. Board of Education*, 349 U.S. 294, 300-01

(1955)(inviting district courts to retain jurisdiction over desegregation cases in order to “fashion[] and effectuat[e]...decrees...guided by equitable principles”). Finally, the State of Ohio is a party in *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06-cv-00896. (Doc. 73 at 4 (Dec. 14, 2006))(granting the State of Ohio leave to intervene). The Board mischaracterizes the parties who entered the *NEOCH* Consent Decree, asserting that the decision to enter the Consent Decree was made solely by then Secretary of State Jennifer Brunner and NEOCH. (Doc. 122 at 12.) The State of Ohio made the determination to enter the *NEOCH* Consent Decree. Specifically, the State of Ohio is listed as an Intervenor-Defendant at the top of page one of the *NEOCH* Consent Decree, and the Consent Decree was expressly “entered with the consent of the parties[.]” *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06-cv-00896. (Doc. 210 at 2 (April 19, 2010)). Accordingly, for all of these reasons, the Board’s improper argument raised for the first time in their Response to Plaintiffs’ Trial Brief that the *NEOCH* Consent Decree should be invalidated must be denied.

For all of the reasons stated herein, the Hamilton County Board of Elections’ Motion for Summary Judgment must be denied.

Respectfully submitted,

/s/ Jennifer L. Branch
Jennifer L. Branch, Trial Attorney
(0038893)
Alphonse A. Gerhardstein (0032053)
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut Street, Suite 400
Cincinnati, OH 45202
(513) 621-9100
Fax: (513) 345-5543
jbranch@gbfirm.com
agerhardstein@gbfirm.com
Attorneys for Plaintiff Tracie Hunter

/s/ Caroline H. Gentry
Caroline H. Gentry, Trial Attorney
(0066138)
PORTER, WRIGHT, MORRIS &
ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748
Fax: (937) 449-6820
cgentry@porterwright.com

Lawrence Bradfield Hughes (0070997)
Eric Benjamin Gallon (0071465)
PORTER, WRIGHT, MORRIS &

/s/ Donald J. McTigue

Donald J. McTigue, Trial Attorney
(0022849)

Mark A. McGinnis (0076275)

MCTIGUE LAW GROUP

550 East Walnut Street

Columbus, OH 43215

(614) 263-7000

Fax: (614) 263-7078

mctiguelaw@rrohio.com

*Attorneys for Intervenor Ohio Democratic
Party*

ARTHUR LLP

41 S High Street, Suite 2800

Columbus, OH 43215-6194

Mr. Hughes: (614) 227-2053

Mr. Gallon: (614) 227-2190

Fax: (614) 227-2100

bhughes@porterwright.com

egallon@porterwright.com

Sara Marie Cooperrider (0085993)

PORTER, WRIGHT, MORRIS &

ARTHUR LLP

250 E. Fifth Street, Suite 2200

Cincinnati, OH 45202

(513) 369-4244

Fax: (513) 421-0991

scooperrider@porterwright.com

Subodh Chandra (0069233)

THE CHANDRA LAW FIRM, LLC

1265 W. 6th Street, Suite 400

Cleveland, OH 44113-1326

(216) 578-1700

Fax: (216) 578-1800

Subodh.Chandra@StanfordAlumni.org

Attorneys for Intervenor Northeast Ohio

Coalition for the Homeless

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch

Attorney for Plaintiff