

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

<b>TRACIE HUNTER,</b>	:	Case No. 1:10-cv-820
	:	
Plaintiff,	:	Chief Judge Dlott
v.	:	
	:	
<b>HAMILTON COUNTY BOARD OF</b>	:	<b>TRIAL BRIEF OF INTERVENING</b>
<b>ELECTIONS, <i>et al.</i>,</b>	:	<b>PARTY DEFENDANT</b>
	:	<b>JOHN WILLIAMS</b>
Defendants.	:	

The crux of this case is whether the Hamilton County Board of Elections violated the Fourteenth Amendment by investigating 31 wrong-precinct provisional ballots cast in person at the Board of Elections for poll worker error, and erroneously counting those 31 provisional ballots, while simultaneously rejecting 850 wrong-precinct provisional ballots<sup>1</sup> cast by voters at various polling places throughout the county on Election Day. There is no evidence, nor have Plaintiffs ever made the allegation, that any poll worker or member of the Board acted intentionally to deprive any voter of the right to vote.

This case turns on whether innocent mistakes in administering an election can rise to the level of either an equal protection or due process violation under the Fourteenth Amendment, and if so, whether the proper remedy is to order ballots that are invalid under Ohio law be counted. As outlined below, the Fourteenth Amendment does not require that an election be error free. Instead, election jurisprudence separates the “garden variety” election irregularities from those instances where the election is fundamentally unfair. This case clearly falls in the “garden variety” category as it involves only isolated innocent errors and not systematic efforts to deprive the 849 voters of their right to vote.

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<sup>1</sup> The 850 ballots wrong-precinct ballots were cast by 849 voters, one of whom cast 2 provisional ballots, each in the wrong precinct.

## I. Undisputed Evidence

Ohio's election system is precinct-based. Under this system, a person is only qualified to vote in the precinct in which she or he resides. R.C. 3503.01(A) (a person "may vote at election in the precinct in which the citizen resides"). It is illegal for a person to vote or attempt to vote "in a precinct in which that person is not a legally qualified elector." R.C. 3599.12; *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2010).

Federal law requires that Ohio allow persons to cast provisional ballots but leaves it to the states to determine the circumstances under which a provisional ballot is cast. 42 U.S.C. §§ 1530, *et seq.* Under Ohio law, a voter may cast a provisional ballot for many reasons, including because the individual's name does not appear in the poll book, he or she has moved recently, or has changed his or her name. However, R.C. 3505.181(C)(2)(A) requires that a provisional ballot not be opened or counted if "the individual is not properly registered in that jurisdiction." And, "Jurisdiction" means the precinct in which a person is a legally qualified elector. R.C. 3505.18(E)(1).

There is one exception to Ohio's clear law that provisional ballots cast in the wrong precinct cannot be counted: when a voter uses the last four digits of his/her social security number as her/his only form of identification and casts a ballot in the wrong precinct due to poll worker error. This exception arises from the consent decree entered in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2-06-cv-896.

Following the November 2010 election, the Hamilton County Board of Elections voted to count, contrary to Ohio law, 31 ballots cast in person at the Board of Elections in which the voters were given the wrong-precinct ballot by Board staff. *See State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, ¶ 49 (Ohio 2011). The Board also voted to reject, in accordance with Ohio

law, all 850 ballots cast in the wrong precinct by voters on Election Day in various precincts throughout the county.

On November 22, 2010, this Court issued an order requiring the Board to investigate the 850 ballots for poll worker error, and if error was found, add those ballots in the recount. Thereafter, the Board conducted an extensive investigation into poll worker error, including: questionnaires sent to every poll worker who worked on Election Day in any precinct in which one of the 850 provisional ballots was cast; in-person interviews of 71 poll workers; careful review of the 830 returned poll worker questionnaires; and review all help desk notes, call logs, and poll book notes for poll worker error. This investigation was undertaken pursuant to directives issued by then-Ohio Secretary of State, Jennifer Brunner, and sought to identify those specific instances in which poll worker error had led to a voter casting a ballot in the wrong precinct.

Following this investigation, the Board held a meeting on December 28 to vote on the results. The Board voted unanimously to count 16 ballots. The Board also unanimously determined that there was no evidence of poll worker error with respect to all the ballots cast in the wrong location and wrong precinct. The Board split 2-2 on whether to find poll worker error and count 269 other ballots miscast in the wrong precinct but correct polling location, which was based on a statistical analysis developed and presented by Board member Caleb Faux.<sup>2</sup> That tie vote was submitted to then-Secretary of State, Jennifer Brunner, pursuant to R.C. 3501.11(X).

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<sup>2</sup> The information that Mr. Faux presented to the Board and to the Ohio Secretary of State in support of his vote was specifically rejected by the Ohio Supreme Court in *Painter*. *Painter*, 128 Ohio St.3d 17, at ¶ 51 (“the board members erred in relying on a statistical analysis . . . to support their claim that poll-worker error occurred.”) (internal citation omitted). This analysis cannot be the basis for counting specific ballots in this action as the Sixth Circuit stated “although the Ohio Supreme Court in *Painter* stated that statistical evidence is not proper evidence of poll worker error under state law, the record is not clear whether the evidence offered by Plaintiffs to demonstrate poll worker error in the disputed 269 ballots is based on statistical analysis. We leave that question for the district court to resolve based on . . . state-law principles.” *Hunter*, 635 F.3d at 229, fn. 19. The affidavit submitted to the Ohio Supreme Court is the exact same affidavit submitted to this Court in support of Plaintiffs Emergency Motion to Enforce the Preliminary Injunction (Doc. 38, Ex. H Affidavit of Tim Burke).

Secretary Brunner split the tie during her final days in office finding that the 269 ballots *were not* cast in the wrong precinct due to poll worker error.

The Board also fully investigated all the NEOCH ballots. There were 28 NEOCH ballots that were rejected by the Board on November 16 that were not wrong-precinct NEOCH ballots. Twenty-four of those ballots were cast by persons not registered to vote, and therefore, not eligible to counted. Three ballots had insufficient information to be counted. The remaining ballot, a ballot with a partial affirmation, is being investigated by the Board for poll worker error in accordance with Ohio law and the NEOCH consent decree.

## **II. Claims**

Although the trial in this case is just weeks away, Defendants still are unclear of the exact nature of Plaintiffs' claims, particularly, Plaintiffs' due process claim. At this time, the extent of Defendants' understanding is that Plaintiffs have brought a claim under 42 U.S.C. § 1983 alleging that the Board's actions in rejecting the 850 provisional ballots cast in the wrong precinct violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

## **III. Legal Issues**

### **A. Plaintiffs must prove more than mere negligence to prevail on their claims.**

Plaintiffs' constitutional claims in this case are brought under 42 U.S.C. § 1983. "A claim under 42 U.S.C. § 1983 has two elements: (1) the defendant must be acting under color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (citation omitted). Because this suit is brought against the individuals in their official capacity and the governmental entity, Plaintiffs must also establish that "the injuries were a result of some policy or custom attributable to the governmental entity." *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1245 (6th Cir. 1989); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding

that a governmental entity is liable in a § 1983 action only when the governmental entity is the “moving force” behind the deprivation).

When litigating under § 1983, the “the plaintiff must prove the culpable mental state applicable to the underlying constitutional right.” *League of Women Voters*, 548 F.3d at 476. But “allegations of mere negligence will not sustain an action under § 1983 . . . .” *Id.*; *see also Daniels v. Williams*, 474 U.S. 327, 328 (1986). The Supreme Court held that “[t]he unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of *intentional or purposeful discrimination*.” *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (emphasis added). The Supreme Court reinforced this sentiment when it held that the Equal Protection Clause does not require states to treat groups uniformly but bans “invidious discrimination.” *Williams v. Rhodes*, 393 U.S. 23, 39 (1968). Invidious discrimination is defined as “discrimination that is offensive or objectionable, esp. because it involves prejudice or stereotyping.” *Black’s Law Dictionary* 500 (8th ed. 2004); *see also Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993) (Court cited with approval the dictionary definition of the term “invidious” as “[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating” (citing Webster’s Second International Dictionary 1306 (1954))).

The evidence will reveal that the Board did not act invidiously when they voted to count the 31 ballots cast at the Board and reject the 850 wrong-precinct ballots. Instead, those decisions were based on the individual circumstances surrounding the casting of the ballots.

**B. The Board reviewed all the provisional ballots using specific and uniform standards set out by the Ohio Secretary of State.**

The evidence will show that the Board investigated all provisional ballots in the exact same manner, using the specific and uniform standards set forth in Directive 2010-74. Following every election, the Board is required to determine whether provisional ballots are eligible to be counted. R.C. 3505.183 (B)(1) (“The board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote . . .”). The Ohio Secretary of State, through the issuance of Directive 2010-74, established the procedure the Board was to use to determine the validity of provisional ballots. *See* Directive 2010-74, Guidelines for Determining the Validity of Provisional Ballots.

The Board followed Directive 2010-74 when processing provisional ballots. One of the first steps listed in the Directive for determining a ballot’s validity is to determine whether the person who cast the provisional ballot voted in the correct precinct. *Id.* For the 31 ballots cast at the Board and the 850 wrong-precinct provisional ballots cast throughout the county, the fact that the provisional ballot was cast in the wrong precinct was apparent from the face of the envelope. There is only one possible reason that the 31 ballots cast at the Board were cast in the wrong precinct – *i.e.*, poll worker error. The Board did not look at any additional documents to make this determination. In contrast, there are numerous possible reasons why the 850 provisional ballots were cast in the wrong precinct, including voter error. *See Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 237 (“To be sure, there may be more explanations for why the voter might have erred at the multiple-precinct polling location than at the Board’s office, requiring a greater inference to conclude that the miscast ballot was a result of poll-worker error . . .”).

But the decision to count the 31 ballots cast at the Board – voters who voted there because they had changes in name or address – and reject the 850 ballots cast throughout the

county does not violate equal protection. Equal protection does not guarantee equality of results. If that were the case, then no ballot could ever be rejected for any reason. Instead, equal protection guarantees that similarly situated persons be treated the same. That happened here. The Board treated the 31 ballots and the 850 ballots with the same degree of care and investigated them in the exact same manner. The fact that the 31 ballots cast at the Board were counted merely reflects factual circumstances surrounding the casting of these ballots, not a difference in treatment. *See Hunter*, 635 F.3d at 248 (Rogers, J., concurring in the judgment) (“The situations were sufficiently different that a bipartisan elections board unanimously counted the votes in the former situation, but did not count the votes in the latter situation.”)

The evidence will also show that the 31 ballots cast at the Board are not substantially similar to the 850 ballots cast at polling locations throughout the County. R.C. 3599.12 provides the requirements for the 850 wrong-precinct voters. This statute specifically places the responsibility on the voter for going to the correct precinct. R.C. 3599.12(A) (“No voter shall do any of the following: (1) [v]ote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector”).

By contrast, a voter who has a change of name or change of address is directed to go to the Board of Elections to cast her/his ballot. R.C. 3503.16 (B)(2)(a) (requiring the voter to appear at “office of the Board of Elections”). None of the 31 voters did anything wrong by presenting themselves at the Board. As such, these ballots were never required to be treated in the same manner because they are not substantially similar.

**C. The Board’s isolated error in counting the 31 wrong-precinct ballots cast at the Board does not rise to an equal protection violation.**

Although the evidence will show that the Board processed all provisional ballots in the same manner, and therefore, no equal protection violation occurred, the legal question remains

whether the Board violated equal protection by erroneously counting the 31 wrong-precinct ballots cast at the Board. Ohio law provides that a provisional ballot must be cast in the correct precinct in order to be counted. *Painter*, 128 Ohio St.3d 17, at ¶ 34. There is no exception under Ohio law that allows the counting of provisional ballots cast in the wrong precinct due to poll worker error. *Id.* at ¶35. The decision by the Board to count the 31 wrong-precinct ballots cast at the Board is merely a mistaken application of state law.

Not every error or imperfect administration by a governmental official gives rise to an equal protection violation. *Snowden*, 321 U.S. at 8. Numerous federal courts have applied this principle in the voting context. *See, e.g., Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995); and *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980). In *Roe*, the court held that the fact local election officials had erroneously counted a small number of ballots, in conflict with the statewide practice to exclude such ballots, was not an equal protection violation. 68 F.3d at 407-08. And in *Gamza*, the court held that the miscounting of votes in a local election as the result of alleged maladministration did not give rise to an equal protection violation. *Gamza*, 619 F.2d at 453 (“isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause”); *see also Gelb v. Bd. of Elections of City of N.Y.*, 155 Fed. Appx. 12, 14-15 (2d Cir. 2005) (“[u]neven or erroneous application” of state law by local board of elections, without more, does not violate equal protection); *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) (“The problem with the district court’s standard is that *any* departure from state law would give rise to a constitutional claim. . . . [I]f local government decisionmakers correctly applied a facially neutral resolution in hundreds of cases and erroneously applied it in a single case, they could never again apply it correctly without violating equal protection.”).

Here, the Board applied Ohio law correctly with regard to hundreds of provisional ballots, including not counting 850 ballots because they were cast in the wrong precinct. The Board applied incorrectly the state statute with respect to the 31 ballots miscast at the Board. *Painter*, 128 Ohio St.3d 17, at ¶ 49. But that error was made innocently: “The Court also notes that there is no allegation that any error on the part of poll workers or the Board staff was intentional.” (R.39 Jan. 12 Order, 6.)

*Bush v. Gore* does not displace any of this. It was the lack of any standard, not the mistaken application of the statewide standard that constituted the equal protection violation. *Bush v. Gore* 531 U.S. 98, 106 (2000) (“The problem inheres in the absence of specific standards to ensure its equal application.”). Moreover, taken at its word, the decision was “limited to [its] circumstances, for the problem of equal protection in election processes generally presents many complexities.” 531 U.S. at 109.

*Roe, Gamza*, and the other cases above involve isolated errors by local officials – not equal protection concerns with a state law or policy generally. Indeed, *Gamza* explicitly recognized this key difference:

We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual’s vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause. The unlawful administration by state officers of a non-discriminatory state law, “resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944).

*Gamza*, 619 F.2d at 453 (internal citation omitted). Nothing in *Bush v. Gore* changes this logic. Indeed, *Gelb* was decided post-*Bush v. Gore*.

The Sixth Circuit opinion recognized that the Board's alleged constitutional violation resulted from the "local misapplication of state law" but suggested that such a mistake could constitute a violation of equal protection based on the holding of *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008). See *Hunter*, 635 F.3d at 238, fn. 16. But the Sixth Circuit's reading of *Crawford* is too much.

*Crawford* involved the determination of whether Indiana's voter identification laws violated the Fourteenth Amendment. *Crawford*, 533 U.S. at 185.<sup>3</sup> There were no allegations in that case that the voter identification laws were being applied mistakenly or unevenly. As such, this case does not displace the line of cases that specifically address mistakes, such as *Roe*, *Gamza*, and *Gelb*. But the Sixth Circuit opinion does not even mention these cases, let alone state that these cases have been effectively overturned by *Crawford*.

**D. The investigation undertaken and completed by the Board cured any alleged Constitutional violation; this Court should not redo the investigation.**

Rather than just conduct a trial on the merits on July 18, Ms. Hunter wants this Court to conduct its own investigation into poll worker error by hearing testimony from every poll worker who signed a provisional ballot cast in the wrong precinct and from individual voters. The reason for this unnecessary exercise is obvious – Ms. Hunter wants this Court to substitute its judgment for that of the bipartisan Board and determine which votes should be counted. Such unprecedented action is neither necessary nor supported by any case law. In fact, it is directly contrary to binding precedent.

The Sixth Circuit concluded that the Board's investigation, which involved sending questionnaires to every poll worker who worked in a precinct in which any of the 850 wrong-

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<sup>3</sup> *Crawford* and *Bush* fit comfortably within the *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (statewide poll tax) and *Reynolds v. Simms*, 377 U.S. 533 (1964) (statewide apportionment plan) line of cases but leave *Snowden* and its progeny unaffected.

precinct ballots were cast, reviewing the 830 returned questionnaires, poll books, and help desk notes, and interviewing in-person 71 poll workers, satisfied constitutional requirements and remedied the equal protection violation:

*. . . the Board has implemented appropriate procedures to remedy its initial unequal treatment. . . .* [T]he Board followed the objective guidelines in conducting its review when it implemented the directives of then-Secretary Brunner, which provided criteria for determining poll worker error and the steps to follow to complete the investigation . . . .We conclude that the Board’s review has met the requirements of *Bush v. Gore*.

*Hunter v. Hamilton Cty. Bd. of Elections*,  
635 F.3d 219, 240 (6th Cir. 2011) (emphasis added).

The mere fact that Ms. Hunter is unhappy with the results does not mean that a constitutional violation still exists such that this Court should redo the investigation and substitute its judgment for that of the Board. The Sixth Circuit has specifically held that “federal courts should not be asked to count and validate ballots and enter into the details of the administration of the election.” *League of Women Voters*, 548 F.3d at 478 (citation and internal quotation marks omitted). And that “[t]he Constitution . . . leaves the conduct of state elections to the states.” *Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 553, 559 (6th Cir. 2010) (citations and internal quotations omitted)). This sentiment is echoed in the Sixth Circuit’s decision in *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 477 (6th Cir. 2008), where the Court again stated, “the Help America Vote Act of 2002 . . . leaves no doubt which lawmaking body – the federal or state governments – has plenary authority over the counting of provisional ballots. It ‘conspicuously leaves . . . to the States’ the determination of ‘whether a provisional ballot will be counted as a valid ballot.’” *Id.* (quoting *Sandusky*, 387 F.3d at 577).

What Plaintiffs are asking this Court to do is to sit for weeks on end hearing testimony about alleged poll worker error and then to decide which votes to count and which votes not to

count. Plaintiffs propose subpoenaing and examining over 400 poll workers and possibly all 849 voters. Defendants would have the right to cross-examine each of those poll workers and voters as well as present their own evidence. Such a hearing will take weeks, if not months. Not only should a federal court not engage in this type of second-guessing of local election officials, based on binding case law, but the hearing itself could be an endless endeavor that would greatly strain this Court's time and resources. That is presumably why the Court left that charge to the Board in the first instance – a charge that has now been completed.

**E. The proper remedy for any alleged equal protection violation is to “uncount” the 31 ballots cast at the Board.**

If this Court were to find that an equal protection violation occurred, the proper remedy is not to order additional illegal ballots be counted. Such a decision calls into question the integrity of either candidate's ultimately being determined the winner. Instead, the proper remedy is to order the 31 ballots cast at the Board, illegally counted under Ohio law, be uncounted. *See* 119 Harv. L.Rev. 115, 1157-1162, *Developments in Law: Voting and Democracy* (2006) (discussing how courts typically deal with illegal counted votes by uncounting the ballots). One legal scholar has proposed uncounting the illegal ballots in this case as a means of rectifying the alleged constitutional violations. *See* Josh Douglas, *Ohio Provisional Ballots: Do Two Wrongs Make a Right?* available at <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8057>.

The evidence will show that the wrong-precinct ballots cast at the Board can be easily identified and “uncounted.” Because the ballots were cast in the wrong precinct, the ballots had to be “remade.” This process involves the removal of the wrong-precinct provisional ballot from its envelope by bipartisan staff of the Board, the stamping of it “original” and the placing of a number on the original ballot. The Board staff then takes a ballot from the correct precinct, stamps it “remade,” places the same number on the remade ballot as that placed on the original

ballot. Then the Board staff effectively copies the voter's choices on the correct ballot – addressing the races that the voter was not entitled to vote on in the correct precinct. The remade ballot numbers and reason for the remake are then recorded in a “remake log.” For the November 2010 election, the remake log shows the 27 ballots cast at the Board in sequential order with the reason for the remake listed as “Provisional-Remake Per Board wrong ballot issued.” An additional four ballots are listed at the bottom of the remake log accounting for the four ballots cast at the Board in the wrong precinct that were discovered to be in the wrong precinct when the Board staff opened the provisional envelopes. The reason for these remakes is listed as “Prov Remake Per Board Wrong Ballot Issued.” In order to “uncount” these ballots, the Board staff merely needs to pull the remade ballots with the corresponding numbers and subtract these ballots from the vote totals.

**F. There is no due process violation.**

Plaintiffs have likewise failed to articulate a viable due process claim. Plaintiffs must either be challenging the constitutionality of a state statute or a state actor's actions – those are the only possibilities.<sup>4</sup> Plaintiffs have not met the federal procedural requirements to challenge the constitutionality of a state statute. Nor can Plaintiffs show that Ohio's provisional voting statute is fundamentally unfair. On the other hand, to the extent that Plaintiffs are challenging the constitutionality of actions of state actors, Plaintiffs cannot show that they had an entitlement

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<sup>4</sup> Plaintiffs' position on what their due process claim is has been inconsistent at best; and it is not clear even now what that claim is. For instance, in her initial pleading, Ms. Hunter alleges that “Hamilton County Board of Elections system of rejecting provisional ballots is so unfair that it denies or fundamentally burdens Ohioan's fundamental right to vote.” (Complaint, Doc. 1, ¶39). The next day, however, at the preliminary injunction hearing, Ms. Hunter represented to the Court that she was “not attacking the state statute.” (Transcript of November 22 Hearing, Doc. 18, at 69.) Then, in merits briefing before the Sixth Circuit Court of Appeals, Ms. Hunter contradicted that earlier position by arguing that disqualifying a provisional ballot cast in the wrong precinct due to poll worker error as required by state law is fundamentally unfair. (Doc. 006110848446, Brief of Plaintiff-Appellee Tracie Hunter, Northeast Ohio Coalition for the Homeless, and the Democratic Party at 21). The Sixth Circuit ultimately concluded that “Plaintiffs have asserted due-process challenges to the state law itself . . .” *Hunter*, 635 F.3d at 243. Whatever Plaintiffs' claim is, it is not cognizable now.

to the interest they seek (*i.e.*, to have otherwise invalid provisional ballots counted) and that they were not given sufficient procedure when such invalid provisions ballots were not counted.

The Sixth Circuit has reiterated § 1983 relief under the Due Process Clause is appropriate only in the “exceptional case where a state’s voting system is fundamentally unfair.” *Warf*, 619 F.3d at 559 (quoting *League of Women Voters*, 548 F.3d at 478). “Federal courts ... ‘have uniformly declined to endorse action[s] under [§] 1983 with respect to garden variety election irregularities.’” *Id.* (quoting *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978)).

**G. Plaintiffs have not properly presented a constitutional due process challenge to a state statute.**

Plaintiffs have not met the threshold procedural requirements to challenge a state statute. Rule 5.1 of the Federal Rules of Civil Procedure requires that a party presenting a constitutional challenge to a state statute file a notice of constitutional question and serve notice on the state attorney general. *See* Fed. R. Civ. P. 5.1. As it stands, Plaintiffs here have not even identified the state statute in question. Nor have Plaintiffs certified that question to the state attorney general. The Court, therefore, “may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response.” Comments to Fed. R. Civ. P. 5.1; 28 U.S.C. § 2403.

**H. Even if a state statute (and, by implication, Ohio’s voting system) is at issue, there is no substantive due process violation.**

Even if Plaintiffs had followed the proper procedure to bring a statewide constitutional challenge, Plaintiffs cannot establish a due process violation related to Ohio’s provisional voting statute or any other state statute at issue here.

Plaintiffs argue that Ohio’s precinct system places a “severe” burden on a select group of voters – those who cast provisional ballots in the wrong precinct due to poll worker error – and that Ohio’s voting statutes should therefore be subjected to strict scrutiny. But this argument

ignores binding precedent. There is no constitutional right to vote in any manner that a person chooses. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Constitution provides that the state may proscribe the time, place, and manner in which a person may vote. *Id.* The Supreme Court has held that “[w]hen a state election law imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state’s regulatory interests are generally sufficient to justify the restrictions.” *Burdick*, 504 U.S. at 434 (citation and internal quotation marks omitted). The Sixth Circuit has recognized numerous regulatory interests in Ohio’s system, including, capping the number of voters who vote at a particular place on Election Day, allowing precinct ballots to list only the races and issues for which the voter may cast a ballot, and making it easier to monitor votes and prevent election fraud. *See Sandusky*, 387 F.3d at 568. Further, Plaintiffs’ argument improperly evaluates the statute based on its impact on individuals, which the Supreme Court has held is impermissible. *See Burdick*, 504 U.S. at 439 (prohibition on write-in candidates constitutional despite the fact that it prevented a number of “voters from participating in a meaningful manner”). Given that the precinct voting system is a reasonable, nondiscriminatory restriction, the state’s regulatory interests are sufficient to satisfy constitutional scrutiny. Ohio’s system is not fundamentally unfair; indeed, it is the same system that is employed by the majority of states.

Plaintiffs also allege that a voter may lose the right to have his or her vote counted through “no fault of their own” and argue that this somehow triggers a due process violation.<sup>5</sup> But the Supreme Court held that “the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.” *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Numerous courts have addressed whether human errors that

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<sup>5</sup> The accuracy of this statement is questionable at best. Voters are provided countless methods to identify the precinct in which they should vote including looking up their precinct on-line, and calling the Board of Elections.

result in votes not being counted is a due process violation; each time the answer is no. *See Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (holding that human error resulting in the miscounting of votes is not a violation of due process); *Bodine v. Elkhart County Elec. Bd.*, 788 F.2d 1302, 1316 (7th Cir. 1986) (human errors in counting votes).

The recent *Warf* decision is particularly instructive. In *Warf*, the court affirmed the trial court's decision that invalidated 11% of the election votes on the basis of improper actions by the county clerk. The voters lost their right to have their vote counted through no fault of their own and none of those voters were provided any notice or hearing. Yet, the Sixth Circuit held that there was no due process violation of the voter's rights. *Warf*, 619 F.3d at 563 ("We therefore cannot conclude that [the trial court]'s decision to void the absentee ballots in this case rises to a level of fundamental unfairness in violation of Due Process"). In the present case, less than one half of one percent of all ballots (850 out of more than 240,000 ballots) were not counted because they were cast in the wrong precinct and are invalid under Ohio law. This case is simply not one of the "exceptional cases" in which the voting system is fundamentally unfair.

**I. No state actor's actions in this case are sufficient to establish a due process violation.**

To the extent Plaintiffs are bringing a challenge to specific actions of some state actor here and not to the state statutory system, that challenge also fails. Indeed, a challenge to an individual actor's actions in a voting context makes no sense under the Due Process Clause because it necessarily cannot involve a challenge to the state's election system. And as a threshold matter, Plaintiffs cannot challenge the failure of a state actor to carry out his or her duties under state law. It is well-established that a federal court cannot enjoin a state actor to follow state law. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court

instructs state officials on how to conform their conduct to state law”); *Skaggs*, 549 F.3d at 479 (citing *Pennhurst*, 465 U.S. at 106). So if the Board or a poll worker failed to conform their actions to state law (by, for example, not directing a voter correctly at a polling place), that challenge cannot be brought in federal court.<sup>6</sup>

But even if there were some claim cognizable here, Plaintiffs would have to satisfy the two-prong test to establish a due process violation: show entitlement to a specific property or liberty interest and show that the state’s procedures that took away that entitlement were so insufficient as to be fundamentally unfair. *See Miller v. Lorain County Bd. of Elections*, 141 F.3d 252, 259 (6th Cir. 1998) (“Due process claims are to be handled in two steps: first, this court asks whether a liberty or property interest exists that has been interfered with by the state; second, it determines whether the procedures attendant upon that deprivation were constitutionally sufficient.” (citations omitted)). But Plaintiffs cannot show that they had an entitlement to have otherwise invalid provisional ballots counted and that they were not given sufficient procedure when such invalid provisions ballots were not counted.

Plaintiffs have failed to identify what specific property or liberty interest exists that has been interfered with by the state. *Miller*, 141 F.3d at 259 (“An individual claiming a protected interest must have a legitimate claim of entitlement to it” (citations omitted)). Plaintiffs are not entitled to have a provisional ballot counted that is invalid under Ohio law. Indeed, in response to similar due process allegations, the Sixth Circuit expressly said that federal law leaves the determination of “whether a provisional ballot will be counted as a valid ballot ... to the States.” *Sandusky*, 387 F.3d at 576. It cannot be concluded, therefore, that the state interfered with the

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<sup>6</sup> Indeed, Plaintiffs’ entire suit raises serious Eleventh Amendment questions because it is essentially backward-looking and not attempting to enjoin the enforcement of a state statute in the future. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474-75 (6th Cir. 2008) (a plaintiff can only avoid an Eleventh Amendment problem when suing an arm of the state in a suit that questions an ongoing violation of federal law and seeks prospective relief only).

right to vote where Plaintiffs failed to meet certain eligibility requirements for provisional voters (including the requirement that the voter be a resident in the precinct in which he or she votes).

Plaintiffs' entitlements arise – if at all – only after he or she has met the requirements set forth by the state. It is axiomatic that “a liberty interest created by state law is by definition circumscribed by the law creating it.” *Dobrovolny v. Moore* 126 F.3d 1111, 1113 (8th Cir. 1997) (citing *Montero v. Meyer*, 13 F.3d 1444, 1450 (10th Cir.)). The Ohio Supreme Court confirmed in *Painter* that an eligibility requirement (to have one's provisional ballot counted) in Ohio is that the voter cast a ballot in the precinct in which he or she resides. *Painter*, 128 Ohio St.3d 17, at ¶¶ 34-35. In this case, the statutory laws directed to provisional voting required certain eligibility requirements. Those state law requirements having not been met, no interest arises.

Regardless of whether an interest exists, Plaintiffs cannot show that the Board's procedures were insufficient and that any additional procedure is required. The Board has held multiple hearings with respect to the invalid ballots. The Board held an open public hearing on November 16, 2011 in which the Board unanimously voted not to count those ballots that had been miscast in the wrong precinct. Plaintiff's counsel, in fact, attended and publicly spoke to the Board at the hearing. (Doc. 1-3, Transcript of Nov. 11, 2011 Board Hearing, pp. 34-49.) Moreover, since the time of that pre-deprivation hearing and the commencement of this action, the Board has held additional public meetings to further investigate the legality of the miscast ballots, as mandated by the Ohio Secretary of State and this Court. And Plaintiff's counsel has attended and been heard at most, if not all, of these hearings. Such hearings moot any argument that there has not been sufficient procedure.

Further, “[N]ot every deprivation of a liberty or property right requires a pre-deprivation hearing or a federal remedy.” *See Ramsey v. Bd. of Educ.*, 844 F.2d 1268, 1273 (6th Cir. 1988). Indeed, “due process is flexible and calls for procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). To determine what process is due, a court is to consider: (1) the private interest that will be affected by state action; (2) risk of erroneous deprivation of such interest and the probable value if any on the additional safeguards or substitute procedural safeguards; and (3) the government’s interest including the administrative burdens that the additional requirement would entail. *Id.* at 335.

Given these considerations and the flexibility of this test, Plaintiffs are not entitled to any additional process. Plaintiffs request interviewing every poll worker in whose precinct a wrong-precinct ballot was cast and every provisional voter who cast a wrong-precinct ballot and having a “meaningful hearing” on each invalid ballot. It would be an enormous and unrealistic administrative burden to undertake such a process – particularly if this is to take place every election cycle in every county in the state that does not count wrong-precinct ballots. This conclusion has been reached by other circuit courts faced with similar constitutional due process challenges on election-related issues. *See Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008) (holding that due process did not require the state to provide voters with notice and an opportunity to be heard when their signatures were rejected on referendum petitions even though the right to vote was implicated because providing thousands of voters with the an individual hearing within the short period of time in which the signatures must be validated is a significant burden on the state); *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006) (“the cost of allowing tens of thousands of people to demand a hearing on the validity of their signatures

would be disproportionate to the benefits” ). The additional process requested by Plaintiffs is not warranted – nor even permissible – under the circumstances.

#### **IV. Conclusion**

The Board’s actions in mistakenly investigating and counting the 31 wrong-precinct ballots cast at the Board of election simply does not constitute a violation of equal protection. But, to the extent that the Court finds otherwise, the Board has taken appropriate steps to remedy the violation. There is no need for this Court to redo the investigation and substitute its judgment for that of the Board. Additionally, innocent mistakes made by election workers do not rise to the level of a due process violation, even when those mistakes result in the voter’s ballot not being counted.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I certify that this Trial Brief was filed on July 5, 2011 using the Court’s CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

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