

CASE NO. 11-3059
CASE NO. 11-3060

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

—
**TRACIE HUNTER, Committee to Elect Tracie M. Hunter for Judge,
Plaintiff - Appellee,**

**NORTHEAST OHIO COALITION FOR THE HOMELESS; OHIO
DEMOCRATIC PARTY,
Intervenors-Appellees**

v.

**HAMILTON COUNTY BOARD OF
ELECTIONS, et al.,
Defendants**

and

**JOHN WILLIAMS,
Intervenor-Appellant**

—
On Appeal from the United States District Court
For the Southern District of Ohio
Western Division

—
**BRIEF OF PLAINTIFF-APPELLEE TRACIE HUNTER.
NORTHEAST OHIO COALITION FOR THE HOMELESS AND
THE OHIO DEMOCRATIC PARTY**

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND
FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellee offers the following disclosures:

Plaintiff-Appellee Tracie Hunter is not a subsidiary or affiliate of a publicly owned corporation.

No publicly traded corporation has a financial interest in the outcome of this appeal.

/s/ Jennifer L. Branch
Attorney for Plaintiff-
Appellee

Date: January 19, 2011, 2010

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Northeast Ohio Coalition For The Homeless makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? **NO**

/s/ Caroline H. Gentry
Signature of Counsel

January 19, 2011
Date

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Ohio Democratic Party makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? **NO**

/s/ Donald J. McTigue
Signature of Counsel

January 19, 2011
Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to FRAP 34(a), Plaintiff and Intervenors request oral argument on these consolidated appeals since they involve the duty to afford voters who cast provisional ballots equal protection under the law and due process of law.

I. JURISDICTIONAL STATEMENT

Plaintiff Hunter brought this 42 U.S.C. § 1983 case against the Hamilton County Board of Elections challenging the Board's unequal treatment of provisional ballots as a violation of the Equal Protection and Due Process Clauses of the United States Constitution. (R. 1, Complaint). This Court and the District Court, therefore have subject matter jurisdiction. Furthermore, this appeal seeks to reverse the order enforcing the court's preliminary injunction issued by the District Court on January 12, 2011. R. 39, Order, Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction.

II. STATEMENT OF ISSUES FOR REVIEW

The issue for review in these two new appeals is:

Whether the District Court properly ordered the Hamilton County Board of Elections to comply with the court's preliminary injunction, count certain ballots, and investigate the *NEOCH* consent decree provisional

ballots to determine whether these provisional ballots were cast for reasons attributable to government poll worker error.

III. STATEMENT OF THE CASE

Plaintiff-Appellee Tracie Hunter is 23 votes away from becoming the first African American juvenile judge in Hamilton County, Ohio. At issue in this appeal is her struggle to ensure that provisional voters who followed all of the instructions they received from government poll workers do not have their votes rejected because the government agents mistakenly directed them to the wrong precinct.

State-court proceedings that were initiated *after* this lawsuit was filed have now established that in Ohio, a provisional vote cast in the wrong precinct will not get counted, notwithstanding poll worker error. Initially, the Defendant Hamilton County Board of Elections (Board) had unanimously and reasonably decided that, when its own government employees were responsible for a ballot being cast in the wrong precinct, they would “remake the ballot” and count the vote since the voter did nothing wrong. But the Board did not consider whether similarly situated ballots that were also affected by poll worker error should likewise be counted. That denial of Equal Protection led to the District Court’s

November 22 preliminary injunction, which is the subject of an earlier appeal.

As detailed below, the District Court has correctly and necessarily directed the Board to count the ballots that were clearly miscast in the wrong precinct because of poll worker error, not voter error. The stakes are high. The record to date shows that the polling places where most of the error-infected provisional ballots were cast are in African American areas of Hamilton County. All voters from all races and all geographical areas need to know that their votes will be counted consistently. In its January 12, 2011 Order, the District Court correctly enforced the principles of equal protection and due process and directed the Board to count votes that were miscast due to known poll worker error.

During the initial vote count, the Board unanimously accepted many miscast provisional ballots that were miscast due to poll worker error, but it did not review all 849 miscast provisional ballots for poll worker error. For example, the Board accepted 26 ballots that were cast at Board headquarters when the Board learned that its staff gave voters ballots for the wrong precincts. 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 arbitrarily chose to count. Ms. Hunter claimed that this disparate treatment of provisional ballots was unconstitutional.

The District Court determined that the Board engaged in differing scrutiny and treatment of provisional ballots and that Hunter had shown a likelihood of success on her equal protection argument. (R. 13, p. 7.) The court issued an injunction and ordered the Board to immediately investigate and count any provisional ballots miscast due to poll worker error. (R. 13, p. 9.)

The Board did not appeal the preliminary injunction, but Intervenor-Defendant John Williams did and sought a stay pending appeal. *See* Case No. 10-4881 (“First Appeal”). A panel of this Court denied Mr. Williams’ request for a stay of the injunction as well as Mr. Williams’ request for reconsideration of the denial of the stay. The panel stated that it “could not conclude that the District Court abused its discretion in determining that this disparate treatment made it ‘likely enough that [the likelihood of success] factor weighs in favor of granting the preliminary injunction.’” (Order, December 1, 2010, p.3.)

While the appeal was pending, the Board investigated some of the 849 ballots for poll worker error and found seven ballots that were cast in the

wrong precinct due to poll worker error. The Board also found that nine of the ballots rejected for being cast in the wrong precinct were, in fact, properly cast in the right precinct. At its December 28, 2010 meeting, the Board voted to count these 16 ballots.

On January 7, 2011, the Ohio Supreme Court issued a writ of mandamus to the Board ordering it to rescind the decisions it had made during the investigation. *State ex rel. Painter v. Brunner*, 2011-Ohio-35, ¶ 52. On January 10, 2011, the Secretary of State issued Directive 2011-04 and ordered the Board to determine that the 850 ballots subject to the District Court's Injunction are "invalid and shall not be counted." (R. 38-1.) The Directive ordered the Board to certify the results of the election. *Id.* The Board immediately scheduled a meeting for the following day – January 12 at 3:30 p.m. – in order to implement this Directive. If that Directive were followed, then the Board would have ignored the District Court's preliminary injunction and affirmed that it can direct unwitting voters to the wrong precinct and then disregard their votes. This power, which can obviously be abused with respect to vulnerable voters, and which results in the disenfranchisement of voters who have done everything within their capacity to comply with applicable election laws, flagrantly violates equal protection and due process.

In response to the Directive, on January 11, Ms. Hunter and Intervenor-Appellees filed an emergency motion with the District Court for an order to enforce the preliminary injunction. The District Court granted the motion on January 12, 2011, before the Board meeting at 3:30 p.m. The District Court ordered the Board to count the 16 ballots it had already unanimously voted to count and 149 additional ballots because the record showed that those ballots had been cast in the wrong precinct at the direction of poll workers. The District Court also ordered the Board to investigate the provisional ballots subject to the *NEOCH* consent decree, which the Board had inexplicably failed to do. (R. 39.)

Mr. Williams and the Board filed their notices of appeal on January 14, 2011 and January 16, 2011, respectively. On January 18, 2011, a panel of this Court granted a stay of the District Court order until resolution of all three appeals.

Knowing the deadline to amend the certification of the election was fast approaching on January 22, 2011, Ms. Hunter and Intervenor-Appellees also asked the District Court to enjoin the Board from complying with the statutory deadline set forth in O.R.C. §§ 3505.32(A) and 3513.22 (R. 38.) The Board had until January 22, 2011 to complete its investigation, count any additional provisional ballots, conduct the automatic recount, and

amend the certification of the results. The District Court granted this request and enjoined the application of O.R.C. §§ 3505.32(A) and 3513.22. (R. 47, Order Regarding Canvas of Returns). No party has appealed this ruling, and this Court did not stay the enforcement of this order. (Order dated January 18, 2011.)

IV. STATEMENT OF FACTS

Ms. Hunter and Intervenors-Appellees incorporate the facts set forth in their merit briefs filed in the First Appeal No. 10-4481, and add these additional facts to explain what has transpired in the last few weeks.

A. The Board's Investigation Found Errors That Led to a Vote to Count Sixteen (16) Additional Ballots and a Tie on Whether to Count 269 Additional Ballots.

- 1. The Board found seven (7) ballots were cast in the wrong precinct due to poll worker error and unanimously voted to count all seven ballots.**

The District Court has ordered the Board to count “seven ballots that were investigated, found to have been cast in the wrong precinct due to poll worker error and unanimously voted upon at the Board’s December 28, 2010 meeting.” (R. 39.) The District Court’s order stems from the Board’s activities following the issuance of the November injunction.

On December 16 and 17, 2010, the Board interviewed 77 poll workers under oath. (Transcripts, R. 38-2 Transcript of December 16, 2010 Board Meeting and R. 38-3.) Transcript of December 17, 2010 Board Meeting (a.m. and p.m. sessions)). The most productive of these interviews was of the seven poll workers who actually processed and signed provisional ballots that had been rejected because they were cast in the wrong precinct. Each of these poll workers testified that they had made a mistake in processing the ballot. Specifically, the poll workers misidentified the voters' correct precincts. For example, one witness in a multiple precinct polling place testified that he processed provisional ballots and that he trusted the other poll workers on his team to look up the voters' addresses to make sure they were in the correct precinct. When he was confronted with the fact that a voter's correct precinct was at another location in the polling place, the witness admitted that the poll workers made a mistake in not getting the voter to the right precinct table. (R. 38-3 p. 7-11.)

During the Board's interviews, other witnesses were asked to look up addresses in the precinct finder book and find the correct precinct. Each of these witnesses admitted that on Election Day they looked up the addresses wrongly and made mistakes about which precincts the voters were in. This

resulted in voters being directed to vote in the wrong precincts. For example:

13 MR. BURKE: What I'd like you to
14 do, Mr. G, is go to the green book
15 and determine the correct precinct those
16 voters should have voted in.
17 CHAIRMAN TRIANTAFILOU: We saw that
18 on Election Day, about the way it was
19 turned upside down
...
7 MR. E G: 4715 -- I think
8 I made a mistake.
9 MR. BURKE: Say again please.
10 MR. E G: I made a
11 mistake, I guess, on that one. Should
12 have been 2F instead of 2G.
13 MR. BURKE: And on Election Day,
14 you were going through this same process
15 with a lot of people there?
16 MR. E G: Right.
17 MR. BURKE: Trying to get things
18 done in a hurry?
19 MR. E G: Right, just
20 wasn't too -- you know.
21 MR. BURKE: Understand. And then,
22 again, nobody --
23 MR. E G: You are right,
24 515 people waiting in line and so forth . . .

(R. 38-2, at pp. 63-64.) The witness went on to explain how he made the same mistake with two additional ballots. *Id.* at 57-67. Another witness looked up the address at the Board's request and determined that the voter was to vote in Cincinnati Precinct 4A. However, he got it wrong. When used correctly, the book indicated that the correct Precinct was 4C. It was

clear that the witness did not pay attention to the fact that the voter's address was an even number. (R. 38-3 at pp. 45-50.) As a result, the poll worker directed the voter to vote in the wrong precinct.

At the Board meeting on December 28, 2010, Chairman Alex Triantafilou moved to count all seven of these ballots. The motion passed unanimously. (R. 38-4 Transcript of December 28, 2010 Board Meeting pp. 68-73.) The Board then stopped interviewing poll workers.

2. The Board's investigation found that nine (9) ballots were properly cast in the right precinct.

The District Court has ordered the Board to count "nine ballots that were investigated, found to have been cast in the correct precinct but were rejected due to staff error, and unanimously voted upon at the Board's December 28, 2010 meeting." (R. 39.) The facts behind this order are as follows. At the December 28 meeting, the Board found that nine (9) provisional ballots had been cast in the right precinct all along. The Board realized that, on November 16, Board staff had improperly included these nine ballots in the group of 849 "wrong precinct" ballots. Due to *staff* error, these nine ballots had been rejected incorrectly by the Board on November 16. The Board corrected this at the December 28 meeting and unanimously voted to count these nine provisional ballots. Under Secretary Husted's

Directive 2011-04, these ballots will not be counted even though they were cast in the right precinct.

- 3. The Board's investigation found that approximately 149 ballots were cast in the right location/ wrong precinct due to poll worker error in determining whether the street address was located inside the precinct.**

The District Court has ordered the Board to count “the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker error in determining whether the street address was located inside the precinct.” (R. 39.) The facts behind this order are as follows. Board members Burke and Faux presented evidence to the Board of their investigation into the addresses of approximately 149 of the 269 right location/ wrong precinct provisional ballots. Their analysis showed that:

- approximately 83 (31% of 269) 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 40 (15% of 269) 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 outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot. (R. 38-8, Burke Affidavit, Ex. 1.)
- approximately 26 (10% of 269) 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 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. (R. 38-8, Burke Affidavit, Ex. 1.)

The Board voted on whether to count the entire group of 269 right location/wrong precinct ballots and tied 2 to 2. On January 7, 2011, Secretary of State Brunner broke the tie in favor of rejecting the entire group of 269, but she simultaneously issued Directive 2011-03, which directed the Board to count the 149 ballots discussed above. (R. 38-9). Secretary of State Husted, on his first day in office, January 10, 2011, issued Directive 2011-04, which "superseded" Directive 2011-03. (R. 38-1.) Secretary

Husted directed the Board to reject all 849 ballots, including the 149 provisional ballots found to have been cast in the wrong precinct due to poll worker error. *Id.*

4. Poll workers reported that all voters, when told where their correct precinct was, went to the correct precinct to cast their vote.

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). The Board sent questionnaires to over 1,000 poll workers and received over 800 responses to the questionnaires before the December 28, 2010 Board meeting. The questionnaires solicited information about whether any voter, when told to go to another table in the polling place, refused to move to the that precinct table. Of the 830 questionnaires returned, there was no evidence of voters refusing to go to the correct precinct table as directed by the poll workers. Instead, all of the returned questionnaires indicated that, when the voter was asked to move to a precinct, the voter complied. (R. 38-4 at pp. 69, 76; R. 38-8, Burke Aff., at ¶ 13.) Additionally, all 77 poll workers who testified under oath testified the same. *Id.*

5. The Board previously found evidence of poll worker error.

The record reveals numerous examples of the Board counting ballots that had been miscast due to poll worker error, even though it later stopped similarly miscast ballots during the recount in Tracie Hunter's race. The Board has 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.

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. (R. 1-3, Transcript November 16, 2010 meeting.) In many cases the Board members asked questions of the Board staff, read the notes on the provisional ballot envelopes, read the notes in the pollbooks, and inquired if there was a call on the Board help line on Election Day regarding

this voter. (R. 1, Complaint ¶ 24; R. 1-3, Board Transcript, 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.” The Board’s legal counsel agreed it was appropriate to accept the ballots. The Board unanimously agreed to accept the ballots. The Board avoided violating state law, O.R.C. § 3505.183(B) (4)(1)(ii), which prohibits counting ballots cast in the wrong precinct, by “remaking” the ballots into 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. (R. 1-3, pp. 40- 45.) These 26 provisional ballots were then included in the final count.

At the November 19, 2010 Board meeting the staff found four additional ballots where poll worker error was found. The staff found several provisional envelopes where the envelope listed the correct precinct

but when the envelope was opened the ballot inside was for the wrong precinct. The Board unanimously agreed to remake and count the ballots even though they were cast in the wrong precinct because of poll worker error.

Another example of poll worker error involved a group of 685 provisional ballots where the poll workers filled in contradictory information on the provisional envelope stating that the voter provided identification and also stating that the voter was required to provide additional identification to the Board. The Board staff investigated the voters to make sure they were registered voters and recommended that the votes be counted even though the voters did not bring identification to the Board. The Board accepted similar ballots in prior elections. The Board's legal counsel agreed that this was an example of "demonstrated poll worker error" such that the Board could process the ballots. The Board agreed to unanimously approve these ballots. (R. 1-3, Board Transcript, pp. 29-33.)

The staff presented to the Board 10 ballots where the voter had not signed the provisional 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 vote a provisional ballot.

The Board unanimously approved these provisional ballots. (R. 1-3, Transcript of November 16, 2010 Board Meeting, pp. 71-72.)

After reviewing all of these actions by the Board, the District Court correctly found 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. 13, Order, p. 7).

B. The Board Did Not Investigate Any of The *NEOCH* Ballots For Poll Worker Error In Violation Of The *NEOCH* Consent Decree.

There were 21 *NEOCH* ballots identified by the Board as being part of the 849 rejected provisional ballots subject to this Court’s Injunction. (R. 38-5.) The Board did not investigate these ballots for poll worker error. The Board failed to conduct this investigation even though, like all boards of election in Ohio, it was ordered by the Secretary of State prior to Election Day to investigate miscast *NEOCH* ballots for poll worker error before rejecting them. (R. 1-2, SOS Directive 2010-74.) Directive 2010-74 instructed the Board how to investigate miscast *NEOCH* ballots for poll worker error: question poll workers. The Board has not done this with regard to the 21 *NEOCH* ballots that are a subset of the 849 rejected ballots.

Plaintiff was under the impression that the Board had investigated the *NEOCH* ballots, but a close reading of the transcript of the Board’s

November 16, 2010 meeting shows they were not discussed. Board staffer Sherry Poland testified at the TRO hearing that these ballots were investigated for poll worker error and none was found. (R. 18 TR. pp. 90-92.) However, they were never discussed at the Board meeting on November 16, 2010. (*See generally* R. 1-3, Transcript of November 16, 2010 Board Meeting.) There was a statement that they would be discussed, but they never were. (*Id.* pp. 34-end). What is clear from the Board meeting is that the Board knew they needed to segregate the *NEOCH* ballots and investigate them, but they were instead rejected *en masse* with the rest of the 849 ballots that were cast in the wrong precinct.

Moreover, the Ohio Supreme Court's recent decision in *State ex rel. Painter v. Brunner*, 2011-Ohio-35, ***expressly excepted these ballots from its order.*** *Id.*, ¶ 52 (ordering the secretary of state to compel the board of elections to “review the 850 provisional ballots that are the subject of Judge Dlott’s order *and are not subject to the consent decree in Northeast Ohio coalition for the Homeless*, with exactly the same procedures and scrutiny applied to any provisional ballots during the board’s review of them leading up to its decision on November 16”) (emphasis added). On January 12, 2011, the Ohio Secretary of State also ordered the Board to investigate the *NEOCH* ballots. (R. 44-1 Directive 2011-05.) The Secretary also instructed

the Board to follow prior Directives 2010-74 and 2010-79. No party to these appeals disputes the Board's need to investigate these ballots according to these directives.

In addition, the Board did not investigate any of the other *NEOCH* ballots that were rejected for reasons other than being cast in the wrong precinct. For example, the Board rejected a number of provisional ballots where the voters either did not print their names on the affirmation on the envelopes but signed the envelopes or printed their names but did not sign the envelopes. The Board rejected these ballots without determining whether poll worker error was involved. Additional ballots were rejected without determining whether there was poll worker error. The *NEOCH* ballots were not identified or investigated before the Board rejected these ballots. (R. 1-3, Transcript of November 16 Board meeting.) The Board's actions violated the *NEOCH* consent decree.

V. SUMMARY OF ARGUMENT

In the preliminary injunction the District Court ordered the Board of Elections to investigate the 849 provisional ballots it had rejected to determine if poll worker error caused the ballots to be rejected and to count those ballots if they were miscast due to poll worker error. (R. 13.) Defendant Williams appealed the preliminary injunction. Plaintiff

thoroughly briefed the propriety of the preliminary injunction in its Merits brief on the First Appeal and will not repeat those arguments here. The district subsequently issued an order to enforce the preliminary injunction. The District Court correctly ordered the Board to count three categories of provisional ballots because the Equal Protection Clause and the Due Process Clause prohibit the Board from disenfranchising voters due to its worker's errors. The District Court correctly ordered the Board to investigate the NEOCH ballots because the Board had flagrantly failed to do so in violation of the NEOCH consent decree.

VI. ARGUMENT

A. The District Court Correctly Held That The Board Should Count Three Categories Of Provisional Ballots Because The Due Process Clause Prohibits The Board From Disenfranchising Voters Due To Its Worker's Errors.

The District Court ordered the Board to: 1) count the seven ballots that were investigated and found to have been cast in the wrong precinct due to poll worker error; 2) count the nine ballots that were investigated and found to have been cast in the *correct* precinct but were rejected due to staff error and unanimously voted on by the Board and 3) count the 149 ballots that were investigated and found to have been cast in the wrong precinct due to poll worker's error in determining whether the street address was located

inside the precinct. (R. 39.) Not only was this Order justified by the District Court's prior preliminary injunction, which was based on the Equal Protection Clause, but the Due Process Clause also requires that these ballots be counted.

The District Court did not rely on due process in its initial Preliminary Injunction (R. 13), although Plaintiff Hunter raised it in her Complaint (R. 1). In its enforcement Order, however, the District 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.

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

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). See also, *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).

Even if the District Court did not explicitly rely on the Due Process Clause, this Court may affirm a District Court's decision on any ground supported by the record, even grounds not relied on by the lower court. *See, Wausau Underwriters Ins. Co. v. Vulcan Development, Inc.*, 323 F.3d 396 (6th Cir. 2002); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 441-442 (6th Cir. 2002); *Hayes v. Equitable Energy Resources Co.*, 266 F.3d 560, 569 (6th Cir. 200).

The concept of "liberty" assured by the Due Process Clause of the Fourteenth Amendment embraces those rights and freedoms that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)(Cardozo, J.). 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 Supreme Court has adopted a special balancing test for evaluating due process claims against state election laws, all of which inevitably affect the fundamental rights of political parties, candidates, and 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, ‘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)).

If the Board disenfranchises the 9 voters whose ballots were cast in the right precinct, the 7 voters whose ballots were cast in the wrong precinct due to admitted poll worker error, and the 149 voters whose ballots were cast in the wrong precinct because the poll worker misread their address, then these 165 voters will suffer a severe burden: the loss of their vote *through no fault of their own*. They only voted in the wrong precinct at the direction of poll workers. Not to count these ballots is indeed a severe burden.

Next, the Court must look to the Board’s interests in disenfranchising these voters. The Board has never articulated its interests in disenfranchising these voters. Three interests can be assumed from the record. The first supports enfranchisement. The Board has demonstrated an interest in counting provisional ballots that would otherwise be rejected when the error is caused by poll workers (*e.g.*, see examples of Board’s practice of correcting poll worker error in section IV (A)(5), *supra.*) Second, the Board wants to prohibit voter fraud (*e.g.*, not allowing a voter to vote twice). A third interest is the Board’s desire to follow state law and not count ballots cast in the wrong precinct. The Board’s decision to reject these

165 ballots is not narrowly tailored to advance the Board's interest in eliminating voter fraud or counting ballots only cast in the right precinct.

Rejecting the 9 ballots properly cast in the right precinct does not advance any of the Board's interests. Frankly, there is no argument any party can make that the Board has any interest in rejecting properly cast ballots. Therefore, under the Due Process Clause, the counting of these ballots was proper.

The Board's rejection of the 7 ballots that poll workers admitted were miscast due to their errors in determining the voters' precincts could further its interest to follow state law and not count ballots cast in the wrong precinct. However, rejecting these ballots is not narrowly tailored to meet that interest. The Board's process for handling other votes miscast in the wrong precinct shows that the Board can narrowly tailor its actions. For example, where the Board found 26 ballots cast on the wrong precinct ballot at the Board, the Board remade these ballots onto the correct precinct ballots. Thus, the voters' intent to vote was preserved and the remade ballots now cast in the right precincts were counted. The Board's ability, practice, and willingness to remake ballots that were improperly cast in the wrong precinct shows that the Board can and does narrowly tailor its

interests so that it does not disenfranchise voters. Therefore, Due Process requires that the Board do the same with regard to these seven ballots.

The Board's rejection of the group of approximately 149 ballots¹ cast in the wrong precinct due to poll workers' failure to match the voters' addresses with the correct precincts is not narrowly tailored to advance the Board's interests. The Board investigated a group of 286 ballots cast at the right polling place but at the wrong precinct table. Board member Caleb Faux investigated these ballots by reviewing the voters' addresses and comparing them to the precincts' address lists. Mr. Faux offered to create a spreadsheet for the Board to review that included voter name, address, and correct precinct. (Ex. A to Plaintiffs' Memorandum in Opposition to Motion for Stay, December 21, 2010 Board Meeting Transcript at 17-20.) He wanted this information to determine if any of the 286 voters whose ballots were rejected for voting in the wrong precinct lived on the opposite side of the boundary street for the precinct in which they miscast their ballot:

19 One of the things that we certainly
20 have seen in the process of interviewing
21 the poll workers that we talked to last
22 week in reviewing the ballots that were
23 dealt with in those individual precincts

¹ Plaintiff derived this number in her motion to enforce the Injunction (R. 38) by adding together 31% of 269, 15% of 269 and 10% of 269 and rounding down. The exact number was not made public at the December 28 Board meeting.

24 were repeated instances of a voter who
25 lived on a street that was the boundary

1 of a precinct. They literally lived
2 across the street from the precinct in
3 which they voted. Clearly the poll
4 workers themselves thought they were in
5 the right precinct. The voter thought
6 they were in the right precinct. It was
7 an issue of misreading the Precinct
8 Guidebook.

9 So, in my mind anyway, in order for
10 us to evaluate these in an orderly
11 fashion, it would be helpful to have the
12 addresses in question of these
13 provisional ballots that are still
14 outstanding. . . .

(*Id.* at 18-19). The Board allowed Mr. Faux to do this analysis to save the Board staff from doing it. (*Id.* at 19:18- 20:16.) At the December 28 Board meeting, Mr. Faux announced the results of his analysis of the addresses of the 286 voters and explained that 31% of the voters lived on the opposite side of the boundary street of the precinct in which they voted:

5 Over 30 percent of these were
6 instances -- by my count 31 percent of
7 them were instances where the voter's
8 address fell on the street, on a street
9 that was the boundary of the precinct
10 that they voted in, their address
11 happened to be on the wrong side of the
12 street. These are instances where the
13 odd numbers or the even numbers made the
14 determination as to which was the correct
15 precinct.

(R. 38-4 at 77.) He found that over 50% of these 286 voters lived on a boundary street or a street that passed through the precinct where they voted – the poll worker just wrongly compared their addresses with the precincts’ addresses. (*Id.* at pp. 84-85.) None of Mr. Faux’s analysis was statistical; he simply gave the overall numbers in the form of percentages of the 286 ballots instead of in absolute numbers. But the Board did not agree to count any of the 286 ballots Faux investigated. The Board submitted the issue to the Secretary of State. (See R. 38-8, Burke Affidavit and exhibits thereto for a very detailed analysis of these ballots.)

The then Secretary of State ruled that the Board *should* count these 149 ballots miscast due to poll worker error. (R. 38-9.) The Secretary based her decision on Board members’ submissions to her. (*Id.*; R. 38-8.) Williams attempted to seek a writ of mandamus from the Ohio Supreme Court to prohibit the Board from complying with Directive 2011-03, but the Ohio Supreme Court dismissed the action. (Ex. B to Plaintiffs’ Memorandum in Opposition to Motions for Stay, Ohio Supreme Court Entry dated January 10, 2011.) Therefore, it is disingenuous for the Board to argue that the District Court’s order regarding these 149 ballots is directly contrary to the Ohio Supreme Court’s decision. (Board Motion at 13-14.) There is no Ohio Supreme Court decision directed to these 149 ballots.

The District Court properly found that Faux's investigation of the 149 miscast provisional ballots provided evidence of poll worker error.² Rejecting all of these ballots will result in the complete disenfranchisement of voters who were told to vote in the wrong precinct simply because the poll worker erred in determining which precinct they lived in. The Board's only interest in not counting these ballots is that they were cast in the wrong precinct. The Board can narrowly tailor its response to satisfy this interest by remaking the ballots onto the correct precinct ballot and counting the votes. Therefore, substantive due process requires that the Board count these ballots. The District Court properly ordered the Board to count this category of ballots.

Procedural due process also requires that these ballots be counted. It is axiomatic that the right to vote is fundamental. It is a "liberty interest" entitled to protection under the Due Process Clause. *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004). It also is a "property interest"

² Moreover, even if the Ohio Supreme Court's analysis of the Equal Protection Clause applied—and it does not—Mr. Faux's analysis would comply with it. None of his analysis is based on poll worker interviews, questionnaires, or the Directives that the Ohio Supreme Court ruled were improper under state law. The Faux analysis consisted of looking at the voters' addresses and comparing them to the street guide for the precincts to see if the voters lived on streets that passed through the precincts where the poll worker determined (wrongly) they should vote. Burke testified in his affidavit that, for example, Madison Road passes through 22 precincts in Hamilton County. (R. 38-8 at Ex. 1.) This type of investigation was approved by the Ohio Supreme Court. (Board Motion for Stay at Ex. 2.)

entitled to such protection. In explaining the nature of a property interest, the Supreme Court has emphasized that its “hallmark” is “an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982). The right to vote is such an entitlement and should be accorded the same protections that procedural due process gives to all property and liberty interests before they are infringed upon by the state, namely, notice and a meaningful opportunity to be heard, and an adequate pre-deprivation or post-deprivation process. *See generally Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

Here, the Ohio statute attempts 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, advising him that his vote will not count. O.R.C. § 3505.181(C). But the evidence shows that *this process was not followed here* because the poll workers themselves wrongly believed that the voter was in the correct precinct and so did not provide this pre-deprivation process. It therefore was not adequate.

To protect these voters’ rights to procedural due process, 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).

B. The District Court Correctly Held That The Board Should Count Three Categories Of Provisional Ballots Because The Equal Protection Clause Prohibits The Board From Disenfranchising Voters Due To Its Workers’ Errors.

The Equal Protection Clause also supports the District Court’s Order to the Board to count these 165 ballots (9+7+149). Plaintiff and Intervenor-Appellees’ Briefs in the First Appeal, which are incorporated herein, explained how the Equal Protection Clause properly supported the District Court’s Injunction. (Hunter Merit Brief pp. 19-28.) The District Court’s January 12 Order required the Board to count the 165 ballots that were found to have been miscast due to poll worker error. The Court’s Order requires the Board to treat these ballots the same as it treated the ballots it counted at the November meetings that were miscast due to poll worker error (*e.g.*, 26 ballots miscast at the board due to staff error, 4 additional ballots miscast at the Board due to staff error, 685 ballots were counted where poll workers

erred in requiring voters to provide identification, 10 ballots where the voter had not signed the envelope, and 2 ballots that had no printed name or only a partial printed name.)

Clearly, the 9 ballots that the District Court ordered to be counted because the ballots were cast in the right precinct must be counted, as all other ballots cast in the right precinct were counted. The Board offers no rationale for treating these ballots differently than all other correctly cast ballots. Indeed, the Board does not even appeal this portion of the Order.

The remaining 156 ballots include the 7 where the poll workers testified that they erred. The Board offers no rationale for treating these 7 ballots differently than the 26 ballots the Board counted because poll worker error caused the voter to cast a ballot in the wrong precinct. Williams will argue that poll worker error was discovered by the Board during its interviews of poll workers, which the Ohio Supreme Court now says was improper under state law. But the *Painter* decision does not apply here because equal protection requires the votes be counted regardless of how the Board discovered the poll worker's error.

- 1. The Board's unequal treatment of known ballots miscast due to poll worker error fails under equal protection.**

Under the Equal Protection Clause, courts apply strict scrutiny when the legislative classification at issue involves a fundamental right or a suspect class.³ *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999). “If the challenged legislation grants the right to vote to some residents while denying the vote to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest.” *Mixon*, 193 F. 3d. at 402. However in *Mixon*, the court applied rational basis review. The challenged legislation changed the selection of the Cleveland school board from an election to appointment. This Court held that the legislation did not restrict the plaintiffs’ right to vote in an election, which would be a fundamental right subject to strict scrutiny. Instead, the plaintiffs had no fundamental right to elect an administrative body such as a school board. *Id.* at 403.

In *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 89 S.Ct. 1886 (1969) the Court articulated the strict scrutiny analysis in a voting case that grants the vote to one citizen, but not to another, saying: “the Court must determine whether the exclusions are necessary to promote a

³ Plaintiffs have not alleged a suspect classification in this case at this time, although the evidence developed in the record may support a classification based on race. See statements made by Board member Burke. Burke has said that a large number of the provisional ballots cast at the right polling place but wrong precinct table are in predominately democratic and predominately racial minority precincts.

compelling state interest.” *Id.*, 395 U.S. at 627. Once the right to vote is granted to the electorate, “lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Id.* (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083 (1996)). In *Kramer*, the Court found that the state’s interest in limiting voters for school board members to those who own property or have a child in school, *i.e.*, those who were “primarily interested” in school affairs, was unconstitutional. The Court balanced the state’s interest and found that some of those excluded from voting for the school board were more interested in school affairs than those who were allowed to vote. The Court held that the voting exclusion was not sufficiently tailored to limit the franchise to those “primarily interested” in school affairs to justify the denial of the franchise to plaintiff. Thus, the legislation was struck down on equal protection grounds.

In the case at bar, the Board’s decision to reject the 165 ballots in question cannot withstand strict scrutiny. The Board’s acceptance of certain ballots that were miscast due to poll worker error while rejecting 165 ballots miscast due to known poll worker error does not advance its interest in complying with state law (which prohibits counting a ballot cast in the wrong precinct), especially in light of the Board’s practice to remake the

ballots before counting them. For these reasons, the District Court's orders properly required the Board to investigate rejected ballots and count the ballots that the Board found were miscast due to poll worker error.

2. The District Court's remedy was proper and not in violation of the schoolyard principle that "two wrongs don't make a right."

The equal protection violation recognized by the District Court is not based on inadvertent error or any other kind of mistake, notwithstanding Williams' assertions to the contrary. Nor does the District Court's January 12 Order wrongfully seek to remedy simple mistakes of the Board by requiring the Board to "compound" its mistakes with "additional improprieties." The equal protection violation that the District Court's Order seeks to prevent arises from the Board's deliberate, informed, and unanimous decision to count certain ballots but not to count other ballots similarly situated in all relevant aspects. Any argument that the District Court is improperly trying to remedy a mistake under the elementary school principle of "two wrongs can make a right" misunderstands and misrepresents the Board's decisions and oversimplifies the issues present in this appeal.

The record in this case demonstrates unequivocally that, when the Board voted unanimously to count the 26 provisional ballots that were cast

in the wrong precinct during early voting at the Board office, the Board was well aware of the all of the facts related to those ballots. Indeed, before deciding that these provisional ballots should be counted, the Board determined through an investigation that the ballots were cast in the wrong precinct because poll workers gave the voters the wrong ballots. The record simply does not support the position that the Board's actions related to these 26 provisional ballots was the result of a mistake. The Board *knowingly* decided to count these 26 provisional ballots, notwithstanding the fact that it knew that the provisional ballots were cast in the wrong precinct due to poll worker error.

As a result of the Board's investigation, the Board now has evidence that 156 of the provisional ballots cast in the correct polling location but the wrong precinct were cast in the wrong precinct because of poll worker error — just as was the case with the 26 provisional ballots cast in the wrong precinct at the Board office. The voters who cast these 156 provisional ballots were given the wrong ballots because poll workers identified the voters' precincts incorrectly when reading the precinct guidebook. Yet, although these 156 provisional ballots are similar in all relevant aspects to the 26 provisional ballots that were cast in the wrong precinct at the Board's office, the Board is refusing to count them.

The District Court's Order does not seek to cure an inadvertent mistake by the Board. The 26 provisional ballots cast at the Board's office were counted deliberately, not as a result of some slip-up by the Board or one of its members. They were counted with full support by the Board's legal counsel. The District Court's January 12 Order merely requires the Board to value the 156 provisional ballots in the same manner in which it decided to value the 26 provisional ballots cast at the Board office. The Order is warranted and correct because, without it, the Board will be permitted to disenfranchise some voters deliberately who cast provisional ballots while, at the same time, consciously counting provisional ballots cast by others who are similarly situated. This disparate treatment strikes at the very heart of the Equal Protection Clause and cannot withstand even the least stringent rational basis review. *See Mixon v. State of Ohio*, 193 F.3d 389, 402 (6th Cir. 1999) (rational basis review applies if the government action does not infringe on the right to vote).

Cases in which federal courts have avoided finding equal protection violations by ignoring minor and unintended disparate treatment do not compel an opposite conclusion because the Board's actions here were neither minor nor unintended. For instance, in *Roe v. Alabama*, 68 F.3d 404, 407-09 (11th Cir. 1995), the district court instructed Alabama on how to

count certain contested absentee ballots.⁴ The Eleventh Circuit stated that a handful of ballots (49, precisely), which were cast in just two of Alabama's 67 counties and which were counted differently than the other contested ballots, were not significant to the asserted equal protection violation because the 49 ballots were counted *inadvertently*, *id.* at 407-08, and, in any event, whether or not the 49 ballots were counted *would not affect the outcome of any of the elections at issue.* *Id.* at 407 n.4.

Vandiver v. Hardin County Board of Education, 925 F.2d 927, 931 (6th Cir. 1990), is no different. In *Vandiver*, the plaintiff claimed that his school district violated the Equal Protection Clause by requiring him to pass an equivalency exam before transferring into the high school while, at the same time, allowing some students to transfer into the high school without passing the exam, even though all of the students were transferring from unaccredited schools. *See id.* The disparate treatment, however, stemmed from the high school principal's mistaken understanding of the facts: he thought that the other students had actually transferred from accredited schools. *See id.* Moreover, to the extent that the school district treated the

⁴ As an aside, this case presents yet another precedent that undercuts Williams' and the Board's contention that federal courts cannot order a state to count or not count certain ballots.

students differently, its rules for accepting transfer students were based on a reasonable government objective. *See id.*

Roe v. Alabama and *Vandiver* are easily distinguishable from the present case because, to the extent that the Board has treated similarly situated provisional ballots differently, it has done so purposefully and not based on any mistake of fact. And the disparate treatment upon which the District Court based its Order is not minor and not inconsequential. As the Court is well aware, *the number of provisional ballots subject to the district court's Orders could very well decide the outcome of the race between Williams and Hunter.*

It is also of no moment that the Supreme Court of Ohio recently declared in *Painter* that, under Ohio law, provisional ballots cast in the wrong precinct may not be counted, even when they were cast in the wrong precinct solely because of poll worker error. The District Court's Order requires the Board to count the 156 provisional ballots because doing so remedies the Board's disparate treatment of those ballots. Under the Equal Protection Clause, whether the Board's actions are consistent with or violate state law is insignificant. What matters is that when voters cast their votes, the State of Ohio must give those votes equal weight. Regardless of whether the District Court's Order could be inconsistent with the Supreme Court of

Ohio's opinion in *Painter*, it is wholly consistent with the Equal Protection Clause and the federal courts' charge to remedy injustice when faced with violations of the Equal Protection Clause as evident as the Board's.

C. The District Court Correctly Ordered The Board To Investigate The *NEOCH* Ballots Because The Board Had Flagrantly Failed To Do So In Violation Of The Neoch Consent Decree.

The District Court ordered the Board to investigate the *NEOCH* ballots and count any ballots that were rejected due to poll worker error. (R. 39.) This finding was proper. It is undisputed that the Board has not investigated the *NEOCH* ballots pursuant to the *NEOCH* consent decree in *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (Marbley, J.), which provides the basis for Directive 2010-74. (R. 8).

On April 19, 2010, the United States District Court for the Southern District of Ohio entered a Consent Decree in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*. (R. 8-1). The *NEOCH* plaintiffs include Intervenor-Appellees Ohio Democratic Party ("ODP") and *NEOCH*. (R. 8-1 at 1). They asserted claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States

Constitution. (*Id.*) The defendants are the Secretary of State and the State of Ohio. (*Id.* at 1).

The Decree is “ binding upon the Defendants and their employees, agents and representatives.” (*Id.* at 3). Defendants-Appellees are representatives of the Secretary of State and, therefore, are bound by the Decree. O.R.C. § 3501.06. 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). On the latter point, the Decree provides, in relevant part:

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. (R. 8-1 at 4).

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. (R. 1-2 at 11-12.) To date the Board has not complied with Directive 2010-74.

D. The Ohio Supreme Court's Decision Does Not Conflict With the District Court's Injunction or Enforcement Order

On January 7, 2011, the Ohio Supreme Court issued an opinion in an action brought by Intervenor Williams involving the same provisional ballots at issue in this case. *State ex rel. Painter et al. v Brunner*, 2011-Ohio-35. The Ohio Supreme Court held that Ohio law does not authorize an exception based on poll worker error to the requirement in the Ohio Revised Code that ballots be cast in the proper precinct in order to be counted. *Id.* ¶ 35. Thus, as a matter of state law, the Ohio Supreme Court confirmed that a ballot cast in the wrong precinct cannot be counted, and that even if government poll workers direct a compliant voter to vote in a specific precinct, if that turns out to be wrong, the compliant voter's ballot will still not be counted. *Id.*

The equal protection and due process claims of plaintiff Hunter were not presented to the Ohio Supreme Court. Nonetheless, in *dicta*, the

Supreme Court volunteered that “any equal-protection claim did not require an investigation—it merely required the same inquiry that the board had engaged in for its initial determination of the validity of the provisional ballots.” *Id.* ¶ 40. Thus the Court suggested that equal investigations – no matter how inadequate – would solve the equal protection problem. But that, of course, fails to address the fundamental problem. Compare two groups of voters in a multiple precinct polling place in Hamilton County who each do exactly what the poll workers tell them to do. One group is directed to the correct tables, votes, and their ballots are counted. The other group is directed to the wrong tables, votes, and their ballots are *not* counted. Thus, among these similarly situated compliant voters who follow directions and do nothing wrong, a large number will not have their votes counted because they were misled by the government’s staff. This violates the equal protection rights of those compliant voters who were directed to the wrong tables. But for the actions of the government, these wrong-table voters would have cast their ballots at the right tables. This analysis was never addressed by the Ohio Supreme Court. This problem is not solved by arbitrarily selecting a paper investigation that does not discover the wrong-table voters. Rather, the investigation should be reasonably calculated to

identify the voters who were misled by the government and then, as a matter of federal constitutional law, those ballots should be counted.

The Ohio Supreme Court further suggested that, if a remedy required that ballots miscast due to government staff error be counted and that remedy were “extended to the entire state, it is doubtful that the time limits for resolving elections would ever be met.” *Id.* at ¶ 42. But of course this case is *not* about a statewide election. This is an election for Hamilton County Juvenile Judge, confined to Hamilton County, Ohio, and supervised by a single Board of Election. In fact, this is precisely the type of equal protection challenge that is manageable and, unlike *Bush v Gore*, the solution is at hand. The District Court’s January 12 order sets out a simple and manageable solution. Note also that with a few simple additions to the provisional ballot envelope this problem will be dramatically reduced in the years ahead and litigation of this nature will be avoided.

In essence, notwithstanding the fact that the issue had not been raised or briefed by the parties, the Ohio Supreme Court held that the District Court’s Order, which required an *immediate investigation*, was not in fact required by “an equal-protection claim.” *Id.* ¶ 40. The Ohio Supreme Court further held that the Supremacy Clause of the U.S. Constitution did not

require it to follow decisions of the U.S. District Court or the U.S. Court of Appeals on federal statutory or constitutional law. *Id.* ¶ 46.

The Ohio Supreme Court therefore went beyond its interpretation of Ohio law (which is not relevant to this Court's order) and purported to offer an advisory opinion overruling the District Court with respect to its interpretation of Plaintiffs' rights under federal law and the United States Constitution. It is only in this case that the federal constitutional claims are actually at issue and fully briefed by the parties. Therefore, with all due respect to the opinion of the Ohio Supreme Court, this Court should affirm the District Court as it correctly decided the issues and should not permit the Ohio Supreme Court's opinion to interfere with that ruling.

E. This Court's Opinions In *Sandusky, Skaggs, and Warf* Do Not Compel Reversal Of The District Court's Orders. On The Contrary, This Court Has Consistently Recognized The Role Of Federal Courts To Ensure That State-Administered Elections Meet Federal – And Constitutional – Requirements.

In their merit briefs and other papers filed in these consolidated appeals, Appellants and their Amicus Curiae, Secretary Husted, rely primarily on three of this Court's prior decisions to contend that what the District Court did here constitutes impermissible interference by a federal judge with a state-administered election. Appellants believe, wrongly, that

existing Sixth Circuit precedent bars a federal district judge from requiring a county board of elections to investigate whether poll worker error caused provisional ballots to be cast in the wrong precinct, or to count the wrong-precinct ballots identified by that investigation.

First, Mr. Williams quotes this Court’s decision in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004) in his Merit Brief for the proposition that the *state* government has plenary authority over the counting of provisional ballots. (Williams First Appeal Merits Brief at 23.) Mr. Williams quoted the *Sandusky* decision for the same proposition in his Emergency Motion for Stay, which this Court granted. (Williams First Appeal Merits Brief at 12.) Secretary Husted relies similarly on the *Sandusky* decision in his Amicus Brief. (Amicus Brief COA No. 11-3060 at 6-7.)

Second, Mr. Williams quotes this Court’s decision in *State ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008) for the proposition that “the Help America Vote Act of 2002 ... leaves no doubt which lawmaking body – the federal or state governments – has plenary authority over the counting of provisional ballots. It ‘conspicuously leaves ... to the States’ the determination of ‘whether a provisional ballot will be counted as a valid ballot.’” Secretary Husted, in turn, makes *Skaggs* the opening citation in his

Amicus Brief, asking this Court “to recognize the supremacy of State law in determining whether a particular vote should be counted.” (Amicus Brief COA No. 11-3060 at 3) (citing *Skaggs*.)

Third, Mr. Williams quotes this Court’s recent decision in *Warf v. Board of Elections of Green County, Kentucky*, 619 F.3d 533 (6th Cir. 2010) in his merit brief for the proposition that the Constitution “leaves the conduct of state elections to the states.” (Williams First Appeal Merits Brief at 23) (quoting *Warf*.) Mr. Williams relied on *Warf* in his Emergency Motion for Stay for exactly the same proposition. (Williams First Appeal Merits Brief at 12.)

But *Sandusky*, *Skaggs*, and *Warf* simply do not support reversal of the District Court’s Orders in this case. Appellants and the Secretary are cherry-picking dicta from these three cases in order to mislead the Court about the precedential value that those cases have (or do *not* have) in *this* dispute. This Court cannot use those prior cases as the basis to vacate the District Court’s Orders here.

- 1. In *Sandusky*, this Court expressly recognized a “federal right enforceable against state officials” regarding provisional ballots.**

While the Appellants and their friends quote *Sandusky* for the general concept that the States have long been primarily responsible for regulating

federal, state, and local elections, they conveniently omit the part of *Sandusky* where this Court expressly noted that “[t]he responsibility and authority of the States in this field are *not without limit.*” *Sandusky*, 387 F.3d at 569 (emphasis added). This Court in *Sandusky*, in fact, unanimously *recognized* a federal cause of action to enforce a federal election statute (the Help America Vote Act, or “HAVA”) touching on provisional ballots – what the Court called “*a federal right enforceable against state officials.*” *Id.* at 572 (emphasis added). As such, while the Appellants strive (via selective quotation) to make *Sandusky* an exemplar of federal deference to state election procedures, exactly the opposite is true. *Sandusky* directs federal judges acting under the authority of federal law (HAVA and 42 U.S.C. § 1983) to protect a voter’s right to cast a provisional ballot by giving them a federal remedy. There is no small irony in the Appellants’ perversion of this precedent into a means to disenfranchise voters here, in scenarios where poll worker error caused their votes to be cast in the wrong precinct.

And while the Secretary of State quotes page 578 of this Court’s opinion in *Sandusky* for the fact that states remain free “to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted,” that holding was based on the specific requirements of HAVA that were before this Court, *not on the requirements of equal protection or due process,*

which formed the basis for the District Court's Orders here. As this Court explained on the very same page quoted by the Secretary, "HAVA's single provision relating to the counting of ballots refers only to eligibility under state law to vote, and makes no reference either explicitly or implicitly to the jurisdiction in which a provisional ballot was cast." *Id.*, 387 F.3d at 578.

Here, the District Court's Orders were based not on the "single provision" in HAVA relating to the right to receive provisional ballots, but rather on the requirements of the federal constitution and the requirements of the *NEOCH* consent decree when it comes to *counting* them. Accordingly, whatever this Court had to say in *Sandusky* about HAVA and that statute's "single provision" relating to provisional ballots simply has no bearing on whether the district court could issue, on the basis of the federal constitution, the Orders being appealed here. Simply put, *Sandusky* in no way compels reversal of the District Court's Orders.

2. **This Court's November 25, 2008 Opinion in *Skaggs* is inapposite because it involved only state-law causes of action, not federal causes of action, and because this Court never reached the merits of the dispute about provisional ballots miscast due to poll worker error.**

Skaggs, another opinion sprinkled liberally throughout the papers of Appellants, is equally inapplicable. Like this Court's opinion in *Sandusky*, *Skaggs* in no way prohibits the actions taken here by the District Court. In

Skaggs, a unanimous panel of this Court held that Ohio’s former Secretary of State could not properly remove an original action for a writ of mandamus from state court (the Ohio Supreme Court) to federal district court because the complaint presented no federal question and no other basis for removal existed. *Skaggs*, 549 F.3d 468, 474. Reversing the district court’s judgment on that jurisdictional basis, this Court expressly *declined to reach the merits* of the district court’s decision, which had directed the Board to count certain provisional ballots that were deficient due to poll worker error. *Id.*

Putting aside the fact that this Court never reached the merits of the provisional-ballot issue in *Skaggs* – which alone makes it impossible to use *Skaggs* as binding precedent on the merits of *this* dispute – this Court’s decision on the jurisdictional issue highlights key distinctions between that case and this one. For one, this Court noted that the claimants in *Skaggs* “did not allege that the secretary had violated the consent decrees or any other federal court order” that would support federal jurisdiction. *Skaggs*, 549 F.3d at 475. Here, of course, the opposite is true—the District Court issued its Orders at the request of a plaintiff expressly alleging violations of other prior federal court orders, including the *NEOCH* consent decree. Moreover, this Court noted that the complaint in *Skaggs* did not set forth any equal-protection claim, and that it expressly disavowed “*any* reliance on

federal law.” *Id.* at 478 (emphasis in original). Here again, the opposite is true. Finally, this Court in *Skaggs* resisted federal jurisdiction “[u]ntil the Ohio Supreme Court finally decides what these state-law provisions [about provisional ballots] mean[.]” *Id.* at 477. Now, of course, that decision by Ohio’s highest court *has* been made, making it the federal District Court’s turn to determine the merits of the *federal* claims which are unmistakably at issue here.

3. ***Warf* was decided by this Court on the basis of Kentucky state law pertaining to election contests, and this Court in *Warf* expressly contemplated federal court intervention where state processes fail to afford fundamental fairness.**

Circuit Judge Smith Gibbons’ Opinion for this Court in *Warf* – a case having nothing to do with provisional ballots – is even less applicable here than *Sandusky* and *Skaggs*. Even so, Appellants rely on *Warf* as they did those cases to urge this Court to wash its hands of issues that they deem best left to the states to resolve. Again, though, Appellants miss the point of this Court’s precedent.

In *Warf*, which concerned a race in Kentucky for court clerk, the Republican challenger received the majority of votes cast by machine, but the incumbent received enough absentee votes to prevail by 151 votes. In an election contest brought pursuant to state law, the Republican challenger

sought to have all absentee ballots cast in the election declared void, arguing that the incumbent had improperly affixed campaign materials to absentee voting applications and placed the absentee voting machine in her personal office. The Kentucky state trial judge agreed with the contest and voided all 542 absentee ballots, *thereby changing the result of the election and declaring the Republican challenger the winner*. While the incumbent's appeal from that contest was pending, two of the absentee voters whose votes had been voided brought an action in federal court, seeking to enjoin the Board of Elections from enforcing the trial court's judgment. The federal district judge declined to do so, and this Court affirmed. *Warf*, 619 F.3d at 563.

There are a couple of points worth making about *Warf* as this Court considers whether it supports vacating the district court's Orders. First, *Warf* clearly stands for the proposition that election irregularities, once identified, *can* properly cause the result in a certified election to change. The initial certified "winner" (Appellant here) can indeed become the "loser" as a result of election irregularities impacting the number of valid votes to be counted by a county Board of Elections. As the District Court noted in its January 12 Order, we cannot yet know if that will be the outcome here due to the Board's slow investigation and counting the miscast

provisional ballots identified in the Preliminary Injunction. But if that *is*, in fact, the outcome, that alone does not make the result unfair or unlawful. If it did, then presumably this Court would not have affirmed the District Court's decision upholding the results of the election contest in *Warf*.

Second, this Court's decision in *Warf* ultimately rested on the state court's correct application of *state* law. As Judge Smith Gibbons concluded, "It is therefore evident that the Green Circuit Court's decision to void all absentee ballots cast in the election *reasonably applied applicable Kentucky case law*." *Warf*, 619 F.3d at 563. Here, of course, the District Court's Orders rest on the requirements of *federal* law, including the U.S. Constitution and the *NEOCH* decree. On the merits, then, *Warf* has no binding effect on this case. The Kentucky case law pertaining to absentee ballots and elections contests has no bearing here.

Finally, the Appellants fail to mention a key aspect of the procedural history in *Warf* supporting the federal courts' involvement in that case (and in this one). The federal district court in *Warf* was asked to *abstain* from deciding the case under *Burford* abstention principles. *Warf v. Bd. of Elections of Green County, KY*, No. 1:08-CV-72-R (W.D. Ky. March 3, 2009), 2009 WL 530666, at *2. As the Appellants do here, the defendants in *Warf* wanted the federal courts to wash their hands of the election dispute

because state-court review was available, because difficult questions of state law were implicated, and/or because the exercise of federal review would be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Id.*, quoting *Adrian Energy Associates v. Michigan Public Service Com’n*, 481 F.3d 414, 423 (6th Cir. 2007). But the district court in *Warf* declined to abstain, saying “this case involves a discreet inquiry into whether [the state court’s] decision to void the absentee ballots was in conformity with Kentucky election law and the Constitution.” *Id.*, 2009 WL 530666, at *3. In doing so, the district court noted this Court’s holding that “federal courts are an appropriate forum for the redress of constitutional violations, regardless of the adequacy of state courts as an alternative forum.” *Id.*, quoting *G&V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23 F.3d 1071, 1077 (6th Cir. 1994). The same is true here.

For each of these reasons, *Warf* does not support any decision by this Court to vacate the District Court’s Orders or leave the issues presented to her to resolution in state court. While this Court in *Warf* did indeed recite the truism that federal courts have limited powers to intervene in state elections, the Sixth Circuit ensured in *Warf* that no Due Process violation occurred as a result of the state-administered election contest, and it did so

by affirming the decision of a federal district judge who (correctly) *declined* to abstain in deference to state proceedings.

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

Mr. Williams suggests additionally that this Court and the District Court lack jurisdiction over this matter because the issue purportedly before the Courts – the Board’s investigations of ballot validity – is “one step removed from the question of the fundamental right to vote and, by implication, one step removed even from the garden variety elections case.” (Williams Brief (10-4481) at p. 25.)

It is true, as Mr. Williams notes, 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).

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.*

And, 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.

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 27 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.

What is at issue in this appeal, 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.)

Appellee respectfully asserts that the Hamilton County Board of Elections’ 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).

VII. CONCLUSION

For the foregoing reasons, Plaintiff-Appellee Tracie Hunter respectfully requests that this Court affirm the District Court's order enforcing the injunction and ordering the Board of Elections to complete its investigation of the *NEOCH* ballots and count the 165 additional provisional ballots and any *NEOCH* ballots found to have been miscast due to poll worker error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Sixth Circuit Local Rule 32(a)(7)(B). According to the word-processing system used for the brief, it contains fewer than 13,889 words, excluding the parts of the brief exempted by Fed. R. No. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in the Times New Roman 14 point font size.

/s/ Jennifer L. Branch

Date: January 19, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served January 19, 2011 electronically on all attorneys who registered electronically with the Court of Appeals.

/s/ Jennifer L. Branch
Attorney for Plaintiff-Appellee

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Item	Docket Record Number
Complaint	R. 1
SOS Directive 2010-74	R.1-2
Transcript November 16, 2010 Meeting	R.1-3
Order granting in part TRO and Preliminary Injunction	R.13
Transcript of November 22, 2010 Motion Hearing	R.18
Emergency Motion to Enforce Judgment	R.38
Directive 2011-4	R.38-1
Transcript of December 16, 2010 Board Meeting	R.38-2
Transcript of December 17, 2010 Board Meeting (a.m. and p.m. sessions)	R.38-3
Transcript of December 28, 2010 Board Meeting	R.38-4
12/28/10 Spreadsheet	R.38-5
Burke Affidavit, Ex. 1	R.38-8
Directive 2011-03	R.38-9
Order, Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction	R.39
Directive 2011-05	R.44-1
Order Regarding Canvas of Returns	R.47

ADDENDUM

Unreported cases

Warf v. Bd. of Elections of Green County, KY, No. 1:08-CV-72-R (W.D. Ky. March 3, 2009), 2009 WL 530666.

2009 WL 530666

Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Bowling Green Division.

Geneal WARF and Glen Gupton, Individually
and on behalf of the class of 542 disenfranchised
Green County, Kentucky absentee voters, Plaintiffs

v.

BOARD OF ELECTIONS OF GREEN
COUNTY, KENTUCKY, et al., Defendants.

No. 1:08-CV-72-R. March 3, 2009.

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Opinion

MEMORANDUM OPINION

	Machine Total	Absentee Total	Total Votes
Scott	2,172	364	2,536
...			
Lowe	2,207	178	2,385

The Board of Elections of Green County (“Board of Elections”) certified Scott the winner of the election. Lowe won the machine voting by a margin of 35 votes; however, with the addition of the absentee votes, Scott prevailed in total number of votes cast by a margin of 151 votes.

Thereafter, Lowe filed a lawsuit in Green Circuit Court contesting the election results. Lowe claimed that Scott improperly handled the election in her role as incumbent county clerk and that her conduct resulted in multiple voting irregularities. Arguing that the absentee ballots were tainted by voting irregularities, Lowe requested that the state court declare them void.

On June 2, 2007, the Honorable William T. Cain, Special Judge of Green Circuit Court, issued an opinion declaring

THOMAS B. RUSSELL, Chief Judge.

*1 This matter is before the Court upon Plaintiffs' Motion for Preliminary Injunction (Docket # 24). Defendants Board of Elections of Green County, Kentucky and Timothy Stumph have responded (Docket # 30) and filed a separate Motion for Summary Judgment (Docket # 29). Intervening Defendant Billy Joe Lowe has responded (Docket # 28). Plaintiffs have replied (Docket # 35) and responded to Defendants' Motion for Summary Judgment (Docket # 34). Defendant Carolyn Scott has responded to Defendants' Motion for Summary Judgment (Docket # 37). Defendants have replied (Docket # 38). These matters are now ripe for adjudication. For the following reasons, Plaintiffs' Motion for Preliminary Injunction is DENIED and Defendants' Motion for Summary Judgment is GRANTED.

BACKGROUND

This matter arises from an election dispute over the office of Green County Court Clerk. On November 7, 2006, a general election was held in Green County, Kentucky. The incumbent, Carolyn Scott (“Scott”), was the Democratic candidate fo court clerk. Billy Joe Lowe (“Lowe”) was the Republican challenger.

After all votes were cast and the polls closed, the results of the election were as follows:

all 542 absentee ballots void, thereby making Lowe the successful candidate for court clerk. Judge Cain determined that Scott's conduct resulted in two election irregularities that tainted the entirety of the absentee voting process. Specifically, Judge Cain found that (1) Scott violated [KRS § 117.085](#)(2) when she used county funds to promote her own campaign by mailing absentee ballot applications (not the absentee ballots themselves) to voters with “Re-elect Carolyn Scott Clerk” stickers on the envelopes, and (2) “Scott improperly used her office by placing the absentee voting machine within her personal office, affording her the powerful opportunity to influence potential voters as they made use of the machine.” Given the questionable integrity of the absentee ballots, Judge Cain concluded that the proper remedy was to declare them void.

*2 Scott filed an appeal with the Court of Appeals of Kentucky and executed a supersedeas bond to remain in office throughout the appeal. However, the Court of Appeals dismissed her appeal as untimely filed. Scott then sought discretionary review from the Kentucky Supreme Court. Her petition was denied on December 10, 2008.

On May 12, 2008, Plaintiffs Geneal Warf and Glen Gupton, individually and on behalf all 542 absentee ballot voters, filed the present action under 42 U.S.C. § 1983 alleging that Judge Cain's judgment disenfranchised their votes in violation of the Fourteenth Amendment. Plaintiffs are residents and registered voters of Green County, Kentucky who cast absentee ballots in the November 7, 2006 election for Green County Court Clerk and claim that no irregularities took place. They request relief in the form of nominal damages, a preliminary injunction, and the entry of a final judgment declaring and ordering all 542 absentee ballots be counted.

ANALYSIS

I. Summary Judgment

Defendants Board of Elections and Sheriff Timothy Stumph now move for summary judgment. Defendant Carolyn Scott opposes the motion and argues on behalf of Plaintiffs.

A. Standard

Summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

“[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact.” *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989). The test is whether the party bearing the burden of proof has presented a jury question as to each element in the case. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir.1996). The plaintiff must present more than a mere scintilla of evidence in support of his position; the plaintiff must present evidence on which the trier of fact could reasonably find for the plaintiff. See *id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). Mere speculation will not suffice to defeat a motion

for summary judgment: “The mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate.” *Moinette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir.1996).

B. Abstention

Defendants argue that the Court should abstain from deciding this case under the *Burford* abstention doctrine. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). “The *Burford* doctrine provides that where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are ‘difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar’; or (2) where the ‘exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.’” *Adrian Energy Associates v. Michigan Public Service Com’n*, 481 F.3d 414, 423 (6th Cir.2007) (internal citations omitted).

*3 *Burford* abstention is inappropriate in this case for a number of reasons. First, *Burford* abstention represents extraordinary relief and should be applied narrowly. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Second, this case does not threaten to undermine all or substantially all of Kentucky's election process or its resolution of election disputes. See *Siegel v. LePore*, 234 F.3d 1163, 1173 (11th Cir.2000). Rather, this case involves a discreet inquiry into whether Judge Cain's decision to void the absentee ballots was in conformity with Kentucky election law and the Constitution. Finally, *Burford* abstention should be denied where constitutional violations are alleged. *G & V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23 F.3d 1071, 1077 (6th Cir.1994) (“federal courts are an appropriate forum for the redress of constitutional violations, regardless of the adequacy of state courts as an alternative forum”); *Middle South Energy, Inc. v. Arkansas Public Serv. Com’n*, 772 F.2d 404, 417 (8th Cir.1985), cert. denied, 474 U.S. 1102 (1986) (*Burford* abstention is inappropriate when federal law or the Constitution place the regulation at issue beyond the state's authority). For these reasons, *Burford* abstention does not present a bar for the exercise of jurisdiction in this case.

C. Constitutional Violation

In their complaint, Plaintiffs allege that Judge Cain's decision to void all absentee ballots in the election for Green County Court Clerk disenfranchised their votes in violation of the Fourteenth Amendment's Due Process Clause. In their motion for summary judgment, Defendants contend that Plaintiffs cannot show an injury rising to the level of a constitutional violation. Plaintiffs cannot show a constitutional violation, Defendants argue, because Judge Cain's opinion was based on indisputable evidence that Scott violated two state election laws pertaining to absentee voting and that, having found that two irregularities occurred, Judge Cain followed Kentucky law in voiding all 542 absentee ballots. In response, Plaintiffs argue that federal intervention is necessary because Judge Cain's opinion clearly departs from Kentucky statutory and case law, thereby rising to the level of a constitutional violation.

The right to vote is a fundamental right, "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, alleged infringements of the right to vote are carefully scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

The states regulate their own elections. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Because the states traditionally have authority over their own elections and because the Constitution contemplates that authority, courts 'have long recognized that not every state election dispute implicates federal constitutional rights.'" *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir.2005) (quoting *Burton v. Georgia*, 953 F.2d 1266, 1268 (11th Cir.1992)); *Roe v. State of Alabama*, 43 F.3d 574, 580 (11th Cir.1995).

*4 While the Constitution affords federal courts the power to intervene and invalidate local elections, only exceptional circumstances warrant the exercise of that power. *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir.1987); *Roe*, 43 F.3d at 580. In *League of Women Voters of Ohio v. Brunner*, the Sixth Circuit held that the "Due Process Clause is implicated, and § 1983 relief appropriate, in the exceptional case where a state's voting system is fundamentally unfair." 548 F.3d 463, 478 (6th Cir.2008) (citing *Griffin*, 570 F.2d at 1078-79). *Brunner* involved a constitutional challenge to Ohio's overall voting system. The Sixth Circuit explained that federal intervention

may be appropriate in this case where " 'the fairness of official terms and procedures under which the election was conducted' " are challenged. *Id.* (quoting *Griffin*, 570 F.2d at 1078). However, "federal courts should not be 'asked to count and validate ballots and enter into the details of the administration of the election.'" *Id.* Substantive due process is implicated in instances where "non-uniform rules, standards, and procedures" are utilized to disenfranchise and dilute the right to vote. *Id.* at 478.

Other circuit courts agree that a federal court's scrutiny of local election contests is limited. "In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir.1998). Examples of garden variety irregularities include malfunctioning of voting machines, *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir.1975), human error resulting in miscounting of votes and delay in the arrival of voting machines, *Gold v. Feinberg*, 101 F.3d 796, 801-02 (2d Cir.1996). See *Shannon*, 394 F.3d at 96 (collecting cases). In contrast, contest results that depart from previous state practice have been found to constitute fundamental unfairness. See *Roe*, 43 F.3d at 580-81 (intervening where failure to exclude contested absentee ballots constituted a post-election departure from previous state practice); *Griffin*, 570 F.2d at 1079 (intervening where state court disrupted seven year practice of voting by absentee and shut-in ballots).

Whether or not federal intervention is appropriate in this case rests on a determination of whether Judge Cain's opinion utilized "non-uniform rules, standards, and procedures" to void the 542 absentee ballots. Defendants argue that it is the practice of Kentucky courts to void absentee ballots when absentee voting irregularities are found. Plaintiffs counter that Judge Cain's opinion is at odds with Kentucky statutory and case law.

Under Kentucky law, a candidate for county office can contest the election of a successful candidate by filing a petition in Circuit Court. KRS § 120.155. The contest shall proceed as an equity action and "the judge shall proceed to a trial of the cause without delay." KRS § 120.165(1). Where the record as a whole demonstrates fraud, intimidation, bribery or violence in the conduct of the election, the election may be set aside by the Circuit Court. KRS § 120.165(4); see also *McClendon v. Hodges*, 272 S.W.3d 188 (Ky.2008) (setting aside mayoral election based on trial court's finding of "pervasive" fraud).

*5 Judge Cain's opinion was based on two election irregularities to which Scott admitted in her deposition testimony. Judge Cain did not make any findings of fraud, intimidation, bribery or violence. The first irregularity Judge Cain found was Scott's placement of stickers stating "Reelect Carolyn Scott Clerk" on the envelopes of absentee ballot applications mailed to voters between September 19 and October 9, 2006. Scott discontinued the practice on October 9, 2006 after she received a telephone call from the Kentucky Attorney General's office advising her that her use of the stickers was, at a minimum, inappropriate. Judge Cain determined that these actions amounted to a violation of [KRS § 117.085\(2\)](#). [Section 117.085\(2\)](#) states, in pertinent part, "[t]he absentee ballot application form shall be in the form prescribed by the State Board of Elections."

The second irregularity Judge Cain found was Scott's placement of the absentee voting machine within her personal office. Although Judge Cain's opinion noted that Scott's position as the incumbent clerk put her "in an extremely high position of trust and responsibility," [Crowe v. Emmert](#), 305 S.W.2d 272, 273-73 (Ky.Ct.App.1957), it failed to identify any statute or regulation that her conduct violated. Of its own accord, the Court notes that the State Board of Elections requires that "the county clerk shall establish a special area to be used solely for the purpose of allowing those voters who qualify" for absentee voting "to secretly cast absentee ballots" and "[i]f the county clerk's office does not have sufficient physical space to designate an area away from the normal activities of the office, the booth or area may be located outside the physical limitations of the county clerk's office, if the area is capable of direct supervision by the county clerk or his or her staff while the area is utilized for the purpose of casting absentee ballots." 31 Ky. Admin. Regs. 4:040(1), (3) (emphasis added).

Kentucky case law supports Judge Cain's opinion. In [Arnett v. Hensley](#), the Court of Appeals of Kentucky considered an election contest for county court clerk in which the absentee ballots determined the outcome of the election. 425 S.W.2d 546 (Ky.Ct.App.1968). The record before the trial court revealed numerous irregularities regarding the absentee voting. *Id.* at 550-52. For example, many of the absentee ballots bore illegal notary work and the manner of tabulating them was contrary to state proscribed procedures. *Id.* at 552. Given the "gross irregularities in the handling of the absentee ballots," the court determined that the trial court was correct in its decision to void all the absentee ballots cast and affirmed the lower court's decision. *Id.* at 553.

Likewise, in [Parrigin v. Sawyer](#), the unsuccessful candidate for county clerk contested the election results after the incumbent clerk was declared the winner. 457 S.W.2d 505, 505 (Ky.Ct.App.1970). The incumbent clerk won the election by only four votes, thirty-four of which came from absentee ballots. *Id.* The trial court found that absentee voting irregularities occurred when the incumbent clerk sent out absentee voting instructions on his official letterhead and the procedures for keeping the absentee ballot box locked were not followed; however, the court did not void the absentee ballots. *Id.* at 506. The Court of Appeals of Kentucky reversed, stating that "the right to vote by absentee ballot is a special privilege granted by the legislature. The privilege is granted under the specific condition that all the procedures set out in the legislative act be complied with. Irregularities in these procedures cannot be tolerated, especially when they are committed by a candidate and obviously inure to his advantage." *Id.* at 508. The court's order to certify the unsuccessful candidate as the winner effectively voided the absentee ballots. *Id.*

*6 Plaintiffs seeks to distinguish the above cases by arguing that Judge Cain's opinion improperly placed the burden of proof on Scott to show that the absentee voting was conducted legally. As the contestant, Plaintiffs argue that Lowe has the burden of proof to show that irregularities occurred. However, the cases cited by Plaintiffs in support of this argument pertain to fraud violations under [KRS § 120.165\(4\)](#) and Kentucky's Corrupt Practices Act, [KRS § 121.055](#), which are not applicable in this case. *See Gregory v. Stubblefield*, 316 S.W.2d 689, 691 (Ky.Ct.App.1958) (fraud); [Lewis v. Sizemore](#), 118 S.W.2d 133, 136 (Ky.Ct.App.1938) (Corrupt Practices Act); [Little v. Alexander](#), 80 S.W.2d 32, 34 (Ky.Ct.App.1934) (fraud); [Napier v. Cornett](#), 68 S.W. 1076 (Ky.Ct.App.1902) (fraud and corrupt practices).

Furthermore, in [Crowe v. Emmert](#), the Court of Appeals of Kentucky explicitly placed the burden of proof on the incumbent clerk in election contests for county clerk involving absentee ballot irregularities. 305 S.W.2d 272, 274 (Ky.Ct.App.1957). The court explained that "an incumbent county clerk, who is a candidate for office, finds himself in an extremely high position of trust and responsibility." *Id.* at 273-74. Therefore,

We think there is even more reason in the case before us than there was in the [Rayburn case](#) [267 S.W.2d 720 (Ky.Ct.App.1954)] to require those in charge of absentee ballots ... to

show that the balloting was conducted legally, and that all requirements of the law to insure its fairness, at least, were met substantially. Under the circumstances, it was the duty of the [incumbent clerk] to go forward with the proof, and the trial court properly held so.

Id. at 274.

Plaintiffs are correct that the later decisions of *Arnett* and *Parrigin* do not address the burden of proof. However, both decisions do cite *Crowe*. Furthermore, failure to address the issue does not necessitate, as Plaintiffs suggest, that the courts placed the burden of proof on the contestant instead of the contestee in those cases.

Finally, Plaintiffs rely on [KRS § 120.165\(2\)](#) to argue that the contestant has burden of proof in election contests. [Section 120.165\(2\)](#) states the order of proof in an election contest;¹ it does not state who holds the burden of proof. The fact that the contestant must complete his evidence before the contestee does not necessitate that the contestant also bears the burden of proof.

Having reviewed the applicable Kentucky law, the Court is convinced that Judge Cain's opinion did not stray from past Kentucky precedent and that the burden of proof was properly placed on the incumbent clerk. Plaintiffs point to no Kentucky statutes or case law that suggest that Judge Cain's opinion relied on "non-uniform rules, standards, and procedures." Plaintiffs make additional arguments that go to the merits of Judge Cain's opinion, but the Court will not address them where a constitutional violation has not been established. The Court finds no indication that Judge Cain's opinion was fundamentally unfair. Therefore, the Court declines to intervene in this matter.

D. Laches

*7 Defendants argue that because Plaintiffs had an opportunity to intervene in the state election contest and failed to do so, their claims should now be dismissed under the equitable doctrine of laches. Plaintiffs respond that under [KRS § 120.155](#) only candidates for election can challenge election results.² Because Plaintiffs were not candidates, they argue that they were unable to intervene in the election contest.

The Court notes at the outset that Plaintiffs' argument is without merit. [Kentucky Revised Statute § 120.155](#) does not afford Plaintiffs any legal protection. The issue before

the Court is not whether Plaintiffs could have been parties to the original election contest. Rather, the issue before the Court is whether, after Judge Cain's opinion voided Plaintiffs' absentee ballots, thereby allegedly causing them injury, Plaintiffs unreasonably delayed in filing the present lawsuit.

"Where a plaintiff seeks solely equitable relief, his action may be barred by the equitable defense of laches if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." [American Civil Liberties Union of Ohio, Inc. v. Taft](#), 385 F.3d 641, 647 (6th Cir.2004) (citing [Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund](#), 206 F.3d 680, 684 (6th Cir.2000)). Judge Cain's opinion was issued on June 2, 2007. The Court of Appeals dismissed Scott's appeal as untimely filed on August, 1, 2007. In November 2007, Scott filed a motion for discretionary review with the Kentucky Supreme Court. Her petition was denied on December 10, 2008. Plaintiffs filed their action in federal court on May 12, 2008, approximately ten months after the Court of Appeals dismissed Scott's appeal. While Defendants are correct in their assertion that Plaintiffs could have filed their action considerably earlier, Defendants offer no evidence that they were prejudiced by Plaintiffs' delay. Indeed, because Scott remained in office pending the Kentucky Supreme Court's discretionary review decision, the filing of Plaintiffs' lawsuit had no impact on the status quo of Defendants. Accordingly, the Court will not apply the equitable doctrine of laches.

II. Preliminary Injunction

When considering a motion for preliminary injunction, a district court must balance four factors:

- (1) whether the movant has a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable injury without the injunction;
- (3) whether issuance of the injunction would cause substantial harm to others; and
- (4) whether the public interest would be served by the issuance of the injunction.

[Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.](#), 511 F.3d 535, 542 (6th Cir.2007). The district judge "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary

injunction if fewer factors are dispositive of the issue.” *Id.* (quoting *Jones v. City of Monroe, MI*, 341 F.3d 474, 476 (6th Cir.2003)).

*8 “In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success. However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*, 119 F.3d 393, 402 (6th Cir.1997). “Although no one factor is controlling [in preliminary injunction analysis], a finding that there is simply no likelihood of success on the merits is usually fatal.” *Gonzales v. National Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir.2000) (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir.1997)).

For the reasons stated above, the Court has already determined that Judge Cain's opinion was not fundamentally unfair, making federal intervention in this case is unwarranted. “[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion.” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir.2000). Plaintiffs cannot establish a likelihood of success on the merits where the Court has determined that Defendants are entitled to summary judgment as a matter of law. See *Wonderland Shopping Center Venture Ltd. Partnership v. CDC Mortg. Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir.2001) (holding that plaintiff cannot show likelihood of success on the merits where summary judgment for defendant is warranted).

Footnotes

- 1 Section 120.165(2) states, “The evidence in chief for the contestant shall be completed within thirty (30) days after service of summons; the evidence for the contestee shall be completed within twenty-five (25) days after filing of answer, and evidence for contestant in rebuttal shall be completed within seven (7) days after the contestee has concluded; provided that for cause the court may grant a reasonable extension of time to either party.”
- 2 Section 120.155 provides, in pertinent part, “Any candidate for election to any state, county, district or city office (except the office of Governor, Lieutenant Governor, member of the General Assembly, and those city offices as to which there are other provisions made by law for determining contest elections), for whom a number of votes was cast equal to not less than twenty-five percent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the Circuit Court of the county where the contestee resides ...” *KRS § 120.155*. Plaintiffs point to the word “candidate” in the statute to argue that they could not have been parties to the election contest.

Certainly, Plaintiffs will suffer irreparable injury if Judge Cain's opinion stands. Their absentee ballots will be considered void and not counted in favor of either candidate. The issuance of an injunction would also clearly cause substantial harm to Intervening Defendant Lowe since he would be denied the office of court clerk. What is less certain is the impact an injunction would have on Defendant Board of Elections. On the one hand, ensuring that all votes are counted could be said uphold the integrity of the Board of Elections, as Plaintiffs suggest, while on the other, the prolonged continuation of this litigation could be substantially harmful to the Board's integrity, as Defendants argue. Furthermore, it is unclear the impact this dispute has had on the community at large. It has been ongoing for almost two years, embroiling local resources and impugning the election process, with no winner yet certified. Given these wavering considerations, plus the compelling factor that Plaintiffs cannot show that they are likely to succeed on the merits, the Court believes that the issuance of a preliminary injunction would be inappropriate in this case. Accordingly, the Court finds that Plaintiffs are not entitled to a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is **DENIED** and Defendants' Motion for Summary Judgment is **GRANTED**.

*9 An appropriate order shall issue.