DIRECTIVE 2010-79
November 30, 2010

TO: HAMILTON COUNTY BOARD OF ELECTIONS
MEMBERS, DIRECTOR, AND DEPUTY DIRECTOR

RE: Supplemental Procedures Regarding Provisional Ballots

I have learned that the Hamilton County Board of Elections rejected over 1,000 provisional ballots cast in the November 2, 2010 General Election. I have also learned that no conclusive review or inquiry to demonstrate the existence or lack thereof of poll worker error in specific provisional ballot situations has been undertaken by the board pursuant Directive 2010-74, Directive 2010-73 and the consent decree issued by the federal court in Northeast Ohio Coalition for the Homeless v. Brunner, S.D. Ohio No. 2:06-cv-896 (“NEOCH”). This Directive 2010-79 is being issued to inform the Hamilton County Board of Elections that it must comply with the aforementioned directives and consent decree pursuant to R.C. 3503.01 in determining the validity of provisional ballots cast in the November 2, 2010 General Election. This directive is issued to specify the application of Directives 2010-73 and 2010-74 regarding the process for determining the validity of provisional ballots.

As explained in Directive 2010-73, poll worker error will not be presumed and must be demonstrated through evidence.

I. Provisional Ballots that May Not be Rejected Due to Poll Worker Error

As cited in Directive 2010-74 and explained in Directive 2010-73, under the consent decree issued by the federal court in Northeast Ohio Coalition for the Homeless v. Brunner, S.D. Ohio No. 2:06-cv-896 (“NEOCH”), boards of elections may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification for any of the following reasons:

1) The voter provided the last four digits of a Social Security number but did not provide a current driver’s license, state issued identification, or other document which serves as identification required for a regular election ballot under Ohio law;
2) The voter did not provide a date of birth;
3) The voter did not provide an address that is tied to a house, apartment, or other dwelling provided that the voter indicated that he or she resides at a non-building location, including but not limited to a street corner, alley, or highway overpass located in the precinct in which the voter seeks to cast a ballot and that the non-building location qualifies as the individual’s voting residence under R.C. 3503.02;
4) The voter indicated that he or she is homeless;
5) The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error;

6) The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error; or

7) The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statutes.

Examples of Evidence of Poll Worker Error for Which Provisional Ballots May Not be Rejected

A. PROVISIONAL BALLOT AFFIRMATION STATEMENT: One example of the type of poll worker error contemplated under the NEOCH consent decree occurs when a voter fails to sign the provisional ballot affirmation statement portion of SOS Form 12-B, but the poll worker completes and signs the verification statement portion of SOS Form 12-B indicating that the voter has completed the affirmation and without indicating that the voter declined to complete the affirmation. If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day. Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement, taken together, provide objective evidence of poll worker error in that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

B. RIGHT POLLING LOCATION, WRONG PRECINCT: Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

C. Failure of a poll worker to complete and sign the "Election Official Verification Statement" portion of SOS Form 12-B is clear evidence of poll worker error because election officials are required by R.C. 3505.182 to complete this information. If the board finds that poll worker error of this nature existed, it shall not reject the provisional
ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

II. OBJECTIVE CRITERIA FOR DETERMINING POLL WORKER ERROR

As a general matter, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or directive issued by the Secretary of State. Poll workers have a duty to follow federal and state election laws, the directives of the Secretary of State and the rules, instructions and policies explicitly outlined in the Poll Worker Manual.

In determining whether poll worker error occurred, a board of elections should apply the following criteria:

1) Did the poll worker carry out his/her duties in accordance with directives and federal and state law?
2) Did the poll worker adhere to the procedures/guidelines outlined in the Poll Worker Manual regarding provisional voting? For example, did the poll worker properly do the following:

   • Check-in each voter? Review the Supplemental Voter List in the back of the Signature Poll Book to find the voter’s name (if applicable)?
   • Check the Precinct Voting Location Guide pursuant to R.C. 3505.181(E)(2), also known as the Precinct Street Directory, to verify if the voter’s current address is in, or out of, the precinct?
   • Examine the ID provided by the voter to determine if it is a valid form of ID?

III. ADDITIONAL STEPS TO DETERMINE VALIDITY

In accordance with the federal court’s decision in NEOCH and Directives 2010-73 and 2010-74, the Hamilton County Board of Elections is hereby ordered to take additional steps to determine whether the provisional ballots that were cast by voters using the last four digits of their Social Security number as identification were improperly rejected for any reason stated in Section I of this Directive or as a result of poll worker error. The board must take the following steps during its investigation:

1) Identify the precincts where the provisional ballots that were cast by voters using the last four digits of their Social Security number as identification were cast and all of the poll workers for each of those precincts;
2) Determine which of the provisional ballots in question were cast in the correct polling location but wrong precinct;
3) By applying the criteria outlined above in Section III of this Directive, the board should contact each poll worker to determine whether they followed the board’s instructions for ensuring that voters were directed to the correct precinct.

If the Hamilton County Board of Elections determines through its investigation that any of the provisional ballots cast by voters using the last four digits of their Social Security number as
identification were improperly rejected or as a result of poll worker error, then those ballots should be counted.

If you have questions about this directive or the consent decree, please contact the elections attorney assigned to your county at 614-466-2585.

Sincerely,

Jennifer Brunner
DIRECTIVE 2010-80
December 9, 2010

TO: HAMILTON COUNTY BOARD OF ELECTIONS
MEMBERS, DIRECTOR, AND DEPUTY DIRECTOR

RE: Supplemental Procedures Regarding the 849 Provisional Ballots Subject to the Court Order in Hunter

This Directive provides clarification to the Hamilton County Board of Elections regarding the counting of provisional ballots pursuant to Directives 2010-73, 2010-74, and 2010-79 and reflects changed circumstances as a result of my resolution of the tie vote matter regarding the appeal of the decision of Chief Judge Susan Dlott of the U.S. District Court for the Southern District of Ohio in Hunter v. Hamilton Cty Bd. of Elections, S.D. Ohio Case No. 1:10-cv-00820, on November 22, 2010, and the U.S. Sixth Circuit Court of Appeals’ order dissolving its earlier stay of that decision issued December 1, 2010. Hunter v. Hamilton Cty Bd. of Elections, Sixth Circuit Case No. 10-4481. In light of these changed circumstances, this Directive provides additional guidance to the board of elections with regard to the investigation of 849 provisional ballots, as ordered by Judge Dlott.

I. Scope of Poll Worker Error Inquiry under Directives 2010-73, 2010-74, and 2010-79

Directives 2010-73, 2010-74, and 2010-79 addressed the consent decree in Northeast Ohio Coalition for the Homeless v. Brunner, S.D. Ohio No. 2:06-cv-896 ("NEOCH"), which prohibits boards of elections from rejecting a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification for the following reasons:

1) The voter provided the last four digits of a Social Security number but did not provide a current driver’s license, state issued identification, or other document which serves as identification required for a regular election ballot under Ohio law;
2) The voter did not provide a date of birth;
3) The voter did not provide an address that is tied to a house, apartment, or other dwelling provided that the voter indicated that he or she resides at a non-building location, including but not limited to a street corner, alley, or highway overpass located in the precinct in which the voter seeks to cast a ballot and that the non-building location qualifies as the individual’s voting residence under R.C. 3503.02;
4) The voter indicated that he or she is homeless;
5) The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error;
6) The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error; or
7) The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statutes.

Directive 2010-79 provided objective criteria for determining poll worker error and additional steps for the board of elections to take to determine the validity of the provisional ballots.

II. Scope of the Order in Hunter v. Hamilton County Board of Elections

The order issued by Judge Dlott in the Hunter case requires the Hamilton County Board of Elections to investigate 849 provisional ballots cast in the wrong precinct to determine if poll worker error was the reason for the ballots being cast in the wrong precinct and to count any ballots cast in the wrong precinct due to poll worker error. Thus, Judge Dlott's order only applies to the 849 provisional ballots cast in the wrong precinct that were not previously counted by the board of elections. However, the investigation of poll worker error required by Judge Dlott's order is broader in the scope than Directives 2010-73, 2010-74, and 2010-79 in that, for the 849 provisional ballots at issue, the determination of poll worker error is not limited to persons who voted using only the last four digits of their Social Security number.

Consequently, this Directive provides instructions to the Hamilton County Board of Elections to assist it in complying with Judge Dlott's order.

III. Objective Criteria for Determining Poll Worker Error

As explained in Directive 2010-79, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or directive issued by the Secretary of State. Poll workers have a duty to follow federal and state election laws, the directives of the Secretary of State and the rules, instructions and policies explicitly outlined in the Poll Worker Manual.

In determining whether poll worker error occurred, a board of elections should apply the following criteria:

1) Did the poll worker carry out his/her duties in accordance with directives and federal and state law?
2) Did the poll worker adhere to the procedures/guidelines outlined in the Poll Worker Manual regarding provisional voting? For example, did the poll worker properly do the following:

- Check-in each voter? Review the Supplemental Voter List in the back of the Signature Poll Book to find the voter's name (if applicable)?
- Check the Precinct Voting Location Guide pursuant to R.C. 3505.181(E)(2), also known as the Precinct Street Directory, to verify if the voter's current address is in, or out of, the precinct?
- Examine the identification provided by the voter to determine if it is a valid form of identification?
IV. Additional Steps to Determine Validity

The court identified 849 provisional ballots that were cast in the wrong precinct and ordered the board to investigate whether poll worker error caused the ballots to be cast in the wrong precinct. The board must take the following steps during its investigation:

1) Identify the precincts in which the 849 provisional ballots were cast and all of the poll workers for each of those precincts;
2) By applying the criteria outlined above in Section III of this Directive, the board should contact each poll worker for the precincts involved to determine whether each followed the board’s instructions for ensuring that voters were directed to the correct precinct;
3) The board should also question each poll worker to determine whether they followed Ohio law, Secretary of State Directives, and the Poll Worker Manual procedures for casting and processing provisional ballots;
4) The board should examine the poll books for each precinct for indications of poll worker error in directing voters to the wrong precinct; and
5) The board should examine the envelopes for each of the 849 provisional ballots for indications that poll workers directed the voter to the wrong precinct.

If the Hamilton County Board of Elections determines through its investigation that any of the provisional ballots were cast in the wrong precinct as a result of poll worker error, then those ballots should be counted as required by Judge Dlott’s order.

In addition to the five steps listed above, the board may also choose to interview the individual voters who cast these provisional ballots for evidence that the voter was directed by poll workers to the wrong precinct. If the board decides to interview voters as part of its investigation, the interview must be conducted by a bipartisan team of election officials. Moreover, the same questions should be asked of each voter interviewed to ensure consistent treatment of voters.

If you have questions about this Directive or the consent decree, please contact the elections attorney assigned to your county at 614-466-2585.

Sincerely,

Jennifer Brunner
JENNIFER BRUNNER
Ohio Secretary of State

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Columbus, Ohio 43215 USA
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ADVISORY 2010-08
December 14, 2010

TO: HAMILTON COUNTY BOARD OF ELECTIONS
MEMBERS, DIRECTOR, AND DEPUTY DIRECTOR

RE: Supplemental Poll Worker (Voter) Investigation Procedures

On November 30, 2010, the Secretary of State’s office issued Directive 2010-79 amplifying required procedures regarding provisional ballots cast in the November 2, 2010 General Election. In response to a federal court order issued by Chief Judge Susan J. Dlott for the U.S. District Court for the Southern District of Ohio in Hunter v. Hamilton Cty Bd. Of Elections, S.D. Ohio Case No. 1:10-cv-00820, on November 22, 2010, and the U.S. Sixth Circuit Court of Appeals’ order dissolving its earlier stay of Judge Dlott’s decision issued on December 1, 2010, the Secretary of State’s office issued Directive 2010-80 amplifying required procedures regarding the 849 provisional ballots that were subject to Judge Dlott’s order in Hunter.

Poll Worker Error

As explained in Directive 2010-73, poll worker error will not be presumed and must be demonstrated through evidence. Directives 2010-79 and 2010-80 provide objective criteria for determining poll worker error. Generally, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or a directive issued by the Secretary of State. Poll workers have a duty to follow federal and state election laws, the directives of the Secretary of State and the rules, instructions, and policies explicitly outlined in the Poll Worker Manual.

Directives 2010-79 and 2010-80 also provide the additional measures that the Hamilton County Board of Elections (“the Board”) must follow to determine whether poll worker error was attributable to the 849 provisional ballots being cast in the wrong precinct pursuant to Judge Dlott’s order in the Hunter case.

Scope and Purpose

The purpose of this Advisory is to provide the Board with specific guidance for conducting the investigation regarding potential poll worker error and in furtherance of the requirements of the federal court order in Hunter.

Investigation Procedures

The Board is hereby advised to conduct a thorough and efficient investigation that brings closure to this matter within a reasonable time. In addition to the procedures explicitly stated in Directives 2010-79 and 2010-80, the Board is advised as to all of the following:

- **Issuing Subpoenas**: The Board may subpoena poll workers to give testimony, under oath and recorded by a court reporter, about instructions the poll workers gave to voters who cast provisional ballots in the precincts being investigated and other relevant
matters to determine whether poll worker error occurred regarding the provisional ballots in question.

- **Issuing Questionnaires In Lieu of Subpoenas:** In addition to issuing subpoenas, the Board may send each poll worker a questionnaire. For those poll workers who also were issued a subpoena, the questionnaire may specify that if the questionnaire is completed and postmarked within seven (7) calendar days from the date the subpoena/questionnaire is sent, the poll worker may be notified by the Board that the poll worker does not have to appear and give testimony pursuant to the Board's subpoena.

- **Review of Documents to Narrow Investigation:** The Board may review documents on file with the Board to better focus its investigation on those ballots for which there appear to be indications from related documents that poll worker error occurred. Such a review, if conducted, may contemporaneously be taking place while testimony is taken regarding any poll worker error, pursuant to subpoenas or questionnaires or both. The document review should be conducted by bi-partisan teams evenly comprised of members of the two major political parties, in this case, Democrats and Republicans. The taking of testimony should be under oath and recorded by a court reporter, as is set forth below.

- **Appointment of Attorneys – Questioning Poll Workers/Voters:** The questioning of poll workers does not have to occur in the presence of the Board at a public meeting (although as indicated above it must be conducted under oath and recorded by a court reporter). The Board may appoint individuals, preferably attorneys, or at least notary publics who are authorized to take oaths, who are experienced in taking sworn statements when questioning poll workers. Initial questions of poll workers should be consistent from poll worker to poll worker, with additional questions being asked reflective of what is learned in the testimony. The attorney or notary should prepare a report to the Board that includes recommendations regarding the counting of individual ballots, if any. It would be advisable for the Board to appoint teams of attorneys, each with one Democrat and one Republican. These teams may also question individual voters if given that authority by the Board. The Board should provide each team with a deadline for completing the investigation and making a report and recommendation. The Board should then meet promptly after the deadline, with prior notice, and vote on the recommendations in the reports.

- **Unavailability of Poll Worker/Voters:** If a poll worker (or voter) cannot be reached or may not be available before the deadline that the Board sets to conclude the investigation, then the investigation may proceed without that particular poll worker or voter. But in no instance should any member or agent of a member of the Board encourage a poll worker or voter to avoid service of process in the investigation of the provisional ballots in question or the circumstances involved in the casting of a provisional ballot.

It would be advisable for the Board to set a deadline by which its investigation should be completed and a deadline by which the Board must bring the matter to closure, including voting
on any recommendations made in the investigative reports. Failure to set a definite timeline may invoke further action from the Secretary of State. The Board must follow the law as established by the U.S. District Court for the Southern District of Ohio and by state law as is interpreted by the Secretary of State pursuant to R.C. 3501.11 and Title 35 of the Ohio Revised Code. I urge you to move expeditiously in this matter with an objective of fairness for all, for the benefit of the candidates and the voters of Hamilton County, Ohio.

If you have questions about this Advisory, please contact the elections attorney assigned to your county at 614-466-2585.

Sincerely,

Jennifer Brunner
DIRECTIVE 2010-87
December 17, 2010

TO: HAMILTON COUNTY BOARD OF ELECTIONS
MEMBERS, DIRECTOR, AND DEPUTY DIRECTOR

RE: Steps that the Hamilton County Board of Elections Must Take as Part of the Investigation of 849 Provisional Ballots as Ordered by Judge Dlott

This Directive provides specific steps that the Hamilton County Board of Elections ("the Board") is hereby directed to take in order to conduct the investigation ordered by Chief Judge Susan Dlott in Hunter v. Hamilton Cty Bd. of Elections, S.D. Ohio Case No. 1:10-cv-00820, on November 22, 2010. Judge Dlott's order includes the following language on page 8: "To prevent irreparable harm to Plaintiff, Defendant is hereby ordered to examine all 849 faulty provisional ballots for poll worker error and, if such error is found, count the ballot as part of the mandatory recount." Moreover, Judge Dlott ordered the Board to begin its investigation "immediately." Id. at 9.

Examining the quoted language, the Board's investigation ordered by Judge Dlott has two components: 1) examining the 849 provisional ballots cast in the incorrect precinct to determine whether they were cast in the incorrect precinct due to poll worker error; and 2) if poll worker error is found to be the cause of the provisional ballot being cast in the incorrect precinct to count the ballot. As I explained in Directive 2010-80, page 2, the scope of Judge Dlott's order is not limited to provisional ballots cast by persons using the last four digits of their Social Security number only. Additionally, Judge Dlott's order is not limited to provisional ballots cast in the wrong precinct but correct polling location, (or in the terms used by the Board, the correct polling location but wrong table), but to the existence of poll worker error in general regarding the casting of provisional ballots.

Although I previously provided specific guidance to the Board in the form of Directives 2010-79 and 2010-80 and Advisory 2010-08, to aid the Board in conducting the investigation and in determining whether poll worker error occurred, the Board has been unable to reach consensus on all the specific steps to be taken to complete the investigation ordered by Judge Dlott. According to Director Sally J. Krisel, there are currently six tie votes that occurred at the Board's December 9 and 11 meetings related to this investigation. The disagreement by the Board regarding the specific steps to take as part of the investigation calls into question whether the Board is complying with Judge Dlott's order to begin its investigation "immediately."

Under R.C. 3501.11(X), the Board must submit tie votes to the Secretary of State “not later than fourteen days after the tie vote or disagreement." The 14th day after December 9 is December 23,

1In an e-mail dated December 15, 2010, Director Krisel informed my office that the Board has issued subpoenas to approximately 215 poll workers to appear and give testimony on December 16 and 17, 2010, but bad weather has apparently hampered the ability of these poll workers to appear pursuant to the subpoenas.
and the fourteenth day after December 11 is December 25. Both of those dates fall in the middle of the Christmas holiday season when many people take time off work to spend with their families. Moreover, the Hamilton County Juvenile Court judgeship at issue has a term commencing date of January 1, 2011. If the Board does not submit its arguments to my office until the last possible date, then the investigation ordered by Judge Dlott may not be completed until after the commencing date for the new Juvenile Court judge’s term. That is an unacceptable course of action. The citizens of Hamilton County in general and, specifically, the juveniles who are incarcerated and awaiting court hearings and the victims involved, should not have their legal proceedings delayed because the Board cannot proceed with an orderly investigation or with an investigation that is unhampered by tie votes at every procedural juncture.

Elections officials perform best when they focus on process and not outcome. Process in this instance includes speed, and the purpose of this directive is to foster a thorough but expeditious investigation of the matter, bringing it to closure timely with the commencement of the new judicial term. It is important for the public in Hamilton County that a judge be in place for the start of the new term, January 1, 2011, who is able to begin the duties of office according to an accurate and transparent vote count that comports with legal requirements. In this instance, those legal requirements include Judge Dlott’s Order, the statutes of Ohio and the directives of the Secretary of State.

At the Board’s December 9, 2010 meeting, Board Chair Alex Triantafilou stated on the record that there was no reason to expedite the Board’s tie vote submission: “The law says we have 14 days. I think it would be partisan for us to decide to move this along because the Secretary of State might be of one party or another.”2 While Board Chair Triantafilou believes that expediting the submission of the tie votes to the Secretary of State would amount to partisanship, so does the metaphorical dragging of feet to resolve this matter. Using process to affect outcome based on matters external to the election involved (change of state administrations) shakes the confidence of voters in a free, fair, open and honest election process. Moreover, the affective “fallout” is not just for the voters and the candidates, but also for the juvenile accused, the victims and the families involved. What is critical here has nothing to do with the impending change of Secretary of State Administration on January 10, 2011; the critical issue is that delay, obfuscation and obstructionism denies the citizens of Hamilton County the benefit of having a new Juvenile Court judge in place on January 1, 2011, creating attendant problems with court administration. The judiciary is not a place where politics should hold sway, especially when it comes to matters affecting juveniles and their families.

Therefore, consistent with my authority under R.C. 3501.05(B) and (C) to issue instructions by directives for the proper method of conducting elections, the Board is hereby directed to take the following steps to complete its investigation ordered by Judge Dlott and in the time frame listed below:

1) As provided in Directive 2010-80 and Advisory 2010-08, identify all poll workers in the precincts in which the 849 provisional ballots at issue were cast, and issue a subpoena to each of them to give testimony. The subpoenas must be issued no later than the close of business on December 20, 2010 to any poll worker not previously subpoenaed. The interviews of poll workers subpoenaed must be completed no later than December 23, 2010.

2 Transcript of the Board’s December 9, 2010 meeting at 56.
Directive 2010-87 Hamilton County Investigation of Provisional Ballots

2) As provided in Advisory 2010-08, the Board must issue questionnaires by mail and/or e-mail no later than close of business on December 20, 2010, to all the poll workers who served in the precincts in which the 849 provisional ballots at issue were cast who have not yet appeared in-person to give testimony. The questions asked in the questionnaire should be the same questions that the Board asked poll workers during the in-person interviews on December 16 and 17. The poll workers must be given two (2) calendar days to complete and e-mail or post mark their response to the questionnaire to avoid having to appear to give testimony as provided in the subpoenas.

3) As provided in Advisory 2010-08, the Board must review all documents from the precincts in which the 849 provisional ballots at issue were cast to determine whether there are any indications of poll worker error. This review must be completed no later than December 27, 2010.

4) The Board must schedule a board meeting no later than December 28, 2010 to review the results of the interviews with poll workers, the questionnaires returned by poll workers, and the documents from the identified precincts and to determine whether there is evidence that poll worker error caused any of the 849 provisional ballots at issue to be cast in the wrong precinct.

5) Any of the 849 provisional ballots for which there is evidence that poll worker error caused the voter to cast the ballot in the wrong precinct shall be counted as provided in Judge Dlott's order.

6) Any additional tie votes of the Board that arise regarding the investigation ordered by Judge Dlott and pursuant to the directives issued in regard to this matter must be submitted to the Secretary of State, along with supporting arguments or statements, within 48 hours of the tie vote in order to permit this matter to be resolved for the Juvenile Court Judge determined to be elected to timely take office.

7) Any and all currently unresolved tie votes of the Board must be submitted to the Secretary of State, along with supporting arguments or statements by electronic delivery no later than the close of business on December 21, 2010. If the members of the board believe any such tie votes are moot as a result of this Directive they may so state with their submission.

8) Alternatively, the Board may meet on December 21, 2010 and revote any currently unresolved tie votes to resolve according to the procedures provided in this and previous directives regarding this judicial election.

If you have questions about this Directive, please contact Elections Attorney Oyango Snell or General Counsel Brian Shinn at 614-466-2585.

Sincerely,

[Signature]

Jennifer Brunner
DIRECTIVE 2011-02  Issued Pursuant to Court Order
January 7, 2011

To:       Hamilton County Board of Elections Members, Director, and Deputy Director

Re:       Directive Issued Pursuant to Court Order—Rescinding Directives 2010-80 and 2010-87


In compliance with that decision, I hereby rescind Directives 2010-80 and 2010-87.

Sincerely,

Jennifer Brunner
DIRECTIVE 2011-03

January 7, 2011

To: The Hamilton County Board of Elections

Re: “Wrong Precinct, but Correct Polling Place” Provisional Ballots

This Directive is being issued in furtherance of my vote in the Tie Vote Decision Letter of January 7, 2011, a copy of which is included with this Directive and incorporated herein by reference as if fully restated herein. The explanation and rationale expressed in that tie vote support the instructions issued to the Hamilton County Board of Elections contained in this Directive.

I hereby direct the Hamilton County Board of Elections to process and count the following "wrong precinct, but correct polling place" provisional ballots referenced in the tie vote decision issued January 7, 2011, regarding the 268 remaining provisional ballots at issue, as follows:

- Provisional ballots that were cast in the wrong precinct, but correct polling place, in situations in which the voters' addresses were located on the wrong side of a boundary street of the precinct in which the voter should have cast a ballot, which were approximately 31% of the 269 provisional ballots in question;
- Provisional ballots that were cast in the wrong precinct, but correct polling place, in situations in which the voters' addresses were located outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot, which were approximately 15% of the 269 provisional ballots in question;
- Provisional ballots that were cast in the wrong precinct, but correct polling place, in situations in which the voters' addresses were located on streets that pass through the precinct in which the voter voted, but the addresses did not fall within the correct address range of the precinct in which the voter should have cast a ballot, which were approximately 10% of the 269 provisional ballots in question.1

Following the processing and counting of said ballots, the Board must proceed to certify the results of the election and take any further steps necessary under the law to bring this matter to finality. If you have any questions about this directive, you may contact the elections attorney assigned to your board.

Sincerely,

Jennifer Brunner

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1 Position Statement of Board Members Burke and Faux, p. 43
January 7, 2011

Sally J. Krisel, Director
Hamilton County Board of Elections
824 Broadway, Room 100
Cincinnati, OH 45202

Re: Tie Votes of December 9 and December 28, 2010 Concerning Whether to Process and Count Wrong Precinct, Correct Polling Place Provisional Ballots

Dear Director Krisel:

The Hamilton County Board of Elections met on December 9, 2010 and December 28, 2010 and considered, among other things, a 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, and that all of those ballots be counted." Board Member Burke moved that the Board authorize the counting of ballots that were solely defective on the basis of being cast in the right location but wrong precinct. The motion was seconded by Board Member Faux and resulted in a tie vote of the Board with Board Members Burke and Faux voting in favor of the motion and Board Member Gerhardt and Chairperson Triantafillou voting against the motion.

In accordance with R.C. §3501.11(X), Directive 2010-87, and with the procedures outlined in the Ohio Election Officials Manual, the Hamilton County Board of Elections submitted the tie votes, including position statements of the board members and a transcript of the meetings, to me on December 21, 2010 regarding the Tie Vote of December 9, 2010 and on December 30, 2010 regarding the Tie Vote of December 28, 2010. My analysis and decision are outlined below.

Background

On November 1, 2010, my office issued Directives 2010-73 and 2010-74, which provide guidelines for determining the validity of provisional ballots. The official canvass of ballots from the November 2, 2010 General Election for Hamilton County Juvenile Court Judge declared Candidate John Williams ("Williams") winning the election against Candidate Tracie Hunter ("Hunter") by 23 votes. The Hamilton County Board of Elections rejected at least 849 provisional ballots cast in the November 2, 2010 General Election. Hunter filed a federal court action on November 21, 2010 seeking relief and requested the United States District Court for the Southern District of Ohio to require the Hamilton County Board of Elections to take action regarding certain provisional ballots. On November 22, 2010, Chief Judge Susan J. Diott held an

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1 The motion proposed by Board member Burke and seconded by Board member Faux during the Hamilton County Board of Elections meeting on December 28, 2010 is essentially the same motion that was proposed by Board member Burke and seconded by Board member Faux during the Hamilton County Board of Elections meeting on December 9, 2010. Thus, both Tie Votes are addressed in this decision.

2 Ballots cast that were fatally flawed for other reasons were not included in this motion and were rejected by the Hamilton County Board of Elections at the Board meeting held on December 28, 2010.

3 The 849 ballots in question are the focal point of a federal court order in Case No. 110-cv-00820, Hunter v. Hamilton County Board of Elections, et al.
emergency hearing resulting in an order requiring the Hamilton County Board of Elections to do the following:

- Investigate whether poll worker error contributed to the rejection of 849 provisional ballots that are at issue in a recount of the race for Hamilton County Juvenile Court Judge; and
- Include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots cast in the wrong precinct that the Hamilton County Board of Elections determines through its investigation were attributable to poll worker error.

Williams intervened in this matter and sought a stay of the District Court's order in the United States Sixth Circuit Court of Appeals. The Hamilton County Prosecuting Attorney filed a brief on behalf of the Hamilton County Board of Elections, and the Sixth Circuit Court of Appeals issued a temporary stay of the District Court's order, which the Sixth Circuit later dissolved on December 1, 2010.

On November 30, 2010, my office issued Directive 2010-79 to provide the Hamilton County Board of Elections with supplemental procedures for determining the validity of provisional ballots in response to issues concerning processing and counting provisional ballots. In light of the federal court order issued by Judge Dlott, on December 9, 2010, my office issued Directive 2010-80 to provide the Board with supplemental procedures regarding the 849 provisional ballots subject to the federal court order in the Hunter case. On December 14, 2010, my office issued Advisory 2010-08 to provide the Board with specific guidance for conducting an investigation regarding potential poll worker error and in furtherance of the requirements of the federal court order in the Hunter case. After learning about various issues concerning investigatory procedures of poll workers and voters, my office issued Directive 2010-87 to provide the Board with specific steps that the Board must take to comply with Judge Dlott's order in the Hunter case.

The Board proceeded to conduct an investigation, and the record of this matter shows the Board's investigation to have been extensive and comprehensive. As part of that investigation, the Board elicited sworn testimony from more than 75 poll workers and reviewed written questionnaires from approximately 830 poll workers.

The Board met on December 9 and 28, 2010 to consider the validity of those provisional ballots that were cast in the wrong precinct, but correct polling location. The Board reached a tie vote twice on a motion to process and count the "wrong precinct, but correct polling location" ballots.

**Discussion**

**Tie Votes on "Wrong Precinct, but Correct Polling Place" Ballots**

The two tie votes presented by the Hamilton County Board of Elections concern whether the Board should proceed to authorize and count the ballots (a total of 269 ballots) that are defective only to the extent that they were cast in the wrong precinct, but correct polling place.

Board Member Faux conducted an analysis of these "wrong precinct, but correct polling place" ballots. Member Faux presented the following information to the Board:

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4 That directive has been rescinded today pursuant to an order of the Ohio Supreme Court.
5 That directive has been rescinded today pursuant to an order of the Ohio Supreme Court.
31% of the ballots were cast in the wrong precinct, but correct polling place in situations in which the voters’ addresses were located on the wrong side of a boundary street of the precinct in which the voter cast a ballot;  
15% of the ballots were cast in the wrong precinct, but correct polling place, in situations in which the voters’ addresses were located outside of the address range of a boundary street of the precinct;  
10% of the ballots were cast in the wrong precinct, but correct polling place, in situations in which the voters’ addresses were located on streets that pass through the precinct in which the voter voted, but the addresses did not fall within the correct address range.  

The above percentages account for 51% of the 269 ballots that were cast in wrong precinct, but correct polling place. In any evidentiary matter, such as the hearing of the board or a trial before a court, direct and circumstantial evidence hold the same weight. Voting as a fifth member of the Hamilton County Board of Elections in order to break the tie, I recognize that the evidence before the board regarding these 51% of the 269 provisional ballots is circumstantial evidence, but it is of such weight that it cannot be ignored. Accordingly, these ballots should be counted.

In their position paper, Board Members Burke and Faux argue that poll workers had difficulty using the address materials that enabled them to direct a voter to the correct precinct table upon the voter’s arrival to the polling location. The poll workers were provided with three address-finders. They note that the county-wide address directory was assembled incorrectly, causing the poll worker "** to have to spin the book around each time they go to the next page (because the next page is upside down from its prior succeeding page) **" and making it easy for a poll worker to make a mistake in matching an address to a precinct.

Board Members Burke and Faux also note that, when questioned, poll workers stated that "** when they handed the provisional ballot in a provisional envelope to a voter, it was an acknowledgment that the poll worker had concluded that the voter would be voting in the right place, unless they specifically told them otherwise." There was no evidence presented to the Board indicating that a wrong precinct, but correct polling place voter, having been informed of the fact that he or she was at the wrong precinct table, refused to walk to the correct precinct table to cast his/her ballot. Consequently, there was no evidence presented that a wrong precinct, but correct polling place voter knowingly and purposefully cast a ballot in the wrong precinct.

For these and the reasons stated in summary of the Board’s thorough and extensive investigation as set forth in members Burke and Faux’s statement in support of their votes on the motion, there is sufficient circumstantial evidence of such weight as to support the conclusion that 51% of the “wrong precinct, but correct polling place ballots” were cast due to poll worker error, and I concluded that 51% of these ballots were cast due to poll worker error and should be counted.

For the remainder of the 269 “wrong precinct, but correct polling place ballots” (i.e., those not included in the 51% outlined above), there is no evidence, either circumstantial or direct, indicating that poll worker error is the cause for ballots voted in the right polling location but wrong precinct. Absent sufficient evidence of poll worker error, those ballots may not be counted. In the absence of such evidence, the ballots cannot be counted.

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6 Position Statement of Board Members Burke and Faux, p. 4.  
7 Position Statement of Board Members Burke and Faux, p. 2.  
8 Position Statement of Board Members Burke and Faux, pp. 2-3.  
9 Position Statement of Board Members Burke and Faux, p. 4.  
10 Position Statement of Board Members Burke and Faux, p. 4.
Discussion

Tie Vote on Ballot with Misspelling

At the December 28th meeting, a separate tie vote occurred on a motion to count one ballot. The ballot is a "wrong precinct, but correct polling place" ballot where the voter misspelled his street name. The record submitted with the tie vote materials fails to establish that this ballot falls within the 51% of ballots cast due to poll worker error. Consequently, I am unable to determine whether this ballot may be counted due to evidence of poll worker error.

Decision

For the foregoing reasons, 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, and that all of those ballots be counted. Accordingly, the motion fails.

As to the tie vote on the ballot with the misspelling, I vote with Board Members Triantafilou and Gerhardt against the motion to count ballot P10502-Springfield O-line 847. Accordingly, the motion fails.

Sincerely,

Jennifer Brunner
DIRECTIVE 2011-04
January 10, 2011

To: The Hamilton County Board of Elections


This Directive is issued in light of the Ohio Supreme Court’s decision rendered on Friday, January 7, 2011, in State ex rel. Painter et al. v. Brunner. Based on that decision, Directive 2011-03 is hereby superseded.

According to the Court, “only ballots cast in the correct precinct may be counted as valid.” The Court further concluded that “[t]heir statutes do not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted.”

The Court specifically rejected any review based on the investigation conducted by the Hamilton County Board as ordered by the former Secretary of State:

Insofar as two of the board members appear to presume poll-worker error in connection with the 269 provisional ballots cast in the wrong precinct but correct location in a multi-precinct polling place, this is incorrect. Neither they nor respondents could rely on the evidence obtained from the improper investigation ordered by the secretary of state and conducted by the board.

The Court has ordered the Hamilton County Board of Elections to rescind its decisions made pursuant to Directives 2010-80 and 2010-87 and instead to review the 850 provisional ballots that are the subject of Judge Dlott’s order and are not subject to the consent decree, “with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16.”

At its November 16, 2010 meeting, the board investigated the validity of the provisional ballots in question. The investigation was generally limited to an examination of election records, poll books, help-line records, and provisional ballot envelopes. The board thereafter unanimously determined that 850 of the provisional ballots were invalid because they had been cast in the wrong precinct and thus should not be counted.

Accordingly, the board must determine now, as it did on November 16, 2010, based solely on its examination of election records, poll books, help-line records, and provisional-ballot envelopes (i.e., the same evidence the board considered at its November 16, 2010, meeting) that the 850 ballots cast in the wrong precinct are, according to Ohio statutes, invalid and shall not be counted. The Hamilton County Board of Elections is further directed to certify the results of the election and take all additional steps necessary under the law to bring this matter to finality.

Sincerely,

Jon Husted

1 Because one voter cast two provisional ballots in the wrong precinct, any prior reference by the board or elections, courts, or secretary of state to 849 disputed provisional ballots are mistaken. Accordingly, the directive will refer to the number of disputed provisional ballots as 850.
Directive 2011-05
January 12, 2011

To: The Hamilton County Board of Elections

Re: Directive 2011-04 and the Mandatory Recount for Hamilton County Juvenile Court Judge

On Monday, January 10, 2011, this office issued Directive 2011-04, which superseded Directive 2011-03 to ensure that the Hamilton County Board of Elections complied with the Supreme Court’s decision in State ex rel. Painter et al v Brunner.

This Directive expands on Directive 2011-04 and orders the board to complete as quickly as possible, its canvass of the votes cast for Hamilton County Juvenile Court Judge on November 2, 2010. The board should do so by amending its certification, as described below, in advance of the January 22, 2011 deadline for concluding the canvass. The Directive is further written to direct the board to review, during its recount, the provisional ballots that were the subject of the 2011-04 directive in a manner that is consistent with both the Ohio Supreme Court’s Order in Painter and the board’s obligations under Judge Dlott’s order of November 22, 2010, as well as Directive 2010-78.

On November 23, 2010, the Hamilton County Board of Elections certified the election results for the race for Juvenile Court Judge. That race will be subject to a mandatory recount because the margin of victory is less than one half of one percent of the total vote. O.R.C. § 3515.011

As part of the mandatory recount, the board should examine the provisional ballots that are the subject of Judge Dlott’s order and are not subject to the consent decree in Northeast Ohio Coalition for the Homeless, consistent with the Ohio Supreme Court’s January 7, 2011 in Painter by examining only the poll books, help-line records, and provisional-ballot envelopes.

In addition, during the recount, the board should examine those provisional ballots that are subject to the consent decree in Northeast Ohio Coalition for the Homeless, in accordance with the requirements of Directives 2010-74 and 2010-79, which, as the Ohio Supreme Court correctly pointed out in Painter, are limited to the situation in which provisional ballots are cast by voters who used only the last four digits of his or her Social Security number as identification.

Finally, the Ohio Supreme Court instructed the Secretary of State to rescind Directives 2010-80 and 2010-87 (an order implemented by Secretary of State Jennifer Brunner via Directive 2011-02) and ordered the board to rescind its decisions arrived at in reliance on these directives. Because the board, due to non-poll worker error, erroneously grouped 9 “correct precinct”
provisional ballots with the 850 "wrong precinct" ballots (and, therefore, invalidated those 9 ballots at the board's November 16, 2010 meeting), those ballots should be counted. The board's unanimous vote at the December 28, 2010, meeting to count those provisional ballots did not rely on those directives, thus, the board should not rescind that decision. Instead, the Board should amend its certification to include those 9 votes.

Sincerely,

[Signature]

Jon Husted
January 15, 2010

Sally J. Krisel, Director
Hamilton County Board of Elections
824 Broadway, Room 100
Cincinnati, OH 45202

Re: Tie Vote of January 14
Concerning Whether to Appeal January 12 Federal Court Order in
Case No. 1:10-cv-00820, Hunter v. Hamilton County Board of Elections, et al.

Dear Director Krisel:

The Hamilton County Board of Elections held a special meeting on January 14, 2011 and considered a motion to appeal the January 12, 2011 federal district court order in Case No. 1:10-cv-00820, Hunter v. Hamilton County Board of Elections, et al. Temporary Chairman Gerhardt made a motion to appeal the order. The motion was seconded by Mr. Triantafilou and resulted in a tie vote of the board with Temporary Chairman Gerhardt and Mr. Triantafilou voting in favor of the motion and board members Burke and Faux voting against the motion. In accordance with R.C. §3501.11(X), the procedures outlined in the Ohio Election Officials Manual, and Directive 2011-06, the Hamilton County Board of Elections submitted the tie vote to me on January 15, 2011 including position statements of the board members and a transcript of the meeting. My analysis and decision are outlined below.

Background

The official canvass of ballots voted in the November 2, 2010 General Election for Hamilton County Juvenile Court Judge declared Candidate John Williams ("Williams") the winning candidate against Candidate Tracie Hunter ("Hunter") by a margin of 23 votes. In certifying the vote on this race, the Hamilton County Board of Elections rejected at least 849 provisional ballots cast in the November 2, 2010 General Election. Candidate Hunter filed a federal court action on November 21, 2010, seeking relief and requesting the United States District Court for the Southern District of Ohio to require the Hamilton County Board of Elections to take action regarding certain provisional ballots.

On November 22, 2010, the federal district court issued a preliminary injunction requiring the Hamilton County Board of Elections to do the following:

- Investigate whether poll worker error contributed to the rejection of 849 provisional ballots that are at issue in a recount of the race for Hamilton County Juvenile Court Judge; and
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January 15, 2011
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- Include in the recount any provisional ballots cast in the wrong precinct that the Hamilton County Board of Elections determines through its investigation were attributable to poll worker error.

On November 23, 2010, the Hamilton County Board of Elections unanimously voted to certify the election results for the race for Juvenile Court Judge. That race will be subject to a mandatory recount because the margin of victory is less than one half of one percent of the total vote. Ohio Revised Code 3515.011.

On December 20, 2010 Williams filed a complaint in mandamus with the Ohio Supreme Court and on January 7, 2011, the Ohio Supreme Court issued a decision. See State ex rel. Painter v. Brunner, Slip Opinion No. 2011-Ohio-35. The Ohio Supreme Court held that under Ohio law only ballots cast in the correct precinct may be counted as valid as the plain language of several statutes provides. The Ohio Supreme Court wrote: "These statues do not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted."

The Ohio Supreme Court specifically rejected any review based on the improper investigation conducted by the board as ordered by the former Secretary of State. The Ohio Supreme Court wrote: "Insofar as two of the board members appear to presume poll-worker error in connection with the 269 provisional ballots cast in the wrong precinct but correct location in a multi-precinct polling place, this is incorrect. Neither they nor respondents could rely on the evidence obtained from the improper investigation ordered by the secretary of state and conducted by the board." The Ohio Supreme Court ordered the board of elections to do the following:

- Rescind its decisions made pursuant to Directives 2010-80 and 2010-87; and

- Review the 850[1] provisional ballots that are the subject of the Federal District Court’s November 22, 2010 order and are not subject to the consent decree. “with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16.”

Subsequently, the Secretary issued two Directives – Directive 2011-04 and Directive 2011-05. Directive 2011-04 implemented the language of the Ohio Supreme Court decision. Directive 2011-05 expanded on Directive 2011-04 and ordered the board to complete its canvass of the votes cast for Hamilton County Juvenile Court Judge on November 2, 2010, count the 9 provisional ballots that were issued in the correct precinct and amend its certification.

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[1] Because one voter cast two provisional ballots in the wrong precinct, any prior reference by the board or elections, courts, or secretary of state to 849 disputed provisional ballots are mistaken. Accordingly, the directive will refer to the number of disputed provisional ballots as 850.
Accordingly, Directive 2011-05 further ordered the Hamilton County Board of Elections, as part of the mandatory recount, to do the following:

- Review the provisional ballots that were the subject of the 2011-04 directive in a manner that is consistent with both the Ohio Supreme Court’s Order in Painter and the board’s obligations under Judge Dlott’s order of November 22, 2010, as well as Directive 2010-78;

- Examine the provisional ballots that are the subject of Judge Dlott’s order and are not subject to the consent decree in Northeast Ohio Coalition for the Homeless, consistent with the Ohio Supreme Court’s January 7, 2011 decision in Painter by examining only the poll books, help-line records, and provisional-ballot envelopes; and

- Examine those provisional ballots that are subject to the consent decree in Northeast Ohio Coalition for the Homeless, in accordance with the requirements of Directives 2010-74 and 2010-79, which, as the Ohio Supreme Court correctly pointed out in Painter, are limited to the situation in which provisional ballots are cast by voters who used only the last four digits of his or her Social Security number as identification.

On January 11, 2011 Plaintiffs filed a motion in federal district court to enforce the November 22, 2010 preliminary injunction. The next day, January 12, 2011, the Federal District Court issued a decision ordering the Hamilton County Board of Elections to do the following:

- Count the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker error in determining whether the street address was located inside the precinct
- Count the 7 ballots that were investigated, found to have been cast in the wrong precinct due to poll worker error, and unanimously voted upon at the Board’s December 28, 2010 meeting;
- Count the 9 ballots that were investigated, found to have been cast in the correct precinct but were rejected due to staff error, and unanimously voted upon at the Board’s December 28, 2010 meeting; and
- Investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree.

On January 12, 2011, the board voted unanimously to request an opinion of the Hamilton County Prosecuting Attorney. After receiving a legal opinion recommending an appeal, the Board held a special meeting on January 14, 2011 and considered a motion to appeal the January 12, 2011 federal district court order. The vote resulted in a tie, which is now before the secretary.
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Shortly after the meeting, the Plaintiffs in the Hunter case filed a motion for an order to show cause as to why the Hamilton County Board of Elections should not be held in contempt based on the federal district court’s January 12, 2011 order. In their motion, Plaintiffs wrote: “Given the need for board members to submit a written summary of their position to the Secretary of State who then can decide to appeal or not, it is likely that no appeal and no stay will be sought in the Sixth Circuit until well after January 22, 2011.”

Before the end of business on January 14, 2011, I issued Directive 2011-06 directing the board to submit any currently unresolved tie votes on motions made during its special meeting of Friday, January 14, 2011, along with supporting arguments or statements, to the secretary of state no later than 4:00 p.m. on Saturday, January 15, 2011. The tie vote was submitted before that deadline.

Discussion

The tie vote of the Hamilton County Board of Elections relates to whether the board should appeal the federal district court’s January 12, 2011 order that conflicts with the Ohio Supreme Court’s decision in State ex rel. Painter v. Brunner.

The position statement provided by board members Burke and Faux asserts that they are convinced that the Board of Elections ought not disenfranchise voters whose ballots were cast in the wrong precinct because of errors committed either by the full-time staff or the poll workers. Board members Burke and Faux further stated that they disagree with the Ohio Supreme Court’s decision and believe counting the votes consistent with the Ohio Supreme Court violates the equal protection clause and that the supremacy clause of the United States Constitution.

Board Members Burke and Faux also wrote: “When this issue was originally presented to the Board on November 16th, Mr. Faux and I voted to deny the validity of 849 or 850 (depending on how you count them) provisional ballots of wrong precinct voters because we recognized at the time that the law of the State of Ohio required us to do that. We did so under protest, as we have in virtually every election since this provision of the law came into being. As a result, we welcomed the lawsuit challenging the constitutionality of the law and its impact and, therefore, we opposed an initial appeal by the prosecutor and we oppose an appeal by the prosecutor now.”

The position statement provided by Mr. Triantafilou and board member Gerhardt describes the history leading up to the Painter and Hunter decisions. It also explains that on January 12, 2011, the board voted unanimously to request an opinion of the Hamilton County Prosecuting Attorney because the board “saw an obvious conflict between the Supreme Court of Ohio and the federal district court’s decision.” Counsel advised that the board is in a “precarious position: violate the order of the Supreme Court of Ohio or violate the order of the federal District Court.”

Chairman Triantafilou and board member Gerhardt stated that they voted to pursue an appeal of Judge Diott’s order in an effort to break the logjam that they believe exists and that the prosecuting attorney outlined in his opinion. They further stated that the only avenue for the board to avoid violating a court order is to pursue the appeal.
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There are currently inconsistent decisions from the Ohio Supreme Court and the federal district court. The United State’s Constitution leaves the conduct of state elections to the states. Warf v. Bd. Of Elections of Green Cty., Ky. (6th Cir., 2010), 619 F.3d 553, 559. In fact, the Help America Vote Act leaves to the states the determination of whether a provisional ballot will be counted as a valid ballot. Sandusky Cty. Democratic Party v. Blackwell (6th Cir. 2004), 387 F.3d 565.

As the Sixth Circuit Court of Appeals recognized, “To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count – under state law- would deprive state courts of their long-established role as the ‘final arbiter on matters of state law.’” Skaggs v. Brunner, 549 F.3d 468, 477, quoting Planned Parenthood of Cincinnati Region v. Strickland (6th Cir. 2008), 531 F.3d 406, 410.

The Ohio Supreme Court has ordered the Hamilton County Board of Elections to count provisional ballots consistent with Ohio law, and the federal district court issued a contrary decision. The law related to the review of provisional ballots must be clear. In this case, an appeal is the only way to ensure that the Hamilton County Board of Elections proceeds consistent with Ohio law.

**Decision**

For the foregoing reasons, I break the tie vote in favor of allowing the Hamilton County Board of Elections to appeal the Order issued by the federal district court on January 12, 2011 in Case No. 1:10-ev-00820, Hunter v. Hamilton County Board of Elections, et. al. Accordingly, the motion passes.

Sincerely,

[Signature]

Jon Husted