

**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.	:	<u>PLAINTIFFS TRIAL BRIEF</u>
	:	
Defendants.	:	

I. STATEMENT OF THE CASE

Plaintiffs seek a permanent injunction against Defendant Hamilton County Board of Elections and its members to enjoin them from rejecting any provisional ballots cast during the November 2, 2010 election due solely to poll worker error.

A. Introduction

Plaintiff Hunter brought this civil rights action on November 21, 2010 against the Hamilton County Board of Elections and its members (“Board”) for treating 849 provisional ballots differently than other provisional ballots. The Board unanimously accepted many miscast provisional ballots that were miscast due to poll worker error, but it did not review all miscast provisional ballots for poll 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. But the Board did not review ballots cast at polling places with multiple precincts for that same type of poll worker error. 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 chose to count. Plaintiff claimed this disparate treatment of provisional ballots was

unconstitutional violation of the Equal Protection Clause and a violation of the Due Process Clause.

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.) Some of the 849 "wrong precinct" ballots described above are subject to that Decree, and the Plaintiffs believe that evidence to be adduced at hearing will demonstrate that other provisional ballots rejected by the Board are as well. The Court should enjoin the Board from rejecting any provisional ballots that must be counted pursuant to the terms of the Consent Decree, and the Court need not find any Equal Protection or Due Process violation with respect to those ballots in order to do so.

B. The Impact of Counting All Ballots

On election night, 2,847 votes separated Ms. Hunter and Mr. Williams in their race for Hamilton County, Ohio Juvenile Court Judge. 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. 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. PX29, Transcript of Board of Elections Meeting November 16, 2010 (pp. 33-34). Another large category of rejected ballots was 849 ballots that were cast in the wrong precinct. *Id.* 34-40. It is

this group of 849 rejected ballots that are at issue in this case, along with any other provisional ballots that were improperly rejected by the Board in violation of the NEOCH Consent Decree.

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. (PX21).

C. Provisional Voting

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. If the poll judge tells the voter she may not cast a regular ballot, the poll worker must tell the voter she can cast a provisional ballot. The poll worker must tell the voter where her correct precinct is and tell her if she casts her ballot in the wrong precinct, her ballot will not be counted. The reasons for needing to cast a provisional ballot include that the voter's name does not appear in the poll book at the precinct, or the voter does not have proper identification, or the poll book indicates the voter had already requested an absentee ballot. O.R.C. § 3505.181 (A). Voters who must cast a provisional ballot are to be helped by the "provisional judge" who has specified duties. (PX 6, Hamilton County Board of Elections Poll Worker Comprehensive Manual, pp. 7- 18). The provisional judge makes sure the voter is given a provisional ballot, the ballot is sealed in an envelope, and the voter and poll worker fill out and sign the envelope. The envelope is then kept separate from the regular ballots. The Board processes all the provisional ballots at the same time after Election Day.

D. Provisional Voting in the Wrong Precinct

In the November 2, 2010 election there were 849 provisional voters whose ballots were rejected by the Board because they were cast in the wrong precinct. Of those 849 ballots, 286

provisional voters were in the correct polling location when they voted in the wrong precinct.¹ These 286 voters voted in a multiple precinct polling location. Some locations have multiple precincts voting in the same room. The voter must find the right table within the location. 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); PX34, Secretary of State Directive 2010-74, p. 12; PX6, Hamilton County Board of Elections Poll Worker Comprehensive Manual, p. 7; PX7, Hamilton County Board of Elections Poll Worker Quick Guide, p. 2). There is confusion in multiple precinct polling locations because voters do not know which is their correct precinct table. 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. PX8, Hamilton County Board of Elections Poll Worker Precinct Guide. The 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.

(PX8, 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).

¹ The Board announced the number was 286 at the December 3, 2010 Board meeting (PX 30 pp. 12-13). This number was later reduced to 269.

E. Board Findings of Poll Worker Error Prior to Injunction

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 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. (PX29).

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. PX30. 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 this voter. (PX 30 Board Transcript Nov. 16, 2010, 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. For example the Board identified 26 provisional ballots that, as a board member put it, were “voted in the wrong precinct.” These 26 voters came to the Board headquarters to cast their ballot. The Board staff gave the voter a ballot for the wrong precinct. Either the staff mis-identified the voter’s precinct or pulled the wrong precinct ballot. The Board called this “clear poll worker error.” Its legal counsel agreed it was appropriate to accept the ballots. The Board unanimously agreed to accept the ballots. State law prohibits counting ballots cast in the wrong

precinct. O.R.C. § 3505.183(B) (4)(1)(ii). The Board avoided violated the state law when it voted to accept these ballots and “remade” the ballots onto correct precinct ballots. 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. (PX30, Board Transcript Nov. 16, pp. 40- 45). These 26 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. (PX 32, Minutes Nov. 19, 2010 meeting).

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. (PX 29, Board Transcript Nov. 16, 2010, pp. 29-33).

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. (PX 29, Board Transcript Nov. 16, 2010, pp. 71-72).

Finally, the Board failed to review and vote on eight (8) 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”), R. No. 8-1 (NEOCH Consent Decree) and in response to PX34, Secretary of State Directive 2010-74.

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.” R. No. 13, Order, p. 7 (emphasis in original).

F. Board Rejected 849 Ballots Without Regard to Poll Worker Error

The Board rejected 849 provisional ballots for being cast in the wrong precinct. These ballots included 269 ballots cast in the right polling location but cast in the wrong precinct. One Board member stated 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.” Nevertheless the Board did not separate out of the 849 provisionals those ballots cast in the right location but in the wrong precinct. Also included in this group of 849 ballots are eight (8) ballots cast by voters who used the last four digits of their social security numbers as identification (“NEOCH ballots”). The Board did not vote on whether poll worker error caused any of these NEOCH ballots to be cast at the wrong precinct. This NEOCH ballot subset was allegedly investigated for poll worker error and none was found.²

² Ms. Poland testified at the TRO hearing that these ballots were investigated for poll worker error and none was found. (PX 29, Board Transcript Nov. 16, 2010, pp. 90-92). However, they were never discussed at the Board meeting on November 16, 2010. There was a statement that they would be discussed, but they never were. What is clear from the Board meeting is that these ballots were not segregated from the 849 and were therefore rejected en

The remaining ballots in the group of 849 were not investigated for poll worker error. With other miscast ballots the Board asked staff questions, checked the poll 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 unanimously voted to reject all 849 ballots. (PX29, Board Transcript Nov. 16, 2010, pp. 24-40; R. No.18, TRO Hearing TR., p. 102).

G. Hamilton County's Practice is Consistent With Other Ohio Counties

Defendants will argue that the Hamilton County Board of Elections' rejection of the 849 ballots was consistent with other counties in Ohio. However, there is no evidence that this is true. At least four counties in Ohio counted provisional ballots cast in the right location but in the wrong precinct. (R. No. 20-7, Ex. F to Motion to Enforce, Minutes of Boards of Elections for Lucas, Seneca, Williams, and Trumbull counties).

H. Hamilton County's Attempts to Comply with Preliminary Injunction

Plaintiff Hunter brought this case on November 21, 2010 seeking an injunction against the Hamilton County Board of Elections and its members ("Board" or "BOE") to investigate and count 849 provisional ballots that the Board had rejected at its November 16, 2010 meeting. The basis for the complaint was twofold: 1) the Board violated the Equal Protection Clause when it counted some miscast provisional ballots due to poll worker error, but not others; 2) the Board violated the Due Process Clause when it allowed the errors of its poll workers to disenfranchise provisional voters.

masse without considering whether poll worker error caused them to be voted in the wrong precinct. (PX 29, Board Transcript Nov. 16, 2010, pp. 34-end). In addition, three NEOCH ballots that are not part of the 849, but are subject to the NEOCH consent decree (ballots 10308, 10494, and 10385) were rejected without any investigation into poll worker error as is required by PX32, Directive 2010-74 p. 11. (*See*, PX 29, Board Transcript Nov. 16, 2010, pp. 50-57; 86-88; 156-158).

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).

The Board, which is a political body made up of two Republicans and two Democrats, cannot 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; 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. The motions resulted in a two to two tie vote. (PX 30, Transcript Dec. 9, 2010 p. 5-7; 22-36). The Board had 14 days to submit the tie to the Secretary of State to break.

After the Board meeting on December 9, 2010, Plaintiff 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. (PX 36, Directive 2010-80). On Saturday December 11, 2010, the Board agreed to subpoena 2,204 poll workers to the Board to testify. (PX 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 about 70 poll workers on December 16 and 17. The vast majority of these poll workers were not poll workers who processed the 849 provisional ballots. (PX 22-26). After 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. (PX15). This action was based on the Secretary of State's Directive 2010-87 further advising the Board how to investigate for poll worker error. The board received about 60% of the responses before it voted on poll worker error on December 28, 2010.

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. (PX 27).

As part of the Democratic Board Members' support to count approximately 149 ballots cast in the correct location Board Member Faux explained that 31% of provisional ballots cast in the right location/wrong precinct were found to have been cast in the wrong precinct because the voters' addresses were located on the wrong side of the boundary street of the precinct in which

the voter should have cast a ballot. This problem was illustrated during the Board interviews where poll workers were confused about the fact that an even house number on a street would be in one precinct and an odd house number on the same street would be in a different precinct. (R. 38-2 6:00 p.m. session at pp. 57-65; R. 38-4 at pp. 76-80; R. 38-8, Burke Affidavit, Ex. 1.) Approximately 15% were found to have been cast in the wrong precinct because the voters' addresses were located outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot. (PX 48 Ex. 1). Approximately 10% were found to have been cast in the wrong precinct because the voters' addresses were located on streets that pass through the precinct in which the voter voted, but the addresses did not fall within the correct address range of the precinct in which the voter should have cast a ballot. (PX 48 Ex. 1).

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. (PX 40 Directive 2011-03). The following Monday, the new Secretary of State took office and superseded Directive 2011-03. (PX Directive 2011-04).

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. 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. 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.

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.

In May 2011, the Board found three provisional ballot envelopes that had never been voted on by the Board. By July 5, 2011, the Board took no steps to investigate, process, or decide what to do with these three newly found provisional ballots.

II. ARGUMENT

A. Jurisdiction

Defendants contest that this Court has jurisdiction over this case (See Joint Final Pretrial Order). Plaintiff raised two constitutional violations: one under the Equal Protection Clause and one under the Due Process Clause. (R. No. 1, Complaint). These claims are properly brought under 42 U.S.C. § 1983. The Court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. When a voting system is attacked for being fundamentally unfair, relief under 42

U.S.C. § 1983 is appropriate. *Warf v. Bd. of Elections of Green County, Ky.*, 619 F.3d 553, 559 (6th Cir. 2010). Such a case may arise if the state employs “non-uniform rules, standards and procedures,” that result in significant disenfranchisement and vote dilution, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008).

The First Circuit has noted that federal court intervention may be appropriate in a challenge to “the fairness of the official terms and procedures under which the election was conducted. [However, t]he federal courts [should not be] asked to count and validate ballots and enter into the details of the administration of the election.”

Brunner, 548 F. 3d at 478, quoting *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978). In *Brunner*, the League alleged that Ohio used non uniform rules, standards and procedures that resulted in massive disenfranchisement. The Court found that it had jurisdiction to hear both the League’s equal protection and due process claims.

Finally, it should be noted that Defendant Williams raised on appeal of this case that this Court did not have jurisdiction to rule on Plaintiff’s claims and that the court should abstain under *Rooker-Feldman*. The Sixth Circuit rejected these arguments. *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 232-234 (6th Cir. 2011), *reh’g and reh’g en banc denied* (March 29, 2011).

B. Permanent Injunction Standard

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)).

C. Equal Protection

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).

Plaintiff will show at trial that Defendant Board violated the Equal Protection Clause by not providing similar treatment to equivalent ballots. There are four categories of ballots in which the Board considered evidence of poll worker error and voted to count the ballots because the defect was caused by poll worker error:

- 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.

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).

At the permanent injunction hearing there will be additional evidence of the similarities with regard to these groups of miscast ballots. All these ballots were cast on the same precinct ballot forms and placed in the same provisional envelopes. All voters were given the wrong

ballot because of poll worker error. For example, the 31 voters who presented themselves at the Board on or before Election Day were not allowed to vote a regular ballot but had to vote a provisional ballot. The voters who presented themselves at a polling location outside the Board were also prohibited from voting a regular ballot and required to vote a provisional ballot. The poll workers at all locations, including the Board, are required by Ohio law and their training, to ensure that the voter is casting a ballot in the correct precinct. The poll worker is required to tell the voter where their correct precinct is, direct them to it if it is not the precinct where they presented themselves, and tell the voter, if he insists on voting in the wrong precinct, that his vote will not count.

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 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. Yet the Board made no review of whether poll worker error caused the other ballots to be cast in the wrong precinct. This different treatment of similarly situated ballots violates the Equal Protection Clause.

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, exacerbates the unequal treatment. After the Board's truncated investigation, it found seven (7) more ballots to be counted. In all, the Board's partial, unequal investigation, found 38 ballots that were miscast due to poll worker error. There is a great likelihood that had

the Board completed the investigation many more ballots would be found to have been miscast due to poll worker error. At the conclusion of the evidence in this case, the Court will be able to determine, by a preponderance of the evidence, the ballots where poll worker error caused the ballots to be cast in the wrong precinct and the Court will be able to direct the Board to count those additional provisional ballots.

All of this evidence shows that Plaintiff has established a constitutional violation by Defendants.

D. Due Process

1. Substantive Due Process

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.

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). The Court was correct. 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).

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).

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).

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)).

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.

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).

Next the Court must look to the Board's interests in disenfranchising these voters. The Board has never articulated an interest in disenfranchising voters, but two interests can be assumed from the record. The first interest is following state law, which prohibits counting any ballot cast in the wrong precinct unless the *NEOCH* exception applies. The second interest is preventing voter fraud.

The latter interest can be quickly dismissed, as there is no rational relationship between the state's interest in preventing or deterring voter fraud, and its rejection of ballots cast by registered and qualified voters whose only mistake was to follow the erroneous instructions of the Board's staff. Because there is not even a rational relationship with this interest, it cannot survive strict scrutiny.

The Board's sole arguable interest in rejecting these ballots, therefore, is that such a result is compelled by state law. There are at least two reasons why this interest does not justify disenfranchising voters whose ballots are defective solely because of government error.

The first reason is because the wrong-precinct ballots can be remade to comply with state law, as shown by the Board's actions here. Specifically, when the Board discovered that 26 ballots were cast on the wrong precinct ballot at the Board's office, it "remade" these ballots onto the correct precinct ballot and then counted the remade ballots. As a result, the voter's intent to vote was preserved, the *remade* ballot—which was now cast in the right precinct—was counted, and the original wrong-precinct ballot was not counted. The Board's ability, practice, and willingness to remake ballots improperly cast in the wrong precinct shows that the Board can narrowly tailor its interest in following state law in a manner that does not unfairly disenfranchise voters. Substantive due process requires that the Board do the same with regard to *all* ballots cast in the wrong precinct because of government error, not just those cast at the Board's office.

The second reason why the Board's interest in following state law does not justify disenfranchising these voters is because it is well-established that where state law conflicts with federal law, federal law reigns supreme. U.S. Const. Art. VI, Cl. 2. The voter's right to due process, including her fundamental right to vote and have her vote be counted, is protected by federal law. U.S. Const. Amend. 14. The fact that state law strictly bars the counting of all technically defective ballots (e.g., those cast in the wrong precinct) in all circumstances—even when the fault lies solely with the government—cannot trump the voter's fundamental right to vote and have his or her vote be counted. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993) (holding that "under no circumstances" may a state confine voters "to a lesser

remedy” than that provided by the Due Process Clause). Accordingly, substantive due process requires that where it is shown, by a preponderance of evidence, that poll worker error caused the ballots to be miscast, those ballots must be counted.

2. Procedural Due Process

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.

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); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1356-57 (D. Ariz. 1990). Therefore, the first prong is met.³

³ *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

The second prong is met under both of the applicable tests. When the Board voted to reject wrong-precinct ballots based on its understanding that state law required that result, 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.

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

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).

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 election⁴ purported to provide a

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.

⁴ 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

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 will show 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. This process therefore was not adequate and instead created a high risk of an erroneous deprivation of the right to vote. 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 2010-68.⁵ Accordingly, the last prong is also met and a due process violation is established.

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.

⁵ 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.

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). Here, the only acceptable post-deprivation remedy is to provide a meaningful hearing with regard to whether the ballot is invalid because of poll worker error and, if so, to count the ballot. The fact that state law prohibits counting these ballots does not prevent such a result, as “under no circumstances” may a state confine voters “to a lesser remedy” than that provided by the Due Process Clause. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993); *see also Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). Alternatively, the voter should have a meaningful post-deprivation hearing and an opportunity to be heard before her ballot is rejected.

E. Equitable Factors

Once Plaintiffs establish a constitutional violation, they must also show they have suffered an irreparable injury. For Plaintiff Hunter, the irreparable injury is not being elected if the final count changes the winner of the election. She will also be injured by the delay in taking the seat on January 1, 2011. For Plaintiff Ohio Democratic Party the irreparable injury is to the voters they represent who have been disenfranchised. The evidence at trial will show that the vast majority of ballots were cast in high performing Democratic precincts. The majority were cast in predominately African American precincts. Thus, for Plaintiff ODP irreparable injury is shown by disenfranchising so many Democratic voters. Plaintiff NEOCH will clearly show

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.

irreparable injury for each of the NEOCH ballots that were not investigated by the Board in violation of the NEOCH consent decree.

There are no adequate remedies available at law for any of the Plaintiffs. An elections contest, which Defendants suggested could be an adequate remedy at law is unavailable to Plaintiffs after the decision in *State ex rel. Painter v. Brunner*, 2011-Ohio-35. In *Painter*, the Ohio Supreme Court held that state law prohibits the Board from counting miscast provisional ballots due to poll worker error, thus an elections contest, which determines whether there were irregularities under state law, is unavailable to Plaintiffs.

The balance of hardships between the parties weighs in favor of Plaintiffs. While the equities between Plaintiff Hunter and Defendant Williams cancel out each other, the Board has a substantial interest in carrying out its election duties timely and in accordance with state and federal law. Additionally, intervenor-appellees NEOCH and the Ohio Democratic Party have a strong interest in enforcing the terms of the *NEOCH* consent decree. *Hunter*, 635 F.3d at 244.

The final factor, the public interest, “primarily addresses impact on non-parties.” In this case, both the state and the voting public have interests at stake. States are “primarily responsible for regulating federal, state, and local elections,” and have a strong interest in their ability to enforce state election law requirements. (“There is ... a strong public interest in permitting legitimate [state] statutory processes to operate to preclude voting by those who are not entitled to vote.”).

Members of the public, however, have a “strong interest in exercising the fundamental political right to vote.” That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful. Because this election has already occurred, we need not worry that conflicting court orders will generate “voter confusion and consequent incentive[s] to remain away from the polls.” To the contrary, 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. at 244-45 (internal citations omitted). Finally, while a visiting judge is sitting on the Juvenile Court bench during this litigation, the public has a right to have the elected candidate on the bench during as much of the six year term as possible.

For all these reasons, the equities balance in favor of issuing an injunction.

F. NEOCH Consent Decree

The Hamilton County Board of Elections is required to comply with the consent decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (Marbley, J.). (“NEOCH Consent Decree”). Plaintiffs NEOCH and the Ohio Democratic Party are parties to the NEOCH consent decree. The consent decree prohibits a Board of Elections from rejecting a provisional ballot that is voted in the wrong precinct due to poll worker error. The consent decree also prohibits the Board from rejecting a ballot with an incomplete signature or name due to poll worker error. 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.” (R. 8-1 at 2).

The Secretary of State, Jennifer Brunner, issued a directive to all Boards of Elections on November 1, 2010 explaining how to comply with the NEOCH consent decree. (PX34 Directive 2010-74). In Directive 2010-74, Secretary of State Brunner reiterated these provisions of the Decree and addressed specific types of poll worker error, including unsigned provisional ballot affirmations and provisional ballots cast in the wrong precinct. (PX34 at 11-12.) To date the Board has not complied with Directive 2010-74 with regard to a number of provisional

ballots. The Board identified 50 potential NEOCH ballots for review. The Board was too narrow in its review and Plaintiffs will show at trial the Board excluded a number of NEOCH ballots from its review and therefore failed to comply with the consent decree with regard to these ballots. Of the 50 identified, 22 were not qualified since the voter was not registered. Five (5) of these ballots were investigated for poll worker error and the evidence at trial will show poll worker error caused these ballots to be miscast. Three were not investigated by the Board at all.

III. REMEDY REQUESTED

A. Order Board to Count Ballots Miscast Due To Poll Worker Error

Based on the evidence submitted at trial, Plaintiff will submit a list of provisional ballot numbers where poll worker error was shown by a preponderance of the evidence. Plaintiff will seek an injunction ordering the Board to count those ballots.

Based on the evidence at trial, Plaintiffs will submit a list of provisional ballot numbers that include all ballots subject to the NEOCH consent decree where the Board did investigate the ballots pursuant to the consent decree and evidence of poll worker error was shown by a preponderance of the evidence. Plaintiffs will seek an injunction ordering the Board to count these ballots.

Based on the evidence at trial, Plaintiffs will submit a list of provisional ballot numbers that include all ballots subject to the NEOCH consent decree where the Board did not investigate the ballots pursuant to the consent decree and order the Board to investigate these ballots using the same inquiry made at the trial of this case, determine whether, by a preponderance of the evidence, poll worker error caused the NEOCH ballots to be miscast, and if so, count those ballots.

B. Do Not Order Board To Uncount Violates Due Process

Defendants seek as a remedy that the Board be ordered to uncount the 31 ballots cast at the Board of Elections Office. This request should be rejected for the same reasons the Sixth Circuit Court of Appeals rejected this remedy. *See, Hunter*, 635 F.2d at 245-46. “[I]t is preferable as an equitable matter to enable the exercise of the right to vote than it is to ignore the results of the investigation already undertaken.” *Id.* at 246.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 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