

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

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

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

**NORTHEAST OHIO COALITION FOR THE HOMELESS; OHIO
DEMOCRATIC PARTY,
Intervenors-Appellees**

v.

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

and

**JOHN WILLIAMS,
Intervenor-Appellant**

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

**PLAINTIFF-APPELLEE OHIO DEMOCRATIC PARTY RESPONSE
IN OPPOSITION TO PETITIONS FOR REHEARING EN BANC**

Donald J. McTigue
Mark A. McGinnis
MCTIGUE & MCGINNIS LLC
545 East Town Street
Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
*Counsel for Intervenor-Appellee
Ohio Democratic Party*

Plaintiff Appellant Ohio Democratic Party concurs in the responses filed by Plaintiff Hunter and Northeast Ohio Coalition for the Homeless and writes separately to address the due process claim and the concerns raised about the affect of this ruling on future elections.

A. THE PANEL DID NOT RULE ON THE DUE PROCESS CLAIM. THEREFORE, THERE IS NO DECISION OF THE PANEL ON THIS ISSUE TO BE REVIEWED *EN BANC*.

Petitioners seek *en banc* review in part based on a brief discussion of Plaintiff's due process claim on pages 34-35 of the Panel's Opinion.

However, the Panel made no decision one way or the other on the claim, stating:

It is premature, however, to decide a due-process challenge to Ohio's election laws as they relate to poll-worker error because the parties have not fully briefed and the district court has not yet ruled on this issue.

Given that neither the district court, nor the appellate panel, has yet to decide the due process claim, there is not actually anything dispositive to be reviewed *en banc*. Review of a claim yet to be decided would not be an appropriate subject for review by all of the Circuit's judges.

The due process claim would be relevant to review if the Court overruled the equal protection findings. The Court may affirm on alternative grounds. Plaintiffs thoroughly briefed the substantive and

procedural due process claims in their Merits Brief filed in Case No. 11-3059 and 11-3060 pp. 20-30.

B. THE SKY IS NOT FALLING AND THE PANEL'S DECISION DOES NOT THREATEN TO UPEND STATE LAW.

The Amicus Brief of the Ohio Secretary of State forecasts disaster for the administration of elections if the Panel's decision is allowed to stand. However, when the facts of the case and the decision of the panel are closely examined, this concern is quickly dispelled.

The Panel's decision relates to a an election that is about to begin a recount of one local race in one county. An automatic recount is required in this race because of close results. A recount is exactly the time to correct errors that occurred in the counting process. This includes counting ballots that were not counted during the official canvass if they are entitled to be counted. Ohio law provides three stages for the counting of ballots and correction of errors in the count after the unofficial count on election night. First is the official canvas, which must begin 11-15 days after the election. R. C. 3505.32(A). Then comes an automatic recount if the margin of victory is within a certain percentage, as it was in the present case. R. C. 3515.03. Finally, there is a contest of election. R. C. 3515.09. During the ten days following an election and during the official canvass, the board of

elections reconciles the paperwork as to the number of ballots issued, the number cast, the number counted and the number not counted. The reason for the recount is to verify the official canvass. It is a second look to ensure that all ballots entitled to be counted have in fact been counted and that the count is accurate. During the recount it is entirely appropriate to deal with the question of improperly rejected ballots in an effort to reach an accurate count and decision of the results of the voting. This is what has been occurring in the recount in the present case. Doing so is preferable to and reduces the likelihood and necessity for bringing contests of election in court seeking to overturn the results. In the present case the recount has been protracted by litigation, but this is a result of both sides seeking to put forward their positions as to whether certain provisional ballots should or should not be counted at the recount. It is better to have this answered at this stage, rather than in a later action seeking to reverse or void the declared results of the election.

The Secretary of State asserts a state interest in determining elections “quickly and efficiently.” However, this interest can not supplant the constitutional right of voters to have their votes counted on the same basis as other voters and their constitutional right to not have their ballots rejected for reasons that are arbitrary or contrary to fundamental fairness. The

Secretary of State argues that by refusing to recognize an exception for ballots miscast due to poll worker error, Ohio law averts the problem of litigating the validity of such provisional ballots and delaying certification of election results. One must ask what is more important-getting it done or getting it done right - and at what cost to voters' rights and public confidence in election results? Is the public more confident in election results that do not include the non-fraudulent ballots of qualified electors rejected for reasons attributable to errors by elections officials? In such cases, can it be said that the final declared results accurately reflect the will or choice of the voters?

CONCLUSION

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

Respectfully submitted,

s/ DONALD J. MCTIGUE

Donald J. McTigue (OH 0022849)

Mark A. McGinnis (OH 0076275)

MCTIGUE & MCGINNIS LLC

545 E. Town Street

Columbus, OH 43215

Tel: (614) 263-7000

Fax: (614) 263-7078

dmctigue@electionlawgroup.com

Counsel for Intervenor-Appellee Ohio Democratic Party

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served February 25, 2011 electronically on all attorneys who registered electronically with the Court of Appeals.

/s/ Mark A. McGinnis
Attorney for Plaintiff-Appellee