

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER, et al.,	:	Case No. 1:10-cv-820
	:	
Plaintiffs,	:	
	:	Chief Judge Susan J. Dlott
vs.	:	
	:	
HAMILTON COUNTY BOARD OF	:	<u>PLAINTIFF HUNTER’S POST-</u>
ELECTIONS, et al.	:	<u>TRIAL TRIAL BRIEF</u>
	:	
Defendants.	:	

Plaintiff Hunter’s Post-Trial Trial Brief addresses only new legal arguments that were not previously made in her Pre-Trial Trial Brief or other pleadings.

A. The Poll Worker Errors in This Case Are Not “Garden Variety”; They Are the Product of a System-Wide Failure to Supervise Poll Workers Who Process Wrong Precinct Ballots.

Federal jurisdiction should not be invoked to review elections in which only “garden variety” mistakes are present. *Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 553, 559 (6th Cir. 2010). The errors uncovered in this election however are *not* garden variety. A garden variety error is one that is “commonplace or ordinary.” MERRIAM WEBSTER DICTIONARY (on-line edition 2011). Garden variety errors reflect the ordinary collection of random errors expected when humans do a task. The errors in this case are systemic, not random. The errors in this case were caused by the Board policy of failing to adequately supervise poll workers with respect to wrong precinct ballots. The errors were predictable as they were present in previous elections. Without supervision, poll workers simply repeated their errors year after year.

Since 2006, the Board has routinely rejected between 7.6 % and 10% of the provisional ballots as cast in the wrong precinct. (PX 2017.) Defense expert Alfred Tuchfarber agreed that

if this same error rate were present in a single car model, General Motors would take steps to determine why there were so many errors in that model but not in its other models. Similarly, here, Dr. Tuchfarber agreed that the Board was on notice that there was an unacceptable level of wrong precinct provisional ballots in previous elections making it reasonable, he opined, to take steps to determine the source of those wrong precinct ballots:

Q. And going into the 2010 general election, the Board was aware that wrong precinct provisional voters was the largest single reason for rejecting provisional votes; right?

A. The Board would have known that that was true in 2006. You can't presume that in advance. That's what happened, but we -- what the Board was thinking before the election, I don't know.

Q. That would have been a predictor, though, of things to look for and problems to solve with respect to the 2010 election; right?

A. Correct.

Q. I mean, wrong precinct voters didn't surprise them in 2010; right?

A. Correct.

(TR (Gerhardstein/Tuchfarber) 10-110:8-21)

Q. So if you were the director of the Board of Elections, would you even explore the basis for this consistent 7.6 to 10 percent rejection rate of provisional ballots due to wrong precincts? Would you even explore it?

A. Of course I would.

Q. Okay. And that's because you would want to minimize it; right?

A. The goal is zero errors.

(TR (Gerhardstein/Tuchfarber) 10-115:12-19)

Q. And, in fact, the Secretary of State has actually required that certain categories of rejected provisional ballots be monitored by the Board; right?

A. I believe that's true.

(TR (Gerhardstein/Tuchfarber) 10-133:10-13)

Unfortunately, no organized effort to identify and correct these poll worker errors was ever pursued. In fact, the evidence shows that poll worker error accounts for the vast majority of these wrong precinct ballots. The errors largely fall into patterns, including the failure to determine the correct precinct when even addresses on a precinct border street fall into one precinct but odd addresses on the border street fall into another precinct; or the failure to determine the correct precinct when the voter's residential street passes through several precincts. (*See*, Doc. 182.)

Prior to the 2010 election, the Board did not test poll workers to determine their proficiency at determining the correct precinct for provisional voters. (TR (Krisel) 12-21-33.)¹ Nor did the Board members formally evaluate the presiding judges, provisional judges and poll workers. (TR (Krisel) 12-55-58; 12-89-90.) The Board had excellent training materials but no way to learn if the training took root. In 2010, the Secretary of State issued Directive 2010-55 to each county board to formally evaluate each poll worker. (DX 2044.) The Board approved an evaluation form and process to evaluate the poll workers in the November 2010 election. (DX 2044 pp. 4-6.) The Board did not implement that directive for the 2010 general election workers or any workers in the three subsequent elections held before this trial. (TR (Krisel) 12-55-58.) Any review of poll worker performance has been triggered by complaints. (TR (Krisel) 12-58.) There has been no comprehensive review of the reasons for wrong precinct ballots at polling locations with high wrong precinct provisional ballot rejection rates. (TR (Krisel) 12-100-104.) Gathering such data is simple. (TR (Tuchfarber) 10-136-140; PX 2020.) Defense expert Dr. Tuchfarber agreed that the error rates should have triggered a Board review:

Q. So wouldn't you agree, then, that if you just looked over the field of precincts and determined which ones had the most wrong precinct errors and wrong precinct ballots

¹ Ms. Krisel's testimony of poll worker training did not include any formal testing of the trainees.

were rejected that it would be a prudent supervisory tool to go and check out the work of those poll workers and make sure they didn't contribute to those high numbers? Right?

A. You would look at the whole situation in those precincts, not just the poll workers but everything that was going on with the voters and the poll workers.

Q. Including the poll workers?

A. Including the poll workers.

(TR (Gerhardstein/Tuchfarber) 10-135:14-24.)

Q. So wouldn't you agree that that's a technique for supervision that could, with scarce resources, allow the Board to target those polling locations that pose -- that generated the highest number of wrong precinct ballots?

A. It's the starting point.

(TR (Gerhardstein/Tuchfarber) 10-138: 21-25.)

Q. ...You'd agree that that's part of it, that you need to have consistent supervision over poll workers to make sure that they follow their training when they're determining the correct precinct for voters to use when they're casting provisional ballots; right?

A. Supervision's always important.

Q. Right. And if, in fact, the evidence shows that there was no supervision on that issue, that's a problem; right?

A. By definition, there is supervision. There's a presiding judge and there's a deputy presiding judge. There is super-vision.

Q. And if, in fact, the evidence shows that the presiding judge is the one who routinely screws up, that's a problem; right?

A. That's a problem.

(TR (Gerhardstein/Tuchfarber) 10-151:10-24.)

But investigating the locations with high rejections rates was not routinely done. Errors that are repeated due to a custom or policy of failing to review the errors made in previous elections are systemic in nature and therefore subject to a systemic correction. These are not garden variety errors that must be tolerated in every election. These are foreseeable and

preventable errors. Therefore, for these reasons, in addition to Plaintiff Hunter's Pre-Trial Brief's arguments, the errors revealed in this case are not "garden variety" and are instead systemic. Thus, Due Process principles apply.

B. Plaintiffs Have Established the "Greater Inference" Required to Count the 295 Ballots Cast in the Right Location But Wrong Precinct as Well As All of the Other Ballots Cast in the Wrong Precinct.

The Sixth Circuit remanded the case to this Court, in part, to determine whether all 269 right location, wrong precinct ballots should be counted. *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 247 (6th Cir. 2011), *reh'g and reh'g en banc denied* (March 29, 2011), *motion to stay denied* 121 S.Ct. 2149 (2011). At trial 134 or 50% of these ballots were addressed with particularized evidence from either a poll worker or voter. (Doc. 182-1 Table A; Table N attached to Plaintiff's Post-Trial Findings of Fact.) This large sample reveals that voters who cast a ballot in the right location but at the wrong precinct in that location were led to that action by poll worker error. Plaintiffs have met the burden described by the Sixth Circuit of producing evidence to satisfy the "greater inference to conclude that the miscast ballot was a result of poll-worker error." *Hunter*, 635 F.3d at 237. All 269 right location, wrong precinct ballots should be counted. This inference is satisfied by examining the repeat poll worker error patterns shared among these miscast ballots and by examining the fact that these errors were the result of a failure by the Board through the years to supervise the poll workers with respect to errors resulting in wrong precinct ballots.

1. A Pattern of Identical Errors Repeated by Poll Workers Supports the Inference That Ballots Fitting the Pattern Were Miscast Due to Poll Worker Error.

All of the poll workers who testified agreed that they were trained to verify that the voter was a current resident of the precinct before handing the voter a provisional ballot in order to

vote in the precinct. (JX 6; JX 7; DX 1004; DX 1053; Table P (evidence of poll worker training testimony.) In many instances poll workers have admitted mistakes. That is, they have admitted errors that resulted in voters casting ballots in the wrong precinct. (See Plaintiff's Post-trial Findings of Facts.) This direct evidence through poll worker admissions supports a finding that poll worker error caused all 690 ballots to be cast in the wrong precinct. (Doc. 182-1 p. 2 (Table A).) Defendants have failed to offer any evidence with respect to these ballots, therefore any argument that the ballot was cast in the wrong precinct due to voter error is purely speculative.

The Board itself voted to count ballots that were miscast where the poll workers admitted mistakes that resulted in a miscast ballot. (JX 28 p. 42-45.) Many poll workers also admitted to other instances when they failed to follow their training with respect to the correct procedure for handling provisional voters. That is they indicated that they did not sign the provisional ballot envelope (Table G), they did not personally verify that the voter resided in the precinct or relied on others to verify residency (Table L); they failed to accurately use the street guide, particularly with respect to even/odd addresses and pass through streets (Tables D, M); they failed to advise voters that the provisional ballot would not count if cast in a precinct where the voter did not reside (Table H); and they incorrectly suggested to voters that wrong precinct ballots could be cured by contacting the Board.² The poll workers repeatedly testified that it was reasonable for voters to follow their determinations as to the precinct in which they should vote. No poll worker testified that a voter insisted on voting in the wrong precinct if the voter was directed to the correct precinct in the same location.

At least two of the four board members voted to find poll worker error with respect to ballots cast in the right location but in the wrong precinct. (JX 27 p. 74-89.) The defense

² TR (Kennedy) 9-34-37, 43, 48-50, 53); TR (Shivers) 8-221; TR (Yates) 8-97; TR (Lovette) 9-244-245; TR (Rouse) 4-27-28, 36; TR (Thompson) 9-130; TR (Lynem) 3-121.

regularly established that the poll worker witnesses had no present recollection of most voters. However, the poll workers clearly remembered their training and their standard way of fulfilling their duties, and they regularly testified that the way they handled provisional voters on Election Day was consistent with their standard practice as poll workers. Many of those standard practices included actions that violated their training with respect to provisional votes.

An inference is a deduction the fact finder may draw but is not required to draw as a matter of law. *Cold Metal Process Co. v. McLouth Steel Corp.*, 126 F.2d 185 (6th Cir. 1942) (“An inference is but a reasonable deduction and conclusion from proven facts.”) Inferences deduced from facts are hardly extraordinary; indeed, the law “depends upon” courts drawing inferences from which justifiable conclusions can be drawn. *Lee v. State Farm Mut. Auto Ins. Co.*, 249 F.R.D. 662, 669 (D. Colo. 2008). As the United States Supreme Court recognized long ago, “[i]nferences from circumstantial facts may frequently amount to full proof of a given theory, and may even be strong enough to overcome the force and effect of direct testimony to the contrary...[.]” *The Wenona*, 86 U.S. 41, 58 (1873).

In this case the Sixth Circuit held that this Court correctly compared the error committed when Board staff handed the wrong precinct ballot to a voter at the Board office to the error committed when a poll worker employed by the Board handed the wrong precinct ballot to a voter at a polling location where the voter did not reside. *Hunter*, 635 F.3d at 237-238. The Sixth Circuit noted, however, that because of additional potential factors, determining whether poll worker error actually caused a voter to cast a ballot in a precinct where she did not reside may require a “greater inference” when that poll worker was at a polling place. *Hunter*, 635 F.3d at 237. As set out above, the plaintiff has met the burden of providing sufficient evidence to support that “greater inference” by presenting 50 poll workers who each revealed one or more

errors in their handling of provisional voters at the polls. (Doc 182-1 p. 62 Table I.) Further, the defense was unable to respond with any evidence for any ballot listed on the table that the voter failed to follow the determination as to her correct precinct made by the poll workers. Further, the plaintiff presented 15 voters who all testified that they voted where they were told to vote by the poll worker, they were not told their vote would be rejected if they voted in that precinct, and that if they had been told to go elsewhere they would have done so.³ Thus, the evidence shows that the voters reasonably relied on the determinations of the poll workers regarding the correct precinct and their ballots were thus miscast due to poll worker error and not voter error.

This “greater inference” with respect to the right location wrong precinct ballots was confirmed by Defense expert Dr. Alfred Tuchfarber:

Q. So we've studied these 269 ballots, and based on that, I want to ask you to make the following assumption. 53 of the wrong precinct ballots were on even/odd streets. Okay?

A. Okay.

Q. And 48 of those wrong precinct ballots were on pass-through streets. Okay?

A. Okay.

Q. And we've talked about this before, but both in the November transcripts that you saw and certainly in this court we've seen evidence of poll workers who have testified having difficulty dealing with this even/odd and pass-through street problem; right?

A. Yes.

Q. So wouldn't you agree that it's reasonable to infer, given the large number of wrong precinct ballots that have these same problems, that the problem of correctly determining precincts for voters on even/odd streets or pass-through streets extended beyond the ballots that were actually individually litigated in court?

A. At both single-precinct polling places and in multiples?

³ TR (Joiner) 6-29-40; TR (Turk) 11-99-110; TR (Schlueter) 10-179-187; TR (Kissling) 8-44-51; TR (Ornelas) 5-141-150; TR (Jewell Jones) 11-120-128; TR (Miller Jones) 11-110-120; TR (Cerrice John) 3-206-212; TR (Burton) 3-212-221; TR (Nestheide) 9-257-265; TR (Johnson) 8-44-53; TR (Chapman) 3-198-206; TR (Howard) 7-8-17; TR (Hill) 7-17-27; TR (Walker) 6-40-50.

Q. Yes.

A. Yes.

(TR (Gerhardstein/Tuchfarber) 10-148:20-149:16.)

Inferences based on sampling are an accepted method of proof where multiple similar problems are at issue before the Court. See, e.g., *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463-64 (D. Haw. 1995) *aff'd sub nom. Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)(evidence of 137 claimants against Marcos estate supported findings with respect to other victims of state violence); *Republic Services, Inc. v. Liberty Mut. Ins. Co.*, 2006 WL 2844122 (E.D. Ky. Oct. 2, 2006)(Court approved the use of inference, agreed to review 745 claims as a basis for findings regarding 7,740 similarly situated claims). Of course in this case the Defendants had ample opportunity to present any evidence that would contradict the inference and have failed to produce such evidence.

2. A Custom of Failing to Supervise Poll Workers Caused the Wrong Precinct Errors and Also Supports the Inference That the Ballots Were Miscast Due to Poll Worker Error.

The problem of right location wrong precinct ballots was well known to the Board before the November 2010 election. As set out above, the Board failed to take any steps to identify those poll workers who consistently erred in determining the correct precinct for provisional voters. Nor did the Board supervise the poll workers in a manner that would assure compliance with the provisional voter requirements set out in the comprehensive manual and quick guide. For example, the Board failed to supervise poll workers assisting provisional voters to ensure that they personally looked up the current address to determine residency in the precinct. Instead the evidence shows that poll workers processing the provisional voters repeatedly relied on other poll workers to determine precinct fit even though they were the subscribing poll worker

attesting to compliance. (Doc. 182-1 p. 48 Table F.) Nor did the Board supervise the staff in a manner that would determine the individual poll workers responsible for errors with even/odd and pass through addresses. Nor did the Board uncover the failure of poll workers to warn voters that they were in the wrong precinct and/or that their vote would not count. Nor did the Board uncover the fact that poll workers mistakenly claimed that voters could correct wrong precinct mistakes by contacting the Board.

Simple steps to improve supervision could have been implemented, but were not. The performance of the poll workers was not evaluated. The performance of the provisional judges was not evaluated. The performance of the presiding judges was not evaluated. None of the poll workers in precincts with high numbers of wrong precinct provisional votes were contacted to discuss the causes of the miscast votes. As a result, blatant errors of law by presiding judges such as Derrick Moore (TR (Moore) 2-229-247) have persisted unnecessarily for many years.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court made it clear that a policy of inadequate training and supervision could support liability in a §1983 case. This is true even though the policy itself is not unconstitutional. In that case police shift commanders had complete discretion to make decisions on whether prisoners needed medical care but those commanders were provided with no training or guidelines with which to make those judgments. The Court held that, “the inadequacy of a training policy may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *Id.* at 388. The Court explained:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [Footnotes omitted]

Id. at 390. In this context deliberate indifference does not imply any level of culpability as in Eighth Amendment cases. Rather it is a term employed to identify those failures that make the failure to train or supervise a moving force behind the constitutional violation. *Id.* at 388. The Court, in *Canton*, identified two methods of proof under this theory. First, a plaintiff can show a failure to train government workers in a specific area where there is an obvious need for training in order to avoid violations of citizen's constitutional rights. Second, liability can be established, "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion, ... [which pattern] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements." *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

This theory was recently approved in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). In that case a plaintiff wrongfully convicted of armed robbery due to a *Brady* violation. The Court held that a single incident was insufficient to establish the necessary pattern of similar constitutional violations needed to support liability on a failure to train theory.

Where a failure to train causes government workers to act in a manner that violates the rights of citizens, Courts have regularly held those governments liable under §1983. See *Hagans v. Franklin County Sheriff's Office*, No. 2:08-cv-850, 2011 WL 2173696, at *11 (S.D. Ohio June 2, 2011) (taser training); *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006) (exculpatory evidence training); *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (Dlott, J.)(training on risk of "agitated delirium with restraint"); *Abdi v. Karnes*, 556 F.Supp. 2d 804 (S.D. Ohio 2008) (training on arrest of mentally ill suspects.)

Applying these principles to the instant case there is liability for failing to supervise under both theories. First, the evidence shows that several persons appointed as presiding judges and provisional judges did not follow the instructions in the comprehensive and quick guides for processing provisional voters. As a result, voters reasonably relied on their instructions and were misled into casting ballots in the wrong precinct as a result. These errors were not discussed or reviewed with these precinct officials and thus these same officials became repeat offenders. These repeat offenders were not tested as to their compliance with training and they needed but did not receive focused supervision regarding provisional voters in order to solve the problem. See e.g., *Hockenberry v. Village of Carrollton*, 110 F.Supp.2d 597 (N.D. Ohio 2000) (denied summary judgment to village where evidence shows only one training course on police procedures, no testing on those procedures). Second, the continuing high incidence of wrong precinct provisional voters – particularly in the same location – put the Board on notice of a pattern of violations and by failing to take simple and obvious steps to mitigate the problem, their supervision became a moving force behind this pattern of poll worker error.

The principles regarding failure to train apply with equal force to failures to supervise. See e.g., *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) (supervision of correctional officers who manage disabled prisoners); *Campbell v. City of Springboro, Ohio*, No. 1:08-cv-737, 2011 WL 1575525, at *36, *37 (S.D. Ohio Apr. 26, 2011) (training and supervision of officer responsible for canine deployment); *Montes v. County of El Paso, Tex.*, No. EP-09-CV-82-KC, 2010 WL 2035821, at *16, *17 (W.D. Tex. May 18, 2010) (supervision of officers who use force); *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009) (failure to take and investigate complaints about wrongdoing by officers); *Estate of Fields v. Nawotka*, No. 03-

CV-1450, 2008 WL 746704, at *8, *9 (E.D. Wis. Mar. 18, 2008) (failure to establish review process for officers who use deadly force).

In this case, Plaintiffs have presented extensive evidence of police officers, including, but not limited to, *experienced* presiding judges and *experienced* provisional judges failing to follow their training. This extensive evidence is clearly adequate to demonstrate the alleged custom. See, e.g., *Okin v. Village of Cornwall-On-Hudson Police Dept.*, 577 F.3d 415, 439, 440 (2nd Cir. 2009) (a “dozen” contacts by plaintiff with officers suggest a custom of failing to adequately respond to complaints of domestic violence); *Williams v. DeKalb County*, No. 07-14367, 2009 WL 1215961, at *6, *7 (11th Cir. May 6, 2009) (not published) (testimony from five members of Police Department established custom or policy regarding relocation of homeless persons); *Sorlucco v. New York City Police Department*, 971 F.2d 864, 872 (2nd Cir. 1992) (Plaintiff, a probationary police officer, was discharged after reporting a rape by a fellow officer and then being criminally charged for having falsely stated that she did not know the name of the officer who had raped her. She brought a Section 1983 discrimination claim against the police department, and she produced evidence regarding *her own* treatment by her superiors, as well as an internal NYPD study showing that in a five-year period, nine male probationary officers were reinstated to their jobs after an arrest, while all four female probationary officers who had been arrested were terminated. Reversing the district court's decision setting aside the jury's verdict, the Second Circuit concluded that “[Plaintiff] presented ample facts concerning her treatment at the hands of her superiors from which the jury, in conjunction with the statistical evidence, could have reasonably inferred that there was a custom of sex bias operating within the NYPD and governing its disciplinary decisions, at least as to probationary officers.”); *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 695-96 (10th Cir. 1988) (Plaintiff brought Section 1983

claim against police department, alleging that police had policy or custom of defendants to provide less protection to victims of domestic assault than to other assault victims. In addition to facts about her own experience, she introduced evidence showing that nondomestic assault cases had a 31% arrest rate in the first nine months of 1983, whereas domestic assault cases had only a 16% arrest rate. The Tenth Circuit concluded that the "pattern of deliberate indifference" the plaintiff demonstrated in her own case, "when examined in the context of other evidence the plaintiff has presented, constitutes evidence of a custom or policy" and was sufficient, if believed, to support a jury finding that the police department had a custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks).

The Defendants have failed to come forward with any evidence that these miscast ballots were the result of properly informed voters who insisted on voting in the wrong precinct.

On this record plaintiffs have established that the failure to supervise these poll workers was the moving force behind the poll worker error that resulted in provisional voters casting ballots in the right location but wrong precinct. This further supports the inference that all right location, wrong precinct ballots suffer from this problem and all these ballots should be counted.

3. Wrong Location, Wrong Precinct Ballots That Reflect the Same Pattern of Errors Also Support the Inference of Poll Worker Error.

On this record Plaintiffs have also established that the failure to supervise these poll workers was the moving force behind the poll worker error that resulted in provisional voters casting other votes in the wrong precinct. Specifically, 90 of the ballots identified in Doc. 182 Tables B, C, and D were cast in the wrong location but nonetheless fit the pattern of even/odd and 64 fit the pattern of pass-through errors. Dr. Tuchfarber did not distinguish right location from wrong location ballots when he when suggested that an inference of poll worker error was appropriate on these facts:

Q. And we've talked about this before, but both in the November transcripts that you saw and certainly in this court we've seen evidence of poll workers who have testified having difficulty dealing with this even/odd and pass-through street problem; right?

A. Yes.

Q. So wouldn't you agree that it's reasonable to infer, given the large number of wrong precinct ballots that have these same problems, that the problem of correctly determining precincts for voters on even/odd streets or pass-through streets extended beyond the ballots that were actually individually litigated in court?

A. At both single-precinct polling places and in multiples?

Q. Yes.

A. Yes.

(TR (Gerhardstein/Tuchfarber) 10-148:20-149:16.)

Therefore this Court should order all 183 ballots miscast due to poll worker errors of even/odd and all 141 ballots miscast due to pass-through mistakes be counted regardless of whether they were cast in the right or wrong location since the inference that they were miscast due to poll worker error is supported by the analysis set out above and the evidence in the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch
Attorney for Plaintiff