

**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.	:	PLAINTIFF HUNTER RENEWS THE MOTION TO ENJOIN STATE COURT PROCEEDINGS
	:	
Defendants.	:	

MOTION

Plaintiff Tracie Hunter renews the motion to enjoin that portion of the state court proceedings that directly conflicts with this Court’s Injunction issued November 22, 2010 (Doc. 13). The Board of Elections has complied with the first part of this Court’s order and was about to conclude its work when Defendant Williams obtained an injunction from the Ohio Supreme Court prohibiting the Board from counting the provisional ballots it found should have been counted. The premise for Williams request for an injunction – that opening the envelopes would cause the ballots to be separated from their envelopes – is false. Plaintiff learned at the December 28, 2010 Board meeting that the ballots counted in this process will not be separated from the envelopes. Therefore, if a counted provisional ballot is later determined by a state court that it should not have been counted, the vote can be removed from the total count. Thus, there is no harm caused by completing the implementation of this Court’s order as mistakenly argued to the Ohio Supreme Court. For these reasons, Plaintiff Hunter requests this Court enjoin the state court order staying the Board from opening the envelopes and direct the Board to complete its counting of these provisional ballots.

INTRODUCTION

A. **The Board of Elections Has Voted to Count Some of the Provisional Ballots it Had Previously Rejected**

On December 28, 2010, the Board of Elections voted whether to accept or reject the 849 provisional ballots this Court ordered the Board to investigate. The Board reviewed the poll books, their notes, the provisional envelopes, the transcripts of the interviews of over 70 poll workers, and over 700 questionnaires submitted by the poll workers prior to the December 28, 2010 meeting. The Board unanimously voted to count 16 of the 849 ballots for the following reasons:

9 Votes were cast in the correct precinct all along

- P9935 – the Board’s review revealed the voter lived not on Ridge Road (inside a Cincinnati precinct) but on Ridge Avenue (inside an Amberly Village precinct). So the ballot was properly cast in the Amberly Village Precinct all along. Apparently the error was caused by the road change from Ridge Road to Ridge Avenue at the border of Cincinnati and Amberly Village.
- P10035 and P10036 – the Board’s review revealed that these two voters went to Precinct Springfield AA to vote, cast provisional ballots, were alerted by a poll worker they were in the wrong precinct, the ballots were spoiled (i.e., not counted) and the voters were sent to the correct precinct, Forest Park F. For some unknown reason, the voters took the Springfield AA provisional envelopes with them to Forest Park F and placed the correct Forest Park F ballots inside the Springfield AA envelopes. The Board was satisfied from the poll worker notes and the information on the envelopes that the ballots inside the envelope were properly cast in Forest Park F.
- P9395, P9823, P10175, P2204, P9940, P9771 – the Board’s review revealed the voters all voted in their correct precinct and the Board staff erred in placing them in the category of “wrong precinct” on November 16, 2010.

7 Votes were cast in the wrong precinct due to poll worker error

- P9764, P9580, P0398, P9399, P9738, P0154, and P9769 – Board reviewed the notes, the logs, and the testimony from the poll workers who testified in person and found these ballots were cast in the wrong precinct due to poll worker error. The Board unanimously voted to accept these ballots for counting.

The Board split two to two on whether to accept for counting 269 right location/wrong precinct provisional ballots. Two board members were satisfied that enough circumstantial evidence existed to prove poll worker error. For example, 30% of the voters live on a border street (one side of the street is in one precinct and the opposite side is on the other). Another 20% live on a street that runs through the wrong precinct where they voted. This tie vote will be broken by the Ohio Secretary of State after the Board submits the tie vote to her by 3:30 p.m. on Thursday December 30, 2010.

The Board rejected 531 provisional ballots cast in the wrong precinct because they had uncovered no evidence of poll worker error. Another 35 ballots were rejected because the Board found the ballots were unqualified for some reason unrelated to being voted in the wrong precinct (no identification, no address, no signature, etc.).¹

Once the tie vote is broken, the Board will reconvene and order the staff to open the envelopes and “remake” all ballots cast in the wrong precinct. The staff will also be directed to open the envelopes of the 9 ballots that the Board found had been cast in the right precinct. These 9 correctly cast ballots do not need to be remade. After the ballots are remade the staff will count the 9 correctly cast ballots and all the remade ballots. The Board will then perform a recount of the Juvenile Judge race. After the recount the Board will amend the certification to show the actual winner and the final vote count.

B. The Ohio Supreme Court’s Injunction Directly Conflicts with the U.S. District Court’s Injunction

Contrary to everything Williams argued before this Court at the hearing on December 27, 2010 and in his pleadings (Doc. 31), Williams directly attacked this

¹ Plaintiff’s complaint and evidence showed 849 provisional ballots were rejected for being cast in the wrong precinct. The final number was 851.

Court's Injunction in his Ohio Supreme Court motion for temporary injunctive relief

(Doc. 29-2). In his motion he requested:

the Hamilton County Board of Elections, and their agents, servants, employees, attorneys and those persons in active concert or participation with them *from opening any* of the 849 provisional ballot application *envelopes* cast as part of the November 2, 2010 general election, pending this Court's consideration of the merits of Relators' request for mandamus relief,

Doc. 29-2 p. 2 (emphasis added). This Court directly ordered the Hamilton County

Board of Elections:

To prevent irreparable harm to Plaintiff, Defendant is hereby ordered to examine all 849 faulty provisional ballots for poll worker error and, if such error is found, *count the ballots* as part of the mandatory recount.

Doc. 13 p. 8 (emphasis added). This Court reiterated this order at the bottom of page 9:

“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.”

The Ohio Supreme Court ordered all parties to respond to Williams' motion by 10:00 a.m. on December 27, 2010. Plaintiff Hunter moved to intervene as a Respondent, which was granted. Plaintiff alerted the Ohio Supreme Court to both the Emergency Motion to Enjoin the state court proceedings that was pending in this Court at the time of the filing and to the fact that Williams' motion was an improper collateral attack on this Court's Injunction. *See, Ohio Pyro, Inc. v. Ohio Dept. of Commerce* (2007), 115 Ohio St. 3d 375, 379, 2007-Ohio-5024, 875 N.E.2d 550, 555. The Ohio Supreme Court granted William's relief and ordered:

it is further ordered that the respondents and their agents, servants, employees, attorneys, and other persons acting on their behalf are hereby *stayed from opening the provisional ballot application envelopes* pending further order of this Court.

Doc. 34-2 (Ohio Supreme Court Entry December 29, 2010) (emphasis added). The majority of the Supreme Court provided no analysis or explanation for its ruling. See Doc. 34-1 (Ohio Supreme Court Opinion December 29, 2010). Nor did the Court address the conflict it placed the Hamilton County Board of Elections in: Being held in contempt for violating the Ohio Supreme Court Order or being held in contempt for violating the U.S. District Court's Order.

Chief Justice Brown acknowledged in his concurring opinion that the *Painter* litigation in the Supreme Court raises “significant issues of comity and jurisdictional priority” because the *Hunter* litigation had already resulted in an Order from this Court.

The Chief Justice wrote that:

This court should not interfere with the litigation of these issues already underway in the federal courts. It is difficult to see the filing of this action as anything other than an attempt by relators to collaterally attack a federal court order issued in federal litigation. As argued by respondents, the requested writ would place the board and the secretary in “an untenable position of potential competing court orders.”

Doc. 34-1 (Ohio Supreme Court Opinion December 29, 2010) p. 6. Despite this concern, the unanimous Supreme Court issued its order which directly contradicts this court's Injunction.

The Board cannot comply with both orders. This Court ordered the Board to count the ballots. The Supreme Court ordered the Board not to open the envelopes. The Board cannot count the ballots without opening the envelopes. The Board has complied with the Court's order by conducting the investigation into poll worker error. As soon as the Secretary of State breaks the tie, the Board is ready to open the envelopes and count the ballots. After that, the Board must conduct the recount since the margin of victory will still be so small an automatic recount will be required. The Supreme Court's Order

prohibits the Board from counting and recounting the ballots for the Juvenile Court race. Therefore, this Court should enjoin that portion of the state court Order prohibiting the Board from opening the envelopes.

C. Defendant Williams Obfuscated the Need for an Injunction Before the Ohio Supreme Court

Plaintiff learned at the Board meeting December 28, 2010 that the provisional ballots that were cast in the wrong precinct will be “remade” before they are counted. Most importantly, Plaintiff learned that when a ballot is remade the original ballot is not separated or discarded as Mr. Williams has argued to the Ohio Supreme Court, it is kept with the envelope.² This remaking process involves the following process:³

- a bipartisan team opens the envelope
- the ballot is removed and a new ballot for the correct precinct is made
- the original ballot is kept with the envelope and retained
- the new remade ballot is scanned and counted

The Board’s remaking process alleviates all concerns Williams has made in the Ohio Supreme Court in his motion for temporary injunctive relief.⁴ Williams argued that the envelopes would be discarded. This is simply not true. Even more surprisingly, Williams, the former Director of the Board of Elections, argued to the Ohio Supreme Court that once the ballot is removed from the envelope there is no way to determine how the voter voted. Williams’ false concern in the Ohio Supreme Court is that if the envelopes and ballots are separated, and a reviewing court later determines the ballot should not have been counted, there is not way to know how that voter voted.

² The Transcript of the 12-28-10 Board meeting will be ready 12-30-10 and filed as supplemental evidence when it is received.

³ See Ex. B to Doc. 1-3 (Transcript of Board meeting November 16, 2010) p. 41, 161-62 and Ex. A attached hereto (Minutes of Board Meeting November 19, 2010 (no transcript made that day)).

⁴ Doc. 28-1 (Complaint) and Doc. 28-2 (Motion for Injunctive Relief).

Williams knew or should have known what Plaintiff learned at the December 28, 2010 Board meeting – the original ballot *will* be kept with the provisional envelope. Based on this fact alone, there is no need for the Supreme Court to have ordered the Board to no open the envelopes.

D. Time is of the essence at this Juncture

Time is of the essence in this case. This Court denied Plaintiff Hunter's motion to enjoin the certification of the results of the Juvenile Court race. Doc. 13. The Board certified that John Williams was the winner on November 23, 2010. The Board has until January 22, 2011 to amend that certification. O.R.C. § 3513.22. If the Board does not amend the certification before January 22, 2010, Mr. Williams will remain the certified winner. Williams' Ohio Supreme Court injunction will delay the Board in opening the ballots, counting the ballots, conducting the automatic recount, and amending the certification. Williams has another remedy at law – an elections contest, which he can file after the recount, and will not interfere with the deadline to amend the certification. Williams has chosen instead to file suit in the Ohio Supreme Court in order to attack this Court's Injunction and to slow the process. Williams actions will allow the passage of time to determine the winner, not due process of law.

ARGUMENT

This Court Should Reconsider Its Denial of the Motion to Enjoin State-Court Proceedings and Order the State-Court Proceedings be Enjoined

Plaintiff Hunter, Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless and Ohio Democratic Party moved to enjoin Intervenor-Defendant Williams, his co-Relator John Painter and their counsel from prosecuting their case in the state court. Plaintiffs also moved this court to issue an order enjoining the state court from

proceeding. This Court denied the motion stating that it was within the province of the Ohio Supreme Court to determine whether the Secretary of State's directives comply with state law. However, this Court left the door open for Plaintiffs to file a new motion for injunctive relief if Plaintiffs believed an order from the Ohio Supreme Court "interferes with this Court's" Injunction. Doc. 32. Plaintiff believes the Ohio Supreme Court Order staying the opening and hence, counting and recounting of the ballots, directly interferes with this Court's Injunction ordering the Board to count the ballots and include them in the recount.

When a federal court first issues an order and a state court later issues an order that conflicts with the federal court's order, the federal court has the power to enjoin the state court from enforcing its order pursuant to the Supremacy Clause of the U.S. Constitution. The Sixth Circuit affirmed a district court's order enjoining a state court in *U.S. v. State of Michigan*, 712 F.2d 242 (6th Cir. 1983). In *U.S. v. State of Michigan* the district court had issued an order protecting Native American gill net fishing rights on Lake Michigan. The State of Michigan later held two Native American fishermen in contempt for gill net fishing on Lake Michigan in violation of state law. The district court issued an injunction against the Michigan state court enjoining it from enforcing its contempt orders. The Michigan state court appealed. The Sixth Circuit affirmed, holding:

The federal court case predated the state court restraining order, and this Court's decision upholding the regulations and permitting the Indians to fish predated the state court's contempt order. We cannot be certain what information regarding the regulations or this Court's decision had been brought to the attention of the state court when it issued its contempt orders. We assume that the state court did not intentionally act in defiance of either the Secretary's regulations or this Court's orders. Nevertheless, the state contempt orders had the effect of punishing conduct that this Court had expressly permitted. Thus, the state court's contempt

orders were void, and the District Court properly enjoined their enforcement in aid of its jurisdiction in the case. . . . Since the state contempt orders violated the Supremacy Clause of the United States Constitution, the District Court did not err in enjoining their enforcement.

United States v. State of Mich. at 242. The same situation exists in this case, except that the Ohio Supreme Court was aware of this Court's Injunction at the time it ruled. This Court therefore has the authority to declare the Supreme Court's order void and to enjoin the court from enforcing its stay.

Plaintiff incorporates herein the original motion (Doc. 29) and moves this Court to issue an injunction enjoining the portion of the Ohio Supreme Court's order that stays Defendant Hamilton County Board of Elections from opening the provisional ballot envelopes. Plaintiff further requests that this Court order John Williams and John (Jack) Painter and their counsel from further prosecuting any action in state court seeking to enjoin or stay the Hamilton County Board of Elections from opening the provisional ballot envelopes, counting the ballots inside or recounting the ballots. John Williams, John (Jack) Painter and their counsel should not be prohibited from filing an elections contest after the results of the recount are announced, as is permitted in O.R.C. § 3515.08 et seq. Furthermore, Plaintiff requests that this Court issue an order directed, to the Ohio Supreme Court, ordering the Ohio Supreme Court to stay and to not enforce that portion of its December 29, 2010 Entry and Opinion staying the Board from opening the ballots.

Finally, Plaintiff requests that this Court direct the Hamilton County Board of Elections to follow its own procedures and keep the original ballot together with the envelope of any provisional ballots that are re-made. With regard to the 9 provisional ballots that were correctly voted in the right precinct and do not need to be remade, the Hamilton County Board of Elections should be ordered to make a copy of the ballot and

keep the ballot copy with those envelopes. The Board should be further ordered to keep all provisional envelopes subject to this Court's November 22, 2010 Injunction secure, as required in O.R.C. § 3505.183(A) and keep the secrecy of the individual ballots as required by O.R.C. § 3505.183 (D).

Respectfully submitted,

/s/ Jennifer L. Branch
Jennifer L. Branch #0038893
Trial Attorney for Plaintiff
GERHARDSTEIN & BRANCH CO. LPA
Alphonse A. Gerhardstein #0032053
Attorney for Plaintiff
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 fax
jbranch@gbfirm.com
agerhardstein@gbfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010, 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