

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

- - -

TRACIE HUNTER, et al.,	.	CIVIL NO. 1:10-cv-820
	.	
Plaintiffs,	.	<b>Oral Argument on Post-Trial</b>
	.	<b>Briefs</b>
- v -	.	
	.	Wednesday, September 7, 2011
HAMILTON COUNTY BOARD OF	.	2:03 PM
ELECTIONS, et al.,	.	
	.	
Defendants.	.	Cincinnati, Ohio
.....	.	

- - -

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE SUSAN J. DLOTT, CHIEF JUDGE

APPEARANCES:

For Plaintiff Tracie Hunter:

JENNIFER L. BRANCH, ESQ.  
ALPHONSE A. GERHARDSTEIN, ESQ.  
Gerhardstein & Branch Co. LPA  
432 Walnut Street, Suite 400  
Cincinnati, Ohio 45202

For Intervenor Plaintiff Northeast Ohio Coalition for the Homeless:

CAROLINE H. GENTRY, ESQ.  
Porter, Wright, Morris & Arthur LLP  
One Dayton Centre  
One South Main Street  
Suite 1600  
Dayton, Ohio 45402-2028

SARA M. COOPERRIDER, ESQ.  
Porter, Wright, Morris & Arthur LLP  
250 East Fifth Street, Suite 2200  
Cincinnati, Ohio 45202-5118

1 APPEARANCES (Continued):

2 For Defendants Hamilton County Board of Elections, Alex  
3 Triantafilou, Timothy Burke, Caleb Faux and Charles Gerhardt:

4 DAVID T. STEVENSON, ESQ.  
5 COLLEEN M. McCAFFERTY, ESQ.  
6 JAMES W. HARPER, ESQ.  
7 Assistant Prosecuting Attorneys  
8 Hamilton County Prosecutor's Office  
9 William Howard Taft Law Center  
10 230 East Ninth Street, Suite 4000  
11 Cincinnati, Ohio 45202

12 For Intervenor Defendant John Williams:

13 R. JOSEPH PARKER, ESQ.  
14 BETH A. BRYAN, ESQ.  
15 Taft, Stettinius & Hollister LLP  
16 425 Walnut Street, Suite 1800  
17 Cincinnati, Ohio 45202-3957

18 Also present: Tracie Hunter  
19 John Williams

20 Law Clerks: Sarah Fairweather, Esq.  
21 Kimberly B. Bakota, Esq.

22 Courtroom Deputy: William A. Miller

23 Court Reporter: Luke T. Lavin, RDR, CRR  
24 838 Potter Stewart U.S. Courthouse  
25 100 East Fifth Street  
Cincinnati, Ohio 45202

---



1 MR. HARPER: I finally got back.

2 THE COURT: And how was your son's wedding, Mr.  
3 Parker?

4 MR. PARKER: It was wonderful, Your Honor. I can't  
5 tell you how much I missed being here.

6 Joe Parker and Beth Bryan on behalf of the defendant  
7 intervenor John Williams.

8 THE COURT: Thank you.

9 All right. I think we talked previously that each side was  
10 not going to take more than an hour. If you want to take less  
11 than an hour -- your briefs and your findings of fact and  
12 everything you filed have been extensive. I appreciate that.  
13 We've got enough paper to kill -- I'm sure you killed a few  
14 trees. So, you know, don't feel that you have to reiterate  
15 everything that's in your pleadings, because you've already  
16 thoroughly done that.

17 I would like to hear, if the other side has raised any  
18 issues in their pleadings that you feel that need to be  
19 responded to, I'd like to hear that.

20 And, Ms. Branch, I've got a couple of questions for you.  
21 First, I'd like you to give an explanation of the due process  
22 argument.

23 Secondly, you used the number 295 as being the right  
24 location and wrong precinct, and we can't figure out where that  
25 number comes from, because it's not the 31 plus 269. It

1 doesn't add up. So we're just curious where that number came  
2 from.

3 And, finally, do -- and this was raised by the defendants  
4 for the first time in their briefing.

5 (Cellular telephone rings.)

6 THE COURT: Will everybody please turn your cellphones  
7 off.

8 Do the plaintiffs want the entire ballot remade or only the  
9 juvenile judge race?

10 MS. BRANCH: I can do that, Judge.

11 THE COURT: Okay.

12 MS. BRANCH: Your Honor, let me start with time. I  
13 would like 30 minutes for plaintiff Hunter and 30 minutes for  
14 NEOCH plaintiffs, as far as time.

15 THE COURT: All right.

16 MS. BRANCH: And for my 30 minutes, I would like to  
17 reserve half of it for rebuttal.

18 THE COURT: Okay.

19 MS. BRANCH: Let me start off by answering your  
20 easiest question first. The 295 in Table B, I thought in  
21 document 182 I summarized how I got that number. But I will  
22 tell you, off the top of my head, it includes the 269.

23 THE COURT: Okay.

24 MS. BRANCH: It includes the nine the Board voted to  
25 count because they were in the right precinct all along.

1 THE COURT: Oh, okay.

2 MS. BRANCH: I added in the seven the Board voted to  
3 count due to poll worker error. I added in the one Oak Street.

4 THE COURT: What was the Oak Street?

5 MS. BRANCH: The guy that lived -- did he live in  
6 Clifton or did he live in Elmwood Place.

7 THE COURT: Okay.

8 MS. BRANCH: And it turns out the Board conceded, yes,  
9 he voted in the right precinct all along.

10 And then I added the two that the Board voted to count July  
11 12th. And if you add those up, I think it's --

12 THE COURT: Let's see.

13 MS. BRANCH: -- seven shy of the number.

14 THE COURT: 285, 286, 288. How many did you think it  
15 was? Let me see. Two and one is three, and that was ten, and  
16 19. I think it's 288.

17 MS. BRANCH: Right. So I'm seven off. Because I  
18 re-added it from the 295 in my pleading. I did that this  
19 morning. I've tried to figure out how did I get --

20 THE COURT: Oh, okay. So you're just seven off.

21 MS. BRANCH: So I think I'm seven off, and I don't  
22 know why.

23 THE COURT: Oh, okay.

24 MS. BRANCH: I didn't go back to Table B and try to  
25 see if I had some duplicates in there.

1 THE COURT: Okay.

2 MS. BRANCH: But I was going to refer to Table B as  
3 the 295, not to confuse you, but --

4 THE COURT: Okay.

5 MS. BRANCH: I know we were talking about the 269 and  
6 the Sixth Circuit talks about the 269. I'm going to just call  
7 those -- on that table I'm going to call those the right  
8 location generically.

9 THE COURT: Okay. The 269?

10 MS. BRANCH: We used to call it the 269. In my  
11 pleading I refer to it as the 295. The title for that is the  
12 right location ballots.

13 THE COURT: Now, wait. I'm confused. Which one? Are  
14 you saying 269 or the 295?

15 MS. BRANCH: The 295.

16 THE COURT: Okay.

17 MS. BRANCH: Just that prior to the trial I used the  
18 other number.

19 THE COURT: Okay.

20 MS. BRANCH: And then to answer your question that I  
21 too thought was an interesting point that the defendants made  
22 in their post-trial briefing about: do we count just the  
23 Hunter race or all the races?

24 First of all, I only represent Tracie Hunter. This case  
25 was brought on her behalf for the ballots in that race. It

1 would be our position that it's up to the Board and the  
2 Secretary of State to figure out what they should be doing with  
3 those other races. I have no opinion.

4 But I would point out that all those races were certified,  
5 and the certifications became final in January because this  
6 Court ordered that the certification not become final only for  
7 the Tracie Hunter -- or the juvenile court race, and that's  
8 docket 47.

9 THE COURT: Now, wait. Wasn't there a recount in one  
10 other race? Two other races. Were those certified?

11 MR. STEVENSON: Your Honor, the results were  
12 certified. The recounts were never scheduled because of this  
13 pending litigation. They are still, shall we say, in limbo.  
14 And it's two mandatory recounts, and there is a third requested  
15 recount --

16 THE COURT: Okay.

17 MR. STEVENSON: -- on the house district in the  
18 northern part of the county.

19 THE COURT: Thank you.

20 MS. BRANCH: And our position is this Court has not  
21 entered any order about those races. So when Mr. Stevenson  
22 says those recounts were done because of this litigation, it's  
23 not because this Court had anything to do with it. I think  
24 that's a decision the Board made that has nothing to do with  
25 any order from this Court.

1 THE COURT: I think he's just saying the recounts  
2 weren't done because of the litigation.

3 MS. BRANCH: But there was no order from this Court  
4 not to recount the other races.

5 THE COURT: Correct. I think they wanted -- my  
6 understanding is they wanted to do a recount only once.

7 MR. STEVENSON: Correct.

8 THE COURT: And not three or four times.

9 MS. BRANCH: Right. So the issue that the Board  
10 raised, I'm not sure how they were going to argue it, but, for  
11 example, how many people voted in the precinct for governor  
12 might matter next time when they're choosing who is going to be  
13 the presiding judge, that issue is decided already. Those  
14 results for the governor race were certified, the date to  
15 modify those has passed, and there shouldn't be really an issue  
16 about that.

17 And then in regard to your due process question, I will  
18 start there.

19 Your Honor, I notice it is 2:15, so -- I didn't realize  
20 what time I started.

21 THE COURT: Well, I've got a clock that, of course,  
22 doesn't go with that clock. According to my clock, you've used  
23 five minutes.

24 MS. BRANCH: Okay.

25 The Sixth Circuit in the *Hunter* decision held that Ohio's

1 system of precinct-based voting that delegates to poll workers  
2 the duty to ensure voters cast their ballots in the correct  
3 precinct and that those ballots cannot be counted if they're  
4 cast in the wrong precinct operates in a manner that is, quote,  
5 fundamentally unfair to the voters of Ohio, an approbation of  
6 the Fourteenth Amendment's guarantee of due process.

7 The Sixth Circuit in *Hunter* said that this system penalizes  
8 the voter when the poll worker directs them to the wrong  
9 precinct and the penalty is a harsh one. So I would start  
10 there. That's the *Hunter* case at 243 to 244.

11 And the analysis in the substantive due process case here  
12 is that the penalty -- we start with a penalty. What's the  
13 penalty to the voter? Complete disenfranchisement. That  
14 injury is so severe that the *Anderson* balancing test comes into  
15 play. And what we look at, once we see that there is severe  
16 injury, is that the government has a compelling interest to  
17 injure the plaintiff in that manner. The only interest the  
18 government has ever articulated anywhere in the pleadings that  
19 I have seen is that there be an election that is done -- I  
20 don't have the words in front of me -- quickly and completely  
21 and within a reasonable amount of time. That is the interest  
22 that the government has articulated in this case.

23 And the argument here is that the Board has that interest  
24 in having an election done in a timely manner, but the Board  
25 could have accomplished that and could have narrowly tailored

1 that interest if the Board had investigated the 849 wrong  
2 precinct ballots in the same manner that they investigated the  
3 31. If the Board had taken the month of December to complete  
4 the investigation in an efficient way, they would have easily  
5 been able to certify the election results before the 81-day  
6 deadline at the end of January. The Board did not tailor their  
7 interest in a way that allowed the voter to be enfranchised  
8 instead of disenfranchised.

9 The Board may also make the argument, and I guess we've  
10 always anticipated they'd make the argument, that, well, we  
11 also have the compelling interest in not telling the -- I'm  
12 sorry. We also have an interest in not breaking Ohio law that  
13 prohibits us from counting a vote that's cast in the wrong  
14 precinct. That's what got us started. You're not allowed to  
15 cast a vote in the wrong precinct. Well, 31 were cast in the  
16 wrong precinct. They didn't break Ohio law when they counted  
17 them. Those are ones that have already been counted, because  
18 they remake the ballots. And that's a great example of  
19 tailoring the government's interest so that they don't penalize  
20 or disenfranchise the voter.

21 That same response can be done here in this case that any  
22 of the ballots that you order to be counted, you should first  
23 order that they be remade and then they be counted, so that the  
24 Board is only counting a ballot that's cast in the correct  
25 precinct. That is the substantive due process argument.

1           The procedural due process argument is that the voter was  
2 entitled to notice and opportunity to be heard before having  
3 their fundamental right, the right to vote, be denied to them,  
4 and there's no dispute here that these voters got no notice.  
5 Now, there was that yellow piece of paper we talked about at  
6 trial where the voter got a yellow sheet to take home. They  
7 could call an 800 number to find out if the vote counted. They  
8 can go down to the Board and give them ID within ten days if  
9 they needed to, but there was no mechanism for the voter to  
10 know that their vote was in jeopardy and that they could do  
11 anything to fix it.

12           So for these due process, both these due process  
13 violations -- well, I'm sorry. For the procedural due process  
14 violation the remedy that we are requesting is that those  
15 voters get notice. Our Table K has 154 ballot numbers on  
16 there. Those are the voters we could not otherwise prove had  
17 any type of substantive due process or equal protection  
18 violation. And instead of just rejecting all of them, they  
19 should be given notice in the same manner that somebody getting  
20 an absentee ballot would get notice. And there was some  
21 testimony at trial, and also in the post-trial findings of fact  
22 there is the directive on absentee ballot voters who, when they  
23 get -- when they send in an absentee ballot that has a problem  
24 with it, the Board of Elections notifies them. They notify  
25 them in writing and they give them, I think it's, ten days to

1 fix their ballot envelope, whatever their problem is, and the  
2 Board even comes out and brings the envelope to them if they're  
3 not able to come in.

4 So we're asking for that same type of remedy for the  
5 procedural due process voters. So that's the remainder.  
6 Everybody else fits under the equal protection part of the  
7 case, which in my two minutes I have left --

8 THE COURT: No. By my count, you've got six minutes  
9 left.

10 MS. BRANCH: Okay.

11 I wanted to start on the equal protection part of the case,  
12 Your Honor. Just by going back to Table A, which is the 690  
13 ballots that we have identified, not every ballot is on there.  
14 We have conceded 18 fatal flaws. That's noted in Footnote 6 in  
15 our list of ballots to be counted up at 182.

16 But, interesting enough, we have some agreement. The Board  
17 of Elections has agreed that 12 of the ballots on that list  
18 should be counted. Those 12 ballots include the nine that the  
19 Board realized were voted in the right location all along, the  
20 two the Board voted to count in July, and the Oak Street ballot  
21 that they conceded was in the right place all along.

22 The Board has also submitted a Table 1, which was most  
23 recently refiled as docket 192-1, and in that table the Board  
24 listed 169 ballot envelopes where the poll worker did not look  
25 up the address.

1 THE COURT: Where the poll worker?

2 MS. BRANCH: Did not look up the address for the  
3 voter.

4 Now, our Table F has a slightly different number, but I'll  
5 take the 169. If we're in agreement that there are 169 ballot  
6 envelopes where the poll worker did not look up the address,  
7 then we have agreement that those ballots are -- that there was  
8 poll worker error, because you remember so clearly every time  
9 we held up the manuals and the Quick Guide, step number one,  
10 duty number one of the poll worker is to look up the address.

11 The Board also listed in Table 1 146 ballot envelopes where  
12 the poll worker believed the voter was in the correct precinct.  
13 They -- I'm not sure how they want to use that number, but I  
14 looked at that number to say 146 ballot envelopes where the  
15 poll worker incorrectly believed the voter was in the correct  
16 precinct, because we know the voter wasn't in the correct  
17 precinct because they voted in the wrong precinct. Those 146  
18 ballots I think are a concession of the Board that the poll  
19 worker made an error because the poll worker didn't determine  
20 the correct precinct.

21 In addition to those that I believe the parties agree to,  
22 we're asking that all the ballots on our docket 182, all the  
23 tables, be counted. In addition, Judge, I need to point out  
24 the seven ballots that the Board voted to count back in  
25 December on the 28th, they now say in their pleadings --

1 THE COURT: That was when?

2 MS. BRANCH: December 28th when the Board voted to  
3 count the seven where the poll workers came and testified, they  
4 are now telling this Court in their pleadings that they should  
5 not be counted. And, in fact, they believe they're under some  
6 duty under *Painter* to not count the seven ballots. And I would  
7 argue to this Court that those seven ballots that the Board has  
8 already voted to be counted needs to be in this Court's order,  
9 because if it's not, it looks like the Board is going to vote  
10 to uncount those.

11 In addition to that, there are 31 ballots that the Board  
12 has already voted to count, remade and counted, that the Board  
13 is also arguing in their pleadings that they should be  
14 uncounted, that somehow that miraculously fixed the equal  
15 protection violation. So I am asking the Court to include in  
16 your order that they not uncount the 31.

17 And maybe I'll save this for the rebuttal, Your Honor, but  
18 I know that one of the arguments that all defendants make is  
19 that the ballots at the Board of Elections are so different  
20 from the ballots -- I'm sorry. The 31 that the Board voted to  
21 count that were cast at the Board of Elections are so different  
22 from the people who voted in the right location. And I'll  
23 address that in rebuttal, because I'm sure they will bring that  
24 up in their argument.

25 In addition, Your Honor, the Board of Elections treated the

1 ballots that were cast at the Board of Elections and the Board  
2 voted to count, the 31, they treated them completely differ-  
3 ently than the rest of the ballots that were cast at the right  
4 location. And I just want to point out at this juncture that  
5 the Board did no investigation prior to this order, prior to  
6 your preliminary injunction order, on any of those right  
7 location ballots. After the injunction, the Board did some  
8 investigation of some of those ballots, and the Board's actions  
9 after the injunction actually add to the equal protection  
10 problem, which I can address later in more detail.

11 And I'll save the rest for the rebuttal.

12 THE COURT: All right. Thank you, Ms. Branch.

13 Ms. Gentry?

14 MS. GENTRY: Thank you, Your Honor.

15 Your Honor, I'd like to start with the due process claims  
16 that you asked about and address some of the defendants'  
17 arguments --

18 THE COURT: All right.

19 MS. GENTRY: -- and then move on to some of the NEOCH  
20 specific arguments. And I'm going to specifically focus on the  
21 procedural due process claim.

22 I think it's been generally explained in the briefs and by  
23 Ms. Branch, one of the arguments that has been briefed at some  
24 length is whether *Monell* has been satisfied in terms of an  
25 unconstitutional customer policy shown to hold the Board liable

1 for the actions of poll workers, and the Board has also raised  
2 an argument about *respondeat superior* and vicarious liability.  
3 Your Honor, all of those arguments are misplaced because it  
4 misconstrues the nature of the claim. And the best explana-  
5 tion, really, for this type of claim is in a Supreme Court case  
6 that I don't believe was cited to this Court. It's *Zinermon*  
7 *versus Burch*, *Z-i-n-e-r-m-o-n versus Burch*, a 1990 Supreme  
8 Court decision, 494 U.S. 113. And this case involved a similar  
9 type of procedural due process claim where it was a person  
10 that's admitted to a mental hospital and the employees at the  
11 hospital hadn't helped him with the forms correctly, and it  
12 turned out he was not competent to admit himself, but they  
13 admitted him anyway, and he was held for five months against  
14 his will. And the Supreme Court said he could state a claim  
15 against the State for that because the procedures were not  
16 adequate, the procedures for admitting him were not adequate.

17 Even though the procedures were not followed by employees,  
18 the court allowed it to go forward against the State without  
19 requiring any kind of *Monell* claim. And the reason for that --  
20 it didn't address *Monell* specifically, but it did explain the  
21 rationale -- and that is that this type of procedural due  
22 process claim really challenges the absence of process. It's  
23 true that there's a deprivation, but the deprivation is only  
24 part of the claim. The tort, the constitutional wrong, is not  
25 completed until the State fails to provide process.

1           And that, Your Honor, is on pages 125 and 126 of the  
2 decision. So 494 U.S. at 125 to 126. The court explains that  
3 at length. It says, quote, The constitutional violation  
4 actionable under 1983 is not complete when the deprivation  
5 occurs. It is not complete unless and until the State fails to  
6 provide due process. Therefore, to determine whether a consti-  
7 tutional violation has occurred, it is necessary to ask what  
8 process the State provided and whether it was constitutionally  
9 adequate. This inquiry would examine the procedural safeguards  
10 built into the statutory or administrative procedure. And then  
11 it goes on.

12           So, Your Honor, my contention is that, you know, although I  
13 think there is evidence of failure to train, the Court never  
14 needs to get there. And for the same reason, Your Honor, the  
15 arguments that they make about procedural due process requiring  
16 an intentional action rather than negligence, it fails for the  
17 same reason. We're not challenging -- we're not basing the  
18 claim on the poll workers' negligence. We're basing it on the  
19 Board's intentional decision not to provide process to these  
20 voters, post-deprivation process to these voters. So, Your  
21 Honor, that's an important point. I wanted to start with that.

22           Defendants also argue that there's no protected liberty  
23 interest here in voting, and they argue that no interest can  
24 arise under state law unless somebody appears in the correct  
25 precinct. So in essence you don't have a right to vote unless

1 you're in the correct precinct. Therefore, there was no  
2 liberty interest deprived.

3 And I would just point the Court to the Ohio Constitution.  
4 Article V, Section 1 of the Ohio Constitution describes the  
5 qualifications that you have to have in order to have the right  
6 to vote in Ohio, and being in the correct precinct is not in  
7 there. What the Ohio Constitution provides is that you have to  
8 be a citizen of the U.S., age of at least 18 years, you have to  
9 be a resident, and you have to be registered to vote for 30  
10 days.

11 So those are the qualifications that give rise to the right  
12 to vote, and there is a liberty interest for all of the voters  
13 whose votes were deprived in this case.

14 Your Honor, they make another argument on the procedural  
15 due process claim about undue burden. They say there's no  
16 undue burden requiring people to be in the right precinct,  
17 because it applies to all voters. Provisional voters, regular  
18 voters, doesn't matter; you have to be in the right precinct.  
19 It's not undue. It's required of everybody.

20 That's actually not accurate, because there is a distinc-  
21 tion between provisional voters and regular voters. That is,  
22 if you are a regular voter and you show up to vote and the poll  
23 worker hands you the wrong ballot with the wrong card, you go  
24 to the machine, you cast your vote, you leave. No one ever  
25 checks it. Your vote is counted. No one ever knows that you

1 voted in the wrong precinct or checks it. Your vote is counted  
2 that evening.

3 But provisional voters go through extra scrutiny. They are  
4 all scrutinized to determine whether they're in the right  
5 precinct or not, afterwards. And if they're found not to be in  
6 the right precinct, their votes are discarded. Regular voters,  
7 voters who vote a regular ballot, never go through that  
8 procedure. So it is not the same for all voters.

9 And the final point I'd like to make on the procedural due  
10 process claim, Your Honor, is they make an argument that there  
11 doesn't need to be any post-deprivation process because there's  
12 the availability of an election contest, and any provisional  
13 voter whose vote isn't counted can file an election contest.

14 Again, that's not entirely accurate. The statute, the Ohio  
15 statute is in Chapter 3515, and it requires that 25 voters band  
16 together to file an election contest. A single voter can't do  
17 it. By statute it has to be 25 voters. They have to pay all  
18 the costs. And the remedy is not to then count their ballots.  
19 The only remedy, the only judgment the court can order is a  
20 decision about who won the election. So it's not a remedy for  
21 addressing the failure to count an individual vote. That's  
22 simply not an adequate process.

23 Your Honor, I'd like now to just move on briefly to some of  
24 the NEOCH specific arguments. In this round, not previously,  
25 but now in this round defendants have attacked both the

1 validity of the Consent Decree and NEOCH's standing to be here.  
2 So in terms of standing, I'm going to start with standing, as  
3 we briefed, the parties unquestionably have standing to enforce  
4 consent decrees, and we cited a Southern District of Ohio case  
5 for that proposition. There are other cases that state the  
6 same thing. And, indeed, the Sixth Circuit stated in its  
7 decision that NEOCH has a strong interest in enforcing the  
8 terms of the Consent Decree. I just don't think that can be  
9 fairly questioned.

10 That addresses the first four, I believe, claims of the  
11 First Amended Complaint. And NEOCH has also asserted an equal  
12 protection and due process claim in Count V of the Complaint.  
13 One of the assertions that the defendants made in their  
14 briefing was that NEOCH lacks standing to assert equal  
15 protection or due process in this case. We're going to address  
16 that in the brief we're filing in response to the motion to  
17 dismiss, but just to quickly respond to it here, Your Honor,  
18 the nature of NEOCH's due process and equal protection claims  
19 is a bit different from plaintiff Hunter's. There's some  
20 overlap, but NEOCH's contention, and we'll cite case law to  
21 this, is that we have standing to challenge the implementation  
22 of the Consent Decree and the extent to which the implementa-  
23 tion of the Consent Decree violated equal protection and also  
24 violated due process. We believe that's happened here. We  
25 think the facts show that. The evidence adduced at trial shows

1 that. And so we'll put that in our brief.

2 Your Honor, the second major challenge that they make to  
3 NEOCH's presence here is, on the Consent Decree itself, they  
4 argue that it's void because the General Assembly was not a  
5 party. As you've seen in our briefs, and I believe we'll put  
6 again in our brief that we're going to file tomorrow, you don't  
7 even need to get to the merits of that, it's an improper  
8 collateral attack, and law of the case bars it. So those are  
9 two threshold doctrines that defeat the argument.

10 But even if the Court were to address the merits, we  
11 believe the evidence shows that the General Assembly was a  
12 party to the case, as we've quoted from the State of Ohio's  
13 motion to intervene in that case, and they specifically mention  
14 the need for the General Assembly to have its interest be  
15 represented. We also quoted from the Sixth Circuit decision  
16 allowing the State of Ohio to intervene, and the Sixth Circuit  
17 recognized that the General Assembly needed to have its  
18 interests represented. So the General Assembly was the party.  
19 It was the State of Ohio in that case.

20 Defendants have pointed to the absence of any journals or  
21 resolutions showing a vote by the General Assembly to enter  
22 into the Consent Decree, and, Your Honor, that's simply beside  
23 the point. The General Assembly was represented by the  
24 attorney general in the proceedings, and it authorized the  
25 attorney general to enter into the Consent Decree, presumably.

1 I don't know that for sure, because those communications are  
2 privileged. It was a privileged attorney-client communication.  
3 But if defendants want to challenge that, they're going to need  
4 to pierce that privilege and take evidence on the nature of the  
5 relationship between the counsel and the party. And, Your  
6 Honor, that wasn't done here and it can't be done here. If  
7 that's going to be done anywhere, it's got to be done in Judge  
8 Marbley's courtroom. He's the only one who could do that.  
9 And, quite frankly, I don't think it can be done anyway because  
10 it's a privileged relationship, but --

11 And then, Your Honor, just moving on quickly through some  
12 of the arguments they make about poll worker error and  
13 provisional ballots, they argue, first of all, that poll worker  
14 error can't be a mistake. It has to be an intentional knowing  
15 violation of Ohio law. And, Your Honor, that's simply not  
16 based on anything either in state law or in federal law. State  
17 law doesn't discuss the concept of poll worker error, and the  
18 Sixth Circuit recognized that at page 239 of its decision.  
19 *Painter* held that poll worker error never provides a basis for  
20 accepting a wrong precinct ballot. So you can't look to -- or  
21 we can't look to state law standards to decide what the poll  
22 worker doctrine is about. It really came about as a result of  
23 the Consent Decree, which is a federal court order, and that's  
24 where the explanation of poll worker error comes from. And in,  
25 I think, the purposes of the decree, paragraph e., it says that

1 the purpose of the decree is to protect voters from being  
2 deprived of the right to vote because of failures of poll  
3 workers to follow Ohio law, and that's it.

4 Now, you can certainly fail to follow the law negligently,  
5 and that is, in fact, what happened here. I'm not contending  
6 that any poll worker intentionally tried to take away some-  
7 body's right to vote. But the fact that they made a mistake  
8 and made an error is exactly what the Consent Decree was  
9 designed to guard against.

10 Your Honor, they also make an argument about inferences  
11 versus presumptions which I want to address. The Consent  
12 Decree provides that poll worker error cannot be presumed but  
13 must be demonstrated through evidence, and that's in the same  
14 paragraph, Your Honor, at paragraph e.

15 A presumption is not the same thing as an inference,  
16 though. I think the defendants conflate the two concepts. As  
17 defined by the Federal Rule of Evidence, as you well know, in  
18 Rule 301, a presumption imposes on the party against whom it is  
19 directed the burden of going forward with evidence to rebut the  
20 presumption. That's what it does. It shifts the burden of who  
21 has to come forward with evidence.

22 An inference doesn't shift the burden of going forward with  
23 evidence. An inference arises when a party attempts to  
24 demonstrate a fact through circumstantial evidence. You always  
25 have to make an inference in order to decide that something has

1 been proven by circumstantial evidence. That's the nature of  
2 circumstantial evidence. And so that's not the same thing as  
3 presumption.

4 And the important point that I've been leading up to, Your  
5 Honor, is that the Sixth Circuit actually recognized the  
6 permissibility of using circumstantial evidence and inferences  
7 to prove poll worker error, and that is in the *Hunter* decision  
8 at page 237. They discuss the different categories of ballots,  
9 and then they say in both instances there's no direct evidence  
10 that the poll worker erred. And then they talk about you have  
11 to make a greater inference in one case than another, but in  
12 both cases you have to decide that there was poll worker error  
13 based on circumstantial evidence. So, Your Honor, just even  
14 under the Sixth Circuit decision the Court is well within its  
15 authority to make decisions based on inferences in this case.

16 And then the final issue, Your Honor, is in the briefs, and  
17 I'll just quickly highlight it. Poll worker error must be  
18 shown by clear and convincing evidence. That's an argument the  
19 defendants make. Again, it's not governed by state law and  
20 it's also not addressed in the Consent Decree. The Court  
21 should look to federal law. And as is cited in the trial  
22 brief, the post-trial brief, equal protection and due process  
23 claims are routinely established by a preponderance of the  
24 evidence.

25 And, Your Honor, I think at that point, unless you have any

1 questions, I'll conclude.

2 THE COURT: No. And I apologize. I forgot to ask my  
3 law clerks if they had any questions when Ms. Branch was done.

4 Any questions? Kim?

5 LAW CLERK BAKOTA: No.

6 THE COURT: No, okay.

7 Thank you, Ms. Gentry.

8 MS. GENTRY: Thank you.

9 THE COURT: Mr. Parker?

10 MR. PARKER: May it please the Court, I'm going to  
11 address the equal protection and due process claims, and Mr.  
12 Stevenson will address some of the remaining issues raised  
13 here.

14 THE COURT: Okay.

15 MR. PARKER: And I'm going to start my comments  
16 exactly where I started my opening statement. The Constitution  
17 does not guarantee an error-free election. The plaintiff had a  
18 burden of proof here to show under Section 1983 that the Board  
19 of Elections committed a constitutional tort entitling her to a  
20 remedy. She had to show either that the Board of Elections  
21 engaged in invidious discrimination against similarly situated  
22 citizens or that the Board of Elections denied citizens due  
23 process of law. She failed in both of these burdens, because  
24 all she proved was that mistakes probably occurred during this  
25 election. And, Your Honor, frankly, you could have taken

1 judicial notice of that at the beginning of this case.

2 So let's start with the equal protection claim. What  
3 exactly is the plaintiff claiming? And I'm looking at their  
4 proposed finding of fact 17, which is at page eight. And this  
5 is -- they consistently said this throughout the case. The  
6 plaintiff claims that the Board of Elections has a practice of  
7 investigating provisional ballots for poll worker error and  
8 then counting some votes because of poll worker error and not  
9 others.

10 Your Honor, the testimony doesn't support that. The Sixth  
11 Circuit in the *Hunter* decision did give us the law that we have  
12 to judge the Board's actions by, and it said the Board of  
13 Elections must apply, quote, specific and uniform standards,  
14 end quote, to avoid arbitrary treatment of voters. So, again,  
15 it's the process which must be examined, not the outcome.  
16 You're not here to decide the election. You're here to decide  
17 whether the process was comporting with equal protection.

18 So the precise issue before the Court: Did the Board of  
19 Elections apply specific and uniform standards in reviewing  
20 10,500 provisional ballots after the election? The evidence is  
21 clear; the evidence is uncontradicted. The same specific  
22 standards were uniformly used to investigate all 10,500 ballots  
23 without exception. Therefore, there can be no violation of  
24 equal protection.

25 So let's look at the evidence a little bit, in a little bit

1 more detail. As Your Honor now knows, the verification of  
2 provisional ballots is only undertaken by the staff. Sherry  
3 Poland testified to that, and that's in Directive 2010-74. The  
4 voting on the ballots themselves is done by the Board.

5 There were only two witnesses in the entire trial that  
6 testified about the verification process. That was Sally  
7 Krisel and Sherry Poland. Members of the Board -- Burke, Faux,  
8 Triantafilou -- were not involved in the verification process  
9 and could not testify to it. All of the testimony of the poll  
10 workers and the voters was totally irrelevant to the  
11 verification, how it was done or how the voting was done.

12 I make these observations about Ms. Krisel and Ms. Poland.  
13 They were very consistent in their testimony. Ms. Poland was  
14 the one most directly involved in the verification process.  
15 There was no witness who contradicted their testimony, and  
16 there would be absolutely no reason for this Court not to  
17 credit their testimony.

18 Now, if we go back to the *Hunter* decision, the *Hunter*  
19 decision in the context, admittedly, of the court-ordered  
20 investigation said that following a Secretary of State  
21 directive is applying specific and uniform standards. And so I  
22 believe that we have to look to see whether specific and  
23 uniform standards were followed in the first instance in the  
24 verification process.

25 And what did the Board look to? Or the staff. We know the

1 staff looked to Secretary of State directives, specifically  
2 Directive 2010-74, which is Joint Exhibit 34, and then the  
3 actual procedure they followed, that is, the steps they  
4 followed, was in Joint Exhibit 5, which is the provisional  
5 envelope verification. And specifically what did that --

6 And by the way, everything I'm about to say Sally -- or,  
7 excuse me, Sherry Poland testified to and is in the joint  
8 exhibits. So if you want to know specifically, I'll tell you,  
9 but I think it's in the briefs.

10 Specifically they were looking for these following things:

11 First, is the person registered to vote in Ohio?

12 Second, did the voter vote in the correct precinct?

13 Third, did the voter complete the affirmation correctly?

14 Fourth, did the voter vote in more than one county or  
15 precinct?

16 Fifth, did the voter vote an absentee ballot?

17 Sixth, did the voter cast more than one provisional ballot?

18 Now, the answer to every one of those questions can be  
19 ascertained from the records at the Board of Elections. They  
20 don't have to investigate any further than that to get those  
21 answers.

22 For the NEOCH voters only there was an extra step taken,  
23 and this is the only quote I'll give you, Your Honor, I  
24 promise.

25 THE COURT: Okay.

1 MR. PARKER: Sherry Poland at Volume 7-301 stated:  
2 "Of the 849, staff separated the ones that provided only the  
3 last four digits of their Social Security number. Then they  
4 looked to see if they voted in the correct location. If they  
5 did, then that became a smaller subset. Then they looked for  
6 any notation in our records about provisionals. If there was  
7 anything, my instructions to staff were to make a copy of that,  
8 attach it to the envelope and place in the," quote, "Further  
9 Review tray to be presented to the Board."

10 The process that I -- the questions that I just posed above  
11 as what they were looking for was done, according to the  
12 testimony, for all 10,500 ballots. And Your Honor should note  
13 that, with the exception of the NEOCH ballots, there's nothing  
14 in Directive 2010-74 that directs the staff to look for poll  
15 worker error, and Sherry Poland testified directly there was no  
16 practice of looking for poll worker error except in the case of  
17 NEOCH ballots.

18 The plaintiff has asked you to also look at the six  
19 hundred--

20 I hope I have my numbers right here. They keep changing.

21 -- 686 ballots were some poll worker checked off More  
22 Information Needed. There were ten ballots where the voter was  
23 asked to vote provisionally when they didn't have to, and then  
24 there were the 31 ballots, and I'll talk a lot more about  
25 those. But the 686 and the ten, the so-called poll worker

1 errors in those cases of marking something on the provisional  
2 envelope or requiring the voter to vote provisionally, while,  
3 yeah, they were poll worker error, it had no effect on  
4 anything. As Sherry Poland testified, those things were  
5 totally irrelevant to the Board, to the staff. They made their  
6 own judgments on these things, as they were required to do by  
7 law.

8 So that was not a question of looking for poll worker  
9 error. It was simply a fact that happened that had no impact  
10 on anything.

11 The 31 fall into a different category, admittedly. There  
12 there was staff error, no one questions it, and it did affect  
13 the validity of the ballot. But, again, the staff wasn't  
14 looking for poll work error when it found the error. It did  
15 the same verification process for the 31 that it did for the  
16 10,500 other ballots. The error there was obvious from the  
17 face of the ballot.

18 Can I get this?

19 THE COURT: Do you want the screen down?

20 MR. PARKER: I just -- yeah.

21 THE COURT: Okay.

22 MR. PARKER: What I've got here, Your Honor, is  
23 Plaintiffs' Exhibit 2011, which is one of the provisional  
24 ballots that was eventually counted at the Board of Elections,  
25 but -- one of the 31, I should say. And what I wanted to point

1 out to you, although this was in the evidence, in the section  
2 down here For Office Use you'll see that somebody's written in  
3 the precinct New, precinct Old, they crossed out the precinct  
4 and then put in a different one.

5 The testimony of Sherry Poland is the way in which the new  
6 precinct is determined at the Board of Elections, the only way  
7 it's determined, is by looking up at step two, which is the  
8 current address. That current address is filled in by the  
9 voter. Whatever the voter puts in there, and I think she  
10 actually said even if it's under a bridge or an alley, if I  
11 recall correctly, whatever they put in there, that's what  
12 determines the new precinct.

13 This is a step, by the way, that is not done at polling  
14 places. The staff worker on election -- or when taking the  
15 vote puts in the precinct number. In this case they put in  
16 2-E, as in Edward.

17 During the verification process, somebody at the staff, the  
18 bipartisan team, looks at that current address in step two and  
19 goes back to make sure that the precinct matches that address.  
20 In this case it did not. The correct precinct, in fact, was  
21 2-B, as in boy. An error was made. That's obvious on the face  
22 of the envelope. You don't have to ask anybody about it. It's  
23 right there. It hits you directly between the eyes.

24 They were 27 of these that were exactly like this. There  
25 were four that were a little bit different in that the correct

1 precinct, the precinct did match up with step two, but when  
2 they opened it up, the ballot did not match the precinct. It  
3 was a different precinct.

4 So the point of all this is, the verification process,  
5 which is what you have to look at, was followed with consistent  
6 specific and uniform standards. Now, if mistakes were made in  
7 there, they were made, but that doesn't mean the process wasn't  
8 valid.

9 So that leaves us with the actual counting by the Board of  
10 Elections. And what this -- and, again, the Sixth Circuit is  
11 giving us the law on this thing that we have to follow, and at  
12 Footnote 13 --

13 Is this on?

14 THE COURT: Yes.

15 MR. PARKER: Oh, okay. All of a sudden it sounded  
16 like it wasn't.

17 THE COURT: Okay. You're fine, Mr. Parker.

18 MR. PARKER: One of the ravages of age, Your Honor,  
19 again.

20 THE COURT: Don't say that, Mr. Parker. I think we're  
21 the same age.

22 MR. PARKER: No, no. I'm much older. I'm much older.

23 THE COURT: No. Mr. Harper's much older.

24 MR. HARPER: Oh, good. I'm --

25 MR. PARKER: I want to now turn to the actual voting

1 that was done by the Board of Elections. And, again, we have  
2 to see, what did the Sixth Circuit tell us? And it told us  
3 that for -- that if there was arbitrary treatment, that could  
4 in and of itself be invidious discrimination. That's at  
5 Footnote 13. So the question you have to answer is: Did the  
6 Board act arbitrarily in voting to count the 31 ballots but not  
7 the 269 that were passed in the right polling place but wrong  
8 precinct? Well, again, the testimony doesn't support that.

9 The Board of Elections followed precisely the same  
10 procedure for every category of provisional ballots. Now, we  
11 know that 31 were cast at the Board of Elections, miscast at  
12 the Board of Elections but were counted because of obvious  
13 staff error. Mr. Burke so testified, and the transcript of the  
14 Board at Joint Exhibit 28 supports that. But that decision was  
15 not arbitrary, and it was not arbitrary for two reasons.

16 First, the 31 are not substantially similar to the 269,  
17 they just aren't, and I'll go into that in detail. And I do  
18 want to point out, that fact was not obvious at the preliminary  
19 injunction hearing. We only had an hour's worth of actual  
20 testimony at that hearing. The rest of it was just listening  
21 to the lawyers. We now have a lot of testimony on this, and we  
22 have a much more complete record.

23 The second reason it wasn't arbitrary was because the Board  
24 acted on advice of counsel, not on some practice of treating  
25 the ballots differently.

1       Let me deal with the first issue first. The provisional  
2 ballots at the Board of Election are cast under materially  
3 different circumstances than provisional ballots at the polling  
4 places, and the chances for error, which is really much more  
5 significant, are materially greater.

6       Let's start with the process at the polling location. You  
7 had a lot of testimony on this, so I'll go through it quickly.  
8 A voter walks in to the precinct. The voter identifies him- or  
9 herself to the poll worker, and the poll worker goes to the  
10 poll book and looks up the name of that person. If the voter's  
11 name and address do not match -- if the address doesn't match  
12 that which was just given to the poll worker, then the voter  
13 has to provide a current address. "Where are you living now?"

14       It's then the poll worker's job to try to figure out what  
15 precinct that person should vote in. Their training is that if  
16 they are in the right precinct, just don't have -- you know,  
17 they just changed addresses, then they get a provisional  
18 envelope to fill out and, once that's filled out, they get to  
19 vote and put the vote in the envelope. It's that simple. If  
20 they're at the wrong precinct, then their training is to direct  
21 the voter to the correct precinct. And as far as we heard from  
22 the testimony, most of the poll workers, if they thought the  
23 person was in the wrong precinct, did that.

24       Okay. At the Board it's very different. The voter, the  
25 only -- there's only one reason you can vote absent-- or,

1 excuse me, not absentee, provisional at the Board as opposed to  
2 polling places. At the polling places there are eight separate  
3 reasons. They're actually in step --

4 That fold is at an inopportune place.

5 That's step six. Whereas if you go to the Board of  
6 Elections prior to the election, there's only one reason you  
7 can vote provisionally, according to the testimony, and that's  
8 because you changed your address since the last election.

9 So the first step isn't to go to a poll book. The first  
10 step is to see if, as a voter, you are actually registered in  
11 the State of Ohio. If -- you know, no poll books to look at.  
12 If you're registered but at a different address, which, of  
13 course, you probably already disclosed, then you would be  
14 provided a provisional envelope and you would -- the voter  
15 would fill it out just as we described before, including that  
16 current address in step two.

17 It's that current address in step two which is critical,  
18 because that's the basis on which, and the only basis on which,  
19 the staff determines what precinct that person is to vote in.  
20 And they write that down, as I said before. And then the staff  
21 worker pulls the ballot out of one of 680, in this case, to  
22 give it to the voter to vote. The voter in that situation is  
23 at the right place. There's no way to be at the wrong place  
24 when you go to the Board of Election.

25 The possibilities for error are materially different, and

1 this addresses really the inferences that you're being told you  
2 can draw. And I want to comment here. Proposed conclusion of  
3 law by the plaintiff number 30 says, and that's at page 57,  
4 "The defense offered no evidence of voter error." The defense  
5 has no burden of proof. The plaintiff has the burden of proof.  
6 We were not required to offer evidence of poll worker -- or  
7 voter error.

8 But putting that aside, the plaintiff proved voter error.  
9 They proved it repeatedly. Let me tell you why. Number one,  
10 every one of the 849 voters made a mistake by going to the  
11 wrong place. In contrast, the voters who went to the Board of  
12 Elections went to the right place.

13 Two. We had evidence that voters didn't bring their voter  
14 notification card. Remember the one that I had that we used as  
15 an exemplar?

16 THE COURT: Let me just go back to what you just said,  
17 going to the wrong place. What you're really saying is the  
18 wrong table; right?

19 MR. PARKER: Wrong table --

20 THE COURT: Wrong table.

21 MR. PARKER: -- is what I'm talking about.

22 THE COURT: They were in the right building.

23 MR. PARKER: Yeah, because of the 840 --

24 THE COURT: They went to the right place, the right  
25 building; they were just standing under the wrong basketball

1 hoop.

2 MR. PARKER: Right. 849 of them were totally wrong  
3 precinct. But the subset of 269 was they were in the right  
4 polling place, admittedly. Okay?

5 But as far as we know, those voters didn't bring their  
6 voter notification card that showed what precinct they were to  
7 vote in, not just where they were to vote but what precinct  
8 they were to vote in. Again, that doesn't happen at the Board  
9 of Elections because it's irrelevant. That's not -- they don't  
10 use those cards to determine the precinct. They use them in  
11 step number two.

12 We had evidence voters didn't avail themselves of the  
13 multiple online Web sites available to determine which precinct  
14 to go to. They just didn't. Again, that can't happen at the  
15 Board of Election because there's no precinct to go to at the  
16 Board of Elections. You are at the right place no matter what.  
17 And the precinct is determined by what you write in step number  
18 two.

19 We have evidence that voters didn't call the Board of  
20 Elections to find out what precinct to vote in. Well, again,  
21 that can't happen at the Board of Elections; you're at the  
22 Board of Elections. And, again, the step number two determines  
23 the precinct.

24 We had evidence that voters refused to go to the correct  
25 precinct tables. There were quite a few of those. That can't

1 happen at the Board of Elections. There aren't any precinct  
2 tables. There's nowhere to direct them to. You just hand them  
3 a --

4 THE COURT: I don't recall anyone -- I don't recall  
5 any testimony that --

6 MR. PARKER: Well, we know that it happened. Well,  
7 this is what I have in my notes. Okay. I'll give you this one  
8 quickly.

9 THE COURT: All right.

10 MR. PARKER: I have Lincoln Heights, Oceania Bradley,  
11 Volume 9, page 11, Joint Exhibit 101, page 24. I'm not quite  
12 sure what that means. Linda Claborn, July 19, Volume 2, page  
13 166. Rankin-Moon, July 20, and I -- it looks like three,  
14 page -- Volume 3, 152. Hall-Muhammad, July 21; that's Volume  
15 4, 61. James Crabtree, Volume 3, page 186.

16 I don't have much more than that here, so I --

17 THE COURT: Okay. Do you want me to give you -- how  
18 are you splitting your time?

19 MR. PARKER: I'm sorry. What?

20 THE COURT: How are you splitting your time?

21 MR. PARKER: We're just -- when I get done --

22 How long have I been on?

23 THE COURT: 20 minutes.

24 MR. PARKER: Okay. Then I need to speed it up a  
25 little bit.

1 THE COURT: Okay.

2 MR. PARKER: I can't read that clock up there.

3 THE COURT: I can't either.

4 MR. PARKER: Okay.

5 We know that the voter can -- it's possible for the voter  
6 to show a poll judge an old ID but write a different address on  
7 the provisional envelope. Again, you can't do that at the  
8 Board of Elections because the only thing that counts is step  
9 two.

10 We had evidence that a voter was misdirected to a precinct  
11 table by a partisan poll worker. Or not poll worker. By a  
12 partisan observer. Again, that can't happen at the Board of  
13 Election because it's not possible to send somebody to another  
14 table. There's no table. It's at least possible that a voter  
15 could tell one poll judge one thing and another another. We  
16 have no way of knowing that, because we didn't hear all of the  
17 poll workers. Last, and this can happen at both places: poll  
18 worker error. It can happen.

19 Now, these errors may or may not be evident from the  
20 ballot, but we know that any number of these things can happen  
21 at a polling place. They can, and in many cases we have  
22 evidence that they did. In sharp contrast, at the Board of  
23 Elections only one thing can go wrong. A Board worker either  
24 writes down the wrong precinct by accident after looking at  
25 step two or literally pulls the wrong ballot out of the 680.

1 We know that happened in four cases. That's the only thing.  
2 That's what Mr. Burke testified to. That's what Mr. Faux  
3 testified to. There's just nothing else that can go wrong  
4 there, just because of the nature of it. So it's a very  
5 different circumstance. The 31 cast at the Board are not  
6 substantially similar to the 269 or the 849.

7 That leads us to the next issue, which is the Board made an  
8 error of law in counting. It did -- based on the advice of  
9 counsel. The Board's action was not arbitrary, because in  
10 every case they did exactly the same thing. When I say every  
11 case, the 850 wrong precinct, the 686 where there was more  
12 information requested, the ten that should not have been voted  
13 provisionally at all, and the 31 voted at the Board of  
14 Elections. In every case an opinion of counsel was requested,  
15 and in every case -- whether or not it was legal to count those  
16 ballots, and in every case the Board followed the advice of  
17 counsel.

18 Now, because the provisional ballots are cast at the Board  
19 of Elections under substantially different circumstances and  
20 the error possibilities are substantially different, there was  
21 room for counsel to opine that the Board of Election ones could  
22 be remade. Keep in mind counsel didn't have the benefit of the  
23 *Painter* decision at that time. That came later.

24 So counsel's opinion, while erroneous, it was understand-  
25 able, and it certainly wasn't arbitrary. So when we get to the

1 end of the day on equal protection, we have the Board of  
2 Elections staff used the same specific and uniform standards to  
3 review all 10,500 ballots, and the Board did not act -- or the  
4 Board did act consistently and not arbitrarily in counting  
5 them, and because we can't find any systemic problem with the  
6 way in which the provisional ballots were verified and the  
7 decisions made to count or not count, there is no invidious  
8 discrimination and the plaintiff has failed to carry its burden  
9 of proof.

10 THE COURT: Well, what are you contending was the  
11 erroneous advice of counsel?

12 MR. PARKER: Counsel was asked -- there was testimony  
13 on this. I know Mr. Burke testified to it, and I believe some  
14 others did as well. I think Sherry Poland testified to it.

15 Counsel was specifically asked at a meeting whether or not  
16 they could count those 31 -- "remake them" I think is the words  
17 they used -- and was advised yes, they could; that would be  
18 acceptable. And *Painter* tells us that was error, but counsel  
19 didn't -- as I said, it was a very understandable mistake.

20 Now, the second issue, if you still find, after all of  
21 that, that there was an equal protection violation in counting  
22 the 31 but not some other subset of the wrong precinct votes,  
23 then the question is whether the Court-ordered investigation  
24 complied with equal protection and in essence solved the  
25 problem. I think the Sixth Circuit has already answered that

1 question. The Sixth Circuit, keep in mind, Judge, had the  
2 benefit of knowing what happened, which, of course, you  
3 couldn't know because you hadn't had a trial yet. The plain-  
4 tiff put before the Sixth Circuit in the briefing exactly what  
5 was put before this Court, there's no real dispute about that,  
6 in terms of what happened in the post-November 22 investiga-  
7 tion, and the Sixth Circuit said the Board followed specific  
8 and uniform standards in that investigation. That complies  
9 with equal protection. It even cautioned that it's not the  
10 outcome you should be looking at. So I don't think that needs  
11 to be revisited by the Court.

12 I'm going to suggest this. If you still find a violation  
13 of equal protection in the counting of the 31, then I think the  
14 remedy -- even though I don't think you can give a retroactive  
15 remedy, and Mr. Stevenson, I think, will address that more --  
16 but the remedy is to uncount the 31.

17 THE COURT: You're saying disenfranchise these folks?

18 MR. PARKER: That's precisely what I'm saying.

19 THE COURT: But the Board has already voted to certify  
20 them. How can I do that?

21 MR. PARKER: The evidence was they can be uncounted  
22 just as well as the provisional ballots can be counted. The  
23 Sixth Circuit -- and I readily admit the Sixth Circuit  
24 expressed concern about that in dicta, about whether that would  
25 violate due process. Their dicta is not the law of the case,

1 and I do not believe that uncounting miscast ballots under Ohio  
2 law would violate due process.

3 THE COURT: What about public policy, though, about  
4 disenfranchising voters?

5 MR. PARKER: That gets to the heart of the due process  
6 argument and whether or not poll worker error, garden variety  
7 poll worker error, violates due process. If it doesn't, then  
8 it doesn't -- it's just the law of Ohio on what is a qualified  
9 vote. If it does violate due process, then different outcome.

10 So let me -- this is good. Let me turn to due process,  
11 because it's -- you're asking the right question.

12 This is just an observation, first. During the preliminary  
13 injunction hearing plaintiffs stood here and said: We're not  
14 challenging the state law. And, of course, to challenge the  
15 constitutionality of a state law, which we briefed, you have to  
16 follow Rule 5.1. It has not been done in this case.

17 THE COURT: And I think they concede that.

18 MR. PARKER: Okay. And that's been raised repeatedly.

19 But yet their arguments are challenging the state law. Let  
20 me look at the procedural due process argument, at least as I  
21 understand it. The plaintiff says they want a, quote, post-  
22 deprivation, end quote, remedy for wrong precinct voters whose  
23 vote wasn't counted. Well, you have to think through what that  
24 means. It means that votes cast at the wrong precinct  
25 regardless of the -- let's even concede it was due to poll

1 worker error -- would have to be counted in violation of Ohio  
2 law. *Painter* made that clear. The statute actually is clear,  
3 but *Painter* made that part of it very clear.

4 The Board of Elections does not have the power to order  
5 votes be counted due to poll worker error. It doesn't -- that  
6 would violate an Ohio law. The only way it wouldn't violate  
7 Ohio law is if Ohio law is declared unconstitutional. That's a  
8 direct challenge. There's no remedy that can be given without  
9 violating Ohio law. They're bound by Ohio law, and this Court  
10 is bound by Ohio law on these issues. That's *Hunter* at  
11 Footnote 19.

12 The suggestion that the precinct-based voting is based --  
13 or should be subject to strict scrutiny is also a direct attack  
14 on Ohio law. And by the way, I disagree with Ms. Branch. The  
15 Sixth Circuit did not hold that there was a due process  
16 violation. I quickly looked at that section. Unfortunately, I  
17 have the slip opinion and not the F.3d, so this is page 35 of  
18 the slip opinion. It's the text surrounding Footnote 24. It's  
19 premature to make that judgment. That evidence, it hasn't been  
20 briefed, it wasn't before the Court, and they didn't say this,  
21 but it hasn't been challenged under Rule 5.1.

22 But, Your Honor, not every regulation that restricts the  
23 right to vote is subject to strict scrutiny. That's simply not  
24 the law. The courts -- I mean the states, rather, have the  
25 right to restrict the time, place, and manner in which citizens

1 can vote. That's Article II of the Constitution. And the  
2 Supreme Court has said so in *Burdick against Takushi*, which is  
3 cited in our brief.

4 The Sixth Circuit's already recognized the value of  
5 precinct-based voting. That's *Sandusky County Democratic Party*  
6 *against Blackwell*, also cited in our briefs.

7 So those attacks should fail. And I want to get right back  
8 to where I started. The Constitution does not guarantee an  
9 error-free election. Here's how the cases expressed it. They  
10 say, "The Constitution does not guarantee against garden  
11 variety errors." The case that's probably most important to us  
12 is the *Warf versus Board of Elections*, which is a Sixth Circuit  
13 case, and it's important to recognize -- well, strike.

14 There's a reason why the plaintiffs started their post-  
15 trial brief with an argument that the errors that they  
16 supposedly demonstrated were not garden variety. What they  
17 said is they're systemic. Well, Random House dictionary tells  
18 us systemic refers to something that affects the system as a  
19 whole. So the plaintiffs' claim, in their own words, is that  
20 the Board of Elections violated the due process clause because  
21 of systemic errors. So what evidence is there of systemwide  
22 problems?

23 All the plaintiff put on in this court were 50 poll workers  
24 and 17 voters. I'm going to forget about the fact that  
25 virtually none of the poll workers remembered the ballots they

1 were testifying about. Forget about the fact that for every  
2 ballot that was testified about, there were a minimum of three  
3 other poll workers who interacted with the voter and we don't  
4 know what happened, and forget about the fact that the majority  
5 of their case was based on inadmissible hearsay to which I had  
6 a standing objection. All the plaintiff proved in this case,  
7 and I'm giving them the evidence absolutely most favorable to  
8 them, was that human mistakes were made. But that doesn't  
9 support a systemic problem. In fact, the evidence in this case  
10 supports exactly the opposite.

11 Let's look at what the evidence showed us about this  
12 election by the numbers. There were over 3,000 poll workers,  
13 each of whom had at least four hours of training. There were  
14 24 poll workers per class, which is a pretty small class.  
15 There were four instructors per class. They were over a  
16 hundred classes given. There were 290,000 votes cast, of which  
17 10,500 were provisional. Something in excess of 20,000 were  
18 absentee. There were over a million pieces of paper to be  
19 processed and handled by over 3,000 poll workers and Board of  
20 Elections staff.

21 And at the end of the day, we had 849 provisional ballots  
22 cast in the wrong precinct, of which 269 were cast in the right  
23 polling place but wrong precinct. What's the error rate? If  
24 you take 849 as the numerator, that's a .3 percent error rate,  
25 three-tenths of a percent. If you take 269, it's .09 percent,

1 nine-one-hundredths of a percent.

2 Contrast that, Your Honor, with the *Warf* case. And the  
3 *Warf* case is important here because *Hunter* was written by Judge  
4 Moore. Judge Moore was on the *Warf* panel. In the *Warf* case,  
5 the court, the Sixth Circuit, approved the disenfranchisement  
6 of 11 percent of the voters not because of voter error but  
7 because of an election official's errors.

8 Now, every single poll worker who testified said they knew  
9 that a voter had to vote in the right precinct, the precinct in  
10 which they lived. So they understood their training; they just  
11 made innocent mistakes. Most of them, when they allowed some-  
12 body to vote in a precinct that turned out to be wrong, they  
13 thought that person belonged there. I know that's not a  
14 hundred percent true, but most of them thought that. That's a  
15 human error.

16 We also know from the testimony of the poll workers that  
17 there were voters who came to the polling place incorrectly,  
18 that the ones who voted in the wrong precinct weren't unique.  
19 There were a lot of other people that did it too. We don't  
20 know how many. But they directed them to the right precinct  
21 and they went. So, you know, we can't infer that there's a  
22 systemic problem there.

23 In order to show systemic errors, the plaintiff needs to  
24 put on expert testimony showing what the systemic problems were  
25 and that, in fact, they are causing systemwide errors. It is

1 not enough to show that some witness on the stand made a  
2 mistake when shown the green book. And by the way, most of  
3 them got it right, and we did keep a tally.

4 The plaintiff actually recognizes this in their post-trial  
5 brief by shifting the focus to training and supervision. They  
6 admit training is adequate. That's at page three of their  
7 post-trial brief. So they're focused on failure to supervise.

8 Well, the testimony of Sally Krisel was that after every  
9 election the Board staff reviews their material and, I quote,  
10 retires 30 to 50 poll workers. She said that's a polite way of  
11 saying fired. So what are we left with? I mean, how many  
12 mistakes does a poll worker have to make before they're  
13 retired?

14 I think it's important to remember we all make mistakes.  
15 That's where the expression "To err is human" comes from. Tim  
16 Burke made a mistake with the green book on the stand. Tim  
17 Burke is a very bright guy and very well educated, and I doubt  
18 there's a person in this room that thinks he's not qualified to  
19 be a poll worker.

20 Plaintiffs did not present any evidence that any poll  
21 worker that they said made a mistake had made a mistake in a  
22 prior election. All they proved was that wrong precinct  
23 provisional ballots get cast, but we have no idea which poll  
24 workers made that same mistake in a prior election. We have no  
25 way of knowing that.

1           This whole issue about supervision is nothing but a red  
2 herring, Your Honor, because if it weren't a red herring, they  
3 would be asking you for an injunction that looks forward and  
4 addresses something about the supervision. But that's not what  
5 they're asking. They're just simply asking you to count votes.

6           I think -- in ending up here, I think we need to focus on  
7 what the consequence of that is, because essentially they're  
8 saying: "Your Honor, we want you to count votes that were  
9 miscast because of what is obviously garden variety of error."  
10 What you do is precedential. This case isn't about who is  
11 going to be our next juvenile court judge. If that's all it's  
12 about, we have no reason to be in federal court. We should be  
13 in state court in an election contest.

14           This case has been postured and tried as being about the  
15 right to vote. The plaintiff is attempting to establish that  
16 human innocence, human error, is not garden variety but,  
17 instead, is a constitutional tort that allows votes to be  
18 counted. The consequence of that is that in Ohio in every  
19 election, every provisional ballot must be investigated by  
20 boards of election for poll worker error and counted if error  
21 is found. And this investigation has to be completed in a  
22 two-week period. If nothing else, this trial has demonstrated  
23 that is an impossible task.

24           The citizens of Ohio have rights too. They have a right to  
25 an election that comes to a speedy resolution. The plaintiff

1 has proved nothing in this case but the obvious: Garden  
2 variety errors will occur in every election. They have failed  
3 to prove a violation of due process. They have failed to prove  
4 that there was any invidious discrimination. We ask the Court  
5 to enter judgment in favor of the Board of Elections.

6 Thank you.

7 THE COURT: Thank you, Mr. Parker.

8 Mr. Stevenson, you've got 20 minutes left.

9 MR. STEVENSON: Thank you very much. I think you're  
10 being generous on that, but --

11 Sorry.

12 MR. PARKER: No, that's okay.

13 MR. STEVENSON: If I hyperventilate because I'm going  
14 too fast, somebody needs to revive me.

15 I want to start by talking about something that hasn't  
16 really had a lot of play in this case, and it's something that  
17 I think is extremely important for the Court to understand and  
18 the Court to know.

19 I want to talk about what standard of proof this Court has  
20 with respect to looking at the evidence in this particular  
21 case. Ms. Gentry referred to it, well, in federal courts it's  
22 always a preponderance of the evidence. That's not true in  
23 this case, and it's not true in every federal case. In every  
24 case, whether it's federal or state, in Ohio when you are  
25 looking at the acts of a public official, that public official

1 is presumed to have performed their duty in a regular and  
2 lawful manner. That presumption can only be overcome by clear  
3 and convincing evidence. That is Ohio law. That is federal  
4 law. That is also the standard that was applied by the Board  
5 of Elections when they counted the 31.

6 If you look at Evidence Rule 301 and 302, they talk about  
7 what a presumption does, and they also say the state law  
8 applies to presumptions. These presumptions remain in effect  
9 until they're overcome by clear and convincing evidence to the  
10 contrary. If there is no direct evidence of what caused the  
11 error in this particular case to overcome the presumption, the  
12 plaintiffs must exclude all other causes. That they have not  
13 done here. In addition, different conclusions can be drawn  
14 from the same evidence. They have not overcome this presump-  
15 tion.

16 The presumption of irregularity attached to the poll worker  
17 activities on November 2nd. When more than one person is  
18 performing part of a duty, it attaches to each of them. The  
19 presumption of irregularity attached to the Board in their vote  
20 on November the 16th, to the Board staff in their preparation  
21 for that vote, to the Board staff when they were looking at  
22 ballots and processing ballots prior to the election day. This  
23 presumption also attaches to the Board vote on December the  
24 28th.

25 In relation to those votes on November 16th and on December

1 the 28th, I think it's important that the Court remember that  
2 the Board was acting pursuant to Ohio law, to directives and  
3 advisories of the Secretary of State, and it was not acting  
4 pursuant to any policy, practice or procedure that was  
5 promulgated by County governing officials.

6 The plaintiffs have asked the Court to draw multiple  
7 inferences in this case. I think if you look at the fact that  
8 there is this presumption of irregularity that must be over-  
9 come, it's important to ask whether you may draw inferences at  
10 all. An inference is nothing more than a legal device that  
11 permits you, as the trier of fact, to assume an unknown fact on  
12 which there is no direct evidence from other known facts on  
13 which direct evidence has been offered. That's all it is.

14 Asking the Court to draw an inference of poll worker error  
15 in the absence of direct evidence is no different than asking  
16 the Court to presume that such error occurred. Even the NEOCH  
17 Consent Decree, which we'll talk about in a couple of minutes,  
18 doesn't permit that result. The language of the decree  
19 specifically provides that poll worker error must be  
20 demonstrated through evidence. That standard is in accord with  
21 Ohio law that requires direct evidence to overcome the  
22 presumption of irregularity. That's out of *State ex rel.*  
23 *Skaggs*, 120 Ohio St.3d, paragraphs 51 and 52. Also there's an  
24 older Ohio State case, *Reynolds versus Schweinefus*, which  
25 states the presumption is so strong that it always prevails

1 unless it is shown to be otherwise by direct and positive  
2 proof.

3 And I want to talk a little bit about causation. Both the  
4 NEOCH decree, to the extent that it applies, and this Court's  
5 November 22nd order required poll worker error to be the sole  
6 cause of a ballot being miscast. Under both scenarios it's not  
7 enough to prove that poll worker error to some degree exists.  
8 The plaintiffs must exclude all other possible errors that may  
9 have contributed to the miscasting of the ballot. In this case  
10 poll worker error must be a failure to follow state law.

11 That's what NEOCH says. The failure of poll workers to  
12 follow Board procedures that are not also required by state law  
13 is not a remedy -- is not an error for which a remedy is  
14 imposed under NEOCH.

15 In looking at some of the errors that the plaintiff  
16 recites, none of the statutes regarding the validity of  
17 provisional ballots require that each poll worker that has  
18 contact with a provisional voter look up the voter's address.  
19 Not looking up an address when another poll worker has already  
20 done so is not poll worker error.

21 A provisional judge is not required under the state code,  
22 and the failure to appoint one is not poll worker error.  
23 Sharing duties is not prohibited by the state code, and to the  
24 extent the poll workers do that, that's not poll worker error.

25 I want to draw attention to one particular error that the

1 plaintiff has asked you to infer and count 183 ballots. They  
2 are talking about looking up old addresses as opposed to the  
3 new address. The quality of the evidence that the plaintiff  
4 offers to prove this inference I think is important for the  
5 Court to look at.

6 First of all, what they offer -- first of all, the portion  
7 of the transcript they cited to is not a poll worker exchange  
8 that took place in a precinct on election day. The question  
9 related to a ballot that was processed at the Board of  
10 Elections. And the question that was asked --

11 And this is on Sally Krisel's testimony. And I'm sorry I  
12 don't have the page, but it's cited in the findings of fact of  
13 the plaintiff with respect to the counting of the 183 on the  
14 old addresses.

15 -- "If we scroll up, and I won't make you do this, but if  
16 you look that address up in step three, the former address,  
17 that would be in Cheviot 1-A. So is the mistake here that the  
18 Board worker made was that they, instead of looking up the  
19 current address in the street listing, they looked up the  
20 former address?"

21 This is the answer: "I can't -- I can't make that  
22 assumption, but -- I mean, I can't say that for sure, but you  
23 could assume that from this."

24 They're asking you to count 183 ballots based on that  
25 single exchange.

1 I know the NEOCH Consent Decree is going to be an issue  
2 here, and I want to address that quickly. I was planning on  
3 addressing it a little bit longer, but Joe covered most of the  
4 rest of my stuff, so I'm not going to worry about it that much.

5 THE COURT: Well, you've still got 11 minutes.

6 MR. STEVENSON: Thank you.

7 We raised the issue regarding NEOCH standing when we were  
8 standing in this courtroom on November 22nd. We made that  
9 statement to you. We said we don't think they have standing.  
10 It was, arguably, for a different issue; frankly, because they  
11 represent people from northern Ohio and not from Hamilton  
12 County. We have reasserted that issue at several points during  
13 these proceedings, and we're reasserting it now. It's one of  
14 those things that, had we not ever asserted it before, we could  
15 assert it now because it goes straight to the heart of Article  
16 III subject matter jurisdiction.

17 First, with respect to the Consent Decree, standing and  
18 jurisdiction can't be conferred on a trial court by the consent  
19 of the parties. I think that's black letter law that nobody's  
20 going to argue with, nor can a jurisdictional defect be waived  
21 by the parties.

22 THE COURT: No, but can't -- I know where you're  
23 going. I don't think you can collaterally attack that.

24 MR. STEVENSON: Ah. But I can, because if the court's  
25 judgment was entered without Article III jurisdiction, it is

1 void, and a void judgment can be attacked collaterally. It can  
2 be attacked directly. It can be attacked at any time. It can  
3 be attacked here. It can be attacked in the Sixth Circuit. It  
4 can be attacked in the Supreme Court. Void judgments are  
5 nullities. It's as if they never existed.

6 We have raised a question and actually offered proof that  
7 the NEOCH Consent Decree changed Ohio law, that it also  
8 suspended the operation of certain provisions for a single  
9 class of voters, and that neither the Secretary of State, nor  
10 the attorney general had the consent of the General Assembly to  
11 enter into that decree.

12 NEOCH's position is it's a secret whether they had the  
13 authority. That is just utter and patent nonsense. The  
14 General Assembly cannot act in secret. The General Assembly  
15 cannot authorize the entry into a consent decree in secret.

16 Now, I assume that's because they don't have knowledge of  
17 it, but we do. There's nothing in the journal entries for the  
18 time period involved that shows anything remotely related to  
19 that case. And understand that this is raised in connection  
20 with NEOCH's standing to proceed here. It's not our burden to  
21 disprove it, although we arguably have. It's their burden to  
22 show it, because they are seeking to invoke your jurisdiction  
23 for their intervening Complaint. That's the problem that they  
24 face here.

25 THE COURT: So you want me to say that my colleague

1 and brother Judge Marbley did not have jurisdiction?

2 MR. STEVENSON: Your Honor, I would hope that you  
3 would. I understand the realities of the situation. We are  
4 raising the issue. I fully expect that this may be argued at  
5 some later point. Obviously, you could resolve that problem  
6 simply by saying they don't have standing and move on. But  
7 those are issues that will be addressed and have to be  
8 addressed because we're being held to task here. We're the  
9 ones who are here before you. We are the ones who are going to  
10 be expected to pay a million dollars to these folks, and we  
11 weren't party to that decree.

12 And I want to touch on that for just a minute. I think I  
13 said it before, but I think it bears repeating. The policies  
14 that were used by the Board in determining whether these  
15 provisional votes were going to be counted were policies of the  
16 State of Ohio: statutes, directives, Secretary of State  
17 directives. To the extent that there is a finding that somehow  
18 there was a constitutional violation here, it is those policy  
19 makers and not the county commissioners who bear the ultimate  
20 responsibility for whatever fees that might be assessed.

21 I would direct the Court's attention to a particular case  
22 out of Georgia which dealt with a very similar issue when the  
23 State of Georgia got sued over judicial elections. The name of  
24 the case is *Brooks versus State Board of Elections*, 848 F.Supp.  
25 1548. I have copies for everybody, so you can take a look at

1 it later. That court -- it was a class action, so the  
2 footing's a little bit different than this case and it's a  
3 little bit different than the NEOCH case. But the judge noted,  
4 in declining to accept a consent decree that was entered into  
5 between the Attorney General and the Secretary of State and the  
6 governor of the state of Georgia, noted, "First and foremost  
7 the proponents have not presented the terms of this consent  
8 decree to the state legislature or to the people for their  
9 approval, but, rather, they seek to invoke the injunctive and  
10 coercive power of the federal court to give effect to their  
11 agreement. Entry of a consent decree is not merely an agree-  
12 ment between litigants. It is a judicial act that requires the  
13 court to exercise equitable discretion.

14 "Furthermore, since a consent decree potentially involves a  
15 court's power to sanction and enforce, the court must not  
16 merely sign on the line provided by the parties but, instead,  
17 exercise its equitable powers of caution. Accordingly, the  
18 court must not blindly defer to the consenting parties and  
19 approve this consent decree, but it must remain keenly aware of  
20 its responsibilities in evaluating the case."

21 That's what should have happened with Judge Marbley, and --  
22 but like I said, I understand the realities of the situation.  
23 I think everybody here does.

24 I want to move to address a couple of things. With respect  
25 to the due process arguments, both the arguments that they've

1 stated, as Mr. Parker has raised, one, they clearly state it's  
2 a -- based upon the Sixth Circuit language that the precinct  
3 voting system is fundamentally unfair. That's a direct attack  
4 on Ohio law, which we're not here to decide. Their procedural  
5 due process claim basically says that 3505.181 is not enough  
6 and that process is somehow deficient. That's also an attack  
7 on Ohio law, which we're not here to decide.

8 Moving on to some things, I'm not going to go over a lot of  
9 this stuff that Joe did with respect to what the Board did, but  
10 I think there are some things that are important enough for me  
11 to raise. And I know I'm running out of time.

12 I don't think it can be said enough, but the Board reviewed  
13 all the provisional ballots in exactly the same manner and  
14 subjected them to the same standards. The review consisted of  
15 an examination of the ballot envelope and a review of the  
16 Board's records. This is prior to the November 16th vote. The  
17 only ballots that were accorded any additional individual  
18 treatment were those that were subject to the NEOCH Consent  
19 Decree. The Board staff did not do any investigation of  
20 provisional ballots to look for poll worker error. What they  
21 did, with respect to the 27 that were cast at the Board, is  
22 they happened to find it and they tried to correct it.

23 For the ballots cast in the field on election day they  
24 didn't find any error. The Board and its staff did not refuse  
25 to consider similar evidence of poll worker error with respect

1 to similar provisional ballots. There wasn't any similar  
2 evidence to consider.

3 We all understand that the right to vote is fundamental,  
4 but it's also important to understand that the right to vote is  
5 the right to participate in an electoral process that is  
6 necessarily structured to maintain the integrity of the  
7 democratic system. And that's out of the *Anderson* case at 460  
8 U.S. 788. It's also important to understand that there is no  
9 fundamental right to cast a provisional ballot. That's a  
10 statutory right that was created by Congress and by the State  
11 of Ohio. There's also no fundamental right to have an  
12 improperly cast ballot counted.

13 What we have shown, or what has been shown in this trial,  
14 is essentially what Mr. Parker related: that mistakes  
15 occurred. And some of the mistakes that we saw were a poll  
16 worker misunderstanding a voter when they give an address.  
17 They might misinterpret an address when looking it up. They  
18 might miss an incomplete affirmation. They might fail to sign  
19 the envelope before the voter drops it in the box. They might  
20 fail to recognize that the correct precinct is in the same  
21 building. They rely on incorrect information relayed to them  
22 by others. They mistakenly assume that somebody else did  
23 something correctly. And they also believed, incorrectly, that  
24 a voter was in the right precinct.

25 Those are the kind of errors you saw here. All of them are

1 human errors that can occur in any election at any time, and  
2 calling them garden variety is point on. Garden variety errors  
3 don't rise to a constitutional violation. And in this case we  
4 believe that the testimony shows that the plaintiffs have not  
5 prevailed in respect to their request to have these ballots  
6 counted, and we ask for that judgment.

7 Thank you.

8 THE COURT: Thank you, Mr. Stevenson.

9 Ms. Branch, just give me one minute to finish my note here.

10 MS. BRANCH: Uh-huh.

11 THE COURT: You and Ms. Gentry have a half hour. I  
12 don't care how you split it.

13 MS. BRANCH: How much would you like?

14 MS. GENTRY: It depends on what you have. You can  
15 take it all, Jennifer.

16 MS. BRANCH: A half hour?

17 THE COURT: Uh-huh.

18 MS. BRANCH: All right.

19 THE COURT: I'm ready. Thanks.

20 MS. BRANCH: Tracie Hunter is not posturing that this  
21 case is about the right to vote. This case is about the right  
22 to vote. Mr. Parker, Mr. Williams' attorney, alleged in his  
23 argument that this was really about the presidential election  
24 in some future time. That is not what this case is about. Mr.  
25 Parker admitted, the defendants admitted repeatedly today that

1 mistakes were made, that mistakes occurred, that so many  
2 mistakes occurred that you could take judicial notice of that  
3 and we didn't even need to have a trial. Well, it would have  
4 been nice if they'd have stipulated to that. We could have  
5 saved ourselves three weeks.

6 Your Honor, it is clear that the defendants admit these  
7 mistakes, and these are important mistakes. They're not garden  
8 variety mistakes. The defendant Board of Elections admits 169  
9 of the poll workers who testified -- I'm sorry, 169 of the  
10 ballots that were testified about in this case, the poll worker  
11 did not look up the voter's address. Step one of the poll  
12 worker's duty under state law is to look up the address so that  
13 the voter is in the correct precinct.

14 The Board admits in their Table 1 that, 146 of the ballots,  
15 the poll worker thought the voter was in the correct precinct.  
16 Those two things create the system that we are attacking in  
17 this case, and it is a system unique to Hamilton County. This  
18 is not an attack on a statute. We don't even reference a state  
19 statute in our Complaint and in our findings of fact or  
20 conclusions of law. This is about the precinct voting system  
21 in Ohio where the Hamilton County Board of Elections allows its  
22 poll workers to make mistakes, and they know it and they don't  
23 do anything about it, and they've known it for years.

24 And those mistakes show that eight percent of the ballots  
25 are rejected in elections because the voter was in the wrong

1 precinct. We have the statewide statistics on that, which was  
2 an exhibit. Dr. Tuchfarber testified about that. These are  
3 mistakes made every year. That precinct guide that the Board  
4 writes says on the front page: We need a precinct guide  
5 because voters are confused, poll workers are confused. Nobody  
6 knows where to go. You need to help people to get to the right  
7 place.

8 Well, Hamilton County has failed the voters. That is not a  
9 garden variety problem. That is a systemic problem unique to  
10 this county. This is an as-applied challenge as a violation of  
11 due process. This is not an attack on the statute.

12 Your Honor, the defendants argued -- Mr. Parker argued that  
13 there was no process of correcting poll worker error. This is  
14 a whole nother process I'm going to talk about. And he cited  
15 to page eight of our findings of fact. And he said there was  
16 no evidence that there was a process of correcting poll worker  
17 error. The Hamilton County Board of Elections corrected the  
18 error their Board staff made on 31 ballots cast at the Board.  
19 The Board corrected the errors 686 poll workers made in  
20 determining that the voter, in order to be eligible to vote,  
21 had to come down to the Board and turn in some identification  
22 within ten days. They corrected that error and counted those  
23 votes without those voters having to do that.

24 The Board of Elections corrected the errors temporal  
25 workers made when they allowed the voter to process the

1 provisional ballot and not sign the affirmation or not fill  
2 their name in. The Board looked at those ten provisional  
3 ballot envelopes. They see no signature or no name printed at  
4 the top. Under state law the Board was to reject those. But  
5 the Board saw that there was an error there. How did they see  
6 it? We have no idea. There was no testimony on how they  
7 figured it out. You can't figure it out from the face of the  
8 envelope, as Mr. Parker said. You have to determine that that  
9 voter never needed to cast a provisional ballot. They should  
10 have been a regular voter. The Board just assumed the voter  
11 made no mistake, they just assumed the poll worker handed them  
12 a provisional ballot and they shouldn't have, and the Board  
13 went ahead and counted those ten ballots.

14 Those are the facts that go to showing that there is a  
15 process that this county has come up with of correcting poll  
16 worker error, and it's obvious why they've come up with that.  
17 Because they know this is a systemic problem in this county.

18 Now, they rely on some advice of counsel defense, but I'd  
19 have to say that if you look at the transcript, which is Joint  
20 Exhibit 28, at page 39 and 40 Mr. Stevenson is asked his  
21 opinion when they're talking about those thirty-- that day it  
22 was only the 27. "What do we do with these 27 ballots?" And  
23 Mr. Stevenson was asked -- the question to Mr. Stevenson --  
24 well, he wasn't even asked a question.

25 At the top of page 41, Mr. Faux says: "The recommendation

1 is to remake the ballot to the proper precinct; is that right?"

2 Mr. Mallory, staff member, said, "Yes."

3 They go on to have a discussion about remaking the ballots.

4 And Ms. Poland ends at the bottom of page 41 that they would  
5 not vote the contest where the voter is not eligible to vote in  
6 and that they would -- "and as far as I think that staff is in  
7 unanimous agreement that this is poll worker error, but we  
8 defer to the prosecutor to determine legally how we handle it."

9 And Mr. Stevenson's response was, "I think the suggestion  
10 of the staff is appropriate to remake the ballot."

11 There wasn't any discussion about the law or whether these  
12 should be counted or not, because this is something the Board  
13 does because the Board has this process of making sure they're  
14 not disenfranchising their voters.

15 Let me move on to the equal protection argument that Mr.  
16 Parker spent a lot of time comparing and contrasting the  
17 ballots. I will make it really simple. We've got the 31  
18 ballots that are cast at the Board in the wrong precinct and we  
19 have 849 ballots cast in the wrong precinct at polling  
20 locations. The same envelope is used by every voter. The same  
21 ballot is cast in each of those -- by each of those voters.  
22 The same error is made. That voter cast a wrong precinct  
23 ballot. Who cares where they were standing at the time they  
24 cast their ballot. The voter takes the exact same steps in  
25 both groups. They tell the government worker their current

1 address. The worker -- and they tell the worker -- I'm sorry.  
2 And they print and they sign the affirmation, and they provide  
3 the ID. All the voters do that in both groups.

4 The poll worker has the same duties. They have to look up  
5 the address to make sure they're voting in the correct  
6 precinct. The people at the Board did that; the people out in  
7 the polling locations did that. The Board worker must ensure  
8 the voter signs and prints on the affirmation. The Board  
9 worker checks or the poll worker checks the ID. And they all  
10 have the same statutory duty to warn the voter, "Hey, if you're  
11 in the wrong precinct, you need to go to the right precinct or  
12 your vote won't count."

13 And the remedy is similar for both these groups: you  
14 remake the ballot. That's how you avoid this problem with  
15 state law. And the poll workers and the Board workers use the  
16 same method of looking up the address. Ms. Krisel testified,  
17 and you asked her which was the easiest method to use at the  
18 Board to look up an address, and she said that they liked to  
19 look up the address just to see where the precinct is but that  
20 only works if other people that live at that address are  
21 registered voters. Otherwise they use the green book or an  
22 electronic version of the green book. And when the computers  
23 are down, they use the green book.

24 So the people at the Board are looking up the address the  
25 same way the people are out in the polling locations. And,

1 sure enough, we found that they all make the same mistakes.  
2 The people at the Board of Elections made 14 even/odd mistakes,  
3 while the people out in the polling locations made 183. The  
4 people at the Board made seven pass-through street mistakes.  
5 The people out in the polling locations made 141.

6 The Board workers got two ballots wrong because they looked  
7 up the old address. You know at step one and step two? Well,  
8 they looked up the address for step two and handed them the  
9 wrong ballot. 183 poll workers out in the locations looked up  
10 the old address instead of the current address.

11 Nobody at the Board of Elections warned a single voter that  
12 they were voting in the wrong precinct and their vote wouldn't  
13 count. That's 31. And 206 of the poll workers out in the  
14 polling locations who testified or the voters who testified  
15 showed no warning was given.

16 And we have the Sixth Circuit holding. The Sixth Circuit  
17 has already held that the 31 wrong precinct ballots were  
18 substantially similar to the 269 right location ballots.  
19 That's page 237. And, of course, we have the NEOCH equal  
20 protection argument, which is that the Board counted seven  
21 NEOCH ballots that were cast at the Board of Elections but  
22 didn't count the 16 that were cast incorrectly in the polling  
23 locations.

24 The Sixth Circuit focused on really one thing the Board did  
25 to treat those groups differently. The Board, in the 31,

1 looked to see where that voter was when she cast her ballot,  
2 and the Board didn't look to see where the 269 voters were when  
3 they cast their ballot. And the Sixth Circuit was clear that  
4 just that different treatment alone was enough to prove an  
5 equal protection violation unless there was direct evidence  
6 that the voter erred.

7 Now let me just talk about the 269 right now, or the 295,  
8 which I will also call the right location voters. There was no  
9 evidence in this trial for three weeks that any one of those  
10 295 voters made a mistake, and whether the defense wants to  
11 take that on as a burden, if they want to make that a defense  
12 and they chose not to or because the evidence wasn't there  
13 doesn't matter. The Sixth Circuit wanted to know. Should we  
14 make this inference to the 295, that the voters did not make a  
15 mistake? They looked for, they asked for, they said the  
16 defense had not presented any evidence of voter error.  
17 Acknowledging at the preliminary injunction; maybe they would  
18 at trial. They didn't.

19 Absent evidence of voter error, all we have are 295 right  
20 location voters where the Board did not look at where they were  
21 when they cast their ballot. That alone is an equal protection  
22 violation, and they should all be counted for that reason.

23 The Board also treated -- I'm going to go back to the whole  
24 849 group -- differently than the 31 because, before your  
25 injunction, they didn't look at poll worker error for any of

1 the 849, not even for the NEOCHs. I mean, Mr. Parker was  
2 talking about NEOCHs and Ms. Poland and the verification  
3 process and they pulled out the Social Security number and they  
4 put a note on it and they put it in a bin. There was no NEOCH  
5 bin. At the end of that whole testimony it all came down to:  
6 there was no NEOCH bin. They didn't separate out the NEOCH  
7 ballots. They never have. No one said they did today. No one  
8 said they did in any of their pleadings.

9 The Sixth Circuit already affirmed your order. It has  
10 never been followed. Those NEOCH ballots were not investigated  
11 by the Board, but we put on substantial evidence at trial they  
12 should all be counted. Those are 16 -- I'm sorry. Yeah, those  
13 are 16 wrong precinct NEOCHs.

14 The Board, after your injunction, went ahead and started to  
15 do some investigation. They interviewed 71 poll workers in two  
16 days. Really efficient. Right at Christmastime. I mean, they  
17 got those people in and they got them out during a snowstorm.  
18 The problem was, only 13 of them signed any of the ballot  
19 envelopes. They didn't interview people who signed the ballot  
20 envelopes like we did in trial. They just started at  
21 Cincinnati 1 and got through Cincinnati 5. Subpoenaed all the  
22 poll workers and, whoever showed up, they interviewed. They  
23 weren't very strategic in how they interviewed those folks.

24 But that's okay. They interviewed them. They found seven  
25 made mistakes and voted to count them. Well, again, that is

1 part of their process of trying to enfranchise voters. Good  
2 work. But the Board missed, for one reason we never will know  
3 because nobody could testify as to why, they didn't go ahead  
4 and count the ballots that poll workers Slaton, Guy, Ahrens and  
5 Edwards all testified to in those transcripts where they made  
6 the same mistakes as some of the people that they did count.  
7 For example, Pat Garry didn't look up an address correctly;  
8 they counted that one. Mr. Slaton didn't look up an address;  
9 they didn't count it. That's different treatment right there.

10 Poll worker Gundrum testified, I think he had three of  
11 them, odd/even mistakes. Just totally confused on how the  
12 odd/even worked. Chair Triantafilou was the one that cross-  
13 examined him about that during the hearing. They counted those  
14 ballots. But poll worker Guy, Ms. Ahrens, Mr. Edwards, they  
15 all testified they didn't do the odd/evens right, but the Board  
16 didn't count those. So even when the Board was told by this  
17 Court to follow the equal protection and count those ballots  
18 where you find poll worker error, they ignored half the ballots  
19 where they found error.

20 That's arbitrary treatment. That's part of our evidence  
21 for constitutional violation. The Board hasn't addressed  
22 today, and I didn't see much of it in their pleadings, that  
23 they just stopped their investigation on December 28th when  
24 they took that vote and they were done with us. That was it.  
25 They weren't going to follow the rest of your order. They

1 didn't care what the Sixth Circuit did after the Sixth Circuit  
2 affirmed. And the defense that they raise today and that they  
3 raised at trial is that, "Well, we didn't have to do anything  
4 more. Our investigation was completed. The Sixth Circuit said  
5 in *Hunter*: Good job. You followed uniform standards and you  
6 completed the investigation."

7 That's not what the Sixth Circuit said. And, in fact,  
8 there is a footnote. Oh, I didn't -- did I write it down? I  
9 think it's Footnote -- I'm not going to tell you. I will look  
10 it up and give it you. There's a footnote in the *Hunter*  
11 decision where the Court -- this is at pages like 242 where  
12 they're talking about this.

13 When the court drops a footnote -- because Mr. Williams was  
14 arguing, "Hey, wait a minute. You interviewed some people in  
15 person, you sent questionnaires. That's not equal treatment.  
16 That's another equal protection violation." And the Sixth  
17 Circuit said, "Well, that's not an equal protection violation  
18 because the questionnaires did the trick. The questionnaires  
19 were efficient and they got the information that we needed."

20 Well, we've learned since then at trial those question-  
21 naires were unhelpful, in the words of Mr. Triantafilou. I  
22 think everybody would concede that question 10 alone made no  
23 sense, and it didn't comply with the Secretary of State  
24 directive. The Sixth Circuit said if you have uniform  
25 standards for looking for evidence of poll worker error, that

1 complies with *Bush v. Gore*. Well, the questionnaires weren't  
2 uniform to the interviews. The Secretary of State Directive  
3 2010-80 said you may send questionnaires, but they must include  
4 the same questions you were asking people in person.

5 And the best thing that they did in asking people in person  
6 was hand them the ballot envelope. "Is this your signature?  
7 What happened? What's the address? Look it up." They didn't  
8 do that with anybody with questionnaires.

9 And, finally, we learned at trial that nobody read them.  
10 Half the questionnaires came in after the 28th and they weren't  
11 even reviewed.

12 So the Board arbitrarily stopped their investigation on  
13 December 28th and has never finished it. That is treating some  
14 of the ballots, the few that got poll worker testimony in the  
15 record, differently from all of the rest, all of the rest of  
16 the 849.

17 Now, there was one questionnaire that the Board sent that  
18 was really helpful. It's remarkable. They actually could  
19 write a questionnaire. They got it answered within minutes,  
20 because the poll worker was somebody who worked in the Board  
21 office. On July 12th, at that meeting they devised a question-  
22 naire about the NEOCH ballot. It was the one where the name,  
23 the guy's first name was written in but his last name wasn't.  
24 And they wrote up a questionnaire, what was your process, did  
25 you follow the rules, what did you do, and she answered them.

1 Well, they didn't use that questionnaire for any of the  
2 other NEOCHs where the name/signature were not filled in. And  
3 it showed that a questionnaire could be effective and could  
4 help, because when you read that questionnaire, which is  
5 Plaintiffs' Exhibit 2003, it shows that the poll worker made a  
6 mistake. We don't know why, but the Board voted on July 12th  
7 not to count that ballot. That's one of the ballots that NEOCH  
8 is asking the Court order to be counted.

9 And finally, I think the other piece of evidence that shows  
10 that the ballots were treated unequally is the one that the  
11 Sixth Circuit relied on, which is that the Board didn't look at  
12 the location. The Board literally did not separate out the 269  
13 from the whole 849 when they voted on the 16th. And when we  
14 were here in trial and Ms. Poland was on the witness stand and  
15 I asked her, this is back in November, "How many of those 849  
16 are right location?"

17 "I don't know."

18 "Well, do you have an idea?"

19 "Maybe 280-something, but we don't know. We haven't done  
20 that yet."

21 That was the day of the preliminary injunction hearing they  
22 hadn't even done that yet. So I think it's clear that the  
23 Board treated all of these 849, and especially the subset of  
24 the right location voters, differently than the 31. And that's  
25 honestly, Judge, all we need to prove for the equal protection

1 argument.

2 Mr. Stevenson brought up the presumption versus inference,  
3 and I did want to address the inference issue, because our  
4 post-trial brief, Your Honor, was only about the inference. We  
5 did not rehash anything else. We only talked about something  
6 that was new. And here's -- maybe here's how we should look at  
7 that. The 295 right location ballots we argue were miscast due  
8 to poll worker error and that you could order the Board to  
9 count all of them even though we didn't have testimony on all  
10 295. That subsection, the seven the Board voted on, the nine  
11 the Board voted on, the two, the one, all of those, the Board's  
12 conceding those, they should be all be counted.

13 Of the rest, which gets us back to the 269 original number,  
14 we put on testimony about 50 percent of those ballots, between  
15 the poll workers who testified and the voters. Now, some of  
16 the voters were wrong precinct folks. Certainly all of their  
17 ballots should be counted. They all testified it was poll  
18 worker error. I mean, those were the people who went -- here's  
19 a great example. Somebody went to their old location. They  
20 didn't know where to go. They went to their old voting  
21 location and they said, "Where should I go vote?" And they  
22 were told to go to place B. And they get to place B and they  
23 say, Go to place C. And they go to place C and they vote, and  
24 they thought everything was fine.

25 "Well, would you have gone to place D if somebody told you

1 to go?"

2 "Yes, I would have."

3 Those wrong location people should all be counted. But  
4 voters and poll workers testified to 50 percent of the 269  
5 right location ballots. You have the ability, it is discre-  
6 tionary, but you have the ability to infer that the rest of the  
7 50 percent that weren't testified to should also be counted  
8 because of poll worker error.

9 The evidence -- we have evidence of the odd/even mistakes;  
10 we have evidence of the pass-through mistakes. That can all be  
11 inferred to apply both to -- well, I'll just say they should be  
12 inferred to apply to the rest of the right location people but  
13 also, farther, to the wrong location people, and we rely on an  
14 expert for that inference. We rely on Dr. Tuchfarber. He's  
15 the one that testified that it was reasonable to infer that the  
16 odd/even pass-through problems shown on the ballots at trial  
17 could extend to the rest of the ballots. And his answer, which  
18 was great, wasn't just "Yes." It was, "If you're talking about  
19 right location and wrong location, then I'll give you that  
20 inference." He's the one that added in the wrong location  
21 people should also be inferred.

22 In addition, the errors that the poll workers testified to  
23 were patterns. I mean, I'm sure there were lots of other  
24 reasons they made mistakes, but the ones we saw, the odd/even,  
25 the pass-through, the poll worker not signing the envelope, I

1 mean, the Secretary of State says that's a reason alone, that's  
2 an objective criteria for determining poll worker error. The  
3 fact that the person, the poll worker didn't even tell the  
4 voter where the correct precinct was is a pattern, and we had  
5 the pattern of not warning the voter that they're in the wrong  
6 precinct.

7 And then we have a little tiny pattern, which is the poll  
8 workers that said, "Yeah, I warned them they were in the wrong  
9 precinct but they could fix it afterwards." Those errors were  
10 also pretty well shown. All of those could be extended, and  
11 the inference could be made for all the ballots, not just the  
12 50 percent we showed evidence in.

13 And then I think the final, the best argument is this whole  
14 supervision issue that came out during trial as we are listen-  
15 ing to the testimony and we're hearing from -- I think it was  
16 the first day -- Derek Moore, who said, "You know, they're not  
17 in my book. I don't know where they're supposed to vote. I  
18 didn't want their vote to count. I'll let them vote here even  
19 though I know they're in the wrong precinct."

20 "Well, Mr. Moore, have you ever been supervised? Anybody  
21 evaluate you?"

22 "Oh, no. I've been doing this for," I don't know, "ten, 20  
23 years."

24 I mean, that is -- I think you could safely rely on that  
25 evidence alone that there is a clear pattern that the Board

1 knew that their poll workers make these odd/even, pass-through,  
2 can't even figure out where the voter is supposed to go  
3 mistakes. They're predictable errors, they're known errors,  
4 and when that pattern is known, it's deliberate indifference  
5 for the Board to not fix it and allow those poll workers to  
6 still continue to misdirect people.

7 That is enough alone to allow you to make the inference  
8 that all of the wrong location -- I'm sorry, wrong precinct,  
9 whether it's right location or wrong location, should be  
10 counted.

11 Oh. I'm sorry, Judge. I'm looking at my notes, which are  
12 not very well written. Mr. Stevenson said that we had shown --  
13 we had category of ballots, 183 ballots, which is Table E, the  
14 old precinct, and he said we had no evidence in the record  
15 other than that Sally Krisel testimony he read where I asked  
16 her to look at one of the 31 ballot envelopes and give us her  
17 opinion as to whether that was a poll worker or Board worker  
18 who looked up the old address instead of the current address,  
19 and she said you could make that assumption. Remember, that  
20 was her cross on the last day of testimony.

21 The other evidence that's in the record are the envelopes  
22 themselves, the 183 envelopes. I mean, that's where you can  
23 determine that the poll worker -- I don't have one here. You  
24 know what they look like.

25 THE COURT: I recall them. Don't worry.

1 MS. BRANCH: In the bottom where it says "Office Use  
2 Only," it says "New" and it says "Old." They're the same.  
3 That's how you know that they made a mistake in the address.

4 THE COURT: I remember that one.

5 MS. BRANCH: So there is evidence on that point.  
6 How much time do I have left?

7 THE COURT: You've got another five minutes.

8 MS. BRANCH: I have five minutes. All right.

9 Well, then I will close and give my five minutes to NEOCH.  
10 And in closing, Judge, you have the discretion, this is a  
11 permanent injunction case and you're balancing the equities  
12 here, and the public interest is a very important interest in  
13 this case despite Mr. Parker accusing us of posturing and that  
14 this is really not about counting every ballot that should be  
15 counted.

16 In Hamilton County thousands of voters are told by poll  
17 workers each November that they may only vote a provisional  
18 ballot. Those thousands of voters are more likely than not to  
19 be Democratic voters and African-American voters. If anyone  
20 sat in this room and heard any of the testimony, they would be  
21 concerned about how many of the poll workers admitted they make  
22 mistakes, and today we heard Mr. Parker and Mr. Stevenson both  
23 admit that mistakes are made by poll workers. The public  
24 should be alarmed that the Board of Elections knows that voters  
25 in multiple precinct locations are confused, that poll workers

1 have to guide them to the correct precinct, and poll workers  
2 year after year misdirect them.

3       These thousands of voters must have faith that their votes  
4 will not be thrown away because the poll workers are making  
5 foreseeable, predictable and obvious mistakes. The public  
6 interest, as the Sixth Circuit said, is best served by favoring  
7 enfranchisement. For that reason, Tracie Hunter requests that  
8 this Court order the Board to count all of the wrong precinct  
9 ballots on our Table A, which is 690, and that the Board be  
10 ordered to remake them, count them in an extremely expeditious  
11 time frame.

12       Thank you.

13       THE COURT: Thank you, Ms. Branch.

14       Thank you to all of you. The Court will take --

15       MS. BRANCH: Wait.

16       MS. GENTRY: Oh. I have nothing further, Your Honor.

17       THE COURT: Oh, I'm sorry, Ms. Gentry. I thought  
18 you'd given up your time to Ms. Branch.

19       MS. GENTRY: I did. Thank you.

20       THE COURT: The Court will take this under advisement  
21 and try to render a decision as quickly as possible, hopefully  
22 within 30 days.

23       MR. STEVENSON: Thank you, Your Honor.

24       COURTROOM DEPUTY: All rise. This court is now  
25 adjourned.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Proceedings concluded at 4:10 PM.)

- - -

C E R T I F I C A T E

I, Luke T. Lavin, RDR, CRR, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Luke T. Lavin  
\_\_\_\_\_  
Luke T. Lavin  
Official Court Reporter

- - -