UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER,	:	Case No. 1:10-cv-820
	:	
Plaintiff,	:	Chief Judge Dlott
v.	:	
	:	**JOINT BRIEF OF DEFENDANTS IN OPPOSITION TO PLAINTIFFS' LIST OF BALLOTS THAT SHOULD BE COUNTED OR SUBJECT TO DUE PROCESS RELIEF**
HAMILTON COUNTY BOARD OF ELECTIONS, *et al.*,	:	
	:	
Defendants.	:	

Plaintiffs chose to conduct this case as a state election contest in federal court—even referring to it as a "quasi judicial proceeding" at times. It was not. It was a federal trial court proceeding, specifically a § 1983 challenge in which Plaintiffs had the burden to prove a violation of the Fourteenth Amendment, which they failed to do for reasons that Defendants have set forth in their separate trial briefs. As a result, this Court does not need to take the wholly unprecedented step of assuming full control of a local election and ordering specific ballots to be counted as remedy.[1]

But putting that aside and assuming that this Court believes that it ought to consider ordering specific ballots to be counted, it is still apparent that it should not order any ballots to be counted on the record that Plaintiffs have compiled here.[2] Despite the fact that Plaintiffs spent virtually all of the just-concluded trial on "evidence" that would go to a ballot-counting remedy (as opposed to actually proving a violation of §1983), they were unable to marshal any compelling evidence to permit this Court to enter findings to support an order to count any

[1] Sixth Circuit authority provides 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 v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (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)); *see also Warf*, 619 F.3d at 559 ("The principles of federalism, therefore, limit the power of federal courts to intervene in state elections" (citations and internal quotations omitted)).
[2] The Eleventh Amendment only allows for the granting of prospective relief. Counting ballots that the Board has already rejected is retroactive relief.

ballots in any of the categories that Plaintiffs have identified. This also despite the fact that the Court permitted Plaintiffs to introduce virtually everything that they proffered as "evidence" and permitted virtually every line of questioning Plaintiffs wanted to pursue, no matter how attenuated from any real issue in the case.[3] Just as Plaintiffs have failed to carry their burden with respect to liability here, they have failed to carry their burden with respect to remedy.

I. Ohio law controls the determination of poll worker error.

The touchstone remedial inquiry here is whether any individual ballot was miscast solely because of poll worker error. With regard to this question and any other question related to remedy, this Court must follow state law principles. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 239 n.19 (6th Cir. 2011). ("We leave that question for the district court to resolve in the first instance, based on the record in this case and **state law principles"**) (emphasis added). Ohio law does not permit the counting of the provisional ballots outlined by the Plaintiffs because Plaintiffs did not establish poll worker error by clear and convincing evidence, nor did not Plaintiffs present evidence to overcome the presumption of regularity.[4]

A. The standard for determining poll worker error is clear and convincing evidence.

Plaintiffs argued that the standard to determine poll worker error in this case is preponderance of the evidence. Plaintiffs Proposed Findings of Fact and Conclusions of Law (Doc. 114) at 26. This standard ignores Ohio law. *Hunter*, 635 F.3d 219, 239 n.19.

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[3] Defendants having continuing objections to the eliciting of hearsay from the poll workers and voters (July 19, 2011 Trial Transcript at 2-125; 2-146-150); the testing the poll workers ability to use the green book while testifying (July 19, 2011 Trial Transcript at 2-161); and the questioning of witnesses regarding their race and the racial make-up of the community (July 27 Transcript at 7-12; 7-18).

[4] Ohio law, of course, does not permit the counting of any wrong precinct ballots. *State ex rel. Painter v. Brunner,* 128 Ohio St.3d 17, 28, 941 N.E.2d 782 (2011) ("there is no exception to the statutory requirement that provisional ballots be cast in the voter's correct precinct") The NEOCH consent decree requires that certain ballots be counted if they were miscast due to poll worker error, However, for the reasons set forth in Defendant Board's post-trial brief, the NEOCH consent decree is invalid.

The Ohio Supreme Court has established that an election irregularity (such as poll worker error) must be shown by clear and convincing evidence. *See, e.g., McMillan v. Ashtabula Cty. Bd. of Elections,* 68 Ohio St.3d 31, 35-36, 623 N.E.2d 43 (Ohio 1993) (poll workers allegedly failed to provide pencils to voters in violation of state election law; clear and convincing evidence of election irregularity required); In *re Contested Election of Nov. 2, 1993*, 72 Ohio St.3d 411, 413, 650 N.E.2d 859 (Ohio 1995) (election irregularities must be established "by clear and convincing evidence").[5] Accordingly, Plaintiffs must establish by clear and convincing evidence that the poll workers in this election erred in the performance of their duties and that the error led to the ballot being miscast.

B. The Ohio Presumption against poll worker error applies in this case.

This Court also must apply the Ohio presumption that provides "in the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by the law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully." *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 32, 341 N.E.2d 782 (Ohio 2011) (citing *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 515, 900 N.E.2d 982 (Ohio 2008) (quoting *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186, 126 N.E.2d 449 (Ohio 1955))). The same presumption exists in federal law. *See Bank of U.S. v. Dandridge*, 25 U.S. 64, 69-70 (1827) ("[The law] presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption." (citations omitted)).

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[5] The Sixth Circuit suggested that Ohio did law did not contemplate what standards to apply to ascertain poll worker error for wrong precinct ballots. *Hunter*, 635 F.3d at 239. But that was not correct because the Board was required to determine poll worker error for wrong precinct ballots under the NEOCH consent degree. Directive 2010-74 sets forth the standard that must be applied. Jt. Ex. 34 Directive 2010-74, at 000011 ("VII PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR . . . .**poll worker error may not be presumed and must be demonstrated through evidence")** (emphasis in original).

In order to overcome this presumption, Plaintiffs had to provide corroborating evidence demonstrating that each individual ballot was miscast due to poll worker error. *State ex rel. Skaggs*, 120 Ohio St.3d at ¶¶ 51-52. *See also Reynolds v. Schweinefus*, 27 Ohio St. 311, 320 (Ohio 1875) (stating the presumption is "[s]o strong. . . that it always prevails, unless it be shown to be otherwise by direct and positive proof. . ."). This Court simply cannot order specific ballots be counted when no evidence was presented for those ballots. But that is exactly what Plaintiffs ask this Court to do.

II. The evidence does not demonstrate poll worker error.

Plaintiffs have categorized the ballots and made generalizations about whether the Court ought to count them. Defendants address these categories below. But it is also apparent, as a threshold matter that Plaintiffs failed to provide competent and reliable testimony from the poll workers sufficient to demonstrate error across all of these categories.

Plaintiffs submitted testimony from only 50 poll workers out of the more than 2000 poll workers who worked at the precincts where the 850 provisional ballots were cast. Those 50 poll workers processed only 248 provisional ballots. Jt. Exs. 49-54; 56-60; 63-64; 67; 69-75; 77; 80-81; 83-88; 91-106; 108-11; 113-114; 116. Plaintiffs also offered the testimony of 17 voters. Yet Plaintiffs have asked this Court to count 690 provisional ballots. Plaintiffs Hunter, NEOCH, and Ohio Democratic Party's List of Ballots that should Be Counted or Subject to Procedural Due Process Relief (Doc. 182), at 1.

But offering the testimony of the poll workers demonstrated nothing. Dr. Tuchfarber testified that "[t]here are no scientifically valid and reliable methods known to me that are available at this late date to resolve the question of exactly which of the 849 precinct provisional votes to count or not to count other than the records kept contemporaneously with the election." Trial Testimony of Dr. Alfred Tuchfarber, August 1, 2011, at 10-81; Def. Ex. 1005, at 35. The

reason for this conclusion is that the provisional ballots only account for a handful of ballots and people forget things very quickly. Just six weeks after the election, the poll workers could not recall the voters. Jt. Exs. 22-26 Transcripts of BOE Meetings on December 16 and 17. Those memories have faded even more 7 months later.

The testimony of the 50 poll workers confirmed Dr. Tuchfarber's testimony. The poll workers consistently testified that they did not remember any individual voters or any conversations they may have had with any voters. There is simply nothing that can be gleaned from this testimony.

Plaintiffs recognizing that the poll workers could not recall individual voters tried to establish poll worker error by offering habit testimony. But all that testimony established was that (1) poll workers looked up voters' addresses to make sure the voters were voting in the correct precinct; (2) the poll workers directed voters to the correct precinct; (3) the poll workers believed that the voters that voted in their precinct were voting in the correct precinct. This does not establish poll worker error. If anything it demonstrates that the poll worker did not make an error.

The testimony confirmed that every single voter made an error. All of the voters went to the wrong precinct to vote. R.C. 3599.12 (1) (stating it is illegal for a voter to "[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."). The fact that the voter did not know where to vote is not the fault of the Board as the Board makes numerous attempts to inform voters of their correct precinct including mailing voters a card setting forth their precinct. Trial Testimony of Diane Goldsmith, August 1, 2011, at 10-24. If the voter has moved, that card is not forwarded to the new address. *Id.* at 10-24. Instead, the Board mails the voter a confirmation notice asking the voter to update

his/her registration. *Id.* at 10-25. Once that is returned, the Board sends a new card to the voter listing the voter's new address.

The Board also provides numerous ways for voters to determine their correct precinct in addition to mailing the information to voters. Voters can call the Board and learn their correct precinct. The Board also maintains a website in which voters can look up their current precinct. *Id.* at 10-30 – 10-31.

None of the voters that testified availed themselves to this information. Many returned to their old precincts knowing that they had moved and would vote in a different precinct. These voters are to blame for casting their ballots in the wrong precinct—not the poll workers.

III. Plaintiffs' have otherwise failed to establish that any of the ballots in their proffered categories should be counted by this Court.

A. The right location, wrong precinct ballots.

Plaintiffs ask this Court to order 295 wrong precinct/correct location ballots be counted.[6] The undisputed testimony is that "[m]ultiple precinct polling locations were not a significant or important cause of wrong precinct voting because such voting was equally prevalent in single precinct polling places." Def. Ex. 1005, at 31. Moreover, the provisional process is the same for both the multiple and single precinct locations. Thus, the opportunity for voter error is the same and the evidence demonstrated that these voters made errors.

For instance, the evidence demonstrated that 16 of the right location/wrong precinct voters voted in their old precinct. (Doc. 182-1), Table A (listing ballots P 3468, P9488, P9664. P9675, P9687, P9688, P9795, P9818, P9819, P1082, P10093, P10119, P10206, P10216, P10217,

[6] The 295 number encompasses the 269 ballots that the Board voted to reject on December 28, 2011, the 16 ballots that the Board voted to accept on December 28, and the 2 additional ballots that the Board voted to accept on July 12, 2011. (Doc. 182), at 1-2.

P10220). There is simply no way to conclude that poll worker error was established for these ballots.

We also know that at least one partisan observer in a multiple precinct polling location was incorrectly directing voters to the wrong precinct. *See* Def Ex. 1045 Arlene Elder Documents; Trial Testimony of Alex Triantafilou, August 5, 2011, at 12-178. Plaintiffs ask that all four wrong precinct ballots be cast in this precinct be counted, despite the fact that not one poll worker from this precinct has ever been questioned. *See* (Doc. 182-1), Table A (listing ballots four ballots cast in precinct 10-B (P9930, P9931, P9932, and P10038) as ballots that fall in the correct location category).

Presumably, Plaintiffs are relying on the fact that none of the 50 poll workers that were called to testify recalled a voter refusing to go to another table in the room to vote after being told that they were voting in the wrong location as the basis for having these votes counted. [7] But it is impossible to infer anything reliable from this. The poll workers consistently testified that believed that the voters who voted in their precinct, even provisionally, lived in that precinct. Accordingly, Plaintiffs' argument fails to recognize that poll workers did not direct voters to another precinct because the poll workers believed that the voters were in the correct precinct due to voter error.[8]

Moreover, this exact same argument has already been rejected by the bipartisan Board as a reason to count this group of ballots. On December 28, the Board split 2-2 on whether to count

[7] Plaintiffs argued in their Proposed Findings of Fact and Conclusion of law that all the right location/wrong precinct ballots should be counted because the voters properly told the poll workers their current address. (Doc. 114 at 19.) To support this argument, Plaintiffs cite to the provisional ballot envelope and provisional poll book. *Id.* Both of these items are filled out by the voter after the poll worker has confirmed that the voter is in the correct precinct, and, therefore, provides no insight into the information that the poll worker used to verify the voter's precinct. Jt. Ex. 6 at 000006. The Plaintiffs called 17 voters. None of those voters testified as to what address they provided to the poll worker. Since Plaintiffs have no evidence to support this theory, it is presumed that this theory will be abandoned.

[8] It cannot be presumed that every voter that voted in the wrong precinct did so due to poll worker error. Absent direct evidence, Plaintiffs cannot overcome the presumption of regularity.

all wrong precinct/correct location ballots. Jt. Ex. 48, Affidavit of Tim Burke, at 000003, 000006, 000009. Pursuant to R.C. 3501.11(X), the Secretary of State breaks all ties of the Board. At the time of the tie vote, the Secretary of State was Jennifer Brunner.

In support of the vote to count these ballots, Board members Burke and Faux submitted a letter to then-Secretary of State Brunner in which Board members Burke and Faux argued that during the interviews with the poll workers on December 16 and 17 the Board "found no evidence that 'any right church, wrong pew voter' having been told at one table (precinct) that if they voted a provisional ballot at that table, their ballots would not be counted because it was the wrong precinct and they needed to go across the room o the correct table refused to do so." Jt. Ex. 48, at 00009. However, then-Secretary Brunner found that this "evidence" was insufficient to establish poll worker error for the 269 ballots. Jt. Ex. 46 SOS Ltr. 1-7-11 to Sally Krisel, at 000004 (" . . . I vote with Chairperson Triantafilou and Board member Gerhardt against the motion to proceed to authorize those ballots which are only defective to the extent that they were cast in the right location but in the wrong precinct. . . . "). This Court should not substitute its judgment for that of the bipartisan Board based on the exact same evidence.

B. The odd/even and pass through categories.

Next, Plaintiffs ask this Court to order all 183 ballots where the voter's precinct is determined based on whether the voter's address ends in an odd or even number and all 141 ballots in which the voter's street passes through more than one precinct be counted. Doc. 182 at 2.[9] This argument—which is a direct challenge to precinct based voting—presumes poll worker

[9] Five ballots that Plaintiffs have identified as falling in the odd/even category do not actually fit into this category. For ballot P-9464, the voter's current address is 825 Dayton Street. Both sides of Dayton Street (even and odd) of the address range 400 – 899 fall within precinct Cincinnati 18-C. *See* Jt. Ex. 9, at 99. The voter voted in Cincinnati 18-A. For ballot P-9709, the voter's current address is 627 Main Street. Both sides of Main Street (even and odd) from 600 – 799 fall within Cincinnati 6-E. *Id.* at 238. The voter voted in Cincinnati 6-F. For ballot P-9890, the voter's current address is 1204 West Rookwood. Both sides of West Rookwood (even and odd) fall within Cincinnati 5-I. *Id.* at 327. The voter voted in Cincinnati 5-H. For ballot, P-9921, the voter's current address is 6501

error and arbitrarily asks this Court to count specific ballots based solely on the layout of the precincts. This Court should deny Plaintiffs' request.

Ohio law requires that precinct boundaries be established based on census tracts. R.C. 3501.18 (B)(1) ("board of elections shall determine all precinct boundaries using geographical units used by the United States department of commerce, bureau of the census . . . ."). The Board is permitted to combine census tracts, but not split the tracts when drawing precincts. Testimony of Sally Krisel, August 3, 2011, ("Krisel August 3 Tr.") at 11-224. Census tracts are based on natural barriers such as rivers and streams, and streets. *Id.* at 11-224. The census tracts are drawn down the middle of streets, which occasionally leads to voters with addresses ending in even numbers voting in one precinct and voters who live on the same street but have addresses ending in an odd number voting in a different precinct.

Plaintiffs' request to count all the ballots where the voter's precinct is determined by the odd/even designation is based entirely on an assumption that the poll worker looked up the address wrong and the voter did everything right. There is simply no evidence to support this conclusion. Setting aside the fact that we know for sure that the voter made a mistake by going to the wrong precinct, many of the poll workers looked up the addresses with the odd/even distinctions correctly when they testified.[10] *See* Trial Testimony of William Singer, July 19, 2011, at 2-223 (picking the correct precinct for ballot P9408); Trial Testimony of Dale Stoops, July 22, 2011, at 5-79 – 5-80 (selecting the correct precinct for ballot P9401 based on the fact that the address fell in the odd range); Trial Testimony of Earlie Thrash, July 25, 2011, at 6-182

Stewart Rd. The voter voted in Silverton C. No part of Stewart Rd votes in Silverton C. *Id.* at 361. For ballot P-9775, the voter's current address is 7056 Glenmeadow Ln. The voter voted in precinct Silverton C. No part of Glenmeadow Ln. votes in Silverton C. *Id.* at 153.

[10] Defendants reassert their continuing objection to the process of having a witness look up the address on the stand. Trial Tr. at 3-50. Such an exercise is irrelevant because it is not probative of what happened on election day. However, to the extent that this Court continues to believe that this evidence is relevant, it does not establish that an inference can be drawn wherein every single ballot that falls in the odd/even or pass through categories can be counted.

– 6-187 (selecting the correct precinct for ballots P9434 and P9435 based on odd/even distinction); Trial Testimony of Tiffany Evans, July 22, 2011, at 5-41 (picking the correct precinct based on the odd/even distinction); Trial Testimony of Sherman Lynem, July 20, 2011, at 3-133 (picking the correct precinct for ballot P10032 based on odd/even distinction); Trial Testimony of Sharon Rankin Moon, July 20, 2011, at 3 -167 (picking the correct precinct for ballot P10120 based on odd/even distinction); Trial Testimony of Eddie Strauss, July 20, 2011, at 3-86 - 3-86 (picking the correct precinct for ballot P10084). There is simply no way based on this evidence that this Court can conclude that for every single provisional ballot in which the poll worker determined the correct precinct based on the odd/even distinction that the ballot was miscast solely due to poll worker error.

The same holds true with the addresses that pass through more than one precinct. We know for sure that the voter made the initial mistake of going to the wrong precinct. We also know that a number of the poll workers selected the correct precinct when testifying. *See* Trial Testimony of Dale Stoops, July 22, 2011, at 5-78 (selecting the correct precinct for ballot P9400); Trial Testimony of Sherman Lynem, July 20, 2011, at 3-118 (locating the correct precinct for ballots P9679, P9893, and immediately recognizing that ballot P9882 would vote in another precinct based on the zip code). That is all we know. It is wrong to assume that the poll worker looked up the address incorrectly simply because the street passes through more than one precinct.

C. The 183 Provisional ballots cast in the voter's old precinct.

Plaintiffs next ask the Court to count all provisional ballots where the voter cast a provisional ballot in their old precinct. This request is ridiculous. Ohio law requires a voter to vote in the precinct in which the voter currently lives—not where they used to live. R.C. 3503.01. Ohio law cannot be ignored.

We know for sure that with this group of ballots the voters made a mistake by going to their old precinct knowing that they had moved. We also know that none of these voters updated their addresses with the Board despite the fact that many of the voters had moved months, sometimes years, before the November 2 Election. *See* Trial Testimony of Wendell Walker, July 22, 2011, at 6-6:45 ("So since October 2008 through November 2, 210, did you ever contact the Board of Elections and tell them that you moved to Freeman Avenue? A. No, I didn't."); Trial Testimony of Maggie Niestheide, July 29, 2011, at 9-259 (stating that she had moved in August but had not alerted the Board); Trial Testimony of Susan Schluster, August 1, 2011, at 10-184 (stating that she had moved in 2009 but had notified the Board.).

Moreover, the provisional ballot envelope clearly states "you <u>must</u> vote in the precinct in which you <u>currently</u> live." Jt. Ex. 12. And the voter solemnly swore that he/she was a "registered voter in the precinct in which I am voting." Jt. Ex. 12. That was not true. This Court simply cannot place all the blame for these voters voting in the wrong precinct on the poll workers.

D. The 145 where the provisional judge did not look up the addresses and the 206 provisional voters not warned by the provisional judges.

It is not enough to prove that one poll workers did not follow the comprehensive manual exactly in order to have the provisional ballot counted. The mere fact that the provisional judge did not look up the voter's address to confirm that the voter was voting in the correct precinct, but instead relied on another poll worker to help them with that task does not demonstrate that the voter voted in the wrong precinct due to poll worker error. Plaintiffs did not bring in all four poll workers from a single precinct. The testimony was consistent, poll workers looked up the voter's address to determine that the voter was voting in the correct precinct, and, if not, the

voter was referred to his/her correct precinct. The fact that it was not the provisional judge who performed this task is off no consequence.

The same is true for the argument that the voter was not warned that if they voted in the wrong precinct their vote would not count. This Court cannot assume just because one poll worker from one precinct did not warn the voter that all three of the other poll workers also failed to warn the voters. Moreover, there were signs at every precinct warning the voter that they must vote in the precinct in which they reside, and the provisional envelope also informs the voter that they must vote in the precinct in which they reside. Jt. Ex. 17; Jt. Ex. 12.

E. The 66 ballots where the provisional judge did not sign the envelope.

This category of ballots truly is a red-herring. The fact that the poll worker did not sign the provisional envelope is not a reason that a provisional ballot would be rejected. Trial Testimony of Sherry Poland, July 22, 2011, at 5-136. Merely showing that poll workers made a mistake unrelated to the determination of where the voter should vote does not demonstrate that the ballot was miscast due to poll worker error.

F. The 261 ballots where there was "particularized testimony" demonstrating poll worker error.

Plaintiffs called 50 poll workers to testify from 47 different precincts.[11] Every precinct had at least four poll workers assigned to that precinct, with some of the larger precincts being assigned six poll workers. Trial Testimony of Sally Krisel, July 18, 2011, at 1-32. Without talking to all the poll workers at those precincts, this Court has no idea what happened with the voter.

[11] Two poll workers testified from the following precincts: Silverton C (Dottie Williams and James Crabtree); Cincinnati 25-A (Ronda Jackson and Vicki Lee Williams); Cincinnati 25-J (Lawrence Rouse and Patricia Webb) and Silverton A (Donald Gehring and Veronica Bryd).

The poll workers that testified were the poll workers that signed the provisional envelopes. The vast majority of these poll workers testified that another poll worker made the determination that the voter was in the correct precinct before the voter ever reached them. Trial Testimony of Mary Horton, July 19, 2011, at 2-15; Trial Testimony of Sherman Lynem, July 20, 2011, at 3-120; Trial Testimony of Carolyn Hill, July 20, 2011, at 3-14 – 3-15; Trial Testimony of Lawrence Rouse, July 21, 2011, at 4-25 - 4-26; Trial Testimony of Rosemary Gentry, July 21, 2011, at 4-167 – 4-168; Trial Testimony of Tiffany Evans, July 22, 2011, at 5-22 - 5-23; Trial Testimony of Patricia Webb, July 22, 2011, at 5-55; Trial Testimony of Dale Stoops, July 22, 2011, at 5-70 - 5-71; Trial Testimony of Donald Gehring, July 26, 2011, at 6-9; Trial Testimony of Anna Marie Johnson, July 26, 2011, at 6-54; Trial Testimony of Johnnie Williams, July 26, 2011, at 6-85 ; Trial Testimony of Joseph Brenner, July 27, 2011, at 7-31; Trial Testimony of Camilla Steward, July 27, 2011, at 7-51; Trial Testimony of Joan Flannery, July 27, 2011, at 7-103 - 7-104; Trial Testimony of Dayle Chandler, July 27, 2011, at 7-127; Trial Testimony of Renee Warren, July 27, 2011, at 7-179 - 7-180; Trial Testimony of Michael Nichols, July 28, 2011, at 8-87; Trial Testimony of Michele Jackson, July 28, 2011, at 8-143; Trial Testimony of Carretta Hayes, July 28, 2011, at 8-164 - 8-165; Trial Testimony of Jacob Hartmann, July 28, 2011, at 8-187 - 8-188; Trial Testimony of Pamela Crooms, July 29, 2011, at 9-78 .

The determination that the voter was in the right or wrong precinct was made based on the information that the voter provided to the poll worker—not what was written on the provisional envelope. Jt. Ex. 6, Poll Worker Comprehensive Manual, at 000006. Absent talking to the poll workers that actually looked up the addresses of the voters, we have no way of knowing whether the voter provided a different address to the poll worker than the address that was written on the envelope, whether the poll worker looked up the address correctly, or whether

the poll worker told the voter that he/she was voting in the wrong precinct and his/her vote would not count. Under both Ohio and Federal law, the presumption is that the poll worker did his/her job. Plaintiffs have not presented any evidence to overcome this presumption.

Additionally, Plaintiffs were unable to establish that the poll workers were even competent to testify as to the specific ballots. The vast majority of the poll workers did not recall any provisional voter that they processed on November 2.[12] They did not recall any conversation with any particular voter on election day. And they certainly did not recall any conversation that another poll worker may have had with any particular voter. Thus, it is still not known whether any of the poll workers told the voter that they needed to go somewhere else to vote, and, if he/she refused to go somewhere else, his/her vote would not count.

As for the testimony for the voters, the only thing that was clearly established was that each of these voters made mistakes. Several voters moved well in advance of the elections, often time years before the election, and never bothered to update their registration. Trial Testimony of Andrea Ornelas, July 22, 2011, at 5-147 (testifying that she had moved in February 2009 but had not informed the Board that she moved); Trial Testimony of Wendell Walker, July 22, 2011, 6-6:45 ("So since October 2008 through November 2, 2010, did you ever contact the Board of Elections and tell them that you moved to Freeman Avenue? A. No, I didn't."); Trial Testimony of Maggie Niestheide, July 29, 2011, 9-259 (stating that she had moved in August but had not alerted the Board); Trial Testimony of Susan Schluster, August 1, 2011, at 10-184 (stating that she had moved in 2009 but had notified the Board). Had the voters bothered to update their

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[12] Tiffany Evans recalled voter, Jill Kirscher because she worked as a poll worker with Ms. Evans in Norwood. Evans Tr. at 5-35. As a poll worker, Ms. Kirscher knew her vote would not count. Timothy Patterson testified that he remembered looking up the address for the particular voter, and that he used the voter's driver's license to determine whether the voter's address was in the precinct. Trial Testimony of Timothy Patterson, July 21, 2011, 4-154; 4-145. Renee Kennedy also remembered the voters that cast the three provisional ballots shown to her. Renee Kennedy, July 29, 2011, at 9-48 – 9-50.

registration, they would have received a new card listing the voter's new precinct. Testimony of Diane Goldsmith, August 1, 2011, at 10-23.

A number of voters also testified that they moved and then returned to their old precinct to vote even though it was the wrong precinct. Trial Testimony of Andrea Ornelas, July 22, 2011, at 5-142 ("I went to the old place I used to vote at . . . .") Trial Testimony of Eric Joiner, July 22, 2011, at 6-30 ("I went there because that was my former voting place from—Q. When you say "former place," had you moved since you had last voted? A. Yes."); Trial Testimony of Wendell Walker, July 22, 2011, 6-41 ("Q. And why did you go there to vote? A. That's where I voted the last 20 years . . . ."); Trial Testimony of Wanda Turk, August 3, 2011, at 11-100 (stating that she went to that location because that is where she had always voted but acknowledged moving since the last time she had voted).

The first voter that testified, Regina Chapman, testified that she received a card from someone that was different than the card from the Board of Elections listing her precinct. Trial Testimony of Regina Chapman, July 19, 2011, at 3-202 – 3-203. Ms Chapman did not know where that precinct was located, so she returned to her old precinct. *Id.* at 3-203. Ms. Chapman further testified that had she been told she needed to go somewhere else to vote she would have "[p]robably went home." *Id.* at 3-205.

Another voter, Cerrice John, could only provide the street on which she resided on election day—not the street number. Trial Testimony of Cerrice John, July 19, 2011, at 3-207. Ms. John voted in her old precinct. Ms. John provided her driver's license as her ID. Jt. Ex. 12 at 1141. We do not know what address was listed on the ID or what address Ms. John's provided to the poll worker. *Id.* at 3-208 – 3-209.

Lakisha Burton is also a voter who voted at her old precinct. Jt. Ex. 12, at 1087. Ms. Burton testified that the poll workers "could not find her in the book." Trial Testimony of Lakisha Burton, July 20, 2011, at 3-216. However, Ms. Burton checked the box that provided the reason that she was voting provisionally was because "signature poll book states must vote provisionally."[13] This voter also testified that the poll worker may have told her she was "in the wrong place." *Id.* at 3-217. She further testified that she "knew she was in the wrong place." *Id.*

Alexandra Kissling testified that she had moved recently, updated her address with the Board and received a new card directing her where to vote. Trial Testimony of Alexandra Kissling, July 28, 2011, at 8-45. Ms. Kissling acknowledged that the card listed her precinct. But she still went to the wrong precinct. *Id.* at 8-50. Armed with all this information, Ms. Kissling still made the mistake of going to the wrong precinct. Ms. Kissling is at least equally responsible for voting in the wrong precinct.

Donna Lee Kermos testified that she had moved, updated her new address with Board and received a new voting card. Trial Testimony of Donna Lee Kermos, July 28, 2011, at 8-154. Ms. Kermos further testified that she took that card with her on election day and brought the card with her to Court. *Id.* at 8-154; Pl. Ex. 2010. These statements are false. The evidence demonstrated that Ms. Kermos did not update her registration with the Board as the Board updated Ms. Kermos registration based on the provisional ballot she cast on November 2. Def. Ex. 1041. The evidence further demonstrated that the card that Ms. Kermos stated she took with her on election day did not exist as the Board mailed Ms. Kermos a card directing her to vote at her old precinct. *Id.* Ms. Kermos testimony is entirely unreliable and should be disregarded.

[13] This designation is placed next to the voter's name in the signature poll book. Therefore, her name was in the poll book for this precinct.

G. The 26 NEOCH ballots.

Plaintiffs next asked that all 26 NEOCH ballots that they allege fit the NEOCH criteria be counted—simply because they are NEOCH ballots. Only three poll workers testified regarding three ballots—all wrong precinct ballots. *See* Doc. 182-1, Table A. None of that testimony establishes poll worker error. *See* Trial Testimony of Michael Nichols, July 28, 2011, at 8-57 (testifying that the voter's address was looked up to determine the correct precinct before the voter reached him); Trial Testimony of William Singer, July 18, 2011, at 2-214 (testifying that he did not recall processing any provisional voters); Trial Testimony of Earlie Thrash, July 26, 2011, at 6-174 (testifying that she looked up the voter's addresses to make sure he/she was voting in the correct precinct). There is simply no way for this Court to conclude based on the evidence that any NEOCH ballot should be counted.

H. The 154 ballots for which Plaintiffs seek additional investigation.

This election occurred more than 8 months ago. The winner still has not taken office. Yet Plaintiffs want to further delay the process by asking this Court to order the Board to investigate 154 ballots for which there is no evidence of poll worker error. These ballots fall within the 850 category and were fully investigated by the Board pursuant to this Court's November 22 Order. The fact that no poll worker from any of these precincts returned a questionnaire does not mean that the Board needs to do additional investigate. *See* Hunter, 635 F.3d at 241 ("We conclude that the Board's review has met the requirements of *Bush v. Gore*"). These ballots should be rejected. It is time to end this dispute, allow the recount to occur, and the rightful winner take office.

Conclusion

Plaintiffs have submitted a wish list of ballots to be counted in which they presume poll worker error. This Court is required to follow Ohio law which does not allow poll worker error to be presumed. Plaintiffs' request should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Memo in Opposition was filed on August 26, 2011 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ Beth A. Bryan
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