

**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 ELECTIONS, et al.	:	
	:	
Defendants.	:	

**PLAINTIFFS' POST-TRIAL
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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I. STATEMENT OF THE CASE

1. Plaintiffs seek a permanent injunction against Defendant Hamilton County Board of Elections and its members to enjoin them from rejecting any provisional ballots miscast in the wrong precinct during the November 2, 2010 election due solely to poll worker error. Plaintiffs seek prospective relief in the form of an injunction ordering the Hamilton County Board of Elections and its members to count all provisional ballots miscast due to poll worker error when the Board does its final count of all provisional ballots, amends its certification, and before the Board conducts the recount.

A. Introduction.

2. Plaintiff Hunter brought this civil rights action on November 21, 2010 against the Hamilton County Board of Elections and its members (“Board”)¹ for treating 849 provisional ballots differently than other provisional ballots. (Doc. 1.) The Board unanimously accepted many ballots that were miscast due to government worker error, but it did not review all miscast provisional ballots for government worker error. For example, the Board accepted 31 ballots that were cast at Board headquarters when the Board learned its staff gave voters the ballot for the wrong precinct. (JX 28, Transcript of Meeting of Hamilton County Board of Elections November 16, 2010, pp. 42-45; JX 32, Minutes of Meeting of Hamilton County Board of Elections November 19, 2010.) But the Board did not review ballots cast at polling places with multiple precincts for that same type of poll worker error. (JX 28 p. 38-41; 46-49.) Ms. Hunter sought an order against the Board to count all provisional ballots that were voted in the wrong precinct due to poll worker error, not just those the Board arbitrarily chose to count. (Doc. 2.)

¹ All references to the “Board” include all four Board members.

Plaintiff Hunter claimed this disparate treatment of provisional ballots was an unconstitutional violation of the Equal Protection Clause and a violation of the Due Process Clause. *Id.*

3. Northeast Ohio Coalition for the Homeless ("NEOCH") and the Ohio Democratic Party ("ODP") intervened as Plaintiffs in this action, seeking an Order requiring the Defendants to comply with the terms of the Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 06-CV-896 (S.D. Ohio) (Marbley, J.) (Doc. 8 and Doc. 180). Sixteen of the 849 provisional ballots rejected for being cast in the "wrong precinct" were rejected in violation of the Consent Decree. (Doc. 182-1 p. 64.) In addition, ten provisional ballots rejected for having an incomplete voter printed name or signature on the ballot envelope affirmation were rejected in violation of the Consent Decree. (Doc. 182-1 p. 64.) The Court should enjoin the Board and its members from rejecting any provisional ballots that must be counted pursuant to the terms of the Consent Decree. The Court need **not** find any Equal Protection or Due Process violations with respect to those 16 ballots in order to do so.

B. It is Important to Count All Provisional Ballots Cast by Qualified Voters.

4. On election night, 2,847 votes separated Ms. Hunter and Mr. Williams in their race for Hamilton County, Ohio Juvenile Court Judge. (JX 21, Official Election Results from Hamilton County November 2, 2010 election.) In the days after the election, the Board processed 10,536 provisional ballots that were not included in the count on election night. At two meetings, on November 16, 2010 and on November 19, 2010, the Board processed the ballots and voted to approve and count over 8,999 provisional ballots. (JX 29, Transcript of Board of Elections Meeting November 16, 2010; JX 32.) The Board rejected 1,537 provisional ballots. One large category of ballots, 438, was rejected because the Board staff investigated and found that the

persons who cast the ballots were not registered to vote. (JX 29, pp. 33-34.) Another large category of rejected ballots was 849 ballots that were cast in the wrong precinct. *Id.* 34-40.

5. After the Board made its decisions on November 19, 2010, the Board added to the election night count the additional provisional ballots it had accepted. As a result, only 23 votes separated Mr. Williams from Ms. Hunter, making this election a clear example of one where fairness, equity, and accuracy in the count is crucial. (TR (Krisel) 1-99.)

C. The Provisional Voting System In Ohio Creates Many Opportunities For Provisional Ballots To Be Miscast Due To Poll Worker Error.

1. The Provisional Voting Process.

6. Typically, a voter arrives at her polling location to vote and a poll worker gives her a ballot to fill out. Poll workers are called judges in Ohio. Poll judges may refuse to allow a voter to cast a regular ballot but must allow the voter to cast a provisional ballot. There are several reasons a poll judge may make a voter vote provisionally: change of address, name is not in the signature poll book, change of name, poll book indicates voter requested absentee ballot, the voter is using as ID the last 4 digits of her social security number, the voter did not bring ID or has no identification. (JX 6, Comprehensive Manual, p. 4; JX 7, Quick Guide, p. 21; O.R.C. § 3505.181 (A).)

7. The provisional judge gives the voter a ballot. Once the voter fills out the ballot it is sealed in an envelope. The provisional judge ensures the voter fills out the front of the envelope, including printing her name, and signs the affirmation. (JX6 p. 7; JX7 p. 23.) The provisional judge then signs the front, fills out the back, and signs the back of the envelope. (JX 6 p. 6-8.) The envelope is then kept separate from the regular ballots and is not counted on election night. The Board members must review the provisional envelopes and decide whether to count or reject

them within 21² days after Election Day. (DX 1001, Timeline of Events Surrounding Hunter v. BOPE Litigation, pp. 1-2.)

2. Duties of the Provisional Judge.

8. The “Provisional Judge” is one of the poll judges at a precinct. Most precincts have four poll judges, some have six. (JX 7 p. 2.) The Provisional Judge has specific duties, unique to the position. (JX 6 pp. 1- 18; JX 7 pp. 21-24.) Once a poll worker directs the voter to the Provisional Judge, the Provisional Judge’s first step is to verify that the voter’s current address is in the precinct. (JX 6 p. 6; JX 7 p. 21.)

9. A provisional ballot will only count if it is cast in the precinct where the voter lives. Therefore, if the voter does not live in the precinct, the Provisional Judge must direct the voter to the correct precinct. Poll workers are trained in Hamilton County as follows:

A voter must vote in precinct where he/she lives in order for their ballot to count. Is the voter’s name and current address in the Signature Poll Book? If not, ask the voter to go to the Provisional Judge who will locate the correct precinct using the Street Lists. See Provisional Voting section in this manual. See also **Comprehensive Manual. Please call 632-7000 to determine the voter’s correct precinct location.**

(JX 7 p. 13) (emphasis in original). It is the duty of the poll worker to direct the voter to the correct precinct or table. (O.R.C. § 3505.181(C) (1); JX 34, Secretary of State Directive 2010-74, p. 12; JX 6 p. 5; JX 7 p. 2.)

10. The Comprehensive Manual explicitly lists the steps a Provisional Judge must take to ensure the voter is voting in the correct precinct:

The Provisional processing Judge must check the voter's current address in the Precinct Street List to make sure that they live in the precinct in which they are trying to vote. The Judge also checks the voter's ID. Check the street numbers in the Street List carefully as well as the street name ending in Ct., Lane, Rd., etc.

² The Board members are statutorily required to begin the official ballot count within 15 days after Election Day and must complete that count within 21 days after Election Day.

If the voter's address cannot be found in the Precinct Street List look up the address in the Ward/TWP Street List. If the address is in the Ward/TWP, and the polling location is close by, give the voter directions. Check the numbers carefully as well as the street name ending i.e. Ct. Lane, Rd. Pay particular attention to the house numbers (odd/even range). Some streets may be divided into different precincts.

If the voter's address cannot be found in the Ward/TWP Street List, look up the address in the County Street List. If the address is in a polling location close by, give the voter directions to the correct precinct listed next to the street name. If the polling location is outside the Ward/TWP please call 632-7000 to confirm.

(JX 6 p. 5.)

3. Voter Confusion in Multiple Precinct Polling Locations.

11. At least 17 polling locations in Hamilton County have four or more precincts voting in the same location. (DX 1016, Multiple Precinct Polling Locations Sorted by Precinct Table.)

There is confusion in multiple precinct polling locations because voters do not know which precinct table they should go to vote. Board member Faux testified that in his experience, only 20-25% of voters know which precinct they vote in. (TR (Faux) 11-60.) Board member Faux stated at a board meeting that he was concerned that the reason somebody would end up voting in the wrong precinct “had more to do with directions they were given by the inside poll workers than it did with their own ineptitude.” (JX 28 p. 36.)

12. Because of this problem, in multiple precinct polling locations with four or more precincts, the Board assigns an additional poll worker called a “precinct guide” to help the voter find her precinct table. (JX 8, Hamilton County Board of Elections Poll Worker Precinct Guide.)

The Precinct Guide Manual states:

Multiple precincts at a polling location can be confusing for the voters and poll workers. The Precinct Guide acts as a traffic controller for the polling location and works with the Presiding Judges and all poll workers to make sure that voters go to the correct table and vote the ballot for their precinct.

There are times when a voter enters a multiple location and ends up voting at the wrong precinct-table. In these cases, the voter's ballot cannot be counted. We continue to work

to find ways to make sure that once a voter gets to their polling location-they vote at the correct precinct and that their vote gets counted.

(JX 8, p. 3.) There are no precinct guides in multiple precinct polling locations with three or fewer precincts. In those locations it is up to the poll workers to direct the voter to the correct precinct table. Poll workers are required, when confronted with a wrong-precinct voter, to inform him that he is in the wrong precinct, direct him to the correct precinct, and instruct him that his ballot will not be counted if he insists on casting a ballot in the wrong precinct. O.R.C. § 3505.181(C)(1).

13. Plaintiffs have identified 295 rejected provisional ballots that were cast in the right location or right polling place. (Doc 182-1 pp. 36-39 (Table B list of right location ballots).)³ Of those, 254 were cast in a polling location where there was no precinct guide. (Compare DX 1016, list of multiple precinct locations, and DX 1018, list of rejected ballots (yellow highlighted ballots were voted in the correct location) with Doc. 182- 1 pp. 36-39 (Table B list of right location ballots).

D. The Board Members Voted to Reject 849 Provisional Ballots.

14. After Election Day, the Board processed all the provisional ballots at the same time. The Board members made sure the voter was qualified to vote in the election (registered to vote, did not vote elsewhere, provided proper identification). The Board also made sure the voters name was printed in Step 1 of the affirmation on the ballot envelope, the affirmation was signed by the voter in Step 8, and that the ballot was cast in the right precinct. The Board then voted to accept or reject the ballots. Of the 10,536 provisional ballots cast, the Board voted to count

³ At the November 16, 2010 Board meeting the Board referred to the number of “right church wrong pew” ballots as 285. At trial and before trial Plaintiffs referred to this number as 269. After trial, Plaintiffs believe there are 295 ballots in this category. At the December 28, 2010 Board meeting the Board members voted to count 16 ballots cast in the right location and at the July 12, 2011 Board meeting the Board voted to count 2 cast at the right location. These 18 ballots were added to the list. Plaintiffs also deleted from the list those ballots Plaintiffs agreed had “fatal flaws.” See Doc. 182-1 p. 35-39 (Table B) for a complete list of the 295 “right location / wrong precinct” ballots.

8,999. (JX 33, County Board of Elections Provisional Ballot Statistics.) These ballot envelopes where later opened and counted. (TR (Krisel) 1-90; JX 28 and JX 32.)

15. At the November 16, 2010 Board meeting the Board members rejected 849 provisional ballots because the ballots were cast in the wrong precinct. (JX 33.) Of those, 295 were cast in the right location. The 295 ballots are shown by ballot number in Table B of Plaintiffs List of Ballots to be Counted (Doc. 182-2 pp. 36-39). The 295 ballots include the nine ballots⁴ the Board of Elections members voted to count as being in the correct precinct (indicated in “right location” column as “YES BOE-c”), the seven ballots⁵ the Board of Elections members voted to count as being miscast in the wrong precinct due to poll worker error (indicated in the “right location” column as “YES BOE”), the two ballots⁶ the Board voted to count at the July 12, 2011 board meeting (indicated in the “right location” column as “YES BOE 7-12-11”) and *excludes* provisional ballot envelopes Plaintiffs concede have fatal flaws, i.e., are not qualified to be counted for reasons unrelated to why they were cast in the wrong precincts, such as voter lived outside of Hamilton County.

16. At the November 16, 2010 Board meeting the Board members also voted to reject 60 ballots because the voter did not sign the envelope and they voted to reject 62 ballots because the voter did not print his or her full name on the envelope. (JX 33.) Of these 122 rejected ballots, 10 were identified as ballots subject to the *NEOCH* consent decree. (PX 2006, Nine *NEOCH* Provisional Ballots where voter name or signature is a problem; PX 2002, Provisional Ballot Envelope No. 10308 (*NEOCH* voted on July 12, 2011); TR (Poland) 5-117-118, 179; 6-210.)

⁴ Provisional ballot numbers 2204, 9395, 9771, 9823, 9935, 9940, 10175, 10035 and 10036. See JX 27 p. 44, 60-68, 52-59.

⁵ Provisional ballot numbers 9398, 9399, 9580, 9738, 9764, 9769, and 10154. See JX 27 p. 70-73.

⁶ Provisional ballot numbers 10548 and 10549.

E. The Board of Elections Created a Practice of Enfranchising Provisional Voters Whose Ballots Were Miscast Due to Poll Worker Error.

17. The Hamilton County Board of Elections has created a practice of investigating if there is poll worker error and if poll worker error is found, of accepting provisional ballots cast due to poll worker error. At the Board meeting on November 16, 2010, the Board spent three hours carefully scrutinizing some of the provisional ballots to determine whether they should be counted. About 8,260 provisional ballots were approved for counting without any significant discussion. Of the remaining provisional ballots, some were investigated, discussed, and examined by the Board to determine if they should be counted. All were voted on by the Board to either be accepted or rejected. (JX 28.)

18. The ballots voted on were given differing levels of scrutiny and investigation. Sometimes the staff presented the results of their investigation to the Board, other times the Board asked the staff for more information. (JX 28.) In many cases the Board members asked questions of the board staff, read the notes on the provisional envelopes, read the notes in the poll books, and inquired if there was a call on the Board help line on Election Day regarding the voter. (JX 28 pp. 90, 105, 106, 111-112, 113, 119, 101-102, 103, 122-124, 136, and 131.) In each case where the Board found evidence of poll worker error, the Board accepted the ballot.

19. The Board identified 27 provisional ballots that, as Board staffer Sherry Poland put it, were “voted in the wrong precinct.” (JX 28 p. 40:14; TR (Faux) 9-193:10-15.) These 27 voters came to the Board office to cast their ballot. The Board staff gave the voter a ballot for the wrong precinct. (TR (Burke) 1-178:2-8.) The Board members did not inquire how or why the poll workers at the Board made their mistake. (TR (Burke) 1-180:3-13; TR (Faux) 9-193-194.) The Board members did not inquire if the voter made a mistake. (TR (Burke) 1-180:14-23; TR (Faux) 9-194; TR (Triantafilou) 12-181-182.) The Board members only needed to know that the

board employee got it wrong when they gave the voter the wrong ballot to vote. (TR (Burke) 1-178; TR (Faux) 9-193:16-24); TR (Triantafilou) 12-181-182.) It was an obvious error. (TR (Faux) 9-193:23-24.) As Board member Faux put it, “the most reasonable explanation for what had taken place was that a Board staff member had given [the voters] an improper ballot.” (TR (Faux) 9-124:20-22.) The Board called this “clear poll worker error.” (JX 28 pp. 40-42.)

I just want to make sure, as we make a record here, that it’s clear that we’re seeing **poll worker error**, and why this Board would make that finding. . . .
Can staff – just again for the purposes of the record, tell us why you think **poll worker error** is so clear in demonstrating – I’d like for the record to be clear about why that is.

(JX 28 TR (Triantafilou) pp. 42:13-16, 42:20-24) (emphasis added). The Board unanimously agreed to accept the ballots. (JX 28 pp. 40-45.) Burke testified he “happily counted” these ballots because

“it was easy for us – once we identify that they got the wrong ballot, it’s easy to correct the ballot under those circumstances, and we do that fairly frequently where a bipartisan team will take the wrongly-cast ballot and put those votes on a correct ballot.”

(TR (Burke) 1-177:23-178:8.)

20. State law prohibits counting ballots cast in the wrong precinct. O.R.C. § 3505.183(B)(4)(1)(ii). The Board members avoided violating Ohio law when they voted to accept these ballots and “remake” the ballots onto correct precinct ballots. (TR (Burke) 1-179:11- 180:2.) The Board had the staff remake the ballot onto the correct precinct ballot by marking only those races where the voter voted and was eligible to cast a vote. (JX 28 pp. 40- 45; TR (Burke) 1-179-180.) These 27 provisional ballots were then included in the final count. An additional 4

ballots were also found to be voted in the wrong precinct at the Board and were remade. (JX 32; TR (Burke) 1-180:24 -181:4.)

21. Another example of poll worker error involved a group of 685 provisional ballots where the poll worker filled in information on the provisional envelope stating that the voter was required to provide additional identification to the Board. Ohio law requires the voter to provide proper identification. The Board staff investigated the voters to make sure they were registered voters and recommended the votes be counted even though the voters did not bring identification to the Board. The Board had accepted similar ballots in prior elections. The Board's legal counsel agreed that this was an example of "demonstrated poll worker error" so the Board could process the ballots. The Board agreed to unanimously approve these ballots. (JX 28 pp. 29-33; TR (Krisel) 1-192-94.)

22. The staff presented to the Board 10 ballots where the voter had not signed the provisional ballot envelope. Ohio law requires the voter to sign a sworn affirmation on the ballot envelope. Normally these ballots would have been rejected. However, the staff investigated and found there was no reason for the poll workers to have made the voters cast provisional ballots. The Board unanimously approved these provisional ballots. (JX 28 pp. 71-72; TR (Krisel) 1-194-196.)

23. Finally, the Board failed to review and vote on 10 *NEOCH* ballots cast at the right location but in the wrong precinct where the voter used the last four digits of his social security number as identification. These ballots must be reviewed for poll worker error according to the Consent Decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. OH Case No. C2-06-896, ("*NEOCH* case"), (PX 2008, *NEOCH* Consent Decree) and Secretary of State Directive 2010-74 (JX 34).

24. After reviewing these actions by the Hamilton County Board of Elections, this Court held that the Board “has – without any specific statutory mandate – carved out situations in which it *will* count provisional ballots cast in the wrong precinct.” Doc. 13, Order, p. 7 (emphasis in original).

F. The Board of Elections’ Practice of Enfranchising Provisional Voters Whose Ballots Were Miscast Due to Poll Worker Error Was Implemented Unequally.

25. The Board members chose to count some provisional ballots that were otherwise ineligible to be counted because the Board looked for and found that poll worker error caused these ballots to be miscast. The Board chose not to consider whether poll worker error caused any other ballots to be miscast. These ballots were similarly situated yet treated differently by the Board.

1. Similarly Situated Ballots.

26. A simple comparison of the 31 ballots cast in the wrong precinct at the Board offices with the 849 ballots cast in the wrong precinct at polling locations shows the ballots are similarly situated yet treated differently.

27. All the ballots cast in the group of 31 and the group of 849 were cast on the wrong precinct ballot. (JX 28 p. 40; JX 28 p. 34-35.)

28. All the voters in each group had to follow the same process: tell the worker their current address so the worker could determine which ballot to vote; print and sign their name on the ballot envelope affirmation; provide identification; and vote on the same ballot. The Board staff and poll workers had to follow the same process: look up the voter’s current address to make sure they voted a ballot in the correct precinct; ensure the voters printed and signed their name on the ballot envelope affirmation; check that the voter had identification; and provide voters with any appropriate warnings. (TR (Krisel) 1-50-53; 75.)

29. All the Board workers in each group looked up the voter's current address to determine the precinct where the voter should vote. At the Board the worker can use the county street list or "Green Book" to look the address up (JX 9), they can use an electronic version of the list, or they can look up electronically whether there is another voter at that address registered and see where he/she votes. (TR (Krisel) 12-63-64.) If the computers were down, which they were frequently, the worker can only use the County Street list. (TR (Krisel) 12-64.) The poll worker can look up the voter's current address in the precinct list (JX 11), the ward street list (JX 10), or the county street list (JX 9). (TR (Krisel) 12-63-64.)

30. The workers at the Board offices and at the polling locations made the same mistakes, such as misreading the county street list or other materials to determine the wrong precinct. One common mistake occurred when the poll worker failed to realize the voter lived on a street where the odd side voted in one precinct and the even side voted in another. These errors are referred to as even/odd mistakes. Another common error occurred when the poll worker did not carefully check the address to make sure the street numbers fell in the range for the precinct. Many long, as well as short streets, pass through more than one precinct. In these situations the voter's street passed through the correct precinct as well as the precinct where they voted. These errors are referred to as "pass through" mistakes.

31. Of the 31 ballots miscast at the Board, 14 even/odd mistakes were made. (PX 2011, Ballot No. 10234 voted at BOE (one of 31 counted), pp. 1-28; TR (Krisel) 12-65.) Whereas, of the 849 rejected ballots, 183 even/odd mistakes were made. (Doc. 182-1 p. 36-39 (Table B); PX 2001, Summary of 849 rejected provisional ballots (under seal)). Seven of the 31 ballots were cast in a precinct where the voter's street passed through both the correct precinct and the wrong precinct the poll worker determined the voter should vote in. This same mistake was made by

poll workers on 141 ballots. Two of the 31 ballots were voted in the voters old precinct (PX 2011 pp. 43 and 55; TR (Krisel) 12-67-68). The workers did not warn the 31 voters that they were casting their ballot in the wrong precinct and if they did their vote would not count. Poll workers did not warn 206 voters either.

32. Another similarity between the ballots cast at the Board and in polling locations is that 7 of the wrong location ballots cast at the Board⁷ are ballots subject to the *NEOCH* Consent Decree and 16 of the 849 are *NEOCH* ballots. However the Board counted the 7 miscast at the Board in the wrong precinct due to worker error but did not count the 16 miscast at polling locations due to poll worker error.

2. Similarly Situated Ballots Treated Differently by Board Members.

33. The Board investigated the wrong precinct ballots cast at the Board for worker error. The Board did not talk to the workers, send them a questionnaire, or review any notes, poll books or documents. The Board members simply asked the worker's supervisor, Joe Mallory, what happened. He said the board worker gave the voter the wrong ballot. (JX 28 p. 43.) The Board members determined that the worker error was obvious. They did not investigate how or why the worker erred (odd/even mistake, pass through street mistake, former precinct mistake, or other). (TR (Burke) 1-180; TR (Faux) 9-193-194.) Nor did the Board members investigate whether the voter erred by not knowing her precinct before she voted, or in giving her wrong current address, or by not correcting the board worker that she was handed the wrong precinct ballot. (TR (Burke) 1-180; TR (Faux) 9-194); TR (Triantafilou) 12-181-182.)

34. In contrast, at the November 16, 2010 meeting the Board members did not investigate the 849 wrong precinct ballots to see if poll worker error caused them to be cast in the wrong precinct. With other miscast ballots the Board members asked staff questions, checked the poll

⁷ PX 2011 p. 5, 19, 21, 23, 27, 29 and 31.

book, and inquired if there were calls to the help desk telephone line. With the 849 ballots the Board did none of that. The Board members unanimously voted to reject all 849 ballots. (JX 28 pp. 24-40; Doc. 18, TRO Hearing TR., p. 102.)

35. After this Court ordered the Board to “**IMMEDIATELY** begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots [cast in the wrong precincts]” the Board members interviewed 71 poll workers on December 17 and 18, 2010. (JX 22-26; TR (Krisel) 1-120:1-10.) Only 13 of whom had signed any of the provisional envelopes in question. (JX 22-26.)⁸ Of those poll workers interviewed, the Board members found poll worker error with regard to seven ballots and voted to count those seven ballots. The Board did not treat all of the 849 ballots the same since they chose not to interview any of the hundreds of other poll workers who processed the remaining 849 provisional voters.

36. Additionally, the Board’s review of the evidence derived from the poll worker interviews was treated differently. The Board could not explain the standards it used or why some ballots were counted and others were not even though the same mistakes were made by the poll workers. (TR (Triantafilou) 12-194-198; 202-206.) For example, during the Board hearings a poll worker, Pat Garry, testified that if the team of poll workers thought a voter was in the correct precinct when she was given a provisional ballot and envelope and she was not in the correct precinct that a mistake was made by the poll workers. (JX 26 p. 9; TR (Triantafilou) 12-187-188.) A poll worker who does not look up a voter’s address to determine if she is voting in the correct precinct is committing poll worker error. (TR (Triantafilou) 12-187-188:14-189:4.) The Board unanimously counted the ballot Pat Garry handled. However, other poll workers testified to the same mistake. Mr. Slaton testified to the Board that he did not look up a voter’s

⁸ JX 22 p. 42 (Peeden) (although Board did not ask him about the ballot he signed No. 9681); JX 23 p. 50 (Park); JX 25 p. 15 (Stoops), p. 44 (Russel), p. 57 (Gundrum); JX 25 p. 14 (Moon), p. 45 (Barnes), p. 109 (Slaton), p. 125 (Ahrens); JX 26 p. 7 (Garry), p. 35 (Pepper) p. 44 (Gay), p. 81 (Clepper).

address on Ballot No. 10159 and if the voter voted at the wrong table a mistake was made. (JX 25 p. 110; TR (Triantafilou) 12-192-194.) Yet the Board tied on whether to count this ballot. (DX 1018 p. 3.)

37. The Board members found examples of poll workers making a mistake when a voter's street separated two precincts with an odd address being in a different precinct than an even address. More were seen at trial. (TR (Triantafilou) 12-199:10-19; (Faux) 9-203.) Poll worker Gundrum testified he made this mistake on these ballots. (JX 24 p. 65; TR (Triantafilou) 12-199-202.) The Board voted to count these ballots (No. 9738, 9399, 10154). (DX 1018 p. 1.) Yet other poll workers made the same mistake and the Board did not count the ballots. Poll worker Dillard Guy testified to the Board he made the same mistake on ballot 9790. (JX 26 p. 48; TR (Triantafilou) 12-203.)

Q. Okay. "Sir, if you'll look, Stettinius is one of these streets that has evens and odds. If you look at where you're looking -- Mr. Gay: Uh-huh." And then you pick up again -- "two lines above it, 3500 through 3798, if it's an even number, which this one was, would be 4-C."
Did I read that correctly?

A. You read it correctly.

Q. So you were directing the poll worker to the correct answer

Yet, despite the Chairman showing poll worker Gay how he made the even/odd error, the Board unanimously did not count his ballot. (DX 1018 p. 18.) See also poll workers: Ahrens who testified to the Board that it was a "toughy" dealing with Madison Road voters, one side voted in her precinct and the other side voted in the other precinct in her location (referring to ballot No. 10048) (JX 25 pp. 150-151); Edwards admitted an even odd mistake was made with ballot No. 9519 (JX 26 pp. 144-146).

38. Additionally, when the Board members voted to count the 31 wrong precinct ballots cast at the Board and the 7 ballots they heard poll worker testimony on, the members did not concern themselves with evidence of whether the voter received notice of her correct precinct, or had an opportunity to look up her precinct on the internet before she voted, or had an opportunity to call the Board to find out her precinct, or signed the envelope warning the voter that she had to vote in the precinct in which she lived. (TR (Triantafilou) 12-180-182; 12-190-191.)

G. Poll Workers Made Common Errors.

39. During its limited investigation on December 16 and 17, 2010, the Board members learned that the poll workers made common errors when they processed a provisional voter: poll workers testified they did not look up the current address of the voter to determine if he was voting in the correct precinct, contrary to the worker's training and duties (e.g. JX 25 p. 110; TR (Triantafilou) 12-192-194.); poll workers testified they erred looking up an address in the county street list by not properly determining whether the voter's address voted was on the odd or even side of the street (TR (Triantafilou) 12-199:10-19; (Faux) 9-203.); poll workers testified they did not warn a voter that he was voting in the wrong precinct or that if he was, his vote would not count (e.g. JX25 p. 48.)

40. At trial, the Court completed the Board's investigation and heard testimony from 50 poll workers. Many poll workers testified that that did not look up the voter's current address to make sure they were voting in the correct precinct. (See Table L, attached.)⁹ They testified they either sometimes looked it up or sometimes relied on their fellow poll worker to look it up; they never looked it up; or they always relied on their fellow poll worker to look it up. Regardless of what they did, all these poll workers failed perform their statutory duty, failed to follow their

⁹ Table L is a summary of each poll worker's testimony with cites to the trial transcript. The evidence establishes the poll worker did not look up the voter's current address to determine if the voter was voting in the correct precinct.

training, and failed to follow the Board's procedures. This is objective criteria of poll worker error. All 162 provisional ballots processed by these poll workers were miscast in the wrong precinct due to poll worker error.

41. At trial, the Court heard many poll workers testify that they erred when they looked up the voter's current address. To determine if the voter was voting a provisional ballot in the correct precinct, the poll worker needed to look the current address up in the county street list. The county street list (JX 9) was a confusing book to use. It is printed in a small font, has approximately 40 lines addresses per page, is 427 pages long, and is printed double sided, with the even pages printed upside down. It is difficult to use when an address appears at first glance to lie in more than one precinct. For example, poll worker Atiya Hampton testified that she looked up voters' address to determine if her precinct, Cincinnati 24-J, was the correct precinct for the voters. Ms. Hampton looked up ballot No. 9489. (JX 72 p. 3.) The voter's address was 798 Dutch Colony Drive. *Id.* At trial, Ms. Hampton looked this address up in the county street list, which is reproduced here: (JX 9 p. 111.)

DUTCH COLONY DR E	500- 688	45232	CINCINNATI 24-0	WINTON
HILLS RECREATION CENTER				
DUTCH COLONY DR 0	501- 533	45232	CINCINNATI 24-0	WINTON
HILLS RECREATION CENTER				
DUTCH COLONY DR 0	535- 899	45232	CINCINNATI 24-J	WINTON
HILLS RECREATION CENTER				
DUTCH COLONY DR E	690- 998	45232	CINCINNATI 24-E	WINTON
HILLS RECREATION CENTER				
DUTCH COLONY DR 0	901- 999	45232	CINCINNATI 24-E	WINTON
HILLS RECREATION CENTER				

Ms. Hampton believed that 798 Dutch Colony Drive voted in her precinct, Cincinnati 24-J.

When confronted with the fact that 798 fit in two ranges (535-899 and 690-998) Ms. Hampton explained that she understood that the 535-899 range was for odd addresses and 690-998 was for

even addresses. She testified 798 was an odd number because the address *started* with an odd number. (TR (Hampton) 1-189-207.)

42. Ms. Hampton was not alone in incorrectly determining which precinct a voter voted in when the poll worker had to first determine whether the voter lived on the even or odd side of a street. For example, Sharron Moon admitted she erred in looking up ballot No. 9752 because she had not noticed there was a separate entry for even and odd address ranges (TR (Moon) 3-157-159); Vicki Lee Williams admitted she did not know how to decide which precinct a person voted in if the address range fell in the even range and the odd range (TR (Williams) 4-125-129); Tim Patterson acknowledged that he made a mistake when he looked up a voter's address because he did not realize he had to determine whether it was even or odd (TR (Patterson) 4-149-153); Paulette Thompson testified if a voter's address could fit in the address range for two different precincts, it was the "voter's choice" where to go to vote. She did not understand the even/odd designations in the county street list. (TR (Thompson) 9-128.) Many more poll workers made these same mistakes. (See Table M, attached.)

43. The evidence is clear that 141 rejected provisional ballots were cast in a precinct where the voter's street passed through it. Caleb Faux testified that he noticed when looking at maps¹⁰ that some of the voters lived on streets that passed through the wrong precinct where they voted. He categorized some of these as "Pass Thru" and "Edge Close" on his spreadsheet (JX 2). (TR (Faux) 9-199 -230.) This can also be seen when looking at a precinct map. Poll worker Earlie Thrash explained that Reading Road was a street that passed through his precinct (Cincinnati 13-J) and many other precincts, including 13-O. When he looked up the voter's address for ballot number 9924, 3896 Reading Road, he got the precinct wrong and then corrected himself. (TR (Thrash) 6-192-94.) Other poll workers made mistakes when looking up an address on a street

¹⁰ Maps of 122 of the voter address that Mr. Faux created are reproduced in PX 2013.

that passed through the precinct where they worked.¹¹ The evidence from the ballot envelopes themselves and the precinct maps or the county street list show that that 141 ballots were cast in a precinct where the voter's street passed through that wrong precinct. (Doc. 182-1 p. 43 (Table D.)

44. The evidence reveals another common error: the poll worker looked up the voter's former address, not her current address when determining the correct precinct. For example, two of the 31 ballots cast at the Board were cast in the voter's old precinct; PX 2011 p. 43 and 55. Ms. Krisel testified one could assume that the board worker looked up the wrong address. (TR (Krisel) 12-67-68.) There are 183 ballots that were cast in the voter's old precinct. (See Doc. 182-1 p. 45 Table E.)

45. All the poll workers testified they were trained on the comprehensive manual and or the quick guide and knew that they were to look up the voter's current address to make sure they were voting in the correct precinct. (Table O, attached.) Many poll workers testified at trial despite knowing they were to look up the voter's address, they processed the voter's provisional ballot without looking up the voter's address or by relying on a fellow poll worker to do that, or by assuming a fellow poll worker had done that before passing the voter to the provisional judge. (See Doc. 182-1 p. 48 Table F.) The testimony ranged from a poll worker always relying on other poll workers to look up the voter's address (TR (Horton) 2-111-112) to a poll worker sometimes looking them up and sometimes relying on other poll workers to do it (TR (M. Jackson) 8-143-144) to a poll worker who never looked up an address (TR (R. Jackson) 5-8-10). This was the most common mistake testified to at trial, with 32 of the poll workers admitting to

¹¹ TR (Chandler) 7-135; TR (Thomas) 7-163; TR (Hill) 3-86; TR (Hall-Muhammad) 4-66-68; TR (A. Johnson) 6-59-70; TR (Yates) 8-105; TR (Shivers) 8-124; and TR (Yarbrough) 9-177-178, 9-181.

this mistake. (See Table F.) These admitted mistakes by poll workers who testified at the Board and at trial cover 145 ballots, all of which should be counted.

46. Another obvious and objective mistake is the provisional judge's failure to sign the provisional ballot envelope. They are trained and required to sign the envelope. The Secretary of State told the Board that failure to sign was objective evidence of poll worker error. (JX 34, SOS Directive 2010-74 p. 12.) There are 66 ballot envelopes that are not signed by the provisional judge. (See Doc. 182-1 p. 52 Table G.)

47. A final obvious error was reflected in testimony at the Board and at trial by poll workers who admitted they did not warn the voter that if they voted a provisional ballot in the current precinct and that was the wrong precinct, their vote would not count. This failure to warn the voter is a violation of their training and the Board manuals. Most importantly it is a violation of the poll worker's statutory duty. O.R.C. § 3505.181(C). Therefore, evidence of poll workers failing to warn the voter that he was voting in the wrong precinct and that his vote would not count is objective criteria of poll worker error. Testimony showed that 206 provisional voters were not warned by the provisional judge that they were voting in the wrong precinct and/or if they voted their vote would not be counted. (See Doc. 182-1 p. 53 Table H.) Some poll workers did warn the voter that their vote would not count but misled the voter by telling him he could correct any problems regarding their voting precinct at the Board of Elections within 10 days.¹² This was an error. Voters only had a ten day window after Election Day to provide identification. (O.R.C. § 3505.181 (B) (8); JX 20, Yellow notice given to provisional voters.) Furthermore, 15 voters testified that they believed they were voting in the right precinct, the poll

¹² 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.

worker who processed their provisional ballot did not tell them they were in the wrong precinct, or that their vote would not count.¹³

H. The Board and its Members Should Count 695 of the Provisional Ballots Miscast In The Wrong Precinct.

1. It is undisputed that 34 ballots should be counted.

48. It is undisputed that the 15 voters who testified at trial cast their ballots in the wrong precinct because they were not told by the poll worker they were in the wrong precinct or their vote would not count. They all testified if they had been told to go to another precinct they would have. The ballots for these 15 voters should be counted.¹⁴

49. It is undisputed that 11 ballots that were rejected for being cast in the wrong precinct were actually cast in the correct precinct. The Board voted to count 9 of these ballots at the December 28, 2010 meeting and 2 at the July 12, 2011 meeting. The Board should be ordered to count these 11 ballots.¹⁵

50. It is undisputed that the Board found poll worker error caused 7 ballots to be miscast in the wrong precinct. The Board should be ordered to count these 7 ballots.¹⁶

51. It is undisputed that the Board agreed at trial that ballot number 9635 (voter lived at 310 Oak Street in Cincinnati not Elwood Place) was voted in the correct precinct. (TR 12-78.) The Board should be ordered to count this 1 ballot.

¹³ 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.

¹⁴ The provisional ballot number for each voter is: Joiner 10132; Turk 9995; Schuler 9774; Kissling 10100; Ornelas 9765; Jewell Jones 10199; Miller Jones 10201; Cerrice John 9902; Burton 9877; Nestheide 10047; Johnson 10029; Chapman 9438; Howard 10081; Hill 9772; Walker 9857

¹⁵ Provisional Ballot numbers 9395, 2204, 9771, 9823, 9935, 9940, 10175, 10035, 10036, and the two voted on in July: 10548, 10549.

¹⁶ Provisional Ballot numbers 9764, 9398, 9399, 10154, 9738, 9580, 9769.

2. All 295 Right Location Wrong Precinct Ballots Should be Counted.

52. Of the 849 provisional ballots cast in the wrong precinct, 295 were cast in the right location. (Table B.) At trial the number 269 was used to describe this group. The Board tied on whether to count all the wrong precinct right location ballots. (JX 27 pp. 74-89.) Mr. Burke and Mr. Faux voted to count these ballots, explaining at the meeting and again at trial why they should be counted:

Q. So why would you change your vote on the 269?

A. . . . As I reviewed our directives, our training to our inside poll workers, I came to the conclusion that if a voter goes to the trouble of finding out where their polling place is and goes to the correct polling place, we darn well – our paid poll workers darn well ought to be able to get them to the right table; and if they don't, it's their fault. And that's poll worker error, in my view.

(TR (Burke) 1-192-193.) “[I]f a voter voted in the right place but at the wrong table, there was good circumstantial evidence to believe that our poll workers did not follow their directions to help ensure that voters got to the correct table.” (TR (Burke) 1-184.) Defendant Mr. Faux agreed that “the fact that a person made it to the right polling place but went to the wrong precinct in and of itself is [evidence of] poll worker error[.]” (TR (Faux) 11-17-18.)

53. Poll workers and voters testified at trial to 134 provisional ballots that were cast in the correct location. This represents 50% of the 269 right location ballots the Board rejected on December 28, 2010.¹⁷ (See Table N attached.) As the testimony proved, without dispute, those 134 right location voters who showed up at the right building are similarly situated to the voters who showed up at the Board of Elections. The board voters and the right location voters were each given the wrong precinct ballot to vote; they were not told they were voting in the wrong

¹⁷ Prior to trial Plaintiffs believed 269 ballots cast in the right precinct were not counted. Since trial, Plaintiffs have increased this number to include the ballots the Board voted to count (but have not counted), 1 ballot the Board found in May but rejected, and others (see footnote 3).

precinct; and they were not told their vote would not count. Yet, the Board only voted to count those miscast at the Board due to board worker error. Since both groups of voters are similarly situated and since the Board treated one group differently, all right location ballots should be counted. Additionally, for the reasons explained in Plaintiff Hunter's Post-trial Brief, not only should the 134 right location ballots subject to testimony be counted, all the 295 right location ballots should be counted.

54. Further evidence of the 295 right location miscast ballots show that 90 were miscast due to the poll worker making a mistake about whether the voter's address fell on the even or odd side of the precinct boundary street. (Table C) Ninety (90) voters lived on a boundary street of the wrong precinct where the voter's street number was on the opposite side of the street of the wrong precinct. Thus, when the poll worker looked the address up in the county street list, the poll worker did not decipher the odd/even side of the street correctly. For example, Voter No. 9394 lived at 1273 Deliquia Drive. Neither the poll worker nor the voter testified about this ballot but it is similar to other ballots where testimony established this common mistake. (See Table M.) Voter No. 9394 voted in Cincinnati 1-N but should have voted in Cincinnati 1-C. Both 1-N and 1-C vote at the same church. The County Street List (JX 9 p. 101) shows 45 entries on the page, two entries are:

- 3. DELIQUIA DR E 1100-- 139845230 Cincinnati 1-N MT
 WASHINGTON BAPTIST CHURCH
- 4. DELIQUIA DR O 1101-- 1399 45230 Cincinnati 1-C MT
 WASHINGTON BAPTIST CHURCH

55. If the poll worker looked the address up correctly, it is clear the poll worker would have told the voter to go to 1-C. Instead, it is obvious the poll worker looked the address up wrong, not recognizing that there is an even odd difference for that street. There are 90 ballots in this

“even/odd” category. Therefore, this is additional evidence to support the finding of poll worker error causing these 90 voters to vote in the wrong precinct at the right location.

56. Another 64 of the right location voters lived on a boundary street for the precinct where they voted on a street that passed through the precinct where they voted but their address was outside the range of street addresses for the precinct (“pass through” category). (Table D.) For example, Voter 9752 lives on 2270 Madison Road. (JX 71 p. 5) He voted in Cincinnati 3-H but should have voted in Cincinnati 3-F. Both precincts vote in same building. Madison Road passes through both precincts. This is clear from the street list (JX 9) and the precinct map (JX 71 p. 15). However, when looking up the address range for a precinct, it can be confusing in the street list:

5.	Madison RD AME Church	E	1900-- 1958	45206	Cincinnati 3-F	Lee Chapel
6.	Madison RD AME Church	E	1960-- 1960	45206	Cincinnati 3-F	Lee Chapel
7.	Madison RD AME Church	E	1962-- 2298	45208	Cincinnati 3-F	Lee Chapel
8.	Madison RD Christian Church	O	1963-- 2009	45208	Cincinnati 5-E	Walnut Hills
9.	Madison RD Presbyterian Church	O	2101-- 2399	45208	Cincinnati 5-H	Knox
10.	Madison RD AME Church	E	2300-- 2324	45208	Cincinnati 3-H	Lee Chapel

(JX 9 p. 235.) This mistake is similar to the ones for which witnesses testified at trial. (See footnote 10.)

57. It is clear from this additional evidence that when voters live on streets that pass through more than one precinct, poll workers can be confused by both the county street list and the fact that the address ranges are close to ranges in the wrong precinct, and that the poll workers erred when determining the correct precinct for the voter. Therefore, this is additional evidence to

support the finding of poll worker error causing these 64 voters to vote in the wrong precinct but correct location.

3. The Remaining 695 Ballots Should Be Counted.

58. Plaintiffs submitted a list of 695 ballots to be counted. The 34 undisputed ballots and the 295 right location ballots should be counted for the reasons stated above. Of the remaining ballots the following should be counted because the testimony at the Board and at trial showed that the following poll worker errors were proven by particularized testimony, by review of the ballot envelopes and other evidence, and by a reasonable inference. (See Plaintiff Hunter's Post-Trial Brief.) More than one type of poll worker error had been established for 398 ballots, so those ballots will be listed on more than one the categories below:

- 93 odd even mistakes for ballots cast at the wrong location (Tables C and M);
- 77 pass through street mistakes for ballots cast at the wrong location (Table D);
- 183 Provisional ballots cast in the voter's old precinct (Table E);
- 145 Provisional ballots where the Provisional Judge did not look up the voter's address to determine if he/she was voting in the correct precinct (Tables F and L);
- 66 Provisional ballot envelopes were not signed by Provisional Judges (Table G);
- 206 Provisional voters were not warned by the Provisional Judges that they were voting in the wrong precinct, or if they voted in the wrong precinct that their vote would not be counted by the Board (Table H);
- 261 Provisional ballots where particularized testimony of poll worker error was elicited from poll workers at the Board of Elections hearings or at trial and/or from voters at trial (Table I);

- 26 Provisional ballots that were rejected in violation of the *NEOCH* Consent Decree (Table J).

I. The 154 Ballots Where No Evidence of Poll Worker Error Has Been Shown Deserve Procedural Due Process Protection.

59. Plaintiffs did not present evidence of poll worker error causing 154 ballots to be cast in the wrong precinct (Table K). These voters were given no notice that their ballots were not counted. The Board members should notify each voter that his or her ballot was rejected, why it was rejected, and that the voter has 10 calendar days from the receipt of the notice to explain to the Board by phone, in writing, or in person, why his or her ballot should not be rejected. Within 10 calendar days after the last voter has had notice and an opportunity to be heard, the Board members shall vote on whether to accept or reject these 154 ballots.

J. The Board of Elections Did Not Comply With This Court's December Preliminary Injunction

60. This Court issued a preliminary injunction on November 22, 2010, ordering the Board to “**IMMEDIATELY** begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots [cast in the wrong precincts] and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” (Doc. 13, Order Granting in Part Plaintiffs’ Motion for a Preliminary Injunction at p. 9 (Nov. 22, 2010) (emphasis added)). The Board did not appeal this order, but Intervenor-Defendant Williams did. The Sixth Circuit Court of Appeals affirmed this order. *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011), *reh’g and reh’g en banc denied* (March 29, 2011), *motion to stay denied* 121 S.Ct. 2149 (2011).

61. The Board, which is a political body made up of two Republican members and two Democratic members, could not agree on how to investigate the 849 ballots. At the December 9,

2010 Board meeting, the Republicans moved to only review the paper records kept at the Board. The Democrats moved to contact poll workers through a questionnaire and through phone calls to poll workers by bipartisan teams. In addition, voters and other poll workers not sent questionnaires could be called. The Democrats defined poll worker error as A) failure to comply with instruction; B) failure to make use of the address book; C) failure to make use of the help desk; D) failure to advise a voter of the correct precinct location where they should vote; E) failure to advise a voter that they were voting in the wrong precinct and that as a result, their vote would not be counted; and F) directing a voter to the wrong precinct. The Democrats also moved to submit any tie votes to the Secretary of State within 24 hours. Each motion resulted in a two to two tie vote. (JX 30, Transcript Dec. 9, 2010, pp. 5-7; 22-36; TR (Burke) 1-183-185.) The Board had 14 days to submit the tie to the Secretary of State to break. The Board was at an impasse.

62. After the Board meeting on December 9, 2010, Plaintiff Hunter moved this Court to enforce the Preliminary Injunction since the Board had taken no action to investigate the ballots. (Doc. 20.) The same evening the Secretary of State issued a Directive instructing the Board how to investigate for poll worker error. (JX 36, Directive 2010-80.) On Saturday December 11, 2010, the Board agreed to subpoena 2,204 poll workers to the Board to testify. (JX 30, Transcript Dec. 11, 2010, p. 55.) On Monday December 13, 2010 the Court took Plaintiff's motion to enforce under submission. (Minute entry Dec. 13, 2010.) The Board interviewed 71 poll workers on December 16 and 17. (TR (Krisel) 1-120:2-10. The vast majority of these poll workers were not poll workers who processed the 849 provisional ballots. (JX 22-26.) After only two days of interviews, which resulted in evidence of poll worker mistakes, the Board abandoned its interviewing of poll workers. The Board then sent out questionnaires to over

2,000 poll workers, receiving over 1,000 responses. (JX 15.) The board received about 60% of the responses before it voted on poll worker error on December 28, 2010. However, as Board member Triantafilou testified, the questionnaires were “just not helpful, candidly.” (TR (Triantafilou) 12-165.)

63. On December 28, 2010 the Board ended its investigation and based on the incomplete investigation, unanimously voted to count 16 ballots (9 for being cast in the correct precinct all along and 7 for having established evidence of poll worker error) and reject 565 ballots. The Board tied on whether to count 269 ballots that were cast in the correct location, but the wrong precinct. (JX 27.)

64. The Secretary of State broke the tie votes on January 7, 2011, and rejected the 269 ballots. However, at the same time, the Secretary of State ordered the Board to count approximately 149 ballots where the voter’s address was on the opposite side of the street than the boundary street of a precinct, was located outside the address range of a boundary street, or was located on a street that passed through the precinct. (JX 40 Directive 2011-03.)

65. Also on January 7, 2011, the Ohio Supreme Court ruled that the Ohio Secretary of State had no authority under State law to direct the Hamilton County Board of Elections on how to investigate for poll worker error. *State ex rel. Painter v. Brunner*, 2011-Ohio-35. The Ohio Supreme Court ordered the Secretary of State to rescind all directives that instructed the Hamilton County Board of Elections how to implement this Court’s preliminary injunction, which she did. (JX 39.)

66. Without any direction from the Secretary of State permitted, the Board had to decide on its own how to investigate the 849 ballots for poll worker error. The Board chose to do no further investigation. (TR (Triantafilou) 12-218-219.)

67. On January 11, 2011, Plaintiff Hunter moved for an Order to Enforce the Court's Preliminary Injunction seeking an injunction ordering the Board to count approximately 165 ballots that were investigated and for which poll worker error was shown and appoint a special master to investigate the remaining ballots. (Doc. 37.) This Court granted the motion in part, ordering the Board to investigate "all ballots subject to the *NEOCH* Consent Decree for poll worker error and count those ballots as required by the Consent Decree" and ordering the Board to count the approximately 165 ballots cast in the wrong precinct. (Doc. 39.) On January 27, 2011, this order was affirmed in part and remanded in part for further proceedings. *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011), *reh'g and reh'g en banc denied* (March 29, 2011). Since the affirmance, the Board has taken no further actions to investigate any ballots. (TR (Triantafilou) 12-218-219; TR (Burke) 1-190-191.)

68. The Board members' argument, that they completed the investigation within the time frame the Secretary of State gave them, that is by December 28, 2010, is unavailing. The Secretary of State directive setting the December 28, 2010 deadline was rescinded ten days later on January 7, 2011. (JX 39.) The appeal was finalized on April 20, 2011. The Board chose to take no further action until July 12, and then the only action it took was to review 3 ballots found in May and 1 *NEOCH* ballot.

69. The Board members failed to comply with this Court's Preliminary Injunction Order. If the Board members had finished interviewing poll workers this Court would have not needed to hear from 50 poll workers and 15 voters over 10 days of trial. Because the Board members chose not to complete the investigation, this Court finds the Board and its members in contempt.

K. Intervening-Plaintiffs' NEOCH & ODP's Findings of Fact Regarding the Board's Failure to Comply With the *NEOCH* Consent Decree.

70. In processing the provisional ballots that were cast on Election Day in the November 2010 election, the Defendants violated the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74, and later-issued 2010-79 in multiple ways. These violations will be addressed in seriatim.

1. The Board Defendants Failed to Undertake an Investigation for Poll Worker Error With Respect to Multiple Provisional Ballots Cast By Voters Using Only the Last Four Digits of their Social Security Numbers as Identification Where the ID Provided Box Was Checked Yes.

71. As a threshold matter, the Defendants failed to undertake the investigation for poll worker error that is required by the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 with respect to multiple provisional ballots that were cast by voters using only the last four digits of their Social Security numbers as identification, in circumstances where: (1) the "ID PROVIDED" box was checked underneath the signature line for the "Witnessing Election Official" on the front page of the Provisional Ballot Affirmation; yet (2) no other form of identification besides the last four digits of the voter's Social Security Number is identified, either in Step 7 of the Provisional Ballot Affirmation, Step 3 of the Election Official Verification Statement, or elsewhere. (TR (Krisel Direct) 1-139-141; TR (Poland Direct) 7-201.)

72. The Defendants erroneously concluded, in other words, that simply checking the "ID PROVIDED" box at the bottom of the Provisional Ballot Affirmation form, without specifying any form of identification provided by the voter *besides* the last four digits of the voter's Social Security Number, suffices to *remove* the provisional ballot in question from the category of *NEOCH* ballots that must be investigated and (if appropriate) counted pursuant to the *NEOCH* Consent Decree and Directives. (TR (Burke) 1-175-176); TR (Krisel Direct) 1-139-141.)

73. Indeed Board member Timothy Burke testified that the Board members had not been made aware that the Board Staff made this conclusion until the Board meeting on July 12, 2011, and that he did not agree with this conclusion. (TR (Burke) 1-175-176.)

74. Rather, Mr. Burke testified that provisional ballots in this category should be considered *NEOCH* ballots. *Id.*

75. Board Director Sally Krisel testified that poll workers were trained to check Yes when proper identification is provided. (TR (Krisel Direct) 1-140.)

76. Ms Krisel expressed that she does not know whether a poll worker would know that a Social Security Number is proper identification when marking the ID Provided Yes or No box when a provisional voter votes with the last four digits of his or her Social Security Number. (TR (Krisel Direct) 1-140.)

77. However, the training materials available to the poll workers direct poll workers that a provisional voter may use his or her last four digits of his or her Social Security Number in order to cast a provisional ballot. (JX 6 & 7.)

78. The Board's own training materials contain no explanation to poll workers on when to check the box. (DX 1043, Poll Worker Training Documents)

79. Moreover, the last four digits of a provisional voter's Social Security Number is listed as "form of *identification* provided" under Step 7 on the provisional ballot envelope. (JX 1) (emphasis added).

80. The Quick Guide notes that the last four digits of the Social Security Number is an "acceptable identification" for a provisional voter. (JX 7 p. 15.)

2. The Board Defendants Violated the NEOCH Consent Decree and Applicable Directives By Failing to Properly Investigate and Count Provisional Ballots Cast by Voters Who Used Only the Last Four Digits of Their Social Security Numbers as Identification and Cast Their Ballots in the Wrong Precinct, But Right Location, For Reasons Attributable to Poll Worker Error.

81. Second, the Defendants violated the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and later issued 2010-79 by failing to investigate properly and count provisional ballots that were cast by voters who used only the last four digits of their Social Security Numbers as identification, and who cast their ballots in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error. (TR (Poland Direct) 5-134-135); TR (Krisel Direct) 1-81; 13-18.)

82. Ms. Krisel testified that prior to bringing the provisional ballots for a vote the Board staff reviewed the provisional ballots pursuant to Secretary of State Directives 2008-101, 2010-48, and 2010-74. (TR (Krisel Direct) 1-81; 13-18.)

83. The clear evidence from the evidentiary hearing, however, was that the Board failed to comply with substantive directions from the *NEOCH* Consent Decree, Directives 2010-48 and 2010-74. Ms. Krisel testified that as of December 9, 2010 well after 16 right location-wrong precinct *NEOCH* provisional ballots were presented to the Board and rejected on November 16, 2010 for having been voted in the wrong precinct, the Board had not contacted any poll workers regarding any of the *NEOCH* ballots either in person or in writing as directed by Directive 2010-74. (*Id.* See also JX 34 at 11-12.)

84. Ms. Poland also testified that that the Board had not interviewed any poll workers in person or in writing prior to the November 16th Board meeting with respect to any of these *NEOCH* ballots in this category (TR (Poland Direct) 5-134-135).

85. The Board's decision to not comply was intentional. Ms. Poland testified the Board did not contact poll workers because that directive was permissive not mandatory. The Board interpreted the word "should" used in Directive 2010-74 at page 12 to mean "may." (TR (Poland Direct) 5 – 132-133.)

86. As Ms. Poland explained at the evidentiary hearing, prior to November 16 a bipartisan team reviewed the provisional ballot envelope after the verification process was completed, and it was determined that the envelope was cast in the wrong precinct. (TR (Poland Direct) 5-108-109.)

87. The bipartisan team then reviewed the face of the envelope and separated those where the voter supplied the last four digits of their Social Security number as a form of identification. (TR (Poland Direct) 5-108-109.)

88. Ms. Poland further testified that the Board staff determined whether the voter, who supplied only the last four digits of their Social Security number, voted in the correct location. *Id.*

89. If the voter voted in the correct location, then the Board staff reviewed the signature poll book notes to determine if there was any indication from a poll worker about the provisional ballot. *Id.*

90. If so, the Board staff was instructed to make a copy and attach it to the envelope and place it in the further review tray, which is a category of miscellaneous ballots presented to the Board. *Id.*

91. No *NEOCH* provisional ballots were placed in further review. (TR (Poland Direct) 5-111.)

92. No list was made of the provisional ballots that the Board staff separated for this review. (TR (Poland Direct) 5-109.)

93. Moreover, the provisional ballots that the Board staff separated for their review were not separately presented to the Board when the Board voted on these provisional ballots on November 16. (TR (Poland Direct) 5-109.)

94. Ms. Poland explained that this was because, as of November 16, 2010, the Board staff found no evidence of poll worker error for any provisional ballots cast in the right location but wrong precinct in which the voter provided only the last four digits of his or her Social Security Number. (TR (Poland Direct) 5-112, 120, 122-125.)

95. Absent from the Board's initial investigation into poll worker error was any contact with the poll workers themselves as directed by the Secretary of State in Directive 2010-74 at page 12. (TR (Poland Direct) 5 – 132-133.)

96. Ms. Poland also testified that there was a second round of review of *NEOCH* right location-wrong precinct ballots as a result of this litigation. (TR (Poland Direct) 5-163.)

97. This led to the creation of the spreadsheets included at JX 3 and DX 1015 (Wrong Precinct Provisionals Rejected Sorted by *NEOCH*). (*Id.*)

98. The Board identified seven *NEOCH* ballots cast in the wrong precinct but right location. (*See* DX 1015.)

99. As previously stated, the intervening-plaintiffs submit there are nine additional *NEOCH* provisional ballots cast in the right location but wrong precinct. (PX 2006.)

100. Of these seven, the Board investigated only five for poll worker error; provisional ballot numbers 9929, 10200, 10497, 9394 and 9671. (JX 15.)

101. Ballot No. 9929 was cast at the right location but the wrong precinct. It was processed by poll worker Jerry Hill Sr. (JX 12 p. 1999.)

102. The Board sent him a questionnaire, which he answered. (JX 15 p. 333.) In answering the questionnaire, Mr. Hill stated he followed Board procedure. He used the Board county street listing (JX 9) to make sure that all provisional voters were in the “the right place at the right table.” He used it “on all provisionally [sic] voters to make sure I was right.” (JX 15 p. 333.)

103. Yet, when the voter’s address is looked up in the county street listing, it shows that the voter’s correct precinct was Cincinnati 9-B, not Cincinnati 9-G. (JX 9 p. 202.)

104. Mr. Hill’s written response to the questionnaire clearly shows that he followed the Board’s procedures, however when he looked up this address he erred in believing the voter was voting in the correct precinct. (JX 15 p. 333; JX 9 p. 202.)

105. The Board members voted whether to count this ballot and tied 2-2. The Republican members voted to reject it. (DX 1015.)

106. Ballot No. 10200 was cast at the right location but in the wrong precinct. The poll worker who processed the ballot returned a questionnaire. (JX 12 p. 1801.)

107. The poll worker indicated on the questionnaire she did not process a provisional ballot but clearly she had. She stated on the questionnaire that she used the county street listing and directed voters to the other precinct in the location. (JX 15)

108. However, when the voter’s address is looked up in the county street listing it shows that the voter voted in the wrong precinct. (JX 9).

109. Clearly, when the poll worker looked up this address she erred in believing the voter was voting in the correct precinct. (*See* JX 15; JX 9)

110. Ballot No. 10497 was cast at the right location in the right precinct. The voter signed the provisional poll book stating his address was 1325 Clay Street. That address is in Cincinnati 6-C. The ballot was cast in Cincinnati 6-C. (JX 12 at 1801).

111. While the ballot envelope indicates voter's current address is 34 Clay Street, there is no 34 Clay Street in Hamilton County. (JX 9).

112. If the poll worker had looked up that address she would have known there is no such address in the county and so informed the voter. *Id.*

113. If the poll worker looked up the address the voter wrote in the provisional signature poll book she would have correctly determined he voted in correct location. *Id.*

114. P10497 should be counted as being cast in the proper location. (TR (Burke) 1-214-215).¹⁸

115. Ballot No. 9394 was cast in the right location in the wrong precinct, Cincinnati 1-N. The voter's address is 1273 Deliquia Drive, Cincinnati, OH 45230. That address is on the odd side of the street. (JX 12 at 31).

116. The odd side of Deliquia votes in Cincinnati 1-C, and the even side votes in Cincinnati 1-N. (JX9 p. 101). Clearly, the poll worker made a mistake in looking up the address.

Many poll workers testified at trial to making this kind of mistake. (See Table M).

117. Ballot No. 9671 was cast in the right location but in the wrong precinct, Golf Manor A. (JX 12 at 619).

118. The voter lived on the odd side of the street. The odd side voted in Golf Manor B, the even side in Golf Manor A. (JX 9).

¹⁸ Burke testified he would have wanted to talk to the voter or the poll worker, but giving the "benefit of the doubt to the voter" the voter lived at 1325 Clay St. (TR (Burke) 2-15:11-14).

119. Clearly, the poll worker made a mistake in looking up the address. Many poll workers testified at trial to making this kind of mistake. (See Table M).

120. Furthermore, the questionnaires returned from other poll workers in Golf Manor A show they were very busy trying to keep their voters on their side of the location and did not turn people away from their precinct. (JX 15 pp. 1354-1363).

121. The remaining three *NEOCH* ballots identified by the Board, Ballot Nos. 9923, 9479, and 9396, and the nine additional *NEOCH* ballots the Board did not identify, were all cast at the right location but in the wrong precinct. (DX 1015; PX 2001)

122. These remaining *NEOCH* ballots were **not** investigated for poll worker error. The Board did not receive a questionnaire response from the poll workers who processed the ballots, (JX 15), nor did the Board question the poll workers in person. (JX 22-31).

3. The Board Violated the NEOCH Consent Decree and Applicable Directives By Failing to Properly Investigate and Count Provisional Ballots Cast by Voters Who Used Only the Last Four Digits of Their Social Security Numbers as Identification and Who Did Not Properly Complete or Sign Their Provisional Ballot Applications for Reasons Attributable to Pollworker Error.

123. As Board Member Timothy Burke testified, there are provisional ballots that fit under this category that should have been investigated by the Board for poll worker error but were not; they were summarily rejected with other name-signature problem ballots on November 16 and never later reviewed by the Board. (TR (Burke Direct) 2-10-25); (TR (Poland Direct) 7-214).

124. As a threshold matter, the Board did not even identify provisional ballots that meet this description as being subject to the *NEOCH* Consent Decree until Spring 2011. *See* (DX 1001 at 8) (“Thursday, May 19, 2011 – Friday, May 20, 2011 – Staff prepares NEOCH spreadsheet listing P#, reason for rejection and precinct voted-in for discovery purposes.)

125. Thus, when these provisional ballots were presented for a vote and were rejected, no one from the Board of Elections had contacted, either in writing or in person, any poll workers regarding a *NEOCH* ballot where the name or signature problem existed. (TR (Poland Direct) 5-134, 179); (JX 34 at 11).

126. In addition, once the Board understood that provisional ballots meeting this category must also be investigated for poll worker error, the Board did not identify nine (9) additional *NEOCH* ballots with name or signature problems. (PX 2006 Ballot Nos. 10261, 10262, 10267, 10311, 10352, 10375, 10377, 10378, and 10379).

127. The Court asked Ms. Poland at the evidentiary hearing why these nine provisional ballots were not included in the list in JX 3, and Ms. Poland expressed that she did not know why they were not included. (TR (Poland Direct) 7-219).

128. For all of these nine rejected “name/signature” provisional ballots, Defendants failed to question the relevant poll workers to determine whether they followed the instructions for completing the verification statement portion of the provisional ballot envelope until July 12, 2011, when the Board sought a questionnaire from one poll worker for one ballot. (PX 2002 and 2003, Beth Noeth poll worker questionnaire (re Ballot 10308)).

129. Ms. Krisel explained that the Board staff, at some point during this litigation, recognized that these provisional ballots are subject to the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79 and issued a questionnaire to one poll worker who had processed a provisional ballot subject to this section of the Consent Decree on July 12, 2011. (TR (Krisel Direct) 1-133-139).

130. Further, Mr. Burke testified that at the July 12, 2011 Board meeting the Board members reviewed one *NEOCH* ballot that staff had found that had not been investigated for poll worker

error as required by the *NEOCH* Consent Decree and this Court's January Order. (TR (Burke Direct) 2-10-25).

131. This ballot, No. 10308, did not contain the voter's printed last name. (PX 2002).

132. It was investigated for poll worker error when the Board members obtained a questionnaire from the poll worker who processed the ballot. (PX 2003).

133. The poll worker stated "I checked [ballot envelopes] to make sure everything was filled in then processed it." *Id.*

134. Despite the poll worker admitting she made sure the voter filled out the affirmation, she obviously had not done so in the case of Ballot No. 10308. (*See* PX 2002).

135. Nonetheless, the Board members voted to reject this ballot. (TR (Krisel) 1- 134).

136. Additionally, the poll worker who processed 10308 and completed the questionnaire at PX 2003, also processed *NEOCH* name/signature problem provisional ballot numbers 10262, 10311, and 10267.

137. The Board staff explained at the evidentiary hearing that the reason the Board staff did not comply with this section of the *NEOCH* Consent Decree and Secretary of State Directives was based on contrary emails and help desk bulletins from the Secretary of State's office. (TR (Poland Direct) 7-251-255)

138. None of the emails or help desk bulletins or frequently asked questions turned over by the Defendants explicitly limit the *NEOCH* Consent Decree to right-location-wrong-precinct voters.

139. Specifically, Ms. Poland testified that the Board director sent an email to the Ohio Secretary of State's office in Spring 2010 after the *NEOCH* Consent Decree was issued

regarding the applicability of the *NEOCH* Consent Decree (TR (Poland Direct) 72-15-216; 251-255).

140. Ms. Poland testified that the Board staff relied on an email response to an email the Director submitted to the Ohio Secretary of State's office in the Spring of 2010, but not Directives 2010-48, 2010-73, 2010-74 and 2010-79 which set forth that a Board 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 because the voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error. *Id.*

141. Notably, the only email exhibit offered at the evidentiary hearing (or later turned over to counsel pursuant to the Court's order from the bench) from the Spring of 2010 is DX 1037 at page 286, which does not expressly limit the consent decree to right location-wrong precinct voters. (DX 1037, Certified Copies of e-mails sent by Ohio Secretary of State's Office, p. 286).

142. Thus, the Board ignored the applicability of this requirement as set forth in the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, 2010-74 and 2010-79. *See* (TR (Poland Direct) 72-15-216; 251-255).

4. Additional Findings of Fact.

143. At the evidentiary hearing, the poll workers who processed *NEOCH* provisional ballot numbers P 9479 (JX 12 at 213), P 9923 (JX 12 at 1185), and 9389 (JX 12 at 19), provided testimony, and the evidence showed that these *NEOCH* provisional ballots were cast in the right location but wrong precinct for reasons attributable to poll worker error. (TR (Branch/Singer) 217:18-218:9); (TR (Branch/Singer) 209:24-210:2); (TR (Branch/Nichols) 8-58-62); (TR (Branch/Thrash) 123:2-5, 125:9-11).

144. Additionally, Board member Tim Burke also provided testimony regarding P 9929 (TR (Burke) 2-25-30), P 9394 (TR (Burke) 2-30-32), P 9671 (TR (Burke) 2-32-33), P 9923 (TR (Burke) 2-33-34), P9479 (TR (Burke) 2-34-36), and P9396 (TR (Burke) 2-36-37), and expressed his recognition of the evidence of poll worker error, including, but not limited to, addresses where an even/odd mistake may have been made.

II. PROPOSED CONCLUSIONS OF LAW

A. Plaintiffs Have Standing.

1. The Board argues that Plaintiffs Hunter, NEOCH, and ODP all lack the requisite Article III standing to pursue their claims. The Board's standing arguments are without merit.

1. Candidates Have Standing To Assert Constitutional Claims Relating To The Conduct Of Elections.

2. The sole argument that the Board advances to claim that Ms. Hunter lacks standing – an argument that is unsupported by citation to any case law on point – is that “the alleged injury is not traceable to the candidate.” (Doc. 94 at 7.) How a candidate in a race separated by less than thirty votes is not prospectively “injured” by the Board's improper disenfranchisement of hundreds of provisional voters is anyone's guess, and is a concept left unexplained by the Board in its Motion. As a direct, individual participant in the electoral process, Ms. Hunter has a concrete, direct, and personal stake – as a candidate – in the outcome of her constitutional challenges to the Board's unequal treatment of provisional ballots in Hamilton County.

3. The Board also fails to mention, much less distinguish, any of the Supreme Court's broad pronouncements on the standing of candidates to bring election-related disputes. *Davis v. Federal Election Comm.*, 554 U.S. 724, 733-735 (2008) (candidate had standing to challenge disclosure requirements and contribution limitations under Bipartisan Campaign Reform Act)

(2008) (*Cook v. Gralike*, 531 U.S. 510, 531 (2001) (Rehnquist, C.J., concurring in the judgment) (“no one questions the standing” of candidates with respect to ballot-access provisions). *Buckley v. Valeo*, 424 U.S. 1, 7-8, 12 n.11 (1976) (per curiam). Most notable, perhaps, is the Board’s failure to discuss *Bush v. Gore* in this context. In that case, as the Board well knows, candidate Gore brought an Equal Protection challenge contesting the certification of the state results and the method of investigating and counting ballots in his race that had yet to be counted. Ms. Hunter, too, raises constitutional challenges to the Board’s unequal treatment of uncounted provisional ballots. In *Bush v. Gore*, 531 U.S. 98, 100 (2000) the original cases in state court were brought by Al Gore. After the Florida Supreme Court issued an order to conduct a manual recount, George Bush and Richard Cheney filed an emergency application for a stay of the Florida Supreme Court mandate to the United States Supreme Court. The U.S. Supreme Court considered that application as a petition for a writ of certiorari and granted certiorari. *Id.* If the U.S. Supreme Court believed that George Bush and Richard Cheney lacked standing to pursue their claims, then the Court was bound to say so, for it is well established that justiciability issues such as standing are jurisdictional, and courts are to raise them even when not briefed by the parties. *See Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Obviously, the Supreme Court allowed George Bush to pursue his outcome-determinative constitutional challenges, and this Court should continue to allow Ms. Hunter to pursue hers, as the Sixth Circuit has already ordered.

4. For these reasons, Plaintiff Hunter has standing.

2. Parties To Consent Decrees “Unquestionably” Have Standing To Seek Enforcement Of Those Decrees.

5. The Board asserts in its Trial Brief (Doc. 88), its Motion for Summary Judgment (Doc. 94), and its Response to Plaintiffs’ Trial Brief (Doc. 112) that both NEOCH and ODP lack standing to pursue their claims in this case. Despite conceding that the Board must follow the *NEOCH* Consent Decree at the evidentiary hearing itself, (TR (Board of Elections’ Opening Statement by Grossmann) 11-151: 23-24), and despite failing to challenge the validity of the *NEOCH* Consent Decree before the Sixth Circuit (when this Court’s January 12 Order requiring the Board to comply with the Decree was at issue), the Board asserts that the *NEOCH* Consent Decree violates the Ohio Constitution, and therefore, Intervening-Plaintiffs NEOCH and ODP lack standing to enforce it. (Doc. 122 at 12.) The Board elaborates on this argument in its Reply in Support of Summary Judgment (Doc. 181) and also referenced the argument at the evidentiary hearing, admitting that it is a legal issue that the parties could address in post-trial briefs. (TR (Stevenson Comments Before Board of Elections’ Opening Statement) 11-141; 16-21).¹⁹

6. Not only is the Board’s recent attack on the validity of the *NEOCH* Consent Decree an improper collateral attack on a district court’s judgment, it is the law of this case that the *NEOCH* Consent Decree applies and should be followed. *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (6th Cir. 2011). Likewise, the Board has waived this argument by admitting that it must comply with the *NEOCH* Consent Decree. Furthermore, in 2011 Directives to local Boards of Election, Secretary of State Husted reaffirmed the applicability of

¹⁹ As Mr. Stevenson mentioned before the Board’s Opening Statement, “We would also indicate that we are again asserting the standing issues with respect to NEOCH. We intend to offer some evidence on that. After discussing it with Miss Cooperrider, we agree that that’s a legal issue and that we may address that issue more specifically. They may address it in their response to summary judgment but more specifically in the trial briefs...” (TR (Stevenson Comments Before Board of Elections’ Opening Statement) 11-141; 16-21).

the *NEOCH* Consent Decree to all Ohio Boards of Election and specifically reminded the Hamilton County Board of Elections that it must comply with the *NEOCH* Consent Decree and former Secretary of State Brunner's Directives 2010-74 and 2010-79.²⁰

7. In addition to being an improper collateral attack on a consent judgment that is belied by the Board's own actions, the Board's challenge to the validity of the *NEOCH* Consent Decree also fails on the merits. Despite the Board's characterization otherwise, the State of Ohio was indeed a party to the *NEOCH* case that resulted in the *NEOCH* Consent Decree, intervening *specifically on behalf of the Ohio General Assembly* so that the General Assembly's distinct interests were advocated in that litigation. The State of Ohio (which intervened on behalf of the General Assembly) and the Ohio Secretary of State defended the constitutionality of the Ohio statutes challenged by NEOCH in that litigation and entered into a narrowly tailored consent decree to remedy the problem created by the Ohio legislature when it created mandatory poll worker duties, but then failed to address the consequences of poll worker error. Boards of Elections, as representatives of the Ohio Secretary of State, are bound by the explicit terms of the *NEOCH* Consent Decree. (PX 2008 p. 3). The Hamilton County Board of Elections members and staff accepted that they were bound by the *NEOCH* Consent Decree (as evidenced by the actions they took, and as explained by the staff and board members at the evidentiary hearing), but have now, at this late stage, decided to change course and argue that the *NEOCH* Consent Decree is "void" and cannot apply to them. For the reasons contained in the NEOCH and ODP Post-trial Trial Brief (Doc. 185), this Court rejects the Board's attempts to question the standing

²⁰ See Husted Directive 2011-05: "Directive 2011-04 and the Mandatory Recount for Hamilton County Juvenile Court Judge The Board" dated January 12, 2011 ("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") (JX 42).

of NEOCH and ODP, as well as the underlying validity of the Consent Decree that they intervened in this case to enforce.

B. The Defendants are Not Immune from Liability.

1. Defendants are Not an Arm of the State.

8. The Hamilton County Board of Elections is not entitled to assert an Eleventh Amendment Immunity defense because it is not an arm of the state. The State undoubtedly has immunity from suit based on the nature of its sovereignty under the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706, 713 (1999). This immunity protects the State from suits by its citizens and by citizens of another State, while also applying this protection to actions against State officials sued in their official capacities for money damages. *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005). This sovereign immunity applies to more than just the State; it also applies to any government entities that act as “arm[s] of the State.” *S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 419 (6th Cir. 2004)(quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Sovereign immunity does not, however, extend to what the Supreme Court has termed “political subdivisions” – i.e., counties and municipalities. *Id.* (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-51 (1994)).

9. Both the Supreme Court and the Sixth Circuit have offered considerable guidance in distinguishing between an “arm of the state” and a “political subdivision.” In evaluating this distinction between specific entities, the Supreme Court has considered four factors: (1) the State’s liability for a judgment against the entity; (2) the language used by state statutes and state courts when referring to the entity, the degree of control over the entity, and the State’s veto power over the entity’s actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the “entity’s functions fall within the traditional purview of state or

local government.” *Ernst*, 427 F.3d at 359 (citing *Hess*, 513 U.S. at 44-51). The Sixth Circuit itself has used a similar set of criteria when evaluating whether an entity is an “arm of the state” or a “political subdivision,” which includes: “(1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity’s funding.” *S.J. v. Hamilton County, Ohio*, 374 F.3d at 420. Both the Sixth Circuit and the Supreme Court have stressed that the first factor, whether the State faces legal liability for a judgment, is the most important factor in the analysis. *Ernst*, 427 F.3d at 358. It is, however, not the only factor. *S.J.*, 374 F.3d at 421 (“the sovereign immunity doctrine is about money *and* dignity-it not only protects a State's treasury, but also “pervasively ... emphasizes the integrity retained by each State in our federal system.””) (emphasis in original) (quoting *Hess*, 513 U.S. at 39).

10. In this case, relief is under the complete control of the local officials and no state money will be spent to comply with this Court’s order. Any order to count specific ballots can be followed by the local board and staff and need not trigger any involvement of the state. Any order directing the local board as to a process it must follow to determine poll worker error can likewise be followed by local board and staff and need not trigger any involvement of the state.

11. The statutes governing the creation and operations of county boards of election are set out at Ohio Revised Code Sections 3501.06 through 3501.17. None of these statutes expressly allocates liability to the state or counties in the event of a lawsuit for injunctive relief. In these situations, courts have turned to the statutes creating and governing such institutions to evaluate how funds are appropriated, whether the state or the municipality bears the cost of operations, and whether or not the entity can directly allocate or tap into state funds. *See, e.g., Hess*, 513 U.S. at 37-38. When such an analysis is applied to the Board in the context of this case, it is

evident from the governing statutory framework that the State would not be liable for a judgment imposing an injunction against the Defendant Board.

a. Source of Agency Funding; Financial Exposure of State.

12. A review of the statutory framework governing the county boards of elections shows that the financial onus for elections is placed almost exclusively on the county. The county bears the costs of establishing the physical facilities operated by the board (O.R.C. § 3501.10), the compensation of board members (O.R.C. § 3501.12), and the vast majority of the costs and expenditures in conducting its operations (O.R.C. § 3501.17(A-E, H-I)). Funds are appropriated through the county either directly from the county treasury, where payment is made like any other county expense, or from an elections revenue fund established by county commissioners. O.R.C. § 3501.12 (“Upon presentation of any such voucher or payroll, *the county auditor shall issue a warrant upon the county treasurer* for the amount thereof as in the case of vouchers or payrolls for county offices and the treasurer shall pay such warrant.”) (emphasis added); O.R.C. § 3501.17(A) (“The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid.”); O.R.C. § 3501.17(I) (“[T]he board of county commissioners may, by resolution, establish an elections revenue fund.”); O.R.C. § 3501.10(A) (“The board of elections in any county may, by resolution, request that the board of county commissioners submit to the electors of the county [. . .] the question of issuing bonds for the acquisition of real estate and the construction on it of a suitable building with necessary furniture and equipment for the proper administration of the duties of the board of elections.”).

13. There are only two limited scenarios where the State bears any expense in the activities of a board of elections, neither of which is relevant here. The first of these situations is when a

precinct is open “solely for the purpose of submitting to the voters a statewide ballot issue.”

O.R.C. § 3501.17(F). In this instance, the county still pays the initial operations costs and must then seek reimbursement from the State. The second cost borne by the State is the advertisement of statewide ballot issues. O.R.C. § 3501.17(G). These are the only financial obligations of the State in regard to the operation of elections and they are not implicated in this case as it involves the selection of a local Hamilton County Juvenile court Judge. The primary Eleventh Amendment test, therefore – whether the State will have to satisfy a judgment – is not met when applied to the Board of Elections in this case seeking injunctive relief.

b. Whether State Law Declares the Entity an Arm of the State.

14. Another factor analyzed under Eleventh Amendment jurisprudence requires an examination of the statutory framework governing county boards of election. This factor is neutral in this case. Ohio Revised Code Section 3501.01 defines a “board of elections” as “the board of elections appointed in a county pursuant to section 3501.06 of the Revised Code.” Section 3501.06 sets out the procedure for how the board is created, stating that a board of elections shall “consist[] of four qualified *electors of the county* [. . .] as *the secretary [of state’s] representatives*.” (emphasis added). This language does little to help the current analysis because it identifies that four board members are officials of the county, while also stating that they serve as representatives of the State. State law effectively defines boards of elections as individuals that are both county and State officials, in some capacity, at the same time. This element of the analysis weighs neither for nor against a finding that the Defendant Board is not an arm of the state.

c. Control by State over Entity.

15. A third factor is the degree of control maintained by the State over the entity. The relevant statutory framework invests control of most major decisions regarding the boards of elections with the State. It is the Secretary of State who initially appoints the four members of such a board (O.R.C. § 3501.06), certifies any individuals selected to fill a vacancy on such a board (O.R.C. § 3501.0), and who “summarily remove or suspend any member of a board of elections” (O.R.C. § 3501.16). Most of a board’s duties are also set out explicitly in Section 3501.11 of the Revised Code, leaving little discretion to such entities in determining how they will operate.

16. The control given to the State, however, is not absolute. The Ohio Revised Code extends some discretion regarding the operations of the various boards of elections. For instance, a board of elections in each county has significant discretion in selecting a chairperson, a director, and a deputy director. O.R.C. § 3501.09. The county and its board have discretion in determining where to establish the board’s facilities. O.R.C. § 3501.10. The county and its board also are given discretion to take the initial steps in filling vacancies on a board of elections if any of the four members goes absent. *See* O.R.C. § 3501.07. In the abstract and standing alone, this factor would weigh in favor of holding the Board to be an arm of the state. But this case involves actions to comply with an order in this case that can be taken by the local board without any involvement of the State; actions the local board clearly is empowered to take. Since the State will not be exposed by an order imposing relief in this case and the other factors do not require an opposite result, the Defendant Board of Elections is not an arm of the state.

17. The cases cited by Defendant do not require a different result. *Tronsen v. Lucas County Bd. Of Elections*, Case No. 3:06CV7089, 2007 WL 978101, p. *6 (N.D. Ohio 2007)(pro se suit

by office seeker who claims that “suits against the state are allowed” so issues were not effectively briefed); *Hulme v. Madison County*, (S.D. Ill. 2001)(suit against the *State* Board of Elections was barred by sovereign immunity; did not involve local board); *Casey v. Clayton County, GA*, Civ. Action No. 1:04-CV-00871-RWS, 2007 WL 788943 (N.D. Ga. 2007)(arises under Georgia law).

18. For these reasons, Defendant Board of Elections and each of its members are not arms of the state and therefore are not entitled to immunity.

2. The Defendants have Waived their Eleventh Amendment Immunity Defense.

19. Defendants have waived any Eleventh Amendment Immunity by defending the case, appealing the Court’s January Order, and engaging in discovery. In a recent case, the Sixth Circuit has reiterated that the burden of establishing Eleventh Amendment immunity lies with the state, and the defense is waived if it is not raised. *Barker v. Goodrich*, Case No. 10-3195 (6th Cir. August 10, 2011) (unreported) * 5. In *Barker*, the state prison “nominally” raised the Eleventh Amendment as a defense in their answer but they did not assert it as a defense in their summary judgment motion or on appeal. The Court held that as a result of the prison’s “failure to assert this defense, it has been waived. See *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (‘[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.’ (internal quotation mark omitted)).” *Barker*, slip op. * 5. In the case at bar, Defendants did not even nominally raise the defense in their answer, litigated their appeal, engaged in discovery, and prepared for trial without raising the defense until the eve of trial. Defendants have therefore waived their immunity defense.

20. Even if Defendants had not waived their immunity defense, they are not entitled to immunity because Plaintiffs seek prospective declaratory and injunctive relief to prevent

constitutional violations if the canvas of election returns is deemed final before the Board complies with applicable law, including this Court's prior Orders and the *NEOCH* consent decree. In its Order enjoining the Board from complying with the statutory deadline to amend the certification of the election results, (Doc. 47), the Court explained that the Board failed to comply with the Court's November 22, 2010 and January 12, 2011 Orders. (Docs. 13 and 39, respectively.) The Court granted Plaintiffs' request and enjoined the application of the statutory deadline, prohibiting any certification of the election results from the race from going into effect until further order of the District Court, "because Plaintiffs' right to equal protection under the Fourteenth Amendment of the U.S. Constitution *will be violated* if the canvas of election returns is deemed final before the Board complies with this Court's prior Orders." (Doc. 47) (emphasis added).

21. One exception to Eleventh Amendment immunity applies when a state official is sued in his official capacity for injunctive relief. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474-75 (6th Cir. 2008) (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 n. 8 (6th Cir. 2007)). The test for determining whether the *Ex parte Young* exception applies is a "straightforward" one. *Id.* (citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). The court considers whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Id.* *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003). The focus of the inquiry remains on the allegations only; it "does not include an analysis of the merits of the claim." *Id.* (citing *Verizon*, 535 U.S. at 646; *Dubuc*, 342 F.3d at 616). Where plaintiffs characterize their prayer for injunctive relief as a prospective § 1983 action alleging

disenfranchisement in the election process, state officials are not entitled to sovereign immunity. *League of Women Voters*, 548 F.3d at 475.

22. Under the *Ex parte Young* doctrine, Plaintiffs are permitted to sue the Board, Chairman, and members in their official capacity to enjoin prospective action that would violate federal law. *League of Women Voters*, 548 F.3d at 475; *Carten v. Kent State University*, 282 F.3d 391 (6th Cir. 2002); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610 (6th Cir. 2003). Here, the named officials have an integral role in providing equal protection and due process in elections and, specifically, in ensuring that such constitutional requirements are met before certifying this election. In their official respective capacities, Chairman Triantafilou, and members Burke, Faux and Gerhardt are clearly proper party defendants in a suit seeking prospective injunctive and declaratory relief as to this election.

C. The Standard of Proof in this Case is Preponderance of the Evidence.

23. The standard of proof necessary for a finding of poll worker error in this case is preponderance of the evidence. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988) (“As this court has observed several times, the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983. Under both statutes, the plaintiff must establish by a preponderance of the evidence [. . .]”); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (“Once a plaintiff proves by a preponderance of the evidence that [their Equal Protection rights were violated], the burden shifts to the state. . .”); *Burke v. Johnson*, 167 F.3d 276, 284 (6th Cir. 1999) (“[Due Process allegations] should be governed by the same “preponderance of the evidence” standard applicable in ordinary civil contract actions”); *Glover v. Williamsburg Local School Dist. Bd. Of Educ.*, 20 F.Supp.2d 1160, 1170 (S.D. Ohio 1998) (“[T]he ultimate issue

under [. . .] the Equal Protection Clause is whether the plaintiff can prove by a preponderance of the evidence that he [had his Equal Protection rights violated].”).

D. The Board Will Violate the Equal Protection Clause If It Treats Similarly Situated Provisional Ballots Differently.

24. The Sixth Circuit clarified the Equal Protection claim in this case:

At the outset, we recognize the special importance of elections cases. “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” . . . Yet “the problem of equal protection in election processes generally presents many complexities.” In part, this is because “[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” Thus, we have held that “[t]he right to vote includes the right to have one's vote counted on equal terms with others.” “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” (“At a minimum, . . . equal protection requires ‘nonarbitrary treatment of voters.’ ” We are therefore guided in our analysis by the important requirement that state actions in election processes must not result in “arbitrary and disparate treatment” of votes.

Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great. As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. This particular post-election feature makes “specific standards to ensure . . . equal application,” particularly “necessary to protect the fundamental right of each voter” to have his or her vote count on equal terms. The lack of specific standards for reviewing provisional ballots can otherwise result in “unequal evaluation of ballots.” Furthermore, the Board's count of provisional ballots is a quasi-“adjudicatory-type” action which, unlike many “regulatory-type” actions, requires review of evidence with respect to a ballot's validity. In other words, the Board is exercising discretion “in making specific determinations about whether particular individuals will be permitted to cast a ballot that counts.” In contrast to more general administrative decisions, the cause for constitutional concern is much greater when the Board is exercising its discretion in areas “relevant to the casting and counting of ballots,” like evaluating evidence of poll-worker error. (“The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”). To satisfy both equal-protection and due-process rights, such a discretionary review must apply similar treatment to equivalent ballots.

Hunter, 635 F.3d at 234-35 (6th Cir.) (internal citations omitted).

25. Plaintiffs have shown that the Board and its members violated the Equal Protection Clause by not providing similar treatment to equivalent ballots. There are three categories of

ballots in which the Board members considered evidence of poll worker error and voted to count the ballots because they found evidence that poll worker error caused the defects in the ballots:

- The 31 ballots cast at the Board office in the wrong precinct where the Board investigated and determined that poll worker error caused the ballot to be cast in the wrong precinct.
- The 686 ballots that the poll worker indicated the voter needed to provide additional identification, as is required by state law, but where the Board investigated and determined that the poll worker erred and no such identification was required.
- The 13 ballots that had either no voter signature or a partial name or no printed name in the affirmation, all of which are required by state law, where the Board investigated and determined that the poll worker erred in making the voter vote provisionally.

26. The Board must apply specific and uniform standards to avoid the “nonarbitrary treatment of voters.” *Hunter*, 635 F.3d at 236. “When the Board reviewed the [31] provisional ballots cast at the Board’s office, despite those ballots being cast in the wrong precinct, the Board considered evidence of the location where the ballots were cast in concluding that those ballots were miscast as a result of poll-worker error.” *Id.* “But in contrast to these instances in which the Board considered evidence of poll-worker error in its review of wrong-precinct provisional ballots, the Board did not consider evidence with respect to 849 provisional ballots cast in the wrong precinct at polling locations.” *Id.* at 237. As the Sixth Circuit concluded, there was sufficient evidence presented at the preliminary injunction hearing of an equal protection violation to justify the injunction.

In particular, the Board explicitly refused to separate from the 849 wrong-precinct ballots those ballots cast at the right polling location but wrong precinct. The evidence of poll-worker error with respect to those 269 ballots—that the ballots were cast at the correct multiple-precinct polling location—is substantially similar to the location evidence considered by the Board with respect to the ballots cast at its office. In both instances, there is no direct evidence that the poll worker erred. For the 27 ballots cast at its office, however, the Board concluded that the cause of casting the ballots in the wrong precinct must be poll-worker error because, under the Board's logic, “the voter had no choice but to walk up to just one person.” R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 42–44). The voter went to the correct location, i.e., the Board's office, and the staff at the Board's

office was required to give the voter the correct ballot; thus, there is little chance that the voter erred, and the wrong-precinct ballot must be due to poll-worker error. Similarly, at the multiple-precinct polling locations, voters went to the correct location and the poll workers were required to direct voters to the correct precinct.

To be sure, there may be more explanations for why the voter might have erred at the multiple-precinct polling locations than at the Board office, requiring a greater inference to conclude that the miscast ballot was a result of poll-worker error, but Defendants have not presented any persuasive rationales. Thus, we believe that the situations of voters at the Board office and at multiple-precinct polling locations are substantially similar. For the 27 provisional ballots cast at its office, the Board considered the location where the ballot was cast as evidence of poll-worker-error, but for the 269 provisional ballots cast at the right polling location but wrong precinct, the Board did not.

Hunter, 635 F.3d at 237-38 (footnotes omitted).

27. At trial, Plaintiffs submitted additional evidence of the similarities with regard to these groups of miscast ballots. The voters who voted a wrong precinct ballot at the Board and at polling locations were all were given the wrong ballot by a board worker. All the voters in each group had to follow the same process: tell the worker their current address so the worker could determine which ballot to vote; print and sign their name on the ballot envelope affirmation; provide identification; and vote on the same ballot. The Board staff at the Board office and poll workers at the polling locations had to follow the same process: look up the voter's current address to make sure they voted a ballot in the correct precinct; ensure the voters printed and signed their name on the ballot envelope affirmation; check that the voter had identification; and provide voters with any appropriate warnings. (TR (Krisel) 1-50-53; 75.)

28. When the Board reviewed all the wrong precinct provisional ballots cast at the Board, the Board decided that they were miscast due to poll worker error. The Board made this determination based on the evidence that a voter at the Board must rely on the Board worker to hand the voter the correct ballot. The Board considered where the voter voted, as circumstantial evidence of poll worker error. The Board had no direct evidence of poll worker error. The Board made no investigation into whether the voter erred by accepting the wrong ballot,

providing their wrong address, or somehow insisting on voting the wrong ballot. In its opening, the Board stated that “the 27 individuals did everything right.” (TR. 11-151.) Yet the Board could not know that because they never investigated the voter’s actions before they voted to count these ballots. The Board unanimously found that this circumstantial evidence was sufficient to conclude that based on where the voter voted their vote was miscast due to poll worker error.

29. The Board members did not use the same standard when it reviewed the 269 ballots cast at the correct polling location. Prior to the injunction the Board did not direct its staff to separate the right location ballots from the wrong location ballots, even though they could have done so. (TRO Hearing TR (Stevenson) 49; (Poland) 101. Only after this Court issued the injunction did the Board separate the right location from the wrong location ballots. (See DX 1017, Wrong Precinct Provisionals Rejected Sorted by Precinct Location, and DX 1018 (Column WP/CL (wrong precinct/ correct location))). Each time the Board members decided to reject right location ballots, in November and again in December, they required evidence of poll worker error and evidence of the absence of voter error. They only found evidence of poll worker error in 7 cases. They ignored evidence of poll worker error in other cases where poll workers testified and admitted their mistakes. In the rest the Board discontinued their investigation so, without direct evidence of poll worker error, rejected all but 8 of the right location ballots.²¹ The Board could have just as easily determined that the right location voter “did everything right” when he showed up at the right location, gave the poll worker his current address, and was handed the wrong ballot to vote. To require a higher level of direct evidence of poll worker error

²¹ The Board voted to count 16 of the wrong precinct ballots. Of those, 9 were cast in the correct location all along, and 7 in which poll worker error was shown through the poll worker interviews. Eight of these 16 were cast in the right location and 8 were cast in the wrong location. DX 1018 p. 1 (green highlighting shows Board voted to count).

and absence of voter error for voters at the polling locations but not the voters at the Board is arbitrary. This different treatment of similarly situated ballots violates the Equal Protection Clause.

30. This Sixth Circuit stated that “there may be more explanations for why the voter might have erred at the multiple-precinct polling locations than at the Board office, requiring a greater inference to conclude that the miscast ballot was a result of poll-worker error, but Defendants have not presented any persuasive rationales.” *Hunter*, 635 F.3d at 238. All Defendants implied in their opening statements they would present evidence that voters were at fault for casting a provisional ballot in the wrong precinct. However, Defendants offered *no evidence* that any voter who showed up at the right location was told to vote at another precinct in that location and refused to go. In fact, all poll workers who testified that they had referred voters to another precinct stated that none of these voters refused to go to another table in their location.²² Likewise all voters testified that if they had been told to go to another table or location, they would have gone.²³ Furthermore, Defendants offered *no evidence* of any specific voter listed on Plaintiff’s Table A of ballots to be counted having caused their ballot to be cast in the wrong precinct.

31. Furthermore, after this Court issued the Preliminary Injunction ordering the Board to immediately investigate the 849 ballots for poll worker error, the Board chose to investigate only some of those ballots. This partial investigation, arbitrarily stopped on December 28, 2010 and never resumed, exacerbated the unequal treatment. After the Board’s truncated investigation, it

²² See Table P (Evidence voter did not refuse to go to correct precinct).

²³ TR (Joiner) 6-29-40; TR (Turk) 11-99-110; TR (Schluter) 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.

found only 7 more ballots to be counted even though the Board members had heard testimony of poll worker error for more than 7 ballots and ignored evidence of additional ballots that had been miscast due to poll worker error. (See paragraphs 36 and 37 of Plaintiff's proposed findings of fact and conclusions of law.)

32. In all, the Board's partial, unequal investigation, found 38 ballots (31 + 7) that were miscast due to poll worker error. Had they applied equal standards they would have identified more ballots as miscast due to poll worker error. The Board agrees that it is likely that had the Board completed the investigation many more ballots would be found to have been miscast due to poll worker error. (TR (Triantafilou) 12-206-207). Moreover, had the Board focused first on interviewing Provisional Judges and voters, as Plaintiffs did at trial, it could have completed its investigation in a timely manner. Given that the Board interviewed 71 poll workers in 2 days and this Court heard testimony from 50 poll workers and 15 voters over 10 days, the Board could have finished its investigation long before the trial of this case.

33. The Board's investigation was further unequal when it chose to abandon the poll worker interviews and instead send questionnaires. The Board questions were not all clearly written.²⁴ The Board Chair testified that the questionnaires were candidly "just not helpful." (TR (Triantafilou) 12-165). The questionnaires did not replicate the questions the Board asked of poll workers in person, and did not include showing the poll worker a copy of the provisional ballot envelope. (TR (Burke) 1-188-189, TR (Krisel) 1-123-124). What makes the use of questionnaires in lieu of interviews all the more troubling is that the Board asked the Secretary of State to waive the interviews and issue questionnaires instead. (JX 47). However the questionnaires did not comply with the Secretary of State directive that required the questions

²⁴ Exhibit JX 15 includes all the questionnaires. All parties admit that question number 10 did not make sense. TR (Krisel) 1-125:23-126:7.

asked to be “the same questions that the Board asked poll workers during the in-person interviews on December 16 and 17.” (JX 37 p. 3). A greater concern is the fact that the Board members did not review all the questionnaires before their vote on December 28 or after. (TR (Burke) 1-125; TR (Faux) 9-200.)

34. The Board contends its investigation was complete and no additional evidence of poll worker error was found. Plaintiffs contend the investigation was non-uniform, was not designed to find poll worker error, was used only to frustrate the investigation, and was abandoned arbitrarily December 28, 2010 when a vote was taken before the investigation was complete. The Court finds that the Board did not comply with the Preliminary Injunction Order. The Board only started its investigation in December, after Plaintiff filed a motion to enforce the Injunction (Doc. 20). The Board arbitrarily stopped the only investigation that was productive, interviewing poll workers, on December 28, 2010. Even if the Board believed the January 22, 2011 deadline impacted its decision to stop the investigation, once that deadline was lifted on January 17, 2011 (Doc. 47), the Board took no action to complete the investigation. The Board has squandered the last seven months when an investigation could have been completed in just a few weeks. Even in the days before trial, when the Board reviewed the three recently found ballots, the Board rejected one of the provisional ballots, cast in the wrong precinct, *without even attempting to investigate the ballot for poll worker error*. (Ballot No. 10547; TR (Burke) 1-190-191; (Krisel) 1-131-132)). The Board’s actions show that despite a Court Order, they have chosen not to investigate all provisional ballots equally and not apply the same standard of review to all the provisional ballots cast in the wrong precinct. Plaintiffs have submitted sufficient evidence to show the Board violated the Equal Protection clause.

E. Intent is Not Required in This Case.

35. Defendants have argued throughout the case that Plaintiffs must prove intent on the part of the Defendant Board and its members. In its trial brief, Defendant Board and its members argue that they did not intend to violate the Equal Protection Clause. Intent is not required in this case. *Hunter*, 635 F.3d 219, fn. 13. Even if intent were required, the Board Members were made aware that they were treating some provisional ballots differently than others when they voted to reject the 849 ballots. JX 28.

F. The Board Violated the Due Process Clause When it Rejected Provisional Ballots Cast in the Wrong Precinct Due to Poll Worker Error.

1. Substantive Due Process.

36. Substantive due process requires the government to count ballots that are technically defective because of poll worker error. In its opinion, the Sixth Circuit expressed “substantial constitutional concerns” about the Board’s rejection of ballots that are defective because of poll worker error:

As we have noted throughout, we have substantial constitutional concerns regarding the invalidation of votes cast in the wrong precinct due solely to poll-worker error. Ohio has created a precinct-based voting system that delegates to poll workers the duty to ensure that voters, provisional and otherwise, are given the correct ballot and vote in the correct precinct. [R.C.] 3505.181(C). Ohio law also provides, as the Ohio Supreme Court recently held in *Painter*, that provisional ballots cast in the wrong precinct shall not be counted under any circumstance, even where the ballot is miscast due to poll-worker error. [R.C.] 3505.183(B)(4)(a)(ii); *Painter*, 941 N.E.2d at 794. Arguably, these two provisions operate together in a manner that is fundamentally unfair to the voters of Ohio, in abrogation of the Fourteenth Amendment’s guarantee of due process of law....

Ohio has created a system in which state actors (poll workers) are given the ultimate responsibility of directing voters to the right location to vote. Yet, the state law penalizes the voter when a poll worker directs the voter to the wrong precinct, and the penalty, disenfranchisement, is a harsh one indeed. To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair. *Cf. Purcell*, 549 U.S. at 4, 127 S. Ct. 5 (“[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.”). Particularly when there is evidence of poll-worker error, the categorical treatment of miscast ballots provided by Ohio law is troubling. It is premature, however, to decide a due-process challenge to Ohio’s election laws as they

relate to poll-worker error because the parties have not fully briefed and the district court has not yet ruled on this issue.

Hunter, 635 F.3d at 243-44.

37. This Court did not rely on due process in its initial Preliminary Injunction (R. 13). In its enforcement Order, however, the Court stated that “the voter had done everything right. To disqualify the ballot because of poll worker error would have been fundamentally unfair.” (R. 38 at 7). Fundamental fairness is the cornerstone of substantive due process. *Lassiter v. Dep't of Soc. Services of Durham County, N. C.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158, 68 L. Ed. 2d 640 (1981); *Warf v. Board of Elections of Green County, KY*, 619 F.3d 553 (6th Cir. 2010) (the Due Process clause is implicated, and § 1983 relief is appropriate, when the election process is fundamentally unfair).

38. Since 1886 the right to vote has been a fundamental right, “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064 (1886). *See also United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031(1941) (recognizing the right of qualified voters to cast ballots and have them counted). Ordinarily, state laws that impinge upon such fundamental liberties are automatically subject to strict judicial scrutiny. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969). The Supreme Court has recognized, however, that “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

39. For this reason, the Court has adopted a special balancing test for evaluating substantive due process challenges to state election laws that inevitably affect the fundamental rights of political parties, candidates, or voters:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

40. Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of that scale, the law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, then ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788-89, n.9). But when the law places “severe” burdens on the rights of political parties, candidates or voters, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

41. The Supreme Court applied this framework in the voting rights context when it decided *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 128 S. Ct. 1610 (2008). Justice Stevens began his lead opinion (joined by Chief Justice Roberts and Justice Kennedy) by observing that “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.” *Crawford*, 553 U.S. at 189 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966)(striking down a poll tax)). He explained that although the Court has not “identif[ied] any litmus test for measuring the severity of a burden that a state law imposes on ... an individual voter, or a discrete class of voters,” even a slight burden “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Id.* at 191.

42. Application of the *Burdick-Anderson* test here shows that substantive due process requires the challenged wrong-precinct ballots to be counted. With respect to the first prong of the test, the burden is unquestionably severe. When the Board disenfranchised voters whose ballots were cast in the wrong precinct due solely to poll worker error, it deprived those voters of the right to vote *because of error by Board staff, not the voter*. These voters did nothing wrong. They were properly registered and qualified to vote. The only reason their ballots were discarded was because they followed the erroneous instructions of the Board staff and voted in the wrong precinct. Rejecting these ballots because of the government's mistake is not only a severe burden on the right to vote, but is also an "invidious" one because it is wholly unrelated to the voter's qualifications. At a minimum, therefore, strict scrutiny applies. *See Hunter*, 635 F.3d at 243 ("[A]ny compelling state interest in preventing the counting of invalid votes must be weighed against the voters' 'strong interest in exercising the fundamental political right to vote,' the very right at issue in this case.") (citation omitted).

43. Next the Court must look to the Board's interests in disenfranchising these voters. The only interest the Board articulated is an interest in conducting elections in a timely, consistent and efficient manner. (Doc. 88 p.15). The Board has offered no evidence how disenfranchising voters through poll worker error is narrowly drawn to advance the state's interest in conducting timely, consistent and efficient elections. The Board members could have finished its investigation of poll worker error in December, if it had taken a non-obstreperous approach to investigating the 849 ballots for poll worker error. The Board members could have voted on the results of the investigation well before the 81 day deadline to amend the certification. Furthermore, if the Board has an interest in conducting consistent elections, this interest weighs

in favor of enfranchising all provisional voters whose ballots were miscast due to poll worker error, not just some (see Equal Protection Section above).

44. It might also be argued that the Board had an interest in enforcing the state law that requires ballots to be cast in the precinct where the voter resides. The Board had an established way to both follow the law and correct for poll worker error. That is, when it was clear that the voter's effort to vote in the correct precinct was thwarted by poll worker error, the Board would simply "remake" the ballot to be consistent with one cast in the correct precinct. (TR (Krisel) 1-96-97; TR (Burke) 1-178-79). This remedy should similarly be employed with respect to all of the ballots miscast due to poll worker error. In this fashion the state law requiring votes to be cast in the precinct where the voter resides can be harmonized with the constitutional rights of the voters.

45. Since the Board and its members voted to disenfranchise voters without having a compelling, narrowly drawn interest, the Board and its members violated substantive Due Process rights of the 849 voters.

1. Procedural Due Process

46. Procedural due process also requires that the challenged ballots be counted. To prevail on a claim based upon deprivation of procedural due process, a plaintiff must show that: (1) he has a property or liberty interest protected by the Due Process Clause, (2) he was deprived of this protected interest within the meaning of the Due Process Clause, i.e., either by an "established state procedure" which itself violates due process or "pursuant to a random and unauthorized act" where state remedies cannot adequately compensate him for the loss, and (3) the state did not afford him adequate procedural rights prior to depriving him of his protected interest.

Wedgewood Ltd. Partnership v. Township of Liberty, Ohio, 610 F.3d 340, 349-50 (6th Cir. 2010).

All three prongs are met here.

47. First, this Court has previously held that the right to vote is a liberty interest protected by the Due Process Clause. *Miller v. Blackwell*, 348 F. Supp. 2d 916, 921 (S.D. Ohio 2004) (Dlott, J.) (“The right to vote, which Plaintiffs allege is threatened here, implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.”). *Accord Teel v. Darnell*, Case No. 1:07-CV-271, 2008 WL 474185, at *8 (E.D. Tenn. Feb. 20, 2008); *Zessar v. Helander*, Case No. 05-C-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006); *Bell v. Marinko*, 235 F. Supp. 2d 772, 777 (N.D. Ohio 2002); *Doe v. Rowe*, 156 F. Supp. 2d 35, 47-48 (D. Me. 2001); *Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1356-57 (D. Ariz. 1990). Therefore, the first prong is met.²⁵

48. The second prong is met under both of the applicable tests. When the Board voted to reject wrong precinct ballots without utilizing its power to remake ballots, it rejected them based on an “established state procedure” that itself violates due process. In addition, when Board staff misdirected the voters to the wrong precincts, they caused their ballots to be rejected due to a “random and unauthorized act” for which the state provides *no* post-deprivation remedy. For both of these reasons, the second prong of the above-described test is met.

49. The last prong is also met. The Supreme Court applies a three-part test when analyzing whether procedural protections are adequate:

²⁵ *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008) does not require a contrary result. In that case, the Sixth Circuit affirmed the dismissal of Plaintiffs’ procedural due process claim based on a liberty interest in voting in a short paragraph at the end of its decision. *Id.* at 479. The Sixth Circuit cryptically stated: “[T]he League has not alleged a constitutionally protected interest. The brevity of argument in the League’s brief—which subsumes procedural due process into the substantive due process analysis—reflects the lack of authority for this position.” *Id.* Since there is in fact substantial authority for this position, as shown by the cited cases, the Sixth Circuit’s dismissal of this claim should be construed as being based on the paucity of the briefing of this issue, rather than a holding on the merits of the allegation.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976).

50. Here, the right to vote is a fundamental and protected liberty interest and “the risk of an erroneous deprivation of such interest through the procedures used” is high, as shown by the fact that Board staff failed to follow the pre-deprivation process that was in place for these ballots. The Ohio statute that was in effect during the November 2010 election²⁶ purported to provide a pre-deprivation process by requiring the poll worker to (1) notify the “wrong precinct” voter that he is in the wrong precinct, (2) direct him to the correct precinct, and (3) if the voter insists on voting in the wrong precinct anyway, advise him that his vote will not count. R.C. 3505.181(C). But the evidence showed that *this process was not followed for the challenged ballots*. In many instances, for example, the poll workers wrongly believed that the voter was in the correct precinct and so did not provide this pre-deprivation process. (Plaintiffs’ Tables C, D, E). In other cases the poll worker abdicated responsibility for determining whether the voter was in the wrong precinct and for telling him if he voted in the wrong precinct his vote would not count. (Plaintiffs’ Tables F, H, P). This process therefore was not adequate and instead created a high risk of an erroneous deprivation of the right to vote.

²⁶ Inexplicably, the statute was recently amended to *weaken* these pre-deprivation procedures by making them optional and shifting the burden of knowing whether the voter is in the correct precinct to the voter. House Bill 194, which was signed by Governor Kasich on July 3, amended R.C. 3505.181(C) to provide that if a voter is in the wrong precinct, “the election official ~~shall~~ may direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.” H.B. 194, lines 3714-3727. R.C. 3505.181(C) was further amended to add that “It is the duty of the individual casting the ballot to ensure that the individual is casting that ballot in the correct precinct.” H.B. 194, lines 3727-3729.

51. Moreover, the Board has an interest in counting all votes cast by registered and qualified voters and preventing their rejection due to poll-worker error, and it can reasonably advance this interest by adopting additional or different procedures. Furthermore, the protections given to absentee voters could have easily been given to provisional voters including 1) written notification of problems with the ballot (unsealed, signature or name problems, unsigned affirmation, etc.) and an opportunity to correct any errors prior to the certification of the election. *See*, Secretary of State Directive 2010-68;²⁷ TR (Burke) 1-206-208. Accordingly, the last prong is also met and a due process violation is established.

52. Next, the Court must decide on a remedy. It is axiomatic that procedural due process guarantees the right to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976). All of the 849 voters whose provisional ballot were rejected, and whose ballots are not otherwise ordered by this Court to be counted by the Board, must be provided meaningful post-deprivation notice, hearing, and an opportunity to be heard before the Board may reject the ballot.

²⁷ Boards must notify voters when either the minimum required information on an absentee ballot ID envelope is missing or when additional information is necessary to verify the identity and eligibility of a voter. The notification must inform the voter of the nature of the ID envelope error. The notices must also be reasonably calculated to reach the affected voter in time to allow them to provide the necessary information. After notifying voters of any problems, the Board must allow voters the opportunity to correct any omission or error regarding their absent voter's ballot ID envelope through the tenth day after the election.

...

If an absent voter's ballot ID envelope is deficient but it is possible to correct the deficiency, the required notice must be sent to the voter in the following situations:

- when the ID envelope does not contain the minimum required information (name, signature or acceptable ID);
- when the ID envelope contains the minimum required information but other information is necessary for the board to reasonably verify the identity and eligibility of the voter;
- when the ID envelope is not sealed.

Electors sign absentee ballot ID envelopes under penalty of election falsification. As such, electors who are not disabled must personally correct any deficiencies associated with their absentee ballot ID envelope. However, if a disabled absentee voter who is homebound notifies the board that he or she desires to correct an error on his or her absentee ballot, the Board must either:

- Dispatch a bipartisan team of election employees to the disabled voter's home, or
- Allow an appointed family member or an attorney to transport the absentee ballot to the disabled

Directive 2010-68 p. 6.

53. Defendants improperly claim that the due process argument rests on the violation of state law by poll workers who fail to correctly determine a voter's precinct. It is clear from the briefing on file in the case that the due process claims are much broader than that and do not rest solely on the violation of state law by poll workers.

54. Defendants also claim that the Board cannot be liable under §1983 because "poll workers are not named defendants ... [and] there is no evidence that a government custom or policy led to any adverse action against the Plaintiffs." (Doc. 94 at 6.) The poll workers do not need to be named as defendants in order to secure liability against the Defendants. Plaintiffs have established that the Defendants have a custom or practice of failing to supervise poll workers with respect to their duty to process provisional voters in accordance with state law. This custom stretched over all of the elections preceding the general election on November 2, 2010. During those previous elections the percentage of provisional votes rejected as cast in the wrong precinct varied between 8 – 10%. (PX 2017, Summary of Hamilton County Rejected Provisional Ballot Statistics for 2006, 2008, 2009, 2010). This high percentage of wrong precinct provisional ballots put the Defendants on notice of a problem that needed investigation and remedy.

55. The evidence shows that the problem was caused by poll workers who failed, on a regular basis, to follow their training. Simply targeting the poll workers at precincts that generated high numbers of wrong precinct ballots would have been a reasonable response to the problem. But the Defendants did nothing. They did not test the poll workers who made errors and they did not supervise their work, thus causing voters to be subjected to these poll worker errors in elections year after year, including in the November, 2010 general election.

56. A government custom of failing to train or supervise may well be the moving force behind constitutional violations suffered by Plaintiffs. See *City of Canton v. Harris*, 489 U.S. 378 (1989)(claim stated where custom that police shift commanders had discretion to make decisions on whether prisoners needed medical care but those commanders were provided no training or guidelines with which to make those judgments). 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. The evidence in this case, on the contrary, includes testimonial evidence that poll worker error was tolerated for years even though it was clearly causing hundreds of ballots to be rejected at every election. (PX 2017; PX 2020, Most Wrong Precinct Provisional Ballots Rejected By Polling Location Hamilton County 2010; (TR (Krisel) 12-100-104). Throughout the years the Defendants did not test poll workers on their provisional ballot proficiency. (TR (Krisel) 12-21-33).²⁸ See *Hockenberry v. Village of Carrolton*, 110 F.Supp.2d 597 (N.D. Ohio 2000)(Denying summary judgment to village where evidence shows only one training course on police procedures, no testing on those procedures).

57. Nor did the Defendants supervise the poll workers or evaluate their performance with respect to provisional voters even though wrong precinct ballots were alarmingly common. (TR (Krisel) 12-55-58; 12-89-90). See generally, *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

²⁸ Ms. Krisel’s extensive testimony of poll worker training did not include any formal testing of the trainees.

suspects.). With respect to failure 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).

58. In sum, there is adequate evidence of a custom of failing to train/test and supervise poll workers and that was the moving force behind the poll worker error that caused voters to miscast their ballots in the wrong precinct and therefore the due process claims should not be dismissed.

G. This Elections Case Deserves Due Process Review Because it is Not a “Garden Variety” Elections Case.

59. Defendants argue that this Court lacks jurisdiction over this matter because the issue purportedly before the Court is merely a “garden variety elections case.” It is true that “[f]ederal courts . . . ‘have uniformly declined to endorse action[s] under [§] 1983 with respect to garden variety election irregularities.’” (*Id.* at p. 24 (quoting *Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 553, 559 (6th Cir. 2010)).) Instead, “[t]he Due Process Clause is implicated . . . in the exceptional case where a state’s voting system is fundamentally unfair.” *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978)). “Such an exceptional case may arise,” this Court had held, “if a state employs ‘nonuniform rules, standards and procedures,’ that result in

significant disenfranchisement and vote dilution[.]” *Warf*, 619 F.3d at 559 (quoting *Brunner*, 548 F.3d at 478).

60. In *Brunner*, for example, the League of Women Voters of Ohio alleged that “registered voters were denied the right to vote because their names were missing from the rolls”; insufficient voting machines were distributed to polling places, leaving thousands of registered voters unable to vote; “[p]oll workers improperly refused assistance to disabled voters”; and provisional ballots were either “not distributed to appropriate voters” or “provided . . . without proper instructions[.]” *Brunner*, 548 F.3d at 478. This Court held these allegations, “if true, could support a troubling picture of a system so devoid of standards and procedures as to violate substantive due process.” *Id.*

61. In a case cited by this Court in *Brunner*, the First Circuit Court of Appeals found that the Due Process rights of Rhode Island’s citizens were violated when the State disseminated absentee and shut-in ballots for use in a primary election, then subsequently invalidated the votes cast by such ballots after a ruling by the Rhode Island Supreme Court that such ballots were not authorized in a primary. *See Griffin*, 570 F.2d at 1067-68. Given that “the issuance of such ballots followed longstanding practice” in the State, the First Circuit proclaimed that it was “unwilling to reject appellees’ claim merely on the fiction that the voters had a duty, at their peril, somehow to foresee the ruling of the Rhode Island Supreme Court invalidating their ballots.” *Id.* at 1076. Instead, the Court concluded that “a broad gauged unfairness [had] infected the . . . election” and that “the federal court was the only practical forum for redress,” given the Rhode Island Supreme Court’s failure to “confront the questions that retroactive application of its ruling would create.” *Id.* at 1078-1079.

62. This case presents troubling Due Process concerns that are justiciable under the

standards set forth in *Warf*, *Brunner* and *Griffin*. In the 2010 election, the Hamilton County Board of Elections imposed non-uniform rules that resulted in the disenfranchisement of hundreds of voters. Properly registered voters choosing to vote at the Board of Elections, but whose votes were cast in the wrong precinct due to poll worker error, were counted. Properly registered voters choosing to vote at their assigned polling locations, but whose votes were cast in the wrong precinct due to poll worker error, were not counted. The Board has considered whether to fix the problem caused by this discrepancy by “un-counting” the 31 provisional ballots cast in the wrong precinct at the Board of Elections. But by retroactively invalidating ballots due to the errors of elections officials, the Board would simply compound the Due Process concerns. Moreover, there is no practical forum for redress of these issues in Ohio courts. The Ohio Supreme Court has held that “under Ohio statutory law, . . . there is no exception to the statutory requirement that provisional ballots be cast in the voter’s correct precinct.” *State ex rel. Painter v. Brunner*, Slip Op. 2011-Ohio-35, at ¶ 36.

63. What is at issue in this case, then, is not just the Board’s investigations of ballot validity. What is at issue is the right of Ohio voters casting otherwise valid provisional ballots not to have their ballots rejected due to mistakes made by those working for the Boards of Elections. As stated in *Griffin*, “[w]hen a group of voters are [*sic*] handed ballots by election officials that, unsuspected by all, are invalid, state law may forbid counting the ballots, but the election itself becomes a flawed process.” *Griffin*, 570 F.2d at 1076. Or, as the District Court more succinctly held in her January 12th Order, “[t]o disqualify [a] ballot because of poll worker error would [be] fundamentally unfair.” (R. 39 at p. 7.)

64. The Board member’s non-uniform acceptance of valid provisional ballots cast in the wrong precinct due to poll worker error, compounded by the Ohio Supreme Court’s holding that

Ohio voters disenfranchised by poll worker error have no redress in Ohio courts, “amount[] to an ‘officially-sponsored election procedure which, in its basic respects, was flawed’ to the level of fundamental unfairness.” *Warf*, 619 F.3d at 560 (quoting *Griffin*, 570 F.3d at 1078).

65. Another reason the errors in this case are not “garden variety” are that they were caused by 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. (See Plaintiff Hunter’s Post-Trial Trial Brief).

H. Intervening-Plaintiffs’ NEOCH & ODP’s Conclusions of Law Regarding the Board’s Failure to Comply With the *NEOCH* Consent Decree.

66. Intervening-Plaintiffs NEOCH and ODP seek a permanent injunction ordering the Board to comply with the *NEOCH* Consent Decree.

67. NEOCH is the lead plaintiff in the *NEOCH v. Ohio Secretary of State* case pending before United States District Judge Marbley in the United States District Court for the Southern District of Ohio, Eastern Division, Case No. C2-06-896. (See PX 2008). ODP is an intervenor-plaintiff in that action. *See id.*

68. NEOCH and other plaintiffs brought the *NEOCH* case against Ohio’s Secretary of State in October 2006, alleging that Ohio’s Voter ID laws were unconstitutional. *Id.* The State of Ohio intervened as a Defendant in the *NEOCH* case. *Id.*

69. On April 19, 2010, District Judge Marbley signed the *NEOCH* Consent Decree in resolution of the *NEOCH* action. (PX 2008).

70. All parties to the *NEOCH* case, including NEOCH, ODP, the Ohio Secretary of State, and the State of Ohio, agreed “to the entry of this Decree as final and binding” and agreed to the jurisdiction of the District Court over the parties and the subject matter of the action. (*Id.* at 2).

71. The purposes of the Decree are to ensure that registered and qualified voters who lack the identification necessary to cast a regular ballot, including indigent and homeless voters: (1) will have their votes counted even if they cast provisional ballots, (2) will not be deprived of their fundamental right to vote by differing interpretations of Ohio’s provisional ballot laws by Ohio’s 88 Boards of Elections, and (3) “will not be deprived of their fundamental right to vote because of failures by poll workers to follow Ohio law.” (PX 2008 at 2).

72. The *NEOCH* Consent Decree states that it “shall be binding upon the Defendants and their employees, agents and representatives. The Secretary of State will issue Directives to the Boards of Elections to follow this Decree, and will use her best efforts to enforce the Decree and all related Directives if put on notice of any alleged violations.” (PX 2008 at 3).

73. By its terms, the *NEOCH* Consent Decree remains in effect until June 30, 2013. (PX 2008 at 6).

74. The *NEOCH* Consent Decree provides “GENERAL INJUNCTIVE RELIEF” which, in relevant part, states:

5. Defendant Secretary of State, her agents, employees and representatives will instruct Ohio’s county Boards of Elections to adhere to the following rules regarding the casting and counting of provisional ballots for persons without identification other than a Social Security Number:

b. 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:

v. 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.

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

vii. 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.

(PX 2008 at 3-4).

75. On November 1, 2010, then- Secretary of State Jennifer Brunner issued Directives 2010-73 and 2010-74. (DX 1019 & JX 34, respectively).

76. Directive 2010-73 was issued pursuant to the *NEOCH* Consent Decree's requirement that the Secretary of State issue a directive before every primary and general election instructing boards of election to comply with the injunctive relief set forth in the *NEOCH* Consent Decree. (DX 1019 at 1.)

77. Directive 2010-73 includes a copy of the injunctive relief ordered in the *NEOCH* Consent Decree which was previously distributed to the County Boards of Elections in Directive 2010-48. (DX 1019 at 2-4.)

78. Directive 2010-74, provided to Ohio's Boards of Elections, including the Defendants, sets forth "Guidelines for Determining the Validity of Provisional Ballots" which "incorporates relevant rulings from the Ohio Supreme Court *** and the United States District Court for the Southern District of Ohio in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896." (JX 34 at 1.)

79. Directive 2010-74 included a Section titled “PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR.” In this Section, the Secretary of State provided the following non-exclusive “Examples of Evidence of Poll Worker Error”:

A. 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. 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 provide objective evidence 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.

B. 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.

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 O.R.C. 3505.182 to complete this information.

(JX 34 at 11- 12) (emphasis in original; internal footnote omitted).

80. Thus, Directive 2010-74 requires Ohio's Boards of Elections to investigate for poll worker error when a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification is rejected due to the voter's failure to properly complete the provisional ballot application or the voter's failure to sign the provisional ballot affirmation statement on the ballot envelope or because the voter voted in the correct polling location but the wrong precinct. *Id.*

81. Directives 2010-73 and 2010-74 remain binding upon Ohio's Boards of Elections and have not been superseded by any other Directive issued by the Secretary of State.

82. On November 30, 2010, then- Ohio Secretary of State Brunner issued Directive 2010-79 to the Hamilton County Board of Elections, Members, Director, and Deputy Director, which required the Defendants to investigate and count provisional ballots that are subject to the terms of the *NEOCH* Consent Decree. (JX 35.)

83. The Ohio Secretary of State issued this Directive after "learning that no conclusive review or inquiry to demonstrate the existence or lack thereof of poll worker error in specific provisional ballot situations had been undertaken by the Defendants pursuant Directive 2010-74, Directive 2010-73, and the *NEOCH* Consent Decree." (*Id.* at 1.)

84. As Ms. Krisel testified, Secretary of State Directive 2010-79 specifically directed the Hamilton County Board of Elections regarding how to implement the *NEOCH* Consent Decree and also how to implement the court order in *Hunter v. Hamilton County Board of Elections* requiring the Board to comply with the *NEOCH* Consent Decree. (TR (Krisel Direct) 1-108).

85. Directive 2010-79 also includes a Section titled "PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR." In this Section, the Secretary of State provided

“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 O.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.

(JX 35 at 2-3) (emphasis in the original).

86. Directive 2010-79 also includes a section titled "OBJECTIVE CRITERIA FOR DETERMINING POLL WORKER ERROR." In this section, the Directive provides:

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 O.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?

(JX 35 at 3).

87. Moreover, the Directive ordered the Defendants 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: (1) for any reason stated in Section I of Directive 2010-79 (setting forth the list of categories from the *NEOCH* Consent Decree); or (2) as a result of poll worker error. (*See Id.* at 3).

88. Further, the Directive sets forth that 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, then those ballots should be counted. *Id.* at 4.

89. Directive 2010-79 remains binding upon the Hamilton County Board of Elections, Members, Director and Deputy Director and has not been superseded by any other Directive issued by the Secretary of State.

90. Indeed, current Ohio Secretary of State Husted specifically reminded the Hamilton County Board of Elections that it must comply with the *NEOCH* Consent Decree and former Secretary of State Brunner's Directives 2010-74 and 2010-79 in Directive 2011-05. (JX 42 at 1) ("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").

1. The Board Defendants Failed to Undertake an Investigation for Poll Worker Error With Respect to Multiple Provisional Ballots Cast By Voters Using Only the Last Four Digits of their Social Security Numbers as Identification Where the ID Provided Box Was Checked Yes.

91. The Defendants' admitted practice of excluding "last 4 SSN/ID PROVIDED" provisional ballots from the category of *NEOCH* ballots that must be investigated and, if

appropriate, counted pursuant to the *NEOCH* Consent Decree and Directives 2010-74 and later-issued 2010-79 finds no support in the Decree, the Directives, or applicable law. (*See* O.R.C. 3505.181(A)(2); TR (Burke) 1-175-176; *see generally* JX 34, JX 35).

92. O.R.C. 3505.181(A)(2) specifically permits an individual to vote a provisional ballot using the last four digits of his/her Social Security Number only. (DX 1036, Ohio Revised Code 3505.181 Eligibility to cast provisional ballot-procedure.)

93. Such an individual does not have to show the poll worker his/her social security card. Moreover, under O.R.C. 3505.181(B)(8), an individual who votes a provisional ballot and provides the last four digits of his/her Social Security Number is not required to take any additional steps or to provide additional information to the board of elections in the ten days after the election in order for the provisional ballot to be counted.

94. This provision of Ohio law became effective in 2006 and *was not changed* by the *NEOCH* Consent Decree.²⁹

95. Because the last four digits of a voter's Social Security Number *itself* permitted a voter to cast a valid provisional ballot in the November 2010 election (and in previous elections), the fact that the "ID PROVIDED" box is checked at the bottom of the Provisional Ballot Affirmation form for such a voter does not indicate that any *other* form of acceptable identification was provided by the voter at the polls. *See* (TR (Burke) 1-175-176).

²⁹ The intervening plaintiff's do not agree with Board Chairman Triantafilou's testimony regarding his understanding of the *NEOCH* Consent Decree, that "my interpretation of it would be that it, you know, it certainly had an impact on who can vote." (TR (Triantafilou Direct) 12-140; 2-3.) O.R.C. § 3505.181(A)(2) and (B)(8) states that the last four digits of a provisional voter's Social Security Number constitute sufficient identification to cast a provisional ballot that can be counted; this statute was in effect prior to the *NEOCH* Consent Decree and was not amended by the *NEOCH* Consent Decree.

96. Thus, checking this box provides the Defendants no basis to *exclude* such provisional ballots from the investigation and counting that is required by the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, 2010-74, and later-issued 2010-79. *See* (TR (Burke) 1-175-176).

97. The Board staff's attempt to distinguish proper identification for casting a regular ballot versus a provisional ballot is beside the point, because the "ID Provided," check "Yes/No" option, is only on the *provisional* ballot application, so poll workers were not trained to check this box in any situation other than when processing provisional ballots. (TR (Krisel Cross Examination) 12-113; 6-8); (TR (Poland Direct) 7-202).

98. The Board failed to rebut these facts with any proof that poll workers are trained otherwise.

99. The Board asked none of the 50 poll workers who testified why they checked or did not check the box.

100. Accordingly, checking "Yes," that ID was provided, is consistent with the provisional voter only providing the last four digits of his or her Social Security Number when casting a provisional ballot.

101. As such, the following provisional ballots at issue in this case and fitting this description should be considered *NEOCH* ballots:

1. P 9389 (JX 12 at 19).
2. P 9397 (JX 12 at 31).
3. P 9398 (JX 12 at 41).
4. P 9471 (JX 12 at 197).
5. P 9472 (JX 12 at 199).
6. P 9476 (JX 12 at 207).

7. P 9580 (JX 12 at 433).
8. P 9664 (JX 12 at 605).
9. P 10311 (PX 2006).
10. P 10267 (PX 2006).
11. P 10378 (PX 2006).
12. P 10379 (PX 2006).

2. The Board Defendants Violated the NEOCH Consent Decree and Applicable Directives By Failing to Properly Investigate and Count Provisional Ballots Cast by Voters Who Used Only the Last Four Digits of Their Social Security Numbers as Identification and Cast Their Ballots in the Wrong Precinct, But Right Location, For Reasons Attributable to Poll Worker Error.

102. As noted above, Section III.5.b.v. of the *NEOCH* Consent Decree provides that 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, where “[t]he voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error[.]” (PX 2008 at 4).

103. For multiple rejected “right location/wrong precinct” provisional ballots, as of December 9, 2010, Defendants failed to question the relevant poll workers to determine whether they followed the instructions for ensuring that voters were directed to the correct precinct as directed in 2010-74 and later issued 2010-79. (JX 34 at 12; JX 35 at 2).

104. Accordingly, as of December 9, 2010, the Board failed to properly investigate for poll worker error pursuant to the *NEOCH* Consent Decree and the applicable directives the following right location-wrong precinct provisional ballots:

1. P 9389 (JX 12 at 19).

2. P 9394 (JX 12 at 31).
3. P 9396 (JX 12 at 37).
4. P 9397 (JX 12 at 39)
5. P 9398 (JX 12 at 41).
6. P 9471 (JX 12 at 197).
7. P 9472 (JX 12 at 199).
8. P 9476 (JX 12 at 207).
9. P 9580 (JX 12 at 433).
10. P 9664 (JX 12 at 605).
11. P 9671 (JX 12 at 619).
12. P 9479 (JX 12 at 213).
13. P 9923 (JX 12 at 1185).
14. P 9929 (JX 12 at 1199).
15. P 10497 (JX 12 at 1801)
16. P 10200 (JX 12 at 1801).

105. The review conducted by the Board did not comply with the requirements of the *NEOCH* Consent Decree or Secretary of State Directive 2010-74 or later issued 2010-79. The Board's decision to not comply was intentional. (TR (Poland Direct) 5 – 132-133).

106. The Board's decision to interpret the word "should" to mean "may" not "shall" or "must" in Directive 2010-74 at page 12, (TR (Poland Direct) 5 – 132-133), is a distinction without a difference when a Court is making a factual determination regarding compliance with a separate legal requirement, as here. *See State ex rel. Badgett v. Mullen* 177 Ohio App.3d 27 (Ohio Ct. App. 2008)

107. In *State ex rel. Badgett v. Mullen*, a taxpayer brought a mandamus action against the city, mayor, president of city council, and council members, alleging that the city had failed to provide "suitable accommodations" for municipal court pursuant to O.R.C. 1901.36. The taxpayer relied, in part, on Appendix D to the Supreme Court of Ohio's Rules of Superintendence. The city in *Badgett* tried to rely on the word "should" within multiple sections of Appendix D (i.e., "[t]he courtroom *should* have adequate seating") (emphasis added) to contend that Appendix D does not contain mandatory requirements that bind the legislative authority. *Id.*

108. The *Badgett* court concluded, "[H]ere, we are construing these standards not as mandatory requirements but rather using them in deciding the factual issue of whether the Marietta Municipal Court facilities are suitable as defined in O.R.C. 1901.36." *Id.*

109. The *Badgett* opinion thus holds that although the word "should" may typically be directory, instead of mandatory, that is a distinction without a difference when a court is making a factual determination about compliance with another, separate legal requirement.

110. Here, the Board is required to comply with the *NEOCH* Consent Decree and this Court's January 12 Order requiring the Board to investigate and count provisional ballots subject to the *NEOCH* Consent Decree.

111. Choosing to ignore explicit direction from the Ohio Secretary of State in Directives 2010-74 and 2010-79 because the term "should" is used, supports the determination that the Board failed to comply with the *NEOCH* Consent Decree by (1) initially ignoring this instruction from the Secretary of State; and (2) subsequently deciding not to follow-up with any poll workers if a questionnaire was not received for a *NEOCH* right location-wrong precinct ballot.

112. Moreover, the Board's decision not to follow-up with poll workers if a questionnaire was not returned for a right location-wrong precinct *NEOCH* ballot also evidences the Board's failure to comply with this Court's January 12, 2011 Order.

113. The Board's second round of review of *NEOCH* right location-wrong precinct provisional ballots also violated the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79.

114. *NEOCH* provisional ballot 10200 should be counted as being cast in the wrong precinct due to poll worker error. (DX 1015); (PX 2008 at 4).

115. Provisional ballot 10497 should be counted as being cast in the proper location. (TR (Burke) 1-214-215).³⁰

116. *NEOCH* provisional ballot 9394 should be counted as being cast in the wrong precinct due to poll worker error. (PX 2008 at 4).

117. *NEOCH* provisional ballot 9671 should be counted as being cast in the wrong precinct due to poll worker error.

118. The Board members failed to follow the *NEOCH* Consent Decree and this Court's January Order with regard to the remaining three *NEOCH* ballots identified by the Board, Ballot Nos. 9923, 9479, and 9396, and the nine additional right location-wrong precinct *NEOCH* ballots the Board did not identify as *NEOCH* ballots: 9389, 9397, 9398, 9471, 9472, 9476, 9580, 9664, and 10200.

119. Nonetheless, these ballots should be counted for the same reasons Plaintiffs argue all right location-wrong precinct provisional ballots should be counted.

³⁰ Burke testified he would have wanted to talk to the voter or the poll worker, but giving the "benefit of the doubt to the voter" the voter lived at 1325 Clay St. (TR (Burke) 2-15:11-14).

120. The Board members failed to follow the *NEOCH* Consent Decree, Directives 2010-74 and 2010-79 and this Court's January Order with regard to the following right location-wrong precinct *NEOCH* provisional ballots and should be ordered to count these ballots:

1. P 9923 (JX 12 at 1185).
2. P 9479 (JX 12 at 213).
3. P 9396 (JX 12 at 37).
4. P 9389 (JX 12 at 19).
5. P 9397 (JX 12 at 31).
6. P 9398 (JX 12 at 41).
7. P 9471 (JX 12 at 197).
8. P 9472 (JX 12 at 199).
9. P 9476 (JX 12 at 207).
10. P 9580 (JX 12 at 433).
11. P 9664 (JX 12 at 605).
12. P 9929 (JX 12 at 1199).
13. P 10200 (JX 12 at 1801).
14. P 10497 (JX 12 at 1801).
15. P 9394 (JX 12 at 31).
16. P 9671 (JX 12 at 619).

3. The Board Violated the NEOCH Consent Decree and Applicable Directives By Failing to Properly Investigate and Count Provisional Ballots Cast by Voters Who Used Only the Last Four Digits of Their Social Security Numbers as Identification and Who Did Not Properly Complete or Sign Their Provisional Ballot Applications for Reasons Attributable to Poll Worker Error.

121. Third, the Defendants violated the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and later-issued 2010-79 by failing to properly investigate and count provisional ballots cast by voters who used only the last four digits of their Social Security Numbers as identification, and who did not properly complete and/or sign their provisional ballot applications³¹ for reasons attributable to poll worker error.

122. As noted above, Section III.5.b.vi. of the *NEOCH* Consent Decree provides that 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, where “[t]he voter did not properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error.” (PX 2008 at 4).

123. When these provisional ballots were presented for a vote and rejected, no one from the Board of Elections had contacted, either in writing or in person, any poll workers regarding a *NEOCH* ballot where the name or signature problem existed, contrary to the *NEOCH* Consent Decree and Secretary of State Directive 2010-74. (TR (Poland Direct) 5-134, 179); (JX 34 at 11).

124. The Board members’ July 12, 2011 vote to reject provisional ballot number 10308 was in violation of the *NEOCH* Consent Decree. (TR (Krisel) 1- 134); (PX 2008 at 4).

125. Because poll worker error was demonstrated, the Board members should be ordered to count provisional ballot number 10308. (PX 2008 at 4).

³¹ Provisional ballot “application” refers to the provisional ballot envelope. (TR (Poland Direct) 5-120; 20-23).

126. Because the poll worker who processed 10308 and completed the questionnaire at PX 2003, also processed *NEOCH* name/signature problem provisional ballot numbers 10262 (PX 2006), 10311 (PX 2006), and 10267 (PX 2006), these provisional ballots should also be counted because poll worker error was demonstrated. The pollworker said that she checked each provisional ballot to make sure everything was filled out, which she obviously did not do when processing these ballots. (*See* PX 2006).

127. As Mr. Burke made clear, pollworker error is not limited to intentional error. (TR (Burke) 2-38).

128. The Board should also count *NEOCH* name/signature problem ballots: 10352 (PX 2006), 10375 (PX 2006), 10377 (PX 2006), 10378 (PX 2006) and 10379 (PX 2006) because the poll workers who processed these provisional ballots signed and affirmed that the provisional voter subscribed and affirmed the provisional ballot affirmation before the poll worker, which is clearly poll worker error, because the provisional voter did not sign the provisional ballot envelope.

129. The Board should also count *NEOCH* name problem ballot 10261 (PX 2006) which is missing the voter's name in Step 1 but is signed by the voter and has the voter's name written on the back of the provisional ballot envelope, for the reasons set forth by Mr. Burke, regarding provisional ballot 10308, that the voter's name is clearly included on the back side of the provisional ballot envelope and was evidently omitted due to poll worker error.

130. The Board members failed to follow the *NEOCH* Consent Decree and this Court's January Order with regard to name/signature problem *NEOCH* provisional ballots. The Board's explanation for failing to comply with the *NEOCH* Consent Decree and applicable directives with respect to this category fails as a matter of law.

131. Emails and bulletins cannot supersede or undermine a binding consent decree or Directives from the Ohio Secretary of State, which, as the Board Chair explained have “the force of law.” (TR (Triantafilou Direct) 12-133).

132. Accordingly, the Board failed to comply with the *NEOCH* Consent Decree and applicable directives by rejecting the following ten *NEOCH* provisional ballots without first investigating for poll worker error:

1. 10308 (PX 2002)
2. 10261 (PX 2006)
3. 10262 (PX 2006)
4. 10267 (PX 2006)
5. 10311, (PX 2006)
6. 10352 (PX 2006)
7. 10375 (PX 2006)
8. 10377 (PX 2006)
9. 10378 (PX 2006)
10. 10379 (PX 2006)

4. Additional Conclusions of Law.

133. As previously set forth, the Board has erroneously chosen not to count provisional ballots that the Board, its Members, and/or its Staff have investigated that are subject to the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, Directive 2010-74, and 2010-79, even where it is apparent, based on directives and guidance from the Secretary of State, that poll worker error caused the provisional ballot to be defective.

134. Because the evidence at the evidentiary hearing showed that *NEOCH* provisional ballot numbers P 9479 (JX 12 at 213), P 9923 (JX 12 at 1185), and 9389 (JX 12 at 19) were cast in the right location but wrong precinct for reasons attributable to poll worker error, the Board should count these ballots pursuant to the *NEOCH* Consent Decree. (TR (Branch/Singer) 217:18-218:9); (TR (Branch/Singer) 209:24-210:2); (TR (Branch/Nichols) 8-58-62); (TR (Branch/Thrash) 123:2-5, 125:9-11).

135. Accordingly, for the reasons set forth herein, the Board should be ordered to count all 26 ballots included in Table J attached to Doc. 182 setting forth Plaintiffs' List of Ballots That Should Be Counted (Doc. 182-1 at 64).

I. Plaintiffs Have Met the Requirements for the Issuance of a Permanent Injunction.

136. Plaintiffs seek a permanent injunction against Defendant Hamilton County Board of Elections and its members to enjoin them from rejecting any provisional ballots cast in the wrong precinct during the November 2, 2010 election due solely to poll worker error. Plaintiffs also seek a permanent injunction ordering the Board to comply with the *NEOCH* Consent Decree. The standard for granting a permanent injunction is essentially the same as the standard for a preliminary injunction except that the Plaintiff must show actual success on the merits rather than a mere likelihood of success. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). The Supreme Court recently reiterated the standard:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006). A district court's grant of a permanent injunction is reviewed under different standards. Its legal conclusions are reviewed de novo, its factual findings are reviewed under a clearly erroneous standard and the scope of the injunctive relief is reviewed for an abuse of discretion. *Women's Med. Profl Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir.2006). In *Baird*, the Court held that "a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Baird*, 438 F.3d at 602 (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998)).

137. Plaintiffs have met all the elements granting a permanent injunction. First, Plaintiff Hunter will suffer an irreparable injury if the votes are not counted. The evidence showed that Hunter garnered a large majority of the provisional ballots when they were counted and that the majority of the provisional ballots in question were cast in predominately democratic precincts. (TR (Burke) 1:194). If she were the duly elected candidate, she will suffer irreparable harm if all qualified provisional ballots are not counted. NEOCH and ODP will suffer irreparable harm if the consent decree is not followed.

138. Second, there are no adequate remedies at law. State law is unavailing to Hunter since the Ohio Supreme Court ruling in *State ex rel. Painter v. Brunner*, 2011-Ohio-35 held that that state law prohibits the Board from counting miscast provisional ballots due to poll worker error. Based on the *Painter* decision, any elections contest that could be brought, which determines whether there were irregularities under state law, is unavailable to Plaintiffs. As to the *NEOCH* claims, there is no state law remedy to enforce the *NEOCH* consent decree.

139. Third, the balance of the hardships between the parties balance in favor of Plaintiffs. NEOCH and ODP have a strong interest in enforcing the terms of the *NEOCH* consent decree. Hunter has a strong interest in having all ballots counted especially since they may change the outcome of the election. There is no harm to Defendants in this Court ordering the Board members to count provisional ballots miscast due to poll worker error. While Defendants claim a delay in certifying the final election results has harmed the Defendants, any delay in the issuance of the final order in the case is of their own doing since they failed to implement the Court's Preliminary Injunction and they engaged in delaying tactics throughout including on the eve of trial.

140. Fourth, the public has an important interest in having fair elections. The public has a "strong interest in exercising the fundamental political right to vote." *Hunter*, 635 F.2d at 244. The public's interest is "best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Id.* "Counting the ballots of qualified voters miscast as a result of poll-worker error may enhance '[c]onfidence in the integrity of our electoral processes[, which] is essential to the functioning of our participatory democracy.'" *Id.* 244-245.

141. All voters have an interest in having their votes counted. This is particularly true for African American voters in Hamilton County. If Ms. Hunter wins she would be the first African American Juvenile Court Judge in Hamilton County Ohio. A majority of the voters who testified were African American.³² These voters, as well as the Hispanic voter explained why it was important to them to have their vote counted by the Board of Elections.

Q. Do you want your vote to be counted?

³² The African American voters are: TR 8-80 (Voters John, Burton, Chapman); TR (Howard) 7-14-15; TR (Hill) 7-18; TR (Johnson) 8-78, 85; TR (Turk) 11-103; TR (M. Jones) 11-114; TR (J. Jones) 11-124. The Hispanic voter is Ornelas TR 5-144-145.

A. Yes, I do.

Q. Why is that?

A. Because we've come too far, you know, for a vote, to get the voting rights. And for them not to be counted, it's very disturbing. I really do want my vote to count.

(TR (John) 3-211)

Q. And why is it important to you to have your vote counted?

A. It's important because if -- if you don't vote, then, in a sense, you don't count. . . .

(TR (Howard) 7-11-12).

Q. And why is it important to have your vote count?

A. Because it -- I think it is the freedom of all Americans to have the opportunity to vote their choice.

(TR. (M. Jones) 11-113).

Q. Do you want the Board of Elections to count your vote?

A. Yes.

Q. And why is that?

A. Because every vote counts. I don't know if my vote determined whether she didn't get it or she did get it. So I went there for the intentions of having my vote counted in hopes of, whoever I voted for, to win. So, yes, I want it to count.

(TR (Hill) 7-23).

Q. Do you want your vote to count?

A. Yes.

Q. Why?

A. Well, I guess for what -- I mean, I didn't do it for nothing. You know, I had a purpose for why I voted. And like everybody said, everybody's vote counts. So there's no reason why mine shouldn't either. And I felt like I picked a good person, so -- or good people, I guess you could say.

(TR (Johnson) 8-77)

Q. And why is it important to you to vote?

A. I believe, as an American woman and as a minority, that that's my right and I should exercise it.

(TR (Ornelas) 5-144-145).

142. The Democratic party chair, Defendant Tim Burke, also testified why it was important to him to make sure African American voters were not disenfranchised. He testified that a “significant majority of the precincts where the “right church, wrong pew” ballots were cast are African American.” (TR (Burke) 1-194-195).

Q. Do you believe that more African-American voters are being disenfranchised than white voters when these 269 provisional ballots were rejected?

4. I do.

Q. Is that a concern of yours?

A. Absolutely.

Q. Why?

A. Because I -- I've thought a lot about this. I'm not sure exactly the way to say it, but I believe that we have more errors in our poorer, less well-educated precincts, and frequently those tend to be a majority African-American precincts.

Q. And when you say "errors," you're talking about errors by poll workers?

A. Errors by poll workers.

(TR (Burke) 1-195).

143. His observations were confirmed by Defense expert Alfred Tuchfarber, PhD. who stated in his report:

... some have noted that neighborhoods with high concentrations of disadvantaged voters have higher numbers of provisional votes as well as more rejected provisional ballots. The explanation for that is simple. Poorer and disadvantaged people are much more likely than other voters to be renters rather than homeowners. Social scientists know with certainty that they are much more likely to move between elections than are homeowners. Thus the difference in numbers and rates ... more moves ... more provisional ballots ... more potential for error by somebody.

(DX 1005, Alfred J. Tuchfarber, PhD Preliminary Report, p. 29). At trial Dr. Tuchfarber confirmed that the impact of these rejected ballots did fall on African Americans. Most neighborhoods in Hamilton County with high concentrations of disadvantaged voters also have high concentrations of African Americans. TR (Tuchfarber) 10-116:16-117:1). African Americans have had a difficult time the in the history of our nation securing and fighting for the right to vote. The struggle has occurred in Hamilton County, where African Americans had to file litigation to secure a district system for electing municipal court judges. (TR (Tuchfarber) 10-117:2-16.)

144. Finally, Plaintiff Hunter also explained the impact an injunction would have on the public.

Q. Have you heard from voters or people who support you or members of the community about this case?

A. Yes, I have. And, in fact, many are here in the courtroom today. People are outraged. People are –

...

Q. So do you have any concerns about what you've heard from the public about what happened with the provisional balloting in November?

A. Yes, I do. People have been quite incensed over what they believe is a disenfranchisement of their right to vote. Many believe that a vote not counted is the same or has the same effect as a vote that was never cast. And for myself personally, coming from a protected class of both women and African Americans, it was quite alarming even on a personal note to discover while attending the public hearings at the Board of Elections that thousands of votes were literally seemingly being arbitrarily discarded or rejected. And, quite honestly, I believe that every vote is a voice. And over the years as a media professional, I've encouraged persons, people throughout my career, to vote, to exercise

their right to vote; and many times I would hear from the public or from individuals that would say, well, why should I vote because my vote does not count, and I would assure them that your vote does count. People fought, bled and died for the right not only to vote but to have that vote counted. And so when I sat down at the Board of Elections and I personally witnessed thousands of votes being discarded, what could I say to these individuals; basically their point was proof that their vote did not count.

And so I felt that I had no choice but to personally stand up for all of the voices, all of the silent voices of persons that would not be heard because many, in fact, as you heard here during this week, did not even realize that their vote was not counted until after my lawsuit was filed, eight months after the election, and only during the -- the process of this trial.

Q. And what do you hope to achieve with this litigation?

A. I hope to help as much as possible to restore the integrity of the voting process, the electoral process. I hope to restore the public confidence in the electoral process. And I believe that the only way that we will be able to do that is to make sure that every vote is counted.

(TR (Hunter) 9-268-70).

145. On balance, the equities weigh in favor of issuing a permanent injunction against the Board and its members to count the provisional ballots outlined herein.

J. Permanent Injunction To Issue.

146. Plaintiffs submitted sufficient evidence at trial that the 295 provisional ballots cast in the right location were miscast due to poll worker error. The voters all arrived at the right location, as the Board instructed on them to do. The poll workers processing the provisional ballots had an obligation to ensure the voter voted in that precinct and if not, send the voter to the right precinct and instruct the voter if she voted in the wrong precinct her vote would not count.

Defendants submitted no evidence that any of these voters were told by the poll workers they were in the wrong precinct, that they had to go to another table in the building to vote, and if they

voted at this table their vote would not count. The Board is ordered to count the ballots listed on Plaintiffs' Table B, and ballot No. 20,000.³³

147. Plaintiffs also proved by a preponderance of the evidence how some poll workers mistakenly looked up voter addresses. Some poll workers misread the very confusing county street list (JX 9). Some workers did not properly determine the voter's correct precinct because the poll worker did not understand the voter's address was on the odd or even side of a street. Others misread the county street list when determining the correct precinct when the voter's street passed through more than one precinct. Since there is a preponderance of the evidence that voter addresses that fall in these categories were miscast due to poll worker error, the ballots on Plaintiffs' Table C and Table D must be counted. These patterns were easily determined from a paper review of the addresses, ward maps and county street list, as Defendant Faux testified, and confirmed by the limited interviews done by the Board, but the Board refused to spend the time looking at this evidence and drawing the proper conclusions.

148. Plaintiffs proved by a preponderance of the evidence that many voters were improperly directed to vote in their old precinct where they no longer reside. A review of the ballot envelopes (JX 12 and PX 2011) shows this was an error by workers at the Board of Elections and the poll workers. This evidence was confirmed by the testimony at trial. (TR (Krisel) 12-67-68.) The ballots listed on Plaintiffs' Table E must be counted.

149. The testimony of the poll workers and voters at trial showed by a preponderance that a large number of poll workers did not look up the voter's address as required and / or did not warn the voter that if she voted in the precinct her vote would not be counted. These ballots,

³³ This ballot was reported on the afternoon of August 26, 2011 to have been found by the Board the same week and appears to have been voted in the correct precinct (and has no fatal flaws).

listed on Plaintiffs' Table F and H must be counted. Furthermore, there was no evidence that any of these voters refused to go to another precinct to vote. (See Plaintiff's Table P).

150. Plaintiffs also proved by a preponderance of the evidence that 66 ballot envelopes were not signed by the Provisional Judge who processed the voter's provisional ballot. Since failure to sign the envelope is objective evidence of poll worker error, these ballots, listed on Plaintiff's Table G, must be counted.

151. Plaintiffs submitted additional persuasive evidence of individual ballots that were miscast due to poll worker error for various reasons. Defendants offered no evidence in rebuttal. Defendants are ordered to count the ballots listed on Plaintiffs' Table I.

152. Finally, Plaintiffs submitted evidence that the 26 *NEOCH* provisional ballots were miscast due to poll worker error. Therefore, all the *NEOCH* ballots listed on Plaintiffs' Table J must be counted.

153. Plaintiffs presented no evidence of poll worker error regarding the 154 remaining ballots (Table K) and the one ballot rejected on July 12 (No. 10547). The Board is ordered to provide the voters of these ballots with procedural due process, as outlined below. The Board is ordered to count any ballot where the voter timely provides information and the Board finds sufficient evidence consistent with this opinion that the poll worker error caused a ballot to be miscast.

154. Defendants seek as a remedy to uncount the 31 ballots the Board members unanimously voted to count, have not moved to uncount, testified they had no intentions of moving to uncount, and have already been re-made. This remedy would create a due process deprivation to these 31 voters. The Board is ordered not to uncount these 31 ballots.

155. The members of the Hamilton County Board of Elections are ordered to open the provisional ballot envelopes listed on Tables B, C, D, E, F, G, H, I, and J (Doc. 182-1). The

Board is ordered to remake all wrong precinct ballots onto the correct precinct ballots. The Board is ordered to count the remade ballots and any other ballots inside these provisional envelopes that do not need to be remade. The Board must allow public observers during each step of this process. The Board must complete all this work within 48 hours of the issuance of this order.

156. The Board members must provide written notice to each voter listed on Table K (Doc. 182-1 p. 65-70), and the voter of ballot No. 20,001,³⁴ at their last known address, within 48 hours of the issuance of this notice. The Board members are ordered to provide written notice to voters explaining that their provisional ballot was rejected, why it was rejected, and telling them they have the right to contact the Board (in writing, by phone, or in person) within in 10 days of the date of the notice to explain why his or her vote should not be rejected. The Board members are ordered to make a record of and consider the voter's response, conduct any follow up investigation the majority of the Board members deem necessary, and to vote on whether to accept or reject these voters' provisional ballots. If any ballots are to be counted, the Board is ordered to remake the ballots, if necessary. The Board members are ordered to count all ballots found to have been cast in the wrong precinct due to poll worker error, including the remade ballots. The Board must allow public observers during ballot remaking and ballot counting. The Board members must complete this work and vote no later than the fourteenth (14th) day after the issuance of this order.

157. After the count is conducted on all ballots ordered to be counted herein, the Board is ordered to amend the certification of the November 2, 2010 election. The amended certification

³⁴ This ballot was reported on the afternoon of August 26, 2011 to have been found by the Board the same week and does not appear to have been voted in the wrong precinct. However, since the parties were not aware of it before trial, and clear poll worker error exists because the poll worker did not sign the front or the back of the envelope, Plaintiffs request it be included in this group to whom due process notice is being provided.

must be completed no later than the fourteenth (14th) day after the issuance of this order.

Thereafter, the Board is ordered to promptly conduct a recount, as required by state law.

158. All parties shall have access to all records of the Board of Elections during the remedial phase in order to ensure compliance with this Court's order.

Respectfully submitted,

/s/ Jennifer L. Branch

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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
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