EXPEDITED REVIEW REQUESTED

No. __

IN THE SUPREME COURT OF THE UNITED STATES

HAMILTON COUNTY BOARD OF ELECTIONS,

and

JOHN WILLIAMS,

Petitioners,

v.

TRACIE HUNTER, Committee to Elect Tracie M. Hunter for Judge, *et al.*,

Respondents.

APPLICATION TO RECALL AND STAY MANDATE OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING CERTIORARI

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PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceedings in the courts below:

Hamilton County, Ohio Board of Elections; John Williams, individually, as Intervenor and nominee for the Hamilton County, Ohio Juvenile Court Judge; Tracie Hunter, Committee to Elect Tracie M. Hunter for Judge, as nominee for the Hamilton County, Ohio Juvenile Court Judge; Alex Triantafilou, in his official capacity as Chair of Hamilton County, Ohio Board of Elections; Timothy Burke, Caleb Faux, and Charles Gerhardt, III, in their official capacity as Members of the Hamilton County, Ohio Board of Elections; Intervenors Northeast Ohio Coalition for the Homeless and Ohio Democratic Party; and the Ohio Attorney General on behalf of the Ohio Secretary of State, Ohio Republican Party, and Cincinnati Chapter of the NAACP as amicus curiae.

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit:

Pursuant to Rules 22 and 23 of this Court and 28 U.S.C. § 2101(f), Petitioners, Hamilton County Board of Elections and John Williams, respectfully move for an order recalling and staying the mandate of the United States Court of Appeals for the Sixth Circuit, which was issued on Friday, April 8, 2011 contemporaneously with the denial of Petitioners' motions to stay the mandate, pending the filing and disposition by this Court on a petition for certiorari seeking review of the Sixth Circuit's judgment in this case.

The petition for certiorari will seek review of the Sixth Circuit's decision in *Hunter v. Hamilton County Bd. Of Elections*, ___ F.3d ___, 2011 WL 242344 (6th Cir. Jan. 27, 2011) (copy attached as Ex. 1), in which the court held that an isolated error by a local board of elections in counting some wrong-precinct provisional ballots illegally cast under state law, but not others, violated equal protection. That decision is in conflict with a long line of circuit court cases following this Court's decision in *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) and directly implicates the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), which continues to divide both federal and state courts.[1] A stay pending this Court's review of this substantial federal question is essential to prevent Petitioners from suffering irreparable injury as a direct result of the erroneous decision below.

The decision of the Sixth Circuit was filed January 27, 2011. Following the Sixth Circuit's decision, Petitioners Hamilton County Board of Elections and Williams requested en banc review, which the Sixth Circuit denied on March 29, 2011, and requested a stay of the court's mandate, which was denied on April 8, 2011 (copy attached as Ex. 2). The Sixth Circuit issued the mandate the same day.

I. INTRODUCTION

While elections can always implicate federal rights, federal courts have been careful to respect the role of the States in the conduct of elections, especially state

[1] Despite the fact that this Court attempted to cabin the impact of the *Bush v. Gore* decision by attempting to limit its reach in the decision itself, *see* 531 U.S. at 109, and has, in fact, never cited the case in a Court opinion, that case has now been cited over 250 different times in federal and state courts and provided the main basis for decision in this case. And there is no reason to believe that the lower courts will cease relying on *Bush v. Gore*.

and local elections. Federal courts have also recognized that not every mistake rises to the level of a Constitutional violation or allows a losing candidate to rush into federal court to seek to change the outcome. But the Sixth Circuit panel majority in this case departs from that history. Having decided that an error under state law was made by counting 27 wrong-precinct ballots (out of 289,791 ballots cast), the majority found an equal protection violation and directed as a remedy the potential counting of hundreds of additional ballots – all of them illegally cast under Ohio law. That decision is in conflict with numerous other circuit court decisions and the highest court of a state decided both before and after *Bush v. Gore, supra*, including:

- **State Supreme Court**: *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009) (actions by elections officials that might amount to erroneous or mistaken performances of a state statutory duty could not give rise to equal protection violations (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

- **Second Circuit**: *Gelb v. Bd. of Elections of City of N.Y.*, 155 Fed. Appx. 12, 14-15 (2d Cir. 2005) ("[u]neven or erroneous application" of state law by local Board of Elections, without more, does not violate equal protection).

- **Fifth Circuit**: *Gamza v. Aguirre*, 619 F.2d 449, 453-54 (5th Cir. 1980) (negligence and "human error" in counting votes not actionable in federal court because "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause").

- **Eleventh Circuit**: *Parra v. Neal*, 614 F.3d 635, 637-38 (7th Cir. 2010) ("we have held that election irregularities implicate § 1983 only when defendants have engaged in 'willful conduct which undermines the organic processes by which candidates are elected' " (citations omitted)).

- **Eleventh Circuit**: *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) (finding that the fact that a "small number of contested ballots (forty-nine) slipped through is of no consequence" and not an equal protection violation).

The Sixth Circuit's decision directly implicates the ongoing reliance on *Bush v. Gore, supra.* Indeed, one leading commentator on election law has opined that "[t]he majority opinion of the Sixth Circuit panel in this Ohio provisional ballot case is, in my judgment, the most significant application of *Bush v. Gore* in the decade since that precedent was decided" and "[f]or the time being, it will be the 'leading case,' so to speak, for this particular area of the law." Edward B. Foley, *A Major Ruling on the Meaning of Bush v. Gore,* ELECTION LAW@MORITZ, Jan. 27, 2011, http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8099. Because the panel decision conflicts with decisions from other circuits and because it presents exceptionally important federal questions, including the interpretation of *Bush v. Gore, supra,* Petitioners Hamilton County Board of Elections and Williams seek a recall and stay of the Sixth Circuit's mandate pending certiorari.

II. ISSUE PRESENTED

Because the trial court has already concluded that there was no intent to discriminate nor does any party allege any such intent, the primary issue to be resolved is whether an isolated error by a local election official in the counting of ballots can give rise to an equal protection violation with respect to other ballots that were similarly miscast under the law. Relying on *Bush v. Gore, supra,* and its language concerning "arbitrary and disparate treatment," the court below answered that an error (however, non-discriminatory or non-invidious) was sufficient. And that the proper remedy for that violation included counting additional votes that had been miscast under state law – thereby compounding the original error. The

lower court's decision to find that an equal protection violation could spring from such a mistake in the context of a local election presents a constitutional question of exceptional importance and is in direct conflict with other circuit court decisions.

III. POSTURE

This case is an appropriate vehicle to reach the equal protection issue. This case is in a preliminary injunction posture but in this particular situation that is not an impediment to review. This case presents the purely legal question of whether an isolated error (without discriminatory or invidious intent) by a Board of Elections can give rise to an equal protection violation resulting in the counting of additional, miscast ballots. The court of appeals and the district court both answered affirmatively, and while there is some dispute about what exactly the differential treatment might have been in this case if indeed an equal protection violation is legally possible, that legal question about whether an equal protection violation can be found in this instance has been resolved by the court of appeals in part relying on the "disparate and arbitrary" language of *Bush v. Gore*. It is on this particular question that the court of appeals' ruling is in conflict with state and federal courts. And if the Supreme Court disagrees with the court of appeals, the legal basis for the relief granted by the trial court will be dissolved.

This Court has reviewed legal questions in the context of preliminary injunctions, *see, e.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938) (citing cases) and may review an interlocutory ruling "particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a

preliminary injunction, will have immediate consequences for the petitioner." Gressman et al., Supreme Court Prac. §4.18, at 281 (citing cases). Here, the legal question involved is "an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." *Id.*, § 4.18, at 282 (citing *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Indeed, the posture of this case on this issue is not unlike court review of a legal question certified for review under 28 U.S.C. § 1292(b). *See Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14 (2004) (granting certiorari to review certified question); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

Review is especially warranted in this election case where the injunction could have the effect of deciding the election at issue. The injunction in this case was not entered to preserve the status quo, but to order certain provisional ballots to be investigated, counted, and added to the official canvass for the election. This could certainly have "immediate consequences" for Petitioners.

IV. FACTS AND PROCEDURE

The history of facts and procedure in this case is largely recounted in this Court's opinion, *Hunter v. Hamilton County Bd. Of Elections*, ___ F.3d ___, 2011 WL 242344 (6th Cir. Jan. 27, 2011), and the Ohio Supreme Court's decision in *State ex*

rel. Painter v. Brunner, 941 N.E.2d 782, 2011-Ohio-35, 2011 WL 115596 (Ohio Jan. 7, 2011) (copy attached as Ex. 3).

Petitioner Williams was the certified winner of the Hamilton County, Ohio Juvenile Court race by 23 votes over Respondent Tracie Hunter. Prior to certification of the results, Petitioner Hamilton County Board of Elections ("Board") had concluded that 850 provisional ballots that were cast in the wrong precinct were illegal votes under Ohio law and should not be counted. That determination was made unanimously by the bi-partisan Board. Days after that decision by the Board, Respondent-Plaintiff Hunter filed suit in federal court alleging equal protection and due process violations.

The lower courts' subsequent finding of a likely equal protection violation is based solely on its comparison of two categories of ballots: (i) 27 provisional ballots cast by voters who were given a wrong (precinct) ballot at the county Board of Elections' office before Election Day; and (ii) another 850 provisional ballots miscast by voters in the wrong precinct on Election Day. Ohio law with respect to all wrong-precinct ballots is clear: ballots cast in the wrong precinct are not valid. *See Painter*, 941 N.E.2d at 794. Ohio, like a majority of states, has a precinct-based voting system in which the voter must cast his or her vote in the precinct in which he or she resides. Under Ohio law, voters can also present themselves at the local board of elections headquarters in the 30 days leading up to an election and cast a ballot for the precinct in which the voter resides.

After the election, Board staff, working in bi-partisan teams, verified and investigated all of the provisional ballots cast prior to and on Election Day. The verification and investigation is mandated by O.R.C. § 3505.183 and includes an examination of the affirmation of the voter and all other information appearing on the provisional ballot envelope. After the election, the Board approved for counting the 27 ballots cast at the offices of the Board prior to Election Day where the Board staff had handed the wrong ballot to the voter, concluding – erroneously – that such poll worker errors could be cured. At the same time, the Board unanimously rejected 850 additional ballots that were cast by voters in the wrong precinct on Election Day at various polling locations throughout the county.

The district court below concluded that because the Board had recognized poll worker error in counting those 27 ballots that "had been cast in the wrong precinct," it would be an equal protection violation for the Board not to further investigate the wrong precinct provisional ballots cast on Election Day for poll worker error. (R.13)

The Ohio Supreme Court's *Painter* decision is the result of a suit challenging the Ohio Secretary of State's directives on how to conduct the further investigation for poll worker error ordered by the district court. Those directives called for procedures that did not comport with Ohio law and, importantly, were not necessary to comply with the district court's injunction. Those directives, for example, included orders that the Board send questionnaires and subpoenas to more than 2000 poll workers to testify before the Board concerning whether there was poll worker error – steps that the Board had not taken with respect to any of

the other provisional ballots, including the 27 votes, and that would be impossible to complete within the timeframes required for Ohio elections. *Painter*, 941 N.E.2d at 796.

On January 7, 2011, the Ohio Supreme Court granted relators' requested relief and ordered the Board to:

> review the 850 provisional ballots that are the subject of Judge Dlott's order and are not subject to the consent decree in [*NEOCH*], 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, without assuming that poll worker error occurred in the absence of specific evidence to the contrary.

Id. at 798. Among other items, the Court confirmed: (1) wrong-precinct ballots were invalid under Ohio law (*id.* at 794); (2) there is no presumption of poll worker error (*id.* at 798); (3) poll worker error is not an exception to the wrong-precinct rule (*id.* at 794); and (4) statistical analysis along lines employed by one Board member regarding the 269 right location, wrong precinct votes specifically cannot be used to find poll worker error (*id.* at 798).

Shortly following the Ohio Supreme Court's *Painter* decision, on January 12, 2011, the district court weighed in again and ordered the immediate counting of 149 of the 269 right-location, wrong-precinct ballots (and certain other ballots) based on the exact same evidence that *Painter* had rejected. In that most recent order, the district court explicitly recognized that no one on the Board intended to violate any

rights: "there is no allegation that any error on the part of poll workers or Board staff was intentional." (R.39 at 6.)[2]

The Board and Williams immediately appealed to the Sixth Circuit (Nos. 11-3059, 3060), which consolidated them with the earlier case (No. 10-4481), expedited briefing and argument, and issued a decision on January 27. The panel majority opinion (Judge Moore joined by Judge Cole) affirmed the trial court's original injunction but vacated the most recent order and remanded for further proceedings. Judge Rogers issued a separate opinion concurring in the judgment. Judge Rogers agreed that the district court's most recent order should be vacated but questioned whether an equal protection violation occurred in the first place. Petitioners Hamilton County Board of Elections and Williams requested en banc review, which the court of appeals denied on March 29, 2011, and requested a stay of the court's mandate, which was denied on April 8, 2011.

V. REASONS FOR GRANTING RELIEF

This application fully satisfies the criteria that govern the propriety of granting a stay, because (1) there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); (2) there is "a fair prospect that five Justices will conclude that the case was erroneously decided below," *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers);

[2] Indeed, the district court further explained: "To the contrary, the evidence demonstrates that poll workers did not know they had made errors resulting in a ballot being cast in the wrong precinct. Poll workers attempted to do the right thing, and upon realizing after the fact that their error resulted in a ballot being disqualified, the workers readily agreed that the ballot should be counted." (*Id.*)

and (3) it is likely that irreparable injury will result if a stay is denied. *Id.*; *California v. American Stores Co.*, 492 U.S. 1301, 1304-07 (1989) (O'Connor, J., in chambers). In appropriate cases, the Circuit Justice may "balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas*, 486 U.S. at 1304. These factors clearly justify issuance of a stay here.

A. There Is a Reasonable Probability That At Least Four Members Of This Court Would Conclude That This Case Warrants Plenary Consideration

There is a reasonable probability that four or more Members of this Court would vote to grant certiorari.

At a minimum, the petition will present the legal question of whether an error by a local Board of Elections that results in the miscounting of ballots can form the basis for a constitutional equal protection violation that would result in the counting of additional, miscast ballots. This is a significant question upon which the Sixth Circuit's decision conflicts with *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) and *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980). In both of those cases, an erroneous decision under state law did not result in an equal protection violation regarding similarly-situated, uncounted ballots. Indeed, in those cases, isolated errors by local boards of elections did not amount to the kind of systematic, statewide error that implicates the Equal Protection Clause in an election context.[3]

[3] *Compare, e.g., Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964). One 1998 federal court decision summarized the difference as follows: "it is not the job of a federal court to involve itself with settling disputes as to how the state deals with counting votes after illegal votes are cast. Instead, a federal court should only intervene into state election disputes

A circuit split among the federal courts of appeals is among the most important, if not the most important, factor in determining whether certiorari will be granted in a case. *See* S. Ct. R. 10(a); Gressman et al., *Supreme Court Prac.* §4.3, at 241 (9th ed. 2007).

To be sure, both of these decisions predate the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). And the Sixth Circuit determined that the Board's decision was inconsistent with the Supreme Court's decision in that case. *See Hunter*, 2011 WL 242344, at *12-13 & fn.13. Whether *Bush v. Gore* has an impact on that earlier line of cases, however, is itself an important issue that contributes to the substantiality of the underlying equal protection question (or is perhaps its own separate issue).

But even more importantly, conflict between the Sixth Circuit's decision here and other courts exists even after the *Bush* decision. For example, the Minnesota Supreme Court, in *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009), specifically determined that actions by elections officials that might amount to erroneous or mistaken performances of a state statutory duty could not give rise to equal protection violations. *Id.* at 463 (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)). The losing candidate in that case challenged the way that certain local jurisdictions applied requirements for absentee voting. Because the conduct was not intentionally or purposely discriminatory (similar to the not intentionally discriminatory but erroneous counting of the ballots cast at the Board of Elections

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where the entire process is fundamentally unfair." *Scheer v. City of Miami*, 15 F. Supp. 2d 1338, 1342 (S.D. Fla. 1998).

in this case), there was not a constitutional violation. Moreover, the Minnesota Supreme Court specifically discussed and distinguished the Supreme Court's decision in *Bush v. Gore*. By contrast, the panel here rejected the applicability of *Snowden* and its progeny in light of *Bush v. Gore*. *See Hunter*, 2011 WL 242344, at *12 n.13.

There are also federal circuit court decisions that postdate *Bush v. Gore* that have similarly and specifically determined that "willful conduct" is necessary where election officials are alleged to have violated equal protection. *See, e.g., Parra v. Neal*, 614 F.3d 635, 637-38 (7th Cir. 2010); *Gelb v. Bd. of Elections of City of N.Y.*, 155 Fed. Appx. 12, 14-15 (2d Cir. 2005) ("[u]neven or erroneous application" of state law by local Board of Elections, without more, does not violate equal protection). These cases stand in stark contrast with the decision here, in which the Sixth Circuit applied a different standard and placed the burden on election officials to show that the purportedly discriminatory treatment that resulted from their mistake was justifiable. *See Hunter*, 2011 WL 242344, at *12-13 & fns.13, 16.

Further, there are additional factors that militate in favor of a grant of certiorari here. This case involves an important question of constitutional law on which the Supreme Court is the ultimate arbiter (unlike, for example, a statutory case that can be altered by Congressional action). *See* Gressman *et al.*, *supra*, at §4.12 ("Important Constitutional Issues").[4] And this case implicates the more

[4] Not surprisingly, this case has generated broad interest. In addition to briefing by Intervenors Ohio Democratic Party and the Northeast Ohio Coalition for the Homeless, the Ohio Attorney General on behalf of the Ohio Secretary of State, the Ohio Republican Party, and the Cincinnati Chapter of the NAACP filed amicus briefs in the court of appeals.

general question of the extent to which federal courts ought to be involved in state or local elections. As stated 30 years ago in *Gamza*: "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss." *Gamza*, 619 F.2d at 453. The potential effect of the lower court's decision on state, local, and federal elections nationwide could be profound. The lower court has effectively blessed federal court intervention to attempt to remedy every instance of error by election officials, no matter whether such mistakes were non-discriminatory and non-invidious.

B. Petitioners Are Likely to Prevail On The Merits

There is at least a "fair prospect" that Petitioners will prevail on the merits in this case.

The case law (*Roe*, *Gamza*, *Gelb*, *Coleman*, etc.) supporting the view that isolated mistakes by local officials in the counting of ballots or administration of elections are not equal protection violations traces back at least to the Supreme Court's decision in *Snowden*. There, the Court determined that unlawful administration by state officers of a non-discriminatory state law, "resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

Respondents and the lower courts have relied upon a line of cases that essentially involve statewide laws or practices, such as *Harper* and *Reynolds*. But there is a distinction between state laws that systematically deny equality in voting, and isolated errors that, despite non-discriminatory laws, adversely affect individuals. The question appears to be whether *Bush v. Gore* has altered the relationship between those lines of cases (*i.e.*, *Snowden* as opposed to *Harper* and *Reynolds*). The *Bush* Court itself characterized its decision in a way that places it on the *Harper*, *Reynolds* side of the equation: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." 531 U.S. at 109. The greater weight of authority, even after *Bush v. Gore*, is that election mistakes like the ones at issue in the case do not give rise to an equal protection violation.

C. Petitioners Will Suffer Irreparable Harm In The Absence of A Stay, And The Balance Of The Equities Favors Issuance Of A Stay

Petitioners will suffer irreparable injury unless a stay issues in this case. The lower court's decision imperils Petitioners' receipt of an election count not further diluted by illegal votes. A stay is necessary because it is likely that the judicial election will be decided by the official count before the significant legal issues discussed herein are resolved. Avoiding this potential injury is even more imperative considering that the trial court is expected to order, as occurred in the past, the immediate counting of certain of the disputed ballots.

Though on the merits, this case is different from *Bush v. Gore* (as discussed above), the posture is similar. And in *Bush v. Gore*, the Supreme Court stayed the implementation of the mandate there pending review. As Justice Scalia specifically noted, the counting of votes that were of "questionable legality" threatened irreparable harm "by casting a cloud upon ... the legitimacy of [the] election." *Bush v. Gore*, 531 U.S. 1046 (2000) (Scalia, J., concurring). And further admonishing: "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." *Id.* Even though there is no Presidential election at stake here, this case presents the very same concerns with respect to Mr. Williams.

Irreparable harm will also occur if the trial court orders the Board to conduct the recount in a manner contrary to the ruling in *Painter* or to the directives of the Ohio Secretary of State. The Board could be placed in the intractable position of having to violate multiple contradictory binding orders thereby subjecting Board members to contempt sanctions and removal from office.

This potential harm to Petitioners is not outweighed by any harm to the public. The Hamilton County Juvenile Court remains fully staffed with judges, as it was when the Sixth Circuit granted an initial stay in January. So any delay associated with resolution of these important issues should not impact the business of the Juvenile Court.

VI. CONCLUSION

Under these circumstances, the effect of a failure to grant a stay could well be to deny Petitioners fully effective relief in this case. A stay is justified by the importance of determining the equal protection issues in the context of elections, not only for this local election but for the next election cycle and those that follow. Petitioners are threatened with irreparable injury, and the equities clearly favor granting a stay, because a stay is the only means of protecting the integrity of the election count and election outcome while ensuring proper and orderly access to the judicial system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2011, a copy of the foregoing was served upon Respondents' counsel of record via electronic mail and by United States First Class Mail, postage prepaid, addressed to the following:

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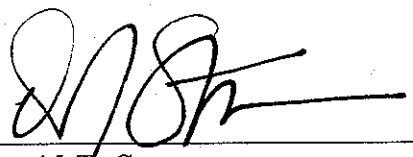

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ADDENDUM

Exhibit	Description
1	*Hunter v. Hamilton Cty. Bd. of Elections*, --- F.3d ---, 2011 WL 242344 (6th Cir. January 27, 2011)
2	Order Denying Motions to Stay Mandate (April 8, 2011)
3	*State ex rel. Painter v. Brunner*, --- N.E.2d ---, 2011 WL 115596, 2011-Ohio-35 (Ohio Jan. 7, 2011) ("*Painter*")

Exhibit 1

--- F.3d ----, 2011 WL 242344 (C.A.6 (Ohio))
(Cite as: 2011 WL 242344 (C.A.6 (Ohio)))

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Sixth Circuit.
Tracie HUNTER, Plaintiff–Appellee,
Northeast Ohio Coalition for the Homeless; Ohio Democratic Party, Intervenors–Appellees,
v.
HAMILTON COUNTY BOARD OF ELECTIONS; Caleb Faux; Timothy M. Burke; Alex Triantafilou; Charles (Chip) Gerhardt, III, Defendants,
Hamilton County Board of Elections, Defendant–Appellant (11–3060),
John Williams, Intervenor–Appellant (10–4481; 11–3059).

Nos. 10–4481, 11–3059, 11–3060.
Argued: Jan. 21, 2011.
Decided and Filed: Jan. 27, 2011.

Background: Judicial candidate brought action under § 1983 against elections board for alleged violations of due process and equal protection with respect to its review and counting of provisional ballots. The United States District Court for the Southern District of Ohio, Susan J. Dlott, Chief Judge, 2010 WL 4878957, granted a preliminary injunction ordering the board to investigate whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error, and also ordered the board to count disputed ballots and to investigate and count certain other ballots subject to an existing federal consent decree, and board and intervening opposing candidate appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:
(1) board acted arbitrarily, in violation of the Equal Protection Clause, in considering the location where the ballot was cast as evidence of poll-worker error for provisional ballots cast at its office, but not for provisional ballots cast at the right polling location but wrong precinct, and
(2) equitable factors supported the district court's grant of a preliminary injunction.

Affirmed in part, vacated in part, and remanded.

Rogers, Circuit Judge, filed opinion concurring in the judgment.

West Headnotes

[1] Federal Courts 170B ⚿171

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(B) Cases Arising Under the Constitution
170Bk171 k. Constitutional Cases in General. Most Cited Cases

Court has jurisdiction to hear claims "arising under the Constitution" and alleging unconstitutional practices taken under color of state law. 28 U.S.C.A. §§ 1331, 1343; 42 U.S.C.A. § 1983.

[2] Federal Courts 170B ⚿573

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk573 k. Injunction and Stay Orders. Most Cited Cases

Court's jurisdiction encompasses appeals from interlocutory orders that grant or modify injunctions. 28 U.S.C.A. § 1292(a)(1).

[3] Federal Courts 170B ⚿180

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(B) Cases Arising Under the Consti-

tution
170Bk178 Particular Cases and Questions, Due Process or Equal Protection
170Bk180 k. Election and Right to Public Office; Apportionment Cases. Most Cited Cases

Federal Courts 170B 576.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk576 Particular Actions, Interlocutory Orders Appealable
170Bk576.1 k. In General. Most Cited Cases

Federal subject matter jurisdiction existed over state judicial candidate's suit alleging that county election board's decision to count some provisional ballots miscast as a result of poll-worker error and not others deprived her of equal protection and due process; facts pleaded in support of such claims raised substantial questions of federal law over which the district court had original jurisdiction and Court of Appeals had jurisdiction on appeal of preliminary injunction. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 1343.

[4] Federal Courts 170B 43

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of State or Foreign Law Involved. Most Cited Cases

Pullman abstention is appropriate only where state law is unclear and a clarification of that law would preclude the need to adjudicate the federal question.

[5] Courts 106 509

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k509 k. Vacating or Annulling Decisions. Most Cited Cases

Rooker–Feldman doctrine applies narrowly to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced.

[6] Courts 106 509

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k509 k. Vacating or Annulling Decisions. Most Cited Cases

Rooker–Feldman abstention doctrine did not apply to election challenge where state-court judgment that formed the basis of county election board's defense was issued nearly seven weeks after candidate filed her complaint in federal district court.

[7] Elections 144 1

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k1 k. Nature and Source of Right. Most Cited Cases

Right to vote includes the right to have one's vote counted on equal terms with others. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 3654

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3654 k. Ballots in General. Most Cited Cases

Constitutional Law 92 ⚿4232

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)9 Elections, Voting, and Political Rights
92k4232 k. Voters, Candidates, and Elections. Most Cited Cases

To satisfy both equal-protection and due-process rights, an election board's discretionary review of provisional ballots must apply similar treatment to equivalent ballots. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ⚿3654

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3654 k. Ballots in General. Most Cited Cases

Elections 144 ⚿239

144 Elections
144IX Count of Votes, Returns, and Canvass
144k239 k. Votes to Be Counted. Most Cited Cases

When it evaluated which provisional ballots to count, Ohio county election board acted arbitrarily, in violation of the Equal Protection Clause, in considering the location where the ballot was cast as evidence of poll-worker error for provisional ballots cast at its office, but not for provisional ballots cast at the right polling location but wrong precinct; in so doing, board exercised discretion, without a uniform standard to apply, in determining whether to count provisional ballots miscast due to poll-worker error that otherwise would be invalid under state law. U.S.C.A. Const.Amend. 14.

[10] Injunction 212 ⚿138.51

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)3 Subjects of Relief
212k138.45 Public Officers, Boards and Municipalities; Schools and Colleges
212k138.51 k. Elections. Most Cited Cases

Equitable factors supported the district court's grant of a preliminary injunction requiring county election board to count provisional ballots of qualified voters miscast as a result of poll-worker error, given the strong likelihood that failure to count such ballots resulted in a denial of equal protection; board had a substantial interest in carrying out its election duties timely and in accordance with state and federal law, and state and the voting public had interests at stake. U.S.C.A. Const.Amend. 14.

[11] Injunction 212 ⚿177

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(B) Continuing, Modifying, Vacating, or Dissolving
212k177 k. Motion to Modify. Most Cited Cases

Order modifying preliminary injunction in suit challenging counting of provisional ballots by resolving disputed facts should not have been issued prior to affording to the opposing parties notice and an opportunity to be heard. 28 U.S.C.A. § 1292(a)(1); Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

West Codenotes
Validity Called into DoubtOhio R.C. § 3505.183
ARGUED:R. Joseph Parker, Taft Stettinius & Hollister LLP, Cincinnati, Ohio, for Appellants. Jennifer L. Branch, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, Caroline H. Gentry, Porter Wright Morris & Arthur, LLP, Dayton, Ohio, for Appellees. David Todd Stevenson, Hamilton

County Prosecutor's Office, Cincinnati, Ohio, for Hamilton County Board of Elections. **ON BRIEF:** R. Joseph Parker, W. Stuart Dornette, John B. Nalbandian, Taft Stettinius & Hollister LLP, Cincinnati, Ohio, James W. Harper, Hamilton County Prosecutor's Office, Cincinnati, Ohio, for Appellants. Jennifer L. Branch, Alphonse A. Gerhardstein, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, Caroline H. Gentry, Porter Wright Morris & Arthur, LLP, Dayton, Ohio, Subodh Chandra, The Chandra Law Firm, LLC, Cleveland, Ohio, Donald J. McTigue, Mark A. McGinnis, McTigue & McGinnis, LLC, Columbus, Ohio, Timothy M. Burke, Manley Burke LPA, Cincinnati, Ohio, for Appellees. Richard N. Coglianese, Pearl M. Chin, Office of the Ohio Attorney General, Columbus, Ohio, for Amicus Curiae.

Before: MOORE, COLE, and ROGERS, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. ROGERS, J. (pp. —— – ——), delivered a separate opinion concurring in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge.

***1** This case arises from the November 2010 election for Hamilton County Juvenile Court Judge between candidates Tracie Hunter and John Williams. Plaintiff-appellee Hunter brought a claim under 42 U.S.C. § 1983 for alleged violations of due process and equal protection by defendant Hamilton County Board of Elections ("Board") with respect to its review and counting of provisional ballots. Hunter alleges that the Board has created a practice of investigating whether invalid provisional ballots were miscast as a result of poll-worker error and, if they were, counting the ballots. She alleges that the Board refused to apply this practice to approximately 849 [FN1] other provisional ballots miscast in the wrong precinct. After the Board completed its count of provisional ballots and added the provisional total to the election-day total, Hunter was 23 votes behind Williams.

Before us are the following consolidated appeals: (1) intervenor-appellant Williams's appeal of the district court's November 22, 2010 order granting a preliminary injunction ordering the Board "to investigate whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error"; (2) Williams's appeal of the district court's January 12, 2011 order, which ordered the Board to count 165 of the 849 disputed ballots and to investigate and count certain other ballots subject to an existing federal consent decree; and (3) the defendant-appellant Board's appeal of the district court's January 12 order. For the reasons explained below, we **AFFIRM** the district court's November 22 order and **AFFIRM** in part and **VACATE** in part the district court's January 12 order.

I. BACKGROUND & PROCEDURAL HISTORY

This case comes to us with a lengthy history. It is helpful to start with an explanation of provisional voting in Ohio. Under Ohio law, certain voters not able to cast a regular ballot in an election may cast a provisional ballot. OHIO REV.CODE ANN. § 3505.181(A). For example, individuals whose names are not on the official list of eligible voters for the polling place, who requested an absentee ballot, or whose signature was deemed by the precinct official not to match the name on the registration forms may be provisional voters. *Id.* To cast a provisional ballot, the voter must execute an affirmation stating that he or she is registered to vote in the jurisdiction and is eligible to vote in the election. *Id.* §§ 3505.181(B)(2); 3505.182. The Board then must determine whether a provisional ballot is valid and therefore required to be counted. Relevant to this dispute, if the Board determines that "[t]he individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot,"

then the ballot envelope shall not be opened and the ballot shall not be counted. *Id.* § 3505.183(B)(4)(a)(ii).[FN2] "Once a provisional ballot is separated from its envelope, the ballots are then commingled to protect voter secrecy, and it becomes impossible to track the votes of any provisional voter." *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 900 N.E.2d 982, 984 (2008).

***2** Also important is the concept of a multiple-precinct polling location. For financial and other administrative reasons, Hamilton County has decided to have some buildings serve as the polling location for several nearby precincts. R.38–8 Ex. 1 (Burke letter at 2). In such locations, voters must go to the correct "precinct"—i.e., table—within the location to cast a valid ballot. To assist voters in finding the correct table, the County assigns an extra poll worker as a "precinct guide" at sixteen of its seventeen polling locations with four or more precincts. The 152 polling locations that have two or three precincts do not have an extra poll worker to serve as a precinct guide. Applicable to all locations but particularly relevant to locations with multiple precincts, Ohio law requires poll workers to assist voters in certain ways if an issue arises regarding the voter's correct precinct:

> If an individual declares that the individual is eligible to vote in a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, the election official shall direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.

OHIO REV.CODE ANN. § 3505.181(C)(1).[FN3] If the voter refuses to go to the correct precinct, or to the Board's office, the voter still may cast a provisional ballot, but the ballot cannot be opened or counted if the voter is not properly registered in the precinct or not eligible to vote in the election, or if the voter's eligibility to vote in the precinct and in the election cannot be established from the Board's records. *Id.* § 3505.181(C)(2).

In 2006, intervenor-appellee the Northeast Ohio Coalition for the Homeless ("NEOCH") sued the Ohio Secretary of State alleging a number of election-related claims including challenges to Ohio's voter-identification laws. *NEOCH v. Brunner*, No. C2–06–896 (S.D.Ohio). This suit resulted in NEOCH and then-Secretary of State Jennifer Brunner entering into a consent decree, which, among other provisions, mandated that the Board "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" if certain deficiencies in the ballot, including being cast "in the wrong precinct, but in the correct polling place," were the result of poll-worker error. *NEOCH*, No. C2–06–896 (S.D.Ohio Apr. 19, 2010) (consent decree). The consent decree, in effect, carved out an exception for counting provisional ballots otherwise invalid under Ohio law if the deficiency was due to poll-worker error—albeit a narrow one limited to those provisional ballots cast by a voter who uses the last four digits of his or her Social Security number as identification.

***3** After the consent decree was entered, Secretary Brunner issued Directive 2010–73 [FN4] and Directive 2010–74 to assist the Board in processing and counting provisional ballots in accordance with the decree. Section VII of Directive 2010–74 provides examples of poll-worker error contemplated under the consent decree as well as steps for the Board to take when there is evidence of poll-worker error, including when "a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct." R.1–2

(Directive 2010–74 at 11–12).

Shortly after the November 2010 election, the Board held meetings on November 16, 2010, and November 19, 2010, to process and vote on the provisional ballots that had been cast. The Board first unanimously voted to accept and count over 8000 provisional ballots with little discussion. R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 23–29). The Board next voted unanimously to accept and count over six hundred ballots in which the poll worker checked contradictory information regarding whether the voter was required to provide additional information to the Board. *Id.* at 29–33. The Board's counsel indicated that he thought the group of ballots "falls within demonstrated pollworker error under Secretary of State Brunner's directive regarding that issue." *Id.* at 32. The Board then reviewed a group of 849 ballots that were cast by voters on election day at polling locations but were cast in the wrong precinct. The record reveals that the Board and its attorney understood Ohio law to be that ballots cast in the wrong precinct were invalid and should not be counted unless, under the consent decree, there was poll-worker error *and* the voter used the last four digits of his or her Social Security number as identification. *Id.* at 34–60. Two Board members expressed their frustration that some of the 849 ballots were instances in which the voter went to the correct polling location but voted in the wrong precinct.[FN5] *Id.* at 35–39. But because these ballots were not implicated by the *NEOCH* consent decree (the voters did not use the last four digits of their Social Security numbers as identification), the Board unanimously voted to disqualify these ballots. *Id.* at 37–40.

The next category of ballots that the Board considered was a group of 27 ballots that were cast at the Board's office in downtown Cincinnati prior to election day but were recorded in the wrong precinct. The Board concluded that these ballots resulted from "clear pollworker error" and voted unanimously to "remake the ballot to the proper precinct" and to count the 27 ballots. *Id.* at 40–45. During the discussion of these 27 ballots, the Board observed that in the process of voting at its office "the voter had no choice but to walk up to just one person." *Id.* at 42–44. The Board mentioned the reasons why a voter at the Board's office must have been given the wrong ballot: "for whatever reason [the poll worker] may have looked up the wrong precinct as they looked at the [voter's] current address and a former address," or "pulled the wrong ballot." *Id.* at 43. When one Board member questioned how the ballot would be remade for the correct precinct given that all the races may not be the same in the two precincts, that member was told that if the voter in question had voted in a race that he or she should not have, the vote for that particular race would simply not be counted. *Id.* at 41. The Board's attorney also noted his agreement with the Board's decision to count the votes cast in the wrong precinct at the Board's office. *Id.* at 42.

***4** After the unanimous vote to count these 27 ballots, counsel for Hunter who attended the meeting raised a question to the Board why the 27 ballots cast at the Board's office were counted but the 849 ballots from the polling locations were not: "In light of your ruling just now on the pollworker errors for the people that voted here at the Board, wouldn't that same logic hold true for the prior batch of the 849 people? If they cast their vote because of pollworker error in the wrong precinct, shouldn't they also have their votes counted?" *Id.* at 46. Hunter's counsel asked whether it was possible to separate out those ballots of the 849 that were cast at the right location but wrong precinct and to decide whether there was poll-worker error with respect to those ballots. *Id.* at 46–47. The Board and its attorney responded that for those ballots cast at the Board's office, the poll-worker error was "obvious," but with respect to the other 849 ballots cast at polling locations, there must be "objective evidence that the pollworker did not do what they are supposed to do." *Id.* at 47–48. Although the Board also recognized that some of the 849 ballots in question were cast at the right location but the wrong precinct, the Board simply noted that those

ballots were not separated out. *Id.* at 49. The Board then continued in its review of provisional ballots without allowing further discussion of the 849 provisional ballots cast in the wrong precinct. *Id.* When the Board concluded its review, the provisional ballots that the Board had voted to count were added to the count of the regular ballots cast on election day. After this total count of ballots, Williams had a 23–vote margin over Hunter.

On November 21, 2010, Hunter filed a complaint in the United States District Court for the Southern District of Ohio, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 against the Board and its four members in their official capacities for asserted violations of the Equal Protection Clause and Due Process Clause. R.1 (Compl.). Hunter alleges that "[t]he Hamilton County Board of Elections has created a practice of investigating if there is poll worker error and if poll worker error is found, of accepting provisional ballots." *Id.* ¶ 22. In support, she alleges that the Board counted (1) 26 provisional ballots cast at the Board's office but in the wrong precinct,[FN6] *id.* ¶ 26 (citing R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 40–46)); (2) 685 provisional ballots with contradictory information regarding whether the voter provided identification,[FN7] *id.* ¶ 27 (citing R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 29–33)); (3) 10 provisional ballots that the voter had not signed but the Board determined that the voter should not have been required to vote a provisional ballot,[FN8] *id.* ¶ 28 (citing R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 71–72)); and (4) "several" provisional ballots in which the ballots themselves were from the wrong precinct but the envelopes were from the correct precinct, *id.* ¶ 29. Hunter alleges that the Board failed to conduct a similar investigation in other instances, including the 849 provisional ballots rejected for being cast in the wrong precinct, and therefore failed to count provisional ballots miscast as a result of poll-worker error. *Id.* ¶¶ 30, 34.

***5** Hunter alleges that the Board violated the Equal Protection Clause "by refusing, without reasonable basis, to investigate whether poll worker error caused some voters to vote at the right polling place but at the wrong table while otherwise investigating similarly situated circumstances where poll worker error caused a voter to vote in the wrong precinct," and "by arbitrarily allowing some provisional voters the right to vote when the error in the ballot was caused by the poll worker, but denying other provisional voters the right to vote when the error in the ballot was caused by the poll worker." *Id.* ¶ 38. She also alleges that the Board's "system of rejecting provisional ballots is so unfair that it denies or fundamentally burdens Ohioan[s'] fundamental right to vote" and that "[d]enying a provisional voter his or her right to vote is a severe burden on that voter's right to vote." *Id.* ¶ 39.

At the same time, Hunter filed a motion for a temporary restraining order and preliminary injunction. R.2 (Mot. for TRO and Prelim. Inj.). NEOCH and the Ohio Democratic Party (together with Hunter, "Plaintiffs") intervened as plaintiffs, alleging that some of the 849 disputed ballots appeared to be subject to the *NEOCH* consent decree and asserting their interest, as parties to the consent decree, in its enforcement. Williams intervened as a defendant (together with the Board, "Defendants"). The following day, November 22, 2010, the district court held an emergency hearing and issued a preliminary injunction directing the Board to "immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error." R.13 (Nov. 22, 2010 order at 9). The district court denied Hunter's request to stay the Board's certification of the election results. *Id.* The Board, therefore, certified the results of the election on November 23, 2010.

Williams appealed the district court's order and moved for a stay in this court. A single judge of this court granted a temporary stay on November 24,

2010, but a three-judge panel of this court denied the motion to stay on December 1, 2010, and dissolved the temporary stay. The panel stated that it could not "conclude that the district court abused its discretion in determining that [the alleged] disparate treatment made it 'likely enough that [the likelihood-of-success] factor weighs in favor of granting the preliminary injunction.' " Case No. 10–4481, Dec. 1, 2010 Order at 3 (second alteration in original) (quoting *United States Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir.2008)). Because it was "unconvinced that Williams faces irreparable harm in the absence of a stay" and "the balance of the remaining factors [did] not persuade [this court] to grant the motion for a stay," the panel ordered that the case "shall thus proceed in the normal course." *Id.* at 2–3. Williams subsequently filed a petition for panel rehearing, which was denied on December 16, 2010. We scheduled oral argument on Williams's appeal, No. 10–4481, for March 1, 2011.

***6** Much has happened, however, since the original appeal. After the district court's November 22 order, Secretary Brunner provided "additional guidance to the [Board] with regard to the investigation of 849 provisional ballots, as ordered [by the district court]." R.38–10 (Directive 2010–80 [FN9]); *see also* R.38–6 (Directive 2010–87 [FN10]). Secretary Brunner also issued Directive 2010–79, which provides "objective criteria for determining poll worker error." R.44–3 (Directive 2010–79). In particular, Secretary Brunner ordered the Board to question every poll worker from the precincts in which the 849 disputed ballots were cast. R.38–6 (Directive 2010–87 at 2).

The Board thus began investigating the disputed ballots and subpoenaed over four-hundred poll workers. R.38–7 (E-mail correspondence at 2). At Board meetings held on December 16 and 17, the Board interviewed over seventy poll workers. R.38–2 (Dec. 16, 2010 Board Meeting Tr.); R.38–3 (Dec. 17, 2010 Board Meeting Tr.). However, on December 20, the Board contacted the Secretary of State and indicated that it still needed to issue approximately 1500 subpoenas to poll workers. R.38–7 (E-mail correspondence at 2). The Board asked that the Secretary permit it to stop interviewing the poll workers and instead send questionnaires to the poll workers. *Id.* The Secretary agreed. *Id.* at 1. After sending out questionnaires to the remaining poll workers, the Board received back 830 completed questionnaires. R.38–4 (Dec. 28, 2010 Board Meeting Tr. at 69).

At its December 28 meeting, the Board rejected approximately 500 of the 849 disputed ballots. *Id.* at 135. The Board voted unanimously to count 7 ballots that the Board determined from its investigation, including interviewing poll workers, were miscast on account of poll-worker error, *id.* at 68–73, and 9 ballots that were determined to have been cast in the correct precinct but erroneously included by Board staff with the rejected "wrong-precinct" ballots, *id.* at 39–44, 52–68. The Board also voted on whether to count 269 ballots that were cast in the correct polling location but in the wrong precinct, but the vote was a 2–2 tie. *Id.* at 88–89. Under Ohio law, the Secretary of State casts the tie-breaking vote when the Board of Elections is deadlocked. OHIO REV.CODE ANN. § 3501.11(X).

On January 7, 2011, Secretary Brunner issued a directive with respect to the 269 ballots. R.38–9 (Directive 2011–03). In the directive, Brunner rejected counting all 269 ballots but, based on an analysis conducted by Board member Caleb Faux, R.38–8 Ex. 1 (Burke letter at 3–4), directed the Board to count approximately 56% of the 269 ballots cast in the wrong precinct but correct polling location based on the voter's address. She directed the Board to count the ballots of voters whose addresses were (1) "on the wrong side of a boundary street of the precinct in which the voter should have cast a ballot" (approximately 31% of the 269); (2) "outside of the address range of a boundary street of the precinct in which the voter should have cast a ballot" (approximately 15% of the 269); and (3)

"on streets that pass through the precinct in which the voter voted, but the address[ ] did not fall within the correct address range of the precinct in which the voter should have cast a ballot" (approximately 10% of the 269).

***7** In the meantime, on December 20, 2010, Williams and John W. Painter, a Hamilton County elector, petitioned the Ohio Supreme Court for "a writ of mandamus correcting the misdirected post-election and post-election-certification instructions of the Secretary of State and stopping the process that is based on those instructions." R.29–1 (*Painter* Compl. ¶ 6). In response, Plaintiffs filed an emergency motion in the federal district court on December 23, 2010, to enjoin the state-court proceedings. The federal district court held a telephonic hearing on December 27, 2010, and denied the motion stating that "[i]t is within the province of the Ohio Supreme Court to determine whether Secretary of State Jennifer L. Brunner's directives comply with state law governing election procedures." R.32 (Dist. Ct. Order Denying Mot. to Enjoin State–Court Proceedings at 1). However, the district court did indicate that if "the Ohio Supreme Court issues a ruling that Plaintiffs in [the federal] action believe interferes with this Court's [preliminary injunction] or that Plaintiffs believe is otherwise contra to constitutional or federal law, Plaintiffs may file a new motion for injunctive relief." *Id.* at 1–2.

The Ohio Supreme Court issued a decision on January 7, 2011, granting the writ of mandamus. Specifically, the state supreme court issued an order

> to compel the secretary of state to rescind Directives 2010–80 and 2010–87 and to compel the board of elections to rescind its decisions made pursuant to those directives and to instead review the [849] provisional ballots that are the subject of [the federal district court'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, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary.

State ex rel. Painter v. Brunner, 128 Ohio St.3d 17, 941 N.E.2d 782, 791 (2011). The state supreme court observed that in its view,

> [a]t best, any equal-protection claim would have merely required the same examination that the board conducted in [ ] concluding[—]incorrectly under Ohio law—that 27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted even though they were cast in the wrong precinct due to poll-worker error. That review was limited to an examination of the poll books, help-line records, and provisional-ballot envelopes and emanated from the uncontroverted evidence that these ballots were cast in the wrong precinct due to poll-worker error.

Id. at 798 (brackets reflect movement of dash).

Also on January 7, 2011, Secretary Brunner issued two directives to the Board. The first, Directive 2011–02, rescinded Directives 2010–80 and 2010–87 in accordance with the *Painter* decision. The second, Directive 2011–03, related to the Board's tie vote on the 269 votes cast in the correct polling location but wrong precinct, as explained above. R.38–9 (Directive 2011–03). Brunner directed the Board to count certain ballots that, based on voter addresses, were cast in the right polling location but in the wrong precinct. On January 10, 2011, however, current Ohio Secretary of State Jon Husted took office and issued a directive superseding Secretary Brunner's Directive 2011–03. R.38–1 (Directive 2011–04). Secretary Husted's Directive 2011–04 further instructed the Board to

> ***8** determine now, as it did on November 16, 2010, based solely on its examination of election records, poll books, help-line records, and provisional-ballot envelopes (i.e., the same evidence the board considered at its November 16, 2010, meeting) that the [849] ballots cast in the wrong

> precinct are, according to Ohio statutes, invalid and shall not be counted,

and "to certify the results of the election" accordingly. *Id.*

A flurry of action took place in the following days. On January 11, 2011, Plaintiffs filed an emergency motion in the federal district court to enforce the preliminary injunction and enjoin the Board from complying with Secretary Husted's directive. R.38 (Mot.). Plaintiffs alleged that the Board's investigation revealed (1) 7 ballots that the Board unanimously agreed to count because they were deficient due to poll-worker error, *id.* at 3–5; (2) 9 ballots that the Board unanimously agreed to count because they were deficient due to error by the Board's staff, *id.* at 5; and (3) approximately 149 ballots that were cast in the right location but wrong precinct due to poll-worker error relating to the voters' addresses,[FN11] *id.* at 6–7. Plaintiffs argued that these ballots should be counted but would not be counted under Secretary Husted's directive.

Plaintiffs also argued that an unknown number of ballots cast in the right location but wrong precinct would not be counted under Directive 2011–04 "even though there is evidence of poll worker error." *Id.* at 7–8. As evidence of poll-worker error, Plaintiffs pointed to the fact that the approximately 900 poll workers who were questioned, either under oath or by questionnaire, reported that no voter had refused to move to the correct precinct table when instructed. And because Ohio law requires poll workers to inform voters if they are in the wrong precinct and to direct them to the correct precinct, Hunter argued that votes cast in the correct location but wrong precinct must have been miscast "because the poll worker believed that the voter was in the correct precinct." *Id.* at 8. In other words, the evidence of poll-worker error is the absence of evidence of voter error. *Id.* at 7. Last, Plaintiffs argued that the Board violated the *NEOCH* consent decree because it did not investigate the provisional ballots subject to the decree for poll-worker error. *Id.* at 8–9. They alleged that 21 of the 849 wrong-precinct ballots are subject to the decree and that there are an unknown number of other provisional ballots subject to the decree that were rejected for reasons other than being cast in the wrong precinct. *Id.*

On January 12, 2011, current-Secretary Husted issued another directive to the Board. R.44–1 (Directive 2011–05). Secretary Husted directed the Board to (1) "examine the provisional ballots that are the subject of [the district court's] order and are not subject to [the *NEOCH* consent decree], consistent with the Ohio Supreme Court's January 7, 2011 [decision] in *Painter* by examining only the poll books, help-line records, and provisional-ballot envelopes"; (2) "examine those provisional ballots that are subject to the [*NEOCH* consent decree—i.e., those cast by voters using their last four digits of their Social Security number as identification], in accordance with the requirements of Directives 2010–74 and 2010–79"; and (3) count 9 provisional ballots that were cast in the correct precinct but erroneously included in the group of 849 "wrong precinct" ballots. *Id.*

***9** Also on January 12, the district court, without a hearing, granted in part the emergency motion to enforce the preliminary injunction and denied as moot the motion to enjoin state-court proceedings. Specifically, the January 12 district-court order stated:

> The Board is hereby (1) enjoined from complying with Secretary of State Directive 2011–04; (2) ordered to 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; (3) ordered to count the 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; (4) ordered to count the 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; and (5) ordered to investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree.

R.39 (Jan. 12, 2011 order at 1). The district court concluded that "[w]ere the Board to certify the election results as they were on November 16, 2010, which is what the Ohio Secretary of State has directed it to do, the Board would violate the Equal Protection Clause of the United States Constitution." *Id.* at 2. It recognized that counting provisional ballots cast in the wrong precinct violates Ohio state law but reasoned that once the Board had violated state law by investigating and counting "some of the provisional ballots improperly cast because of poll worker error," it could not refuse to do the same for all provisional ballots. *Id.* at 2, 5–9 (citing *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.")).

The district court's January 12 order was filed just before the Board was scheduled to meet. At its meeting, the Board requested a legal opinion from the Hamilton County Prosecutor's Office on how it should proceed. R.44–2 (Legal Op.). Two days later, at the Board's meeting on Friday, January 14, the Prosecutor's Office recommended that the Board appeal the district court's January 12 order to this court. *Id.* at 5. The Board voted on whether to appeal but tied 2–2. R.44 (Mot. to for an Order to Show Cause at 2).

Later on January 14, Hunter and NEOCH filed in the district court a motion to show cause "why the Board should not be held in contempt for its failure to follow" the district court's two preliminary-injunction orders. *Id.* at 1. The motion alleges that the Board has failed to order the count of the 149 ballots cast in the wrong precinct determined to be due to poll-worker error related to the voters' addresses, the 7 ballots cast in the wrong precinct due to admitted poll-worker error, and the 9 ballots determined to have, in fact, been cast in the correct precinct. *Id.* at 4. The motion also alleges that the Board has failed to investigate the ballots subject to the *NEOCH* consent decree. *Id.* at 6. In addition to asking the district court to find the Board and each noncompliant Board member in contempt, Hunter and NEOCH requested that, if the Board did not comply by 4:00 p.m. on January 21, 2011, the district court enjoin the Board from complying with Ohio's statutory deadline to amend the certification of election results [FN12] and enjoin Williams from taking the oath of office. The district court granted the motion on January 14, without notice or a hearing, and ordered the Board to appear before the district court on Tuesday, January 18. R.45 (Order to Show Cause).

***10** Shortly thereafter, Williams filed a notice of appeal of the district court's January 12 order, No. 11–3059. R.46. Subsequently, on January 14, the district court also entered an order enjoining the Board from complying with Ohio's statutory deadline to amend the certification of the election results by January 22, 2011. R.47. The district court "prohibit[ed] any certification of the election results from [the disputed] race from going into effect until further order of [the district court]." *Id.* On January 15, Williams filed with this court a motion to stay the district court's January 12 order.

On January 16, the Board filed a notice of appeal of the district court's January 12 order, No. 11–3060, and the next day the Board filed a motion to stay the January 12 order and any further district-court proceedings. We granted the motions to stay the January 12 order on January 18, consolidated appeal Nos. 10–4481, 11–3059, and 11–3060, and expedited briefing and oral argument. We held oral argument on January 20, 2011. The district court's order prohibiting certification of the election results has remained in effect.

II. JURISDICTION

We first address the Defendants' jurisdictional arguments. "The right to vote is a fundamental

right" that the United States Constitution protects and the exercise of which preserves the other rights that citizens enjoy. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir.2008) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). It is this core liberty that Hunter claims the Board abrogated in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See generally* U.S. CONST. amend. XIV; R.1 (Compl.) (raising constitutional claims using 42 U.S.C. § 1983). Nonetheless, Defendants contest subject-matter jurisdiction, arguing that Hunter's allegations raise concerns that fall squarely within the ambit of state law and that her constitutional claims are not so grave as to warrant the exercise of federal jurisdiction.

[1][2][3] It is firmly established that we have jurisdiction to hear claims "arising under the Constitution" and alleging unconstitutional practices taken under color of state law. *See* 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 1983. Our jurisdiction encompasses appeals from interlocutory orders that "grant[ ]" or "modify[ ]" injunctions. 28 U.S.C. § 1292(a)(1). And "[i]n decision after decision, [the Supreme Court] has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Hunter has alleged this species of unequal treatment. She alleges that the Board's decision to count some provisional ballots miscast as a result of poll-worker error and not others deprived her of equal protection and due process. The facts pleaded in support of these claims confer federal subject-matter jurisdiction because they raise substantial questions of federal law over which the district court had original jurisdiction and this court has jurisdiction on appeal. This case is far removed from disputes in which a plaintiff's claim is "so insubstantial, implausible ... or otherwise completely devoid of merit as not to involve a federal controversy." *See Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 519 (6th Cir.2006) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

***11** To be sure, "garden variety election irregularities" may not present facts sufficient to offend the Constitution's guarantee of due process, *Griffin v. Burns*, 570 F.2d 1065, 1077–79 (1st Cir.1978), and federalism concerns "limit the power of federal courts to intervene in state elections," *Warf v. Bd. of Elections of Green Cnty.*, 619 F.3d 553, 559 (6th Cir.2010) (quoting *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir.2005)). But "[j]urisdiction is not defeated by the possibility" that a plaintiff may not recover, or the bare fact that states have primary authority over the administration of elections. *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 624 (6th Cir.2010) (quoting *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003) (alteration in original). That federal courts are constrained in an area does not mean that they must stand mute in the face of allegations of a non-frivolous impairment of federal rights. Moreover, the complaint's references to state law do not, as Defendants insist, negate the constitutional thrust of Hunter's allegations, but rather underscore that the Board's allegedly unconstitutional actions were taken under color of state law. *See* 28 U.S.C. § 1343.

Defendants' reliance on *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir.2008), is misplaced. The *Brunner* court found no federal jurisdiction where a non-diverse state-court defendant sought to remove to federal court a lawsuit bringing a single claim under Ohio law and "expressly *disclaim[ing]* " any relationship to federal law. *Id.* at 471, 475 (emphasis added). By contrast, here, the only claims at issue are federal. Accordingly, we conclude that we have jurisdiction over Plaintiffs' claims.

III. *PULLMAN* ABSTENTION AND THE *ROOKER–FELDMAN* DOCTRINE

[4] In the alternative, Defendants first argue that even if this court has jurisdiction, we should abstain from deciding the case. Abstention under

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), is appropriate only where state law is unclear *and* a clarification of that law would preclude the need to adjudicate the federal question. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). The Ohio Supreme Court's decision in *Painter* clarified any relevant confusion regarding Ohio law's treatment of provisional ballots cast in the wrong precinct and made equally plain that the resolution of state-law issues does not resolve the constitutional dispute properly before this court. *Pullman* abstention is, therefore, inappropriate.

[5][6] The Board's *Rooker–Feldman* argument is equally meritless. The *Rooker–Feldman* doctrine applies narrowly to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered *before the district court proceedings commenced.*" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005) (emphasis added). The state-court judgment that forms the basis of the Board's *Rooker –Feldman* argument was issued nearly seven weeks after Hunter filed her complaint in federal district court. Accordingly, *Rooker–Feldman* does not divest us of subject-matter jurisdiction.

IV. ANALYSIS

A. Standard of Review

***12** In our review of the district court's November 22 and January 12 preliminary injunction orders, we consider the four factors relevant to the district court's determination whether to enter a preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits; 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) (internal quotation marks omitted).

Additionally, our standard for reviewing the district court's grant of a motion for a preliminary injunction is well established:

> We generally review a district court's [decision on] a request for a preliminary injunction for abuse of discretion. Under this standard, we review the district court's legal conclusions *de novo* and its factual findings for clear error. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo.* However, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. This standard of review is "highly deferential" to the district court's decision. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. at 540–41(internal quotation marks and citations omitted). We also note that "considerations specific to election cases" and exigencies of time may be weighed, but that it is "still necessary, as a procedural matter, for [us] to give deference to the discretion of the District Court." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006).

B. Likelihood of Success on the Merits

1. Equal Protection

At the outset, we recognize the special import-

ance of elections cases. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell,* 549 U.S. at 4, 127 S.Ct. 5. At stake is "the 'fundamental political right' to vote," *id.* (quoting *Dunn v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), which we recognize as " 'preservative of all rights.' ") *League of Women Voters of Ohio,* 548 F.3d at 476 (quoting *Yick Wo,* 118 U.S. at 370, 6 S.Ct. 1064); *see also Harper,* 383 U.S. at 670, 86 S.Ct. 1079.

[7] Yet "the problem of equal protection in election processes generally presents many complexities." *Bush v. Gore,* 531 U.S. 98, 109, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). In part, this is because "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Id.* at 104, 121 S.Ct. 525 (citing *Harper,* 383 U.S. at 665, 86 S.Ct. 1079). Thus, we have held that "[t]he right to vote includes the right to have one's vote counted on equal terms with others." *League of Women Voters,* 548 F.3d at 476 (citing *Bush,* 531 U.S. at 104, 121 S.Ct. 525; *Dunn,* 405 U.S. at 336, 92 S.Ct. 995; *Reynolds v. Sims,* 377 U.S. 533, 567–68, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 7, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Gray v. Sanders,* 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963); *United States v. Classic,* 313 U.S. 299, 315, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *United States v. Mosley,* 238 U.S. 383, 386, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); U.S. CONST. amends. XV, XIX, XXIV, XXVI). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush,* 531 U.S. at 104–05, 121 S.Ct. 525; *see also League of Women Voters,* 548 F.3d at 477 ("At a minimum, ... equal protection requires 'nonarbitrary treatment of voters.' " (quoting *Bush,* 531 U.S. at 105, 121 S.Ct. 525)). We are therefore guided in our analysis by the important requirement that state actions in election processes must not result in "arbitrary and disparate treatment" of votes.[FN13]

***13** [8] Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great. As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. *See* John Fortier, *Foley on the Future of Bush v. Gore,* 68 OHIO ST. L.J. 1051, 1061 (2007). This particular post-election feature makes "specific standards to ensure ... equal application," *Bush,* 531 U.S. at 106, 121 S.Ct. 525, particularly "necessary to protect the fundamental right of each voter" to have his or her vote count on equal terms, *id.* at 109, 121 S.Ct. 525. The lack of specific standards for reviewing provisional ballots can otherwise result in "unequal evaluation of ballots." *Id.* at 106, 121 S.Ct. 525. Furthermore, the Board's count of provisional ballots is a quasi-"adjudicatory-type" action which, unlike many "regulatory-type" actions, requires review of evidence with respect to a ballot's validity. Edward B. Foley, *Refining the* Bush v. Gore *Taxonomy,* 68 OHIO ST. L.J. 1035, 1037 (2007). In other words, the Board is exercising discretion "in making specific determinations about whether particular individuals will be permitted to cast a ballot that counts." *Id.* In contrast to more general administrative decisions, the cause for constitutional concern is much greater when the Board is exercising its discretion in areas "relevant to the casting and counting of ballots," like evaluating evidence of poll-worker error. *Id.; cf. Bush,* 531 U.S. at 109, 121 S.Ct. 525 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."). To satisfy both equal-protection and due-process rights, such a discretionary review must apply similar treatment to equivalent ballots.

a. The Board's Treatment of "Wrong–Precinct" Provisional Ballots

In this case, Plaintiffs allege that the Board treated some miscast provisional votes more favorably than others. Specifically, Plaintiffs point to

four categories of ballots in which the Board considered evidence of poll-worker error and accordingly voted to count the ballots because the defect with respect to each was due to poll-worker error. These four categories consisted of:

First, 27 provisional ballots that were cast at the Board's office, but in the wrong precinct. The Board determined that the poll worker erred in giving the voter the incorrect ballot.

Second, 686 provisional ballots that were found to include contradictory information regarding whether the voter provided identification. The Board determined that the poll worker erred in indicating that further information was required.

Third, 13 provisional ballots that had either no voter signature or only a partial name or no printed name in the affirmation. The Board determined that the poll worker erred in requiring the voter to vote a provisional ballot.

Fourth, 4 provisional ballots in which the ballots themselves were from the wrong precinct but the envelopes were from the correct precinct. The Board concluded that poll-worker error was responsible for this defect.

***14** R.1 (Compl. ¶¶ 26–29); NEOCH & Ohio Democratic Party 1st Br. at 12–13; Plaintiffs 2d Br. at 15–16.

Given these four categories of provisional ballots in which the Board *did* consider evidence of poll-worker error, Plaintiffs point to four *other* categories of provisional ballots in which the Board did *not* consider whether there was evidence of poll-worker error, and argue that the Board should have treated them in a manner similar to the first four categories with respect to poll-worker error, but did not. These four categories consist of the following:

First, 849 provisional ballots that were cast by voters on election day at a polling location, but in the wrong precinct.

Second, 53 provisional ballots that had no printed name in the affirmation.

Third, 9 provisional ballots that had only a partial name in the affirmation.

Fourth, 74 provisional ballots that were not signed by the voter.

R.1 (Compl. ¶¶ 30, 34–35); NEOCH & Ohio Democratic Party 1st Br. at 14–15.

When granting the preliminary injunction in its November 22 order, the district court focused on the category of provisional ballots cast in the wrong precinct—the 27 ballots cast at the Board's office and the 849 ballots cast at polling locations—and concluded that "the [Board's] differing treatment of the various provisional ballots cast in the wrong precinct raises equal protection concerns." R.13 (Nov. 22, 2010 order at 6). The district court found that the Board "ha[d]—without any specific statutory mandate—carved out situations in which it *will* count provisional ballots cast in the wrong precinct." *Id.* at 7. In its January 12 order, the district court further explained its analysis of Plaintiffs' equal-protection claim. Relying on the "fundamental premise that 'equal weight [be] accorded to each vote,' " the court explained that because the Board took evidence of poll-worker error into consideration for the 27 ballots cast in the wrong precinct at the Board's office, it must do the same for all provisional ballots cast in the wrong precinct. R.39 (Jan. 12, 2011 order at 8) (quoting *Bush*, 531 U.S. at 104, 121 S.Ct. 525) (alteration in original).

[9] We agree with the district court's analysis and conclude that there is a sufficiently strong likelihood of success on an equal-protection claim to weigh in favor of the district court's grant of a preliminary injunction. In its review of the provisional ballots, the Board must apply specific and uniform standards to avoid the " 'nonarbitrary treatment of voters.' " *League of Women Voters*, 548 F.3d at 477 (quoting *Bush*, 531 U.S. at 105, 121 S.Ct. 525).

When the Board reviewed the 27 provisional ballots cast at the Board's office, despite those ballots being cast in the wrong precinct, the Board considered evidence of the location where the ballots were cast in concluding that those ballots were miscast as a result of poll-worker error. Similarly, although not included in the district court's analysis, we note that at its November 19 meeting, the Board counted 4 provisional ballots cast in the wrong precinct that were found in envelopes for the correct precinct. But in contrast to these instances in which the Board considered evidence of poll-worker error in its review of wrong-precinct provisional ballots, the Board did not consider evidence with respect to 849 provisional ballots cast in the wrong precinct at polling locations.

***15** In particular, the Board explicitly refused to separate from the 849 wrong-precinct ballots those ballots cast at the right polling location but wrong precinct. The evidence of poll-worker error with respect to those 269 ballots [FN14] —that the ballots were cast at the correct multiple-precinct polling location—is substantially similar to the location evidence considered by the Board with respect to the ballots cast at its office. In both instances, there is no direct evidence that the poll worker erred. For the 27 ballots cast at its office, however, the Board concluded that the cause of casting the ballots in the wrong precinct must be poll-worker error because, under the Board's logic, "the voter had no choice but to walk up to just one person." R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 42–44). The voter went to the correct location, i.e., the Board's office, and the staff at the Board's office was required to give the voter the correct ballot; thus, there is little chance that the voter erred, and the wrong-precinct ballot must be due to poll-worker error. Similarly, at the multiple-precinct polling locations, voters went to the correct location and the poll workers were required to direct voters to the correct precinct.

To be sure, there may be more explanations for why the voter might have erred at the multiple-precinct polling locations than at the Board office, requiring a greater inference to conclude that the miscast ballot was a result of poll-worker error, but Defendants have not presented any persuasive rationales. [FN15] Thus, we believe that the situations of voters at the Board office and at multiple-precinct polling locations are substantially similar. For the 27 provisional ballots cast at its office, the Board considered the location where the ballot was cast as evidence of poll-worker error, but for the 269 provisional ballots cast at the right polling location but wrong precinct, the Board did not.

We think it unlikely that "a corresponding interest sufficiently weighty" for equal-protection purposes justifies the Board's decision to refuse to consider similar evidence of poll-worker error with respect to similar provisional ballots. *Norman v. Reed*, 502 U.S. 279, 288–89, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). Rather, disparate treatment of voters here resulted, not from a "narrowly drawn state interest of compelling importance," but instead from local misapplication of state law. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). [FN16] This discriminatory disenfranchisement was applied to voters who may bear no responsibility for the rejection of their ballots, and the Board has not asserted "precise interests" that justified the unequal treatment. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *see Crawford*, 553 U.S. at 189–91, 128 S.Ct. 1610 (explaining the balancing approach applied to constitutional challenges to election regulations under *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), *Norman*, 502 U.S. 279, 112 S.Ct. 698, and *Burdick*, 504 U.S. 428, 112 S.Ct. 2059).

***16** Furthermore, we recognize that Ohio law, now made explicitly clear in *Painter*, does not permit the consideration of poll-worker error with respect to ballots cast in the wrong precinct, but rather mandates that no ballot cast in the wrong precinct may be counted. [FN17], [FN18] *Painter*, 941

N.E.2d at 793–94. Despite the requirements of state law, Plaintiffs have provided evidence that, in the November election, the Board considered evidence of poll-worker error with respect to some ballots cast in the wrong precinct but not other similarly situated ballots when it evaluated which ballots to count. In so doing, the Board exercised discretion, without a uniform standard to apply, in determining whether to count provisional ballots miscast due to poll-worker error that otherwise would be invalid under state law.

The distinctions drawn by the Board at the time of its decisions were made in the midst of its review of provisional ballots, after the election. They were not the result of a broader policy determination by the State of Ohio that such distinctions would be justifiable. Therefore, they are especially vulnerable to equal-protection challenges. In light of this unguided differential treatment, Plaintiffs' allegation that the Board decided arbitrarily when to consider (in the case of the 27 votes cast at the Board's office and the 4 votes found in envelopes for the correct precinct), or not consider (in the case of the 269 votes cast in multiple-precinct polling locations), similar evidence of poll-worker error raises serious equal-protection concerns.

b. The Effect of the Ohio Supreme Court's Decision in *Painter*

Defendants argue that, even if there is an equal-protection problem, we should order the Board to proceed under the *Painter* decision and Secretary Husted's Directive 2011–05. The Ohio Supreme Court in *Painter,* however, addressed a limited area of state law with respect to provisional ballots. Specifically, the state-law holdings of *Painter* are that (1) "there is no exception to the statutory requirement that provisional ballots be cast in the voter's correct precinct," *Painter,* 941 N.E.2d at 794; (2) "election officials err in presuming poll-worker error because 'in the absence of evidence to the contrary, [poll workers] ... will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully,' " *id.* at 798 (quoting *Skaggs,* 900 N.E.2d at 990) (alteration omitted); and (3) statistical analysis [FN19] is not proper evidence of poll-worker error, *id.* (citing *State ex rel. Yiamouyiannis v. Taft,* 65 Ohio St.3d 205, 602 N.E.2d 644 (1992)). We agree with both the district court and the Ohio Supreme Court that "[i]t is within the province of the Ohio Supreme Court to determine whether Secretary of State Jennifer L. Brunner's directives comply with *state law* governing election procedures.' " *Painter,* 941 N.E.2d at 797–98 (quoting R.32 (Dist. Ct. Order Denying Mot. to Enjoin State–Court Proceedings at 1) (alteration in original) (emphasis added)).

***17** However, as we indicated in our analysis of *Pullman* abstention, these state-law issues do not resolve the federal constitutional question in this case. Moreover, the Ohio Supreme Court's instruction to the Board to "review the [849] provisional ballots that are the subject of [the district court's] order ... 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," *Painter,* 941 N.E.2d at 791, is not based on state-law principles. *Painter* states that, under Ohio law, there is no exception for poll-worker error for ballots cast in the wrong precinct. *Id.* at 794. Therefore, at the time the Board considered the provisional ballots, Ohio law simply did not contemplate what standards to apply to ascertain poll-worker error in such a context, because poll-worker error was irrelevant to whether or not a miscast vote was counted. Rather, the state supreme court's instruction to the Board to limit its review of the 849 disputed ballots to the poll books, help-line records, and provisional-ballot envelopes is based on its own analysis of the district court's order and Plaintiffs' equal-protection claim. [FN20] It is not for the state court, however, to resolve the equal-protection claim previously filed and still pending in federal court.[FN21] *Cf. Madej v. Briley,* 371 F.3d 898, 899–900 (7th Cir.2004) ("It is for the federal judiciary, not the [state], to determine the force of [the federal court's] orders.") (Easterbrook, J.). We

also note that the federal constitutional claims pending in the district court and the subject of its November 22 order were not properly before the Ohio Supreme Court because they were not presented there. R.29–1 (*Painter* Compl. ¶ 4) ("While Relator Williams has appealed from [the federal district court's order], this action does not in any way challenge the [district court's] conclusion. Rather, it addresses exclusively the way in which that investigation should proceed under *state* election law...." (emphasis added)).

For these reasons, we reject Defendants' arguments that we should defer to the Ohio Supreme Court's views on the substantial federal constitutional questions before us.

c. Greater Equal–Protection Problems

i. The Board's Review of Wrong–Precinct Ballots

We have also considered the claim that the district court, in ordering the Board to investigate the disputed ballots and count those miscast as a result of poll-worker error, has created greater equal-protection problems. Although there are time and resources limitations to the review that may be undertaken, the Board has implemented appropriate procedures to remedy its initial unequal treatment. Williams contends that the investigation ordered by the district court was not uniformly applied to the remaining provisional ballots, and therefore undermined the purported aim of the district court to require election officials to treat provisional ballots equally.[FN22] To the contrary, however, the Board followed objective guidelines in conducting its review when it implemented the directives of then-Secretary Brunner, which provided criteria for determining poll-worker error and the steps to follow to complete the investigation. R.44–3 (Directive 2010–79); R.38–10 (Directive 2010–80); R.38–6 (Directive 2010–87). Whereas the Board's consideration of evidence with respect to poll-worker error for only the 27 provisional ballots cast at its office for the wrong precinct was an arbitrary and uneven exercise of discretion by the Board in violation of state law, its subsequent review of the 849 provisional ballots cast in the wrong precinct was guided by delineated standards to be applied to all such ballots.[FN23]

***18** We conclude that the Board's review has met the requirements of *Bush v. Gore.* Secretary Husted urges that the district court failed to satisfy the requirements of *Bush v. Gore* when it ordered a "standardless investigation" which was not applied to the first group of 27 ballots, and then was inconsistently implemented with respect to the remaining ballots. Husted Amicus Br. at 14. But, as discussed above, the Board's review of the wrong-precinct provisional ballots was guided by objective criteria provided by Secretary Brunner to effectuate the district court's order. Moreover, the guidance rejected by the Supreme Court in *Bush* is different from that used here. The "intent of the voter" standard invalidated in *Bush* was being implemented differently by different counties with respect to the same presidential election. *Bush,* 531 U.S. at 105–07, 121 S.Ct. 525. Because of a lack of "specific standards to ensure its equal application," *id.* at 106, 121 S.Ct. 525, "each of the counties used varying standards to determine what was a legal vote," *id.* at 107, 121 S.Ct. 525. Here, however, the district court's order applied to only one jurisdictional entity—Hamilton County—and one race—Hamilton County Juvenile Court Judge. This is not a situation in which a court is announcing a standard to be interpreted differently by multiple jurisdictions, resulting in the unequal counting of votes across counties. Instead, the district court is requiring the Hamilton County Board of Elections to review all deficient provisional ballots within the county under the same standard, and not just those cast at one particular location. Therefore, the district court's order, unlike the statewide order in *Bush,* does not give rise to inter-jurisdictional differences in how the order is implemented.

We recognize that whatever review the Board conducts must be limited in some way. But given that the Board chose to consider evidence of poll-

worker error with respect to the first group of 27 ballots, the district court did not abuse its discretion in requiring the Board also to consider evidence of poll-worker error for similarly situated ballots. We do not fault the district court, after analyzing the equal-protection claim at the preliminary injunction stage, for providing the state wide berth to design and implement the specific procedures for complying with the district court's order. Defendants and Secretary Husted have repeatedly pointed to the particular federalism concerns in the context of elections. To the extent that Defendants argue that the procedures ordered by then-Secretary Brunner go beyond what is required under equal protection, they could have raised that argument to the district court. To the extent that Secretary Brunner ordered an investigation more thorough than state law permits (as determined by *Painter*) or than federal constitutional law requires (a determination we leave for the district court in the first instance), the district court did not err in considering the resulting evidence.

ii. Statewide Implications

***19** It has also been argued that the district court's equal-protection analysis, which focused on countywide equal treatment of ballots cast in the wrong precinct because of poll-worker error, created another equal-protection problem one level up. That is, certain wrong-precinct ballots are ordered to be counted only in Hamilton County, and not in the rest of Ohio. According to Secretary Husted, the district court would be required to order the same investigative process statewide that was applied to Hamilton County's provisional ballots in order to avoid subjecting provisional ballots across the state to differential treatment.

This particular Board, however, did not treat equally the provisional ballots cast within its own county, and that is the equal-protection problem that we address. Only voters in Hamilton County are eligible to vote for Hamilton County Juvenile Court Judge. Because voters in other counties may not cast votes for a local judgeship, remedying poll-worker error with respect to votes in this race does not result in unequal treatment of voters outside Hamilton County. The counting of provisional ballots in a Hamilton County race does not impact whether voters who cast ballots in other races are treated equally when compared to similarly situated voters in those races.

Statewide equal-protection implications could arise, however, to the extent that the ballots at issue include candidates for district and statewide races that transcend county lines. *See Bush*, 531 U.S. at 106–07, 121 S.Ct. 525. But, as a practical matter, no statewide 2010 election is subject to a vote-counting dispute, and all statewide elections are now deemed final under Ohio law. *See* OHIO REV.CODE ANN. § 3505.32(A) (providing an eighty-one-day deadline from the date of the election to amend the canvass of election returns). And, to the extent that Ohio election procedures present equal-protection and due-process problems in local contests in other counties, they may be resolved in separate litigation.

Furthermore, Hunter argues that a statewide equal-protection problem already exists, regardless of whether Hamilton County provisional ballots are investigated. Hunter provided evidence that four other counties in Ohio counted provisional ballots cast in the correct location but wrong precinct in the November 2010 election. R.20–7 (Board Minutes for Lucas, Seneca, Williams, and Trumbull counties). This evidence suggests that, despite the contrary instruction of Ohio law, individual counties have already adopted their own standards and applied differential treatment to provisional ballots.

In any event, we need not address whether either the initial counting of the 27 miscast ballots or the subsequent provisional-ballot investigation rises to a level of unconstitutional inequality when considered in a hypothetical statewide challenge. The inconsistent treatment of provisional ballots across Ohio counties and the precise degree of inequality from county to county tolerated by the

Constitution is not at issue here. *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1069–70 (2007) (describing application of the principle of equal treatment to voters across counties in matters of election administration). We instead affirm the likelihood that the intrajursidiction unequal treatment undertaken by the Hamilton County Board is constitutionally impermissible. The Board arbitrarily treated one set of provisional ballots differently from others, and that unequal treatment violates the Equal Protection Clause.

iii. Voter Dilution

***20** At oral argument, the Board raised the issue of voter dilution. Amicus ORP also raised the issue, arguing that "the counting of provisional ballots cast in the wrong precinct because of poll worker error ... harms every Hamilton County voter who cast a legal vote in the correct precinct." ORP 2d Amicus Br. at 21–22. According to ORP, these votes were cast in violation of Ohio law, and to include such votes among the rest of the votes will dilute the power of those other, valid votes. *Id.* at 22 (citing *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). But the issue of vote dilution turns, first, on whether unlawful votes have been counted. *See Purcell*, 549 U.S. at 4, 127 S.Ct. 5 (discussing dilution caused by voter fraud). Invalidating ballots cast in the wrong precinct relies on *Painter's* statement of state law that such votes may not be counted under Ohio law regardless of poll-worker error. We do not resolve the question of whether refusal to count votes miscast solely due to poll-worker error violates due process. Therefore, we do not presume that invalidating such votes complies with the Constitution. Furthermore, any compelling state interest in preventing the counting of invalid votes must be weighed against the voters' "strong interest in exercising the fundamental political right to vote," *Purcell*, 549 U.S. at 4, 127 S.Ct. 5 (internal quotation marks omitted), the very right at issue in this case.

In sum, the Board was required to review all provisional ballots. In doing so, it chose to consider evidence of poll-worker error for some ballots, but not others, thereby treating voters' ballots arbitrarily, in violation of the Equal Protection Clause. We therefore conclude that there is a strong likelihood of success on this equal-protection claim which weighs heavily in favor of the district court's grant of a preliminary injunction.

2. Due Process

Plaintiffs present the argument that failure to count provisional ballots cast in an incorrect precinct due to poll-worker error violates the Due Process Clause. Although *Painter* made clear as a matter of state law that there is no exception for votes miscast in an incorrect precinct due to poll-worker error, Plaintiffs have asserted due-process challenges to the state law itself, which prohibits counting provisional ballots cast in the wrong precinct, even where there is evidence that the error was entirely caused by poll workers.

As we have noted throughout, we have substantial constitutional concerns regarding the invalidation of votes cast in the wrong precinct due solely to poll-worker error. Ohio has created a precinct-based voting system that delegates to poll workers the duty to ensure that voters, provisional and otherwise, are given the correct ballot and vote in the correct precinct. OHIO REV.CODE ANN. § 3505.181(C). Ohio law also provides, as the Ohio Supreme Court recently held in *Painter*, that provisional ballots cast in the wrong precinct shall not be counted under any circumstance, even where the ballot is miscast due to poll-worker error. OHIO REV.CODE ANN. § 3505.183(B)(4)(a)(ii); *Painter*, 941 N.E.2d at 794. Arguably, these two provisions operate together in a manner that is fundamentally unfair to the voters of Ohio, in abrogation of the Fourteenth Amendment's guarantee of due process of law. *See Warf v. Bd. of Elections of Green Cnty.*, 619 F.3d 553, 559–60 (6th Cir.2010) ("The Due Process clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state's

voting system is fundamentally unfair." (internal quotation marks omitted)).

***21** Ohio has created a system in which state actors (poll workers) are given the ultimate responsibility of directing voters to the right location to vote. Yet, the state law penalizes the voter when a poll worker directs the voter to the wrong precinct, and the penalty, disenfranchisement, is a harsh one indeed. To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair. *Cf. Purcell*, 549 U.S. at 4, 127 S.Ct. 5 ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges."). Particularly when there is evidence of poll-worker error, the categorical treatment of miscast ballots provided by Ohio law is troubling.[FN24] It is premature, however, to decide a due-process challenge to Ohio's election laws as they relate to poll-worker error because the parties have not fully briefed and the district court has not yet ruled on this issue.

C. Equitable Factors

In addition to the likelihood of success on the merits, three other factors influence the propriety of a preliminary injunction: "whether the movant would suffer irreparable injury without the injunction"; "whether issuance of the injunction would cause substantial harm to others"; and "whether the public interest would be served by the issuance of the injunction." *Certified Restoration Dry Cleaning Network*, 511 F.3d at 542.

The injury to plaintiff Hunter from the absence of an injunction mirrors defendant Williams's injury from the issuance of the injunction because the disputed ballots matter to the outcome of the election. The candidate who ultimately loses the election will suffer an irreparable and substantial harm, and therefore, with respect to the candidates, the second and third factors negate each other. The Board has a substantial interest in carrying out its election duties timely and in accordance with state and federal law. Additionally, intervenor-appellees NEOCH and the Ohio Democratic Party have a strong interest in enforcing the terms of the *NEOCH* consent decree.

The final factor, the public interest, "primarily addresses impact on non-parties." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931 (9th Cir.2003) (internal quotation marks omitted). In this case, both the state and the voting public have interests at stake. States are "primarily responsible for regulating federal, state, and local elections," *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir.2004), and have a strong interest in their ability to enforce state election law requirements. *Cf. Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir.2004) ("There is ... a strong public interest in permitting legitimate [state] statutory processes to operate to preclude voting by those who are not entitled to vote.").

[10] Members of the public, however, have a "strong interest in exercising the fundamental political right to vote." *Purcell*, 549 U.S. at 4, 127 S.Ct. 5 (internal quotation marks omitted). That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful. Because this election has already occurred, we need not worry that conflicting court orders will generate "voter confusion and consequent incentive[s] to remain away from the polls." *Id.* at 4–5, 127 S.Ct. 5. To the contrary, counting the ballots of qualified voters miscast as a result of poll-worker error may enhance "[c]onfidence in the integrity of our electoral processes[, which] is essential to the functioning of our participatory democracy." *Id.* at 4, 127 S.Ct. 5. Finally, while the public benefits from filling judicial vacancies expeditiously, the judge who is temporarily filling the contested seat has relieved some of the urgency in this case.

***22** Williams and the Board raise the fact that the original ballots miscast in the wrong precinct were each kept with its separate ballot envelope and only the ballots that the Board remade to the correct

precinct have been commingled with the rest of the ballots. Therefore, it is apparently possible for the Board to "uncount" the 27 votes. But this suggestion as a possible remedy is unsatisfactory.

First, although the district court relied on the differing treatment of provisional ballots cast in the wrong precinct for its analysis of the equal-protection claim, Plaintiffs allege other instances in which the Board counted otherwise invalid provisional ballots because of poll-worker error to support their constitutional claims. R.1 (Compl. at ¶¶ 26–29); *see also* R.13 (Nov. 22, 2010 order, at 3) ("The Board found multiple instances of poll worker error in its review of the provisional ballots. *For example,* the Board discovered that approximately twenty-six provisional ballots had been cast in the wrong precinct even though the ballots had been cast at the Board of Elections downtown." (emphasis added)). In particular, Plaintiffs allege that the Board counted 686 provisional ballots that had contradictory information regarding voter identification and 13 provisional ballots that had either no voter signature or only a partial name or no printed name in the affirmation. Plaintiffs allege that the Board rejected other similar categories of provisional ballots—those without a printed name (53), with only a partial name (9), and that were not signed (74)—without considering whether poll-worker error was involved.

We understand that, unlike the 27 ballots cast at the Board of Elections, these other categories of ballots that were counted cannot be identified and uncounted. Indeed, it is not clear to us whether the ballots that the Board unanimously voted to count at its December 28 meeting (the 7 votes determined in interviews with poll workers to have been miscast because of poll-worker error and the 9 votes determined by the Board's review to have been cast in the correct precinct) have been counted irretrievably. The uncounting of 27 ballots is, therefore, not a satisfactory remedy for the Plaintiffs' challenge. Additionally, as we have explained, it is preferable as an equitable matter to enable the exercise of the right to vote than it is to ignore the results of the investigation already undertaken. Furthermore, we have significant due-process concerns regarding the disenfranchisement of qualified voters solely on account of known error caused by a state actor. On the whole, therefore, equitable factors support the district court's grant of a preliminary injunction.

Considering the strong likelihood of success on this equal-protection claim and the equitable factors supporting the grant of a preliminary injunction, we conclude that the district court did not abuse its discretion in its grant of a preliminary injunction in the November 22, 2010 order.

D. Notice & Hearing Requirements

***23** [11] Although we conclude, for the reasons discussed above, that the district court did not abuse its discretion in its ultimate determination that the four preliminary injunction factors weigh in favor of granting preliminary injunctive relief in the November 22, 2010 order, we nonetheless conclude that we must vacate, in part, the district court's January 12, 2011 order. The district court ordered particular votes to be counted—in effect, modifying the November 22 order—without prior notice to Defendants or an opportunity for a hearing. Federal Rule of Civil Procedure 65(a)(1) explicitly requires the district court to provide "notice to the adverse party" before issuing a preliminary injunction. While Rule 65(a)(1) does not expressly require a hearing, Supreme Court precedent establishes that "[t]he notice required by Rule 65(a) ... implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 432 n. 7, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974) (deeming "same-day notice" insufficient). More recently, we have clarified that, although a hearing is not required "when the issues are primarily questions of law," Rule 65(a)(1) does require a hearing "when there are disputed factual issues" material to the preliminary injunction. *Certified Restoration*

Dry Cleaning, 511 F.3d at 552. "[C]ourts have not hesitated to dissolve a preliminary injunction issued without sufficient notice or opportunity to contest issues of fact or of law." *Amelkin v. McClure*, No. 94–6161, 1996 WL 8112, at *5 (6th Cir.1996) (unpublished opinion); *accord Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1253 (10th Cir.2006) (" 'Preliminary injunctions entered without notice to the opposing party are generally dissolved.' " (quoting *United States v. Microsoft*, 147 F.3d 935, 944 (D.C.Cir.1998))). The demands of Rule 65(a)(1) are equally pertinent whether a court is issuing or modifying an injunction. *W. Water Mgmt., Inc. v. Brown*, 40 F.3d 105, 109 (5th Cir.1994) ("[W]e find no authority allowing ... a modification [of an injunction] to be made without notice.").

The district court characterized its January 12, 2011 order as a response to the plaintiffs' "Motion to *Enforce* [the] Preliminary Injunction." R.39 (January 12, 2011 Order at 1) (emphasis added). How the district court styled its order, however, is not dispositive, and we look instead to "the nature of the order and the substance of the proceeding below" to determine what action the district court took. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1005 (6th Cir.2006) (holding that "the label attached to an order by the trial court is not decisive" when assessing whether parties may bring an interlocutory appeal under 28 U.S.C. § 1292(a)(1)); *cf. Morales Feliciano v. Rullan*, 303 F.3d 1, 7 (1st Cir.2002) (holding that, for purposes of § 1292(a)(1), an order *modifies*—rather than interprets—an injunction "if it substantially readjusts the legal relations of the parties, and does not relate simply to the conduct or progress of litigation" (internal citation omitted)). The practical effect of the January 12, 2011 order was to modify the November 22, 2010 preliminary injunction based on a vehemently disputed issue of fact: whether poll-worker error caused various sets of voters to miscast ballots in the wrong precinct. In the January 12, 2011 order, the district court enjoined compliance with Secretary Husted's Directive 2011–04, which did not exist until well after November 22, 2010. The district court also ordered investigation of ballots subject to the *NEOCH* consent decree, a decree which was not discussed in the November 22, 2010 order. Finally, the district court identified with specificity which votes to count—a requirement that went far beyond the November 22, 2010 order, which had simply instructed defendants to "begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount ... any provisional ballots improperly cast for reasons attributable to poll worker error," R.13 (Nov. 22, 2010 order at 9). Because it modified the November 22, 2010 preliminary injunction by resolving disputed facts, the January 12, 2011 order should not have been issued prior to affording to the defendants notice and an opportunity to be heard.

V. CONCLUSION

***24** We conclude that the district court did not abuse its discretion in granting the November 22 preliminary injunction ordering the Board to "immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error." We also conclude that Plaintiffs have shown a strong likelihood of success on the merits of their equal-protection claim and that the balance of harms favors Plaintiffs.

We also conclude that it was premature for the district court to identify which ballots were miscast due to poll-worker error. Although there is evidence to support the district court's findings, and indeed some portions of the January 12 order reflect the unanimous Board votes to count the 7 admitted poll-worker error ballots and the 9 correct-precinct ballots, we conclude that it was premature to make the findings when the Board and Williams lacked the opportunity to present their own evidence and arguments in opposition. As a result, we **VACATE**

the portion of the district court's January 12 order directing the Board to count the 149 ballots, the 7 ballots, and the 9 ballots. We **VACATE AS MOOT** the portion of the district court's January 12, 2011 order enjoining the Board from complying with Directive 2011–04. That Directive has, in effect, been superseded by Directive 2011–05. With respect to the *NEOCH* consent decree, all parties agree that the consent decree remains and should be followed. Because the parties do not contest it, we **AFFIRM** the district court's January 12, 2011 order that the Board "investigate all ballots subject to the NEOCH Consent Decree for poll worker error and count those ballots as required by that Consent Decree." We leave to the district court in the first instance, applying the uniformity requirement of *Bush v. Gore,* to direct the Board how to proceed regarding the 9 ballots unanimously determined by the Board to have been cast in the correct precinct, the 7 ballots unanimously determined by the Board to have been miscast because of poll-worker error, the *269* ballots cast in the correct location but wrong precinct in which the determination of poll-worker error remains disputed, and, pursuant to the *NEOCH* Consent Decree, the NEOCH ballots.

We remand this case to the district court for further proceedings consistent with this opinion.

ROGERS, Circuit Judge, concurring in the judgment.

I agree largely with much of the majority opinion. I write briefly in light of the need for our court to rule promptly.

I am not confident that there is a strong likelihood of success with respect to the Equal Protection claim that is the basis for the district court's November 22 order. That order is based on unequal treatment of two groups of ballots: 27 ballots cast in the Board's office prior to the election where the ballot was for the wrong precinct (almost certainly due to official error) and a much larger number of ballots where the voter cast a ballot at the wrong precinct table (where doing so may have been due to poll-worker error). The situations were sufficiently different that a bipartisan elections board unanimously counted the votes in the former situation, but did not count the votes in the latter situation.

***25** It is not entirely clear whether the Board acted in accordance with Ohio law in counting the 27 votes, but either way the likelihood is not particularly strong that there was an Equal Protection violation under the principle of *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The two wrong-precinct groups of ballots are sufficiently different that Ohio law could permit counting the 27 votes on the ground that the error was much more clearly and ascertainably not attributable to the voter than in the election-day polling place situations. And if Ohio law does not permit counting the 27 votes, then they were counted under a mistaken view of the law by the Board. In that circumstance, there should be a state-law challenge to the votes erroneously cast, not a counting of a much larger number of votes county-wide that were erroneously cast in a similar—but not exactly the same—way. Moreover, counting improperly cast votes county-wide, where the ballots include trans-county district and state races, raises serious Equal Protection concerns in having Hamilton County votes counted differently from those of other Ohio counties.

Assuming that the district court's November 22 order properly determined the likelihood of success on the Equal Protection claim, however, I agree that the court's January 12 order must be vacated for the reasons given by the majority.

In this case we have the holding of the Ohio Supreme Court as to how the district court's November 22 order should be complied with. The Ohio Supreme Court explicitly contemplated *compliance* with the district court's November 22 order. *See State ex rel. Painter v. Brunner,* 128 Ohio St.3d 17, 941 N.E.2d 782, 795, 798 (2011).[FN1] This was a commendable exercise of discretion in a constitutional system where federal and state courts are independent of each other. State courts and lower fed-

eral courts need not, and should strive not to be, in conflict. The law and the public interest support tailoring of federal equitable relief so as to conform as closely as possible to the Ohio Supreme Court's interpretation of Ohio election law.

While the state courts cannot control the enforcement of a federal court order enforcing federal law, the state courts may properly direct state officials responsible for carrying out the order on the choice of options consistent with the order. This is what the Ohio Supreme Court has done, and it appears to have done so in a thoughtful and deferential manner.

The district court in the balance of equities in future orders should give great weight to the public interest in minimizing federal court control of state election law and practice. In my view, this factor weighs strongly in favor of conforming any further relief—as far as it is possible to do so consistent with the November 22 order—to the roadmap outlined by the Ohio Supreme Court.

FN1. We use the term "approximately" because the number of disputed provisional ballots has been referred to as 849 in some instances and 850 in others. The Ohio Secretary of State indicated that, in the course of the dispute, it was determined that "one voter cast two provisional ballots in the wrong precinct." R.38–1 (Directive 2011–04 at 1 n.1). For simplicity, we refer to the number of disputed ballots throughout this opinion as 849.

FN2. *See also* OHIO REV.CODE ANN. §§ 3505.183(B)(3)(b) (requiring, in the converse, that the Board find that the individual is eligible "to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot" to open the envelope and count the ballot); 3503.01(A) ("Every citizen ... may vote at all elections in the precinct in which the citizen resides."); 3599.12(A)(1) ("No person shall ... vote ... in a precinct in which that person is not a legally qualified elector.").

FN3. "Jurisdiction" is defined as "the precinct in which a person is a legally qualified elector." OHIO REV.CODE ANN. § 3505.181(E)(1).

FN4. Directive 2010–73 essentially summarizes the terms of the consent decree.

FN5. Board member Faux stated: "I continue to have a problem with the fact that we are now about to disqualify the votes of people who actually took the time to go to the polls[,] got to the right building, and yet somehow their vote yet won't be counted. I just find that to be problematic." R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 37). Board member Burke stated: "[W]e all ought to be frustrated when several hundred voters got to the right room and for one reason or another were at the wrong table." *Id.* at 38–39.

FN6. The record reveals that there were 27 provisional ballots cast at the Board's office but in the wrong precinct counted by the Board at its November 16, 2010 meeting—ballots numbered P–10222 through P–10248. R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 40). For simplicity, we continue to use the number of 27 to refer to the ballots cast at the Board's office.

FN7. The record reveals that the correct number of provisional ballots approved in this category is 686—ballots numbered P–8257 through P–8942. R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 33).

FN8. The record reveals that the correct number of provisional ballots approved in this category is 11—ballots numbered P–10364 through P–10374. R.1–3 (Nov.

16, 2010 Board Meeting Tr. at 71). The record also reveals that the Board approved counting two additional miscast provisional ballots because it was determined that the poll worker should not have required the voter to cast a provisional ballot. *Id.* at 57–61.

FN9. Directive 2010–80 included the criteria that the Board should apply to determine whether poll-worker error occurred and five steps for the Board to follow when investigating the 849 provisional ballots at issue, including questioning poll workers as well as examining poll books and ballot envelopes. The directive further stated that "the board may also choose to interview the individual voters who cast these provisional ballots for evidence that the voter was directed by poll workers to the wrong precinct." R.38–10 (Directive 2010–80 at 2–3).

FN10. After the Board was "unable to reach consensus on all the specific steps to be taken to complete the investigation ordered by [the district court]," Brunner issued Directive 2010–87, which provided more detailed instructions in eight steps, as well as deadlines for completion. R.38–6 (Directive 2010–87).

FN11. This group of votes is what then-Secretary Brunner ordered to be counted in Directive 2011–03, which was superseded by current-Secretary Husted's Directive 2011–04. Secretary Brunner's directive did not specify that the total number of ballots in this category is 149. Rather, her directive used percentages, and counsel for Hunter informed us at oral argument that counsel calculated the number 149 from the percentages in Directive 2011–03. Counsel also indicated at argument that Directive 2011–03 stated the number of ballots in terms of percentages of the total of 269 correct-location-but-wrong-precinct votes because the individual ballots could not be publicly identified.

FN12. Ohio law provides the Board eighty-one days after the election date to amend the canvass of election returns before it becomes final, OHIO REV.CODE ANN. § 3505.32(A), resulting in a deadline of January 22, 2011.

FN13. The Ohio Republican Party ("ORP") disputes the application of this standard. In its view, the Equal Protection Clause has not been violated because there has been no showing of intentional discrimination on the part of the Board. Specifically, ORP argues that Hunter must show more than merely " 'an erroneous or mistaken performance of [a] statutory duty.' " ORP 2d Amicus Br. at 11 (quoting *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944)). Instead, ORP points to the requirement in *Snowden* that there be a showing of " 'an element of intentional or purposeful discrimination.... [A] discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination.' " *Id.* (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (internal citation and quotation marks omitted)).

> We do not agree. The Supreme Court has held in cases since *Snowden* that the Equal Protection Clause protects the right to vote from invidious and arbitrary discrimination. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30, 34, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (holding that " 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause," and that Ohio's laws limiting the ability of political parties to appear on the ballot constitute "an invidious discrimination, in violation of the

> Equal Protection Clause"). In particular, the Court has spoken regarding the requirements of the Equal Protection Clause with respect to claims that a state is counting ballots inconsistently. *See Bush*, 531 U.S. at 104–05, 121 S.Ct. 525 ("Equal protection applies ... to the manner of [the] exercise [of the right to vote]. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.") (citing *Harper*, 383 U.S. at 665, 86 S.Ct. 1079); *id.* at 105, 121 S.Ct. 525 ("The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."). Of great importance, a showing of intentional discrimination has not been required in these cases. Consequently, we reject ORP's argument that there can be no violation of the Equal Protection Clause here without evidence of intentional discrimination.

FN14. The record indicates that the initial total of ballots cast in the right polling location but wrong precinct was 286. Of those, some were disqualified for other reasons and others were found to have been cast in the correct location in the first place, leaving 269 still in dispute. R.38–8, Ex. 1 at 1–2.

FN15. Williams argues that the 27 votes cast at the downtown office "is a distinguishable situation" because they were not "cast in the wrong precinct" but rather at the downtown office. Williams 1 st Br. at 4, 14–15. He argues that "[n]o one who goes to the Board of Elections to vote early is voting in his or her own precinct." *Id.* at 15. To the extent that Williams attempts to make a distinction based on the physical location, the argument is not well taken. Casting a ballot "in the precinct" cannot simply mean the voter must be physically located within the boundaries of the precinct. Voters in multiple-precinct voting locations do not necessarily cast their votes while physically "in" the precinct; the Board utilizes these multiple-precinct locations to share resources among neighboring precincts. Although voters may not be physically located in their precinct when voting at these multiple-precinct polling locations, they must cast their votes on the ballot that corresponds to their correct precinct.

> The Board also attempted at oral argument to distinguish the ballots on the fact that polling locations utilize temporary workers on election day, whereas the Board's full-time staff are at its office. We question whether this is a distinction of any legal significance, and note that the record does not support the distinction factually. R.1–3 (Nov. 16, 2010 Board Meeting Tr. at 43) ("[T]he staff that we have here at the Board of Elections [office], sometimes we have full time and part time. So our part-time extras that we have aren't as familiar with our system here, the registration system.").

FN16. Defendants argue that the Board merely made a "mistake" and that such "mistakes" do not rise to the level of a constitutional violation. But that is no answer to the equal-protection challenge because discriminatory treatment must be justifiable, *see Crawford*, 553 U.S. at 189–90, 128 S.Ct. 1610, and *unanticipated* inequality is especially arbitrary.

FN17. The Ohio Supreme Court in *Paint-*

er, however, does recognize the exception carved out by the *NEOCH* consent decree for those provisional voters using the last four digits of their Social Security number as identification. *Painter,* 941 N.E.2d at 794–95. We do not express here views on any constitutional issues relating to that consent decree. In this litigation, intervenors NEOCH and the Ohio Democratic Party seek to enforce the consent decree with respect to the defendant Board's review of the relevant ballots.

FN18. We note, however, that Ohio law as explained in *Painter* raises substantial due-process concerns. *See infra* Part IV.B.2.

FN19. We note also that, although the Ohio Supreme Court in *Painter* stated that statistical analysis is not proper evidence of poll-worker error under state law, the record is not clear whether the evidence offered by Plaintiffs to demonstrate poll-worker error in the disputed 269 ballots is based on statistical analysis. We leave that question for the district court to resolve in the first instance, based on the record in this case and state-law principles.

FN20. *Painter,* 941 N.E.2d at 798 ("At best, any equal-protection claim would have merely required the same examination that the board conducted in [ ] concluding[—]incorrectly under Ohio law—that 27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted even though they were cast in the wrong precinct due to poll-worker error. That review was limited to an examination of the poll books, help-line records, and provisional-ballot envelopes and emanated from the uncontroverted evidence that these ballots were cast in the wrong precinct due to poll-worker error.").

FN21. *See, e.g., Painter,* 941 N.E.2d at 796 ("[A]ny 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"; "[I]n attempting to resolve equal-protection concerns implicated by the board's counting 27 provisional ballots cast in the wrong precinct at the board, the secretary of state may have caused much greater equal-protection concerns.").

FN22. Williams also argues that an equal-protection problem arises from applying an additional, and more detailed, investigation to other provisional ballots that was not applied to the group of 27 ballots cast at the Board's office. This argument is misplaced because, as we have explained, the Board considered the location at which the group of 27 ballots was cast to conclude that they must have been miscast due to poll-worker error, but did not consider evidence of correct polling location with respect to other provisional ballots.

FN23. Although the Board stopped interviewing poll workers after its December 16 and 17 meetings, it did so with the permission of Secretary Brunner, and it substituted mailed questionnaires for interviews as an effective means of gathering information expeditiously from poll workers. Furthermore, the fact that only some poll-worker questionnaires were returned speaks to the results of their review, and not to inconsistent application of the review standards in the first instance.

FN24. It is also discomforting that Ohio's rule that all provisional ballots cast in the wrong precinct must be excluded may fall—at least in this instance—unevenly on voters depending on where the Board directs them to vote. In single-precinct

polling places there is less room for error than at the multiple-precinct locations that have caused so much difficulty in this case. As a result, fewer provisional ballots are likely to be counted in multiple-precinct polling places than in those that serve only a single precinct. This disparate impact might not be of constitutional significance everywhere in Ohio, but here Plaintiffs assert that "the polling places where most of the error-infected provisional ballots were cast are in African–American areas of Hamilton Country." Plaintiffs 2d Br. at 3. It appears, then, that the exclusionary rule in this case may accrue to the detriment of a protected class.

FN1. *Id.* at 795 ("Therefore, the secretary of state also has a duty to instruct election officials on the applicable requirements of federal election law as well as federal court orders that are applicable to them."); *id.* at 798 ("And Judge Dlott's injunctive order did not require the investigation ordered by the secretary of state and conducted by the board of elections here. At best, any equal-protection claim would have merely required the same examination that the board conducted in—concluding incorrectly under Ohio law—that 27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted even though they were cast in the wrong precinct due to poll-worker error. That review was limited to an examination of the poll books, help-line records, and provisional-ballot envelopes and emanated from the uncontroverted evidence that these ballots were cast in the wring precinct due to poll-worker error."); *id.* at 798 ("Therefore, we grant relators a writ of mandamus ... to compel the board of elections ... to instead review the 850 provisional ballots that are the subject of Judge Dlott's order....").

C.A.6 (Ohio),2011.
Hunter v. Hamilton County Bd. of Elections
--- F.3d ----, 2011 WL 242344 (C.A.6 (Ohio))

END OF DOCUMENT

Exhibit 2

Case No. 10-4481 /11-3059 /11-3060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

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

BEFORE: MOORE, COLE and ROGERS, Circuit Judges

Upon consideration of appellants' motions to stay the mandate,

It is **ORDERED** that the motions be and hereby are **DENIED**. The mandate shall issue today, April 8, 2011.

.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: April 08, 2011

Exhibit 3

C

Supreme Court of Ohio.
The STATE ex rel. PAINTER et al.
v.
BRUNNER.

No. 2010-2205.
Submitted Jan. 6, 2011.
Decided Jan. 7, 2011.

Background: Candidate for Court of Common Pleas judge and county elector filed action for writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error and rescission by board of its decision to subpoena poll workers to testify before board.

Holdings: The Supreme Court held that:
(1) Supreme Court had subject-matter jurisdiction over action;
(2) laches did not bar action;
(3) candidate and elector lacked adequate remedy in the ordinary course of the law;
(4) poll-worker error is not an exception to statutory requirement that provisional ballots be cast in the voter's correct precinct;
(5) federal district court's consent decree did not justify Secretary's issuance of directives and advisory to require board to contact poll workers for each disputed provisional ballot;
(6) Supremacy Clause did not preclude Supreme Court from issuing writ of mandamus; and
(7) collateral-attack doctrine did not preclude Supreme Court from issuing writ of mandamus.

Writ granted.

Pfeifer, J., filed dissenting opinion.

McGee Brown, J., dissented.

West Headnotes

[1] Mandamus 250 141

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k141 k. Jurisdiction and authority. Most Cited Cases

Supreme Court had subject-matter jurisdiction over claim of candidate for Court of Common Pleas judge position and county elector that sought writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error and rescission by board of its decision to subpoena poll workers to testify before board; claim concerned issue whether secretary of state had misdirected board regarding board's duties.

[2] Mandamus 250 143(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k143 Time to Sue, Limitations, and Laches
250k143(2) k. Laches. Most Cited Cases

Laches did not bar action that was brought by candidate for Court of Common Pleas judge position and county elector and that sought writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error and rescission by board of its decision to subpoena poll workers to testify before board; action was filed three days after issuance of one directive and 11 days after issuance of other directive, delay was not unreasonably long, and expedited schedule for briefing and evidence would have been warranted even if action had been filed

on day on which last directive was issued.

[3] Elections 144 278

144 Elections
144X Contests
144k278 k. Limitations and laches. Most Cited Cases

Laches may bar an action for relief in an election-related matter if the persons seeking this relief fail to act with the requisite diligence.

[4] Equity 150 67

150 Equity
150II Laches and Stale Demands
150k67 k. Nature and elements in general. Most Cited Cases

The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.

[5] Mandamus 250 3(4)

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(2) Remedy at Law
250k3(4) k. Acts and proceedings of public officers and boards and municipalities in general. Most Cited Cases

Mandamus 250 74(4)

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k74 Elections and Proceedings Relating Thereto
250k74(4) k. Counting ballots and canvassing returns. Most Cited Cases

To be entitled to writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error and rescission by board of its decision to subpoena poll workers to testify before board, candidate for Court of Common Pleas judge position and county elector were required to establish clear legal right to requested relief, corresponding clear legal duty on part of Secretary of State and board to provide it, and lack of adequate remedy in ordinary course of the law.

[6] Mandamus 250 3(4)

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(2) Remedy at Law
250k3(4) k. Acts and proceedings of public officers and boards and municipalities in general. Most Cited Cases

Mandamus 250 74(4)

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k74 Elections and Proceedings Relating Thereto
250k74(4) k. Counting ballots and canvassing returns. Most Cited Cases

Candidate for Court of Common Pleas judge position and county elector lacked adequate remedy in the ordinary course of the law, as would support issuance of writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error and rescission by board of its decision to subpoena poll workers to testify before board; mandamus was appropriate remedy to rectify any misdirection of board by Secretary of State, and there was a need to resolve action in timely fashion.

[7] Mandamus 250 74(1)

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k74 Elections and Proceedings Relating Thereto
250k74(1) k. In general. Most Cited Cases

If the Secretary of State has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.

[8] Elections 144 223

144 Elections
144VIII Conduct of Election
144k223 k. Challenges to voters and proceedings thereon. Most Cited Cases

Poll-worker error is not an exception to statutory requirement that provisional ballots be cast in the voter's correct precinct. R.C. §§ 3503.01(A), 3505.181(C)(2)(a), 3505.182, 3505.183(B)(4)(a)(ii), 3599.12(A)(1).

[9] Elections 144 5

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k2 Power to Confer and Regulate
144k5 k. State Legislatures. Most Cited Cases

United States Constitution leaves the conduct of state elections to the states.

[10] Elections 144 223

144 Elections
144VIII Conduct of Election
144k223 k. Challenges to voters and proceedings thereon. Most Cited Cases

Federal Help America Vote Act conspicuously leaves to the states the determination of whether a provisional ballot will be counted as a valid ballot. Help America Vote Act of 2002, § 101 et seq., 42 U.S.C.A. § 15301 et seq.

[11] Elections 144 239

144 Elections
144IX Count of Votes, Returns, and Canvass
144k239 k. Votes to be counted. Most Cited Cases

Only ballots cast in the correct precinct may be counted as valid. R.C. §§ 3503.01(A), 3505.181(C)(2)(a), 3505.182, 3505.183(B)(4)(a)(ii), 3599.12(A)(1).

[12] Elections 144 10

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k8 Statutory Provisions Conferring or Defining Right
144k10 k. Construction and operation. Most Cited Cases

Unless there is language allowing substantial compliance, election statutes generally are mandatory and must be strictly complied with.

[13] Elections 144 239

144 Elections
144IX Count of Votes, Returns, and Canvass
144k239 k. Votes to be counted. Most Cited Cases

Supreme Court is not authorized to add an exception that is not contained in the express language of the statutes providing that only ballots cast in the correct precinct may be counted as valid. R.C. §§ 3503.01(A), 3505.181(C)(2)(a), 3505.182, 3505.183(B)(4)(a)(ii), 3599.12(A)(1).

[14] Elections 144 54

144 Elections
144III Election Districts or Precincts and Officers
144k54 k. Powers and proceedings of officers in general. Most Cited Cases

Secretary of State has a duty to instruct local election officials on the applicable requirements of federal election law as well as federal court orders that are applicable to them. R.C. § 3501.04, 3501.05(B, C, M).

[15] Elections 144 ⚿223

144 Elections
144VIII Conduct of Election
144k223 k. Challenges to voters and proceedings thereon. Most Cited Cases

Federal district court's consent decree in action challenging Ohio's identification and provisional-ballot laws did not justify Secretary of State's issuance of directives and advisory to require county board of elections to contact poll workers for each of disputed provisional ballots that were cast in wrong precinct and to question them to determine whether poll-worker error caused ballots to be cast in improper precinct in election for judge position on Court of Common Pleas; decree specified only that boards of elections may not reject a provisional ballot cast by voters who used only last four digits of his or her Social Security number as identification, and directives were limited to provisional ballots cast by voters who used only last four digits of his or her Social Security number as identification.

[16] Elections 144 ⚿223

144 Elections
144VIII Conduct of Election
144k223 k. Challenges to voters and proceedings thereon. Most Cited Cases

Federal district court's preliminary injunction commanding county board of elections to investigate whether provisional ballots cast in correct polling location but wrong precinct were improperly cast because of poll-worker error in election for judge position on Court of Common Pleas did not justify Secretary of State's postelection instructions directing board to question poll workers concerning 850 provisional ballots cast in wrong precincts; court relied on board's determination that 27 provisional ballots cast in wrong precinct at board of elections should be counted because evidence established that improper casting of votes must have been attributable to poll-worker error.

[17] Elections 144 ⚿54

144 Elections
144III Election Districts or Precincts and Officers
144k54 k. Powers and proceedings of officers in general. Most Cited Cases

Secretary of State and local boards of elections have general investigative authority over election irregularities, but this power is generally limited to reporting possible violations to the Attorney General or prosecuting attorney for prosecution. R.C. §§ 3501.05(N)(1), 3501.11(J).

[18] Elections 144 ⚿54

144 Elections
144III Election Districts or Precincts and Officers
144k54 k. Powers and proceedings of officers in general. Most Cited Cases

Secretary of State's decision to truncate statutory 14-day period to two-day period for county board of elections to submit tie vote to Secretary for resolution of issue of whether to count certain provisional ballots in election for judge position on Court of Common Pleas did not violate statute requiring that board's chairperson submit matter in controversy to Secretary not later than 14 days after tie vote or disagreement; secretary had authority to shorten any statutory limits to further expedite matters in election situations. R.C. § 3501.11(X).

[19] Courts 106 ⚿97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States

Courts as Authority in State Courts
106k97(1) k. In general. Most Cited Cases

Mandamus 250 141

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k141 k. Jurisdiction and authority. Most Cited Cases

States 360 18.1

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.1 k. In general. Most Cited Cases

Supremacy Clause did not preclude state Supreme Court from issuing writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error in election for judge position on Court of Common Pleas, even though federal district court entered consent decree in action challenging state's identification and provisional-ballot laws and entered preliminary injunction in separate action that concerned the judicial election; state Supreme Court was not bound by federal district court's rulings, and federal court's rulings did not resolve issues raised in mandamus action. U.S.C.A. Const. Art. 6, cl. 2.

[20] Judgment 228 829(3)

228 Judgment
228XVII Foreign Judgments
228k829 Effect of Judgments of United States Courts in State Courts
228k829(3) k. Operation and effect. Most Cited Cases

Collateral-attack doctrine, under which collateral or indirect attacks on judgments are disfavored, did not preclude state Supreme Court from issuing writ of mandamus seeking rescission by Secretary of State of directives governing investigation of county board of elections regarding whether any of the provisional ballots were cast in wrong precinct because of poll-worker error in election for judge position on Court of Common Pleas, even though federal district court had entered consent decree in action challenging state's identification and provisional-ballot laws and entered preliminary injunction in separate action that concerned the judicial election; federal court's rulings did not resolve issues raised in mandamus action.

[21] Courts 106 97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In general. Most Cited Cases

States 360 18.1

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.1 k. In general. Most Cited Cases

Under Supremacy Clause, state Supreme Court is not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court; however, the state Supreme Court will accord those decisions some persuasive weight. U.S.C.A. Const. Art. 6, cl. 2.

[22] Judgment 228 470

228 Judgment
228XI Collateral Attack
228XI(A) Judgments Impeachable Collaterally
228k470 k. Judgments presumed valid in

general. Most Cited Cases

Collateral or indirect attacks on judgments are disfavored.

[23] Judgment 228 ⚿518

228 Judgment
228XI Collateral Attack
228XI(C) Proceedings
228k518 k. Collateral nature of proceeding in general. Most Cited Cases

A "collateral attack" on a judgment is an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.

[24] Elections 144 ⚿223

144 Elections
144VIII Conduct of Election
144k223 k. Challenges to voters and proceedings thereon. Most Cited Cases

In reviewing disputed provisional ballots that were cast in wrong precinct but correct location in a multiple-precinct polling place in election for judge position on Court of Common Pleas, members of county board of elections could not presume that poll-worker error occurred in absence of specific evidence to the contrary; in absence of evidence to the contrary, poll workers would be presumed to have properly performed their duties in regular and lawful manner and not to have acted illegally or unlawfully.

****786** Taft, Stettinius & Hollister, L.L.P., R. Joseph Parker, W. Stuart Dornette, and John B. Nalbandian, Cincinnati, for relators.

Richard Cordray, Attorney General, and Richard N. Coglianese, Erick D. Gale, and Michael J. Schuler, Assistant Attorneys General, for respondent Secretary of State Jennifer Brunner.

Gerhardstein & Branch Co., L.P.A., Jennifer L. Branch, and Alphonse A. Gerhardstein, Cincinnati, for intervening respondent Tracie Hunter.

Porter, Wright, Morris & Arthur, L.L.P., Caroline H. Gentry, Dayton, Sheena L. Little, Columbus, and Brad Hughes; The Chandra Law Firm, L.L.C., and Subodh Chandra, Cleveland; and McTigue Law Group, Donald J. McTigue, and Mark A. McGinnis, Columbus, for intervening respondents Northeast Ohio Coalition for the Homeless and Ohio Democratic Party.

Bricker & Eckler, L.L.P., Anne Marie Sferra, James P. Schuck, and Christopher N. Slagle, Columbus, urging granting of the writ for amicus curiae, Ohio Republican Party.

PER CURIAM.

***18** {¶ 1} This is an original action for a writ of mandamus to compel respondents Secretary of State Jennifer L. Brunner and the Hamilton County Board of Elections to rescind certain directives and decisions relating to the procedure for an investigation ordered by a federal court. The investigation is to determine whether certain disputed provisional ballots that were not counted in the November 2, 2010 election for judge of the Hamilton County Court of Common Pleas, Juvenile Division, because they had been cast in the wrong precinct due to poll-worker error. Because relators have established their entitlement to the requested extraordinary relief, we grant the writ.

Facts

Election and Initial Count

{¶ 2} On November 2, 2010, an election was held for judge of the Hamilton County Court of Common Pleas, Juvenile Division, between relator John Williams and intervening respondent Tracie Hunter. The term for the office began on January 1, 2011. On election night, unofficial results indicated that Williams led Hunter by 2,847 votes. There remained 10,500 provisional ballots as well as a few other ballots that had not been counted.

****787** {¶ 3} At a November 16 meeting, the board unanimously determined that 849 [FN1] of the provisional ballots were invalid and should not be

counted because they had been cast in the wrong precinct. At the same meeting, the board decided that 27 provisional ballots cast at the board of elections during the 28-day period before the November 2 election should be counted because although they were voted in the wrong precinct, that mistake was caused by poll-worker error. Board employees stated that for provisional ballots cast at the board, the voter would ask a board employee to vote, and the employee would give the voter a ballot, so if the voter received the wrong ballot, poll-worker error would have been the ***19** cause. The board's investigation into the validity of these ballots at the meeting was generally limited to an examination of election records, poll books, help-line records, and provisional-ballot envelopes. The board voted to remake these ballots so that they would be cast in the proper precincts. After the meeting, the envelopes containing provisional ballots that the board had determined to be valid were opened, and the ballots were counted. The board's final count indicated that Williams had won the election by 23 votes.

> FN1. Because one voter cast two provisional ballots in the wrong precinct, any references by the board of elections, courts, or secretary of state to 849 disputed provisional ballots are mistaken. Therefore, this opinion will refer to the number of disputed provisional ballots as 850 rather than 849.

Federal District Court Action

{¶ 4} On November 21, Hunter filed a complaint under Section 1983, Title 42, U.S.Code, for a temporary restraining order and declaratory and injunctive relief against the board of elections and its members in the United States District Court for the Southern District of Ohio, Western Division. *Hunter v. Hamilton Cty. Bd. of Elections*, S.D.Ohio (W.D.) No. 1:10-CV-820, 2010 WL 4878957. Hunter claimed that the board and its members had violated her rights to due process and equal protection by refusing to investigate whether poll-worker error caused some voters to vote at the right polling place but in the wrong precinct, even while correcting other poll-worker error that caused a voter to vote in the wrong precinct. She also sought a temporary restraining order and a preliminary injunction ordering the board and its members to contact provisional voters whose ballots had been rejected, to investigate whether poll-worker error contributed to the rejection of provisional ballots, and to count all provisional ballots where poll-worker error caused the voter to vote in the wrong precinct.

{¶ 5} On November 22, Judge Susan J. Dlott of the federal district court granted Hunter's motion for a preliminary injunction "insofar as it seeks an order commanding [the board and its members] to investigate whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error." Judge Dlott reasoned that because the board of elections had, at its November 16 meeting, decided to count 27 provisional ballots cast at the board but in the wrong precinct due to "clear poll worker error," its failure to apply similar scrutiny to other provisional ballots cast at the correct polling place but in the wrong precinct "raises equal protection concerns." To prevent irreparable harm to Hunter, Judge Dlott ordered that the board of elections "examine all 849 [850] rejected provisional ballots * * * for reasons attributable to poll worker error." Judge Dlott further ordered that the board "immediately begin an investigation into whether poll worker error contributed ****788** to the rejection of the [850] provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court judge any provisional ballots improperly cast for reasons attributable to poll worker error." On November 23, the board certified the results of the election, with Williams certified as the winner over Hunter by a margin of 23 votes-114,989 to 114,966.

***20** *Appeal in Federal Case*

{¶ 6} Williams appealed the federal district court's November 22 preliminary injunction, and after initially granting him a stay of the order, the

United States Court of Appeals for the Sixth Circuit dissolved its prior stay and denied Williams's motion for stay on December 1. *Hunter v. Hamilton Cty. Bd. of Elections*, Sixth Circuit No. 10-4481. The court of appeals expressly stated that "[t]his disparate treatment-counting the 26 [27] wrong-precinct ballots based on poll-worker error during early voting without similarly investigating whether poll-worker error led to any of the 849 [850] ballots being cast in the wrong precinct on election day-forms the basis for the injunctive order in this case." On December 16, a divided panel of the court of appeals denied Williams's petition for reconsideration of the denial of his motion for stay. The appeal remains pending before the court of appeals, which has scheduled oral argument for March 1.

Secretary of State Instructions on Poll-Worker Error Regarding Provisional Ballots

{¶ 7} In *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D.Ohio (E.D.) No. C2-06-896, the United States District Court for the Southern District of Ohio, Eastern Division, entered a consent decree in April 2010 in a case challenging Ohio's identification and provisional-ballot laws. The plaintiffs in that case, including the intervening respondents in this case, Northeast Ohio Coalition for the Homeless and the Ohio Democratic Party, claimed that some of the plaintiffs' members lacked the identification required by Ohio law to cast a regular ballot on election day and that the provisional-ballot laws have been and will be applied differently and unequally by the state's 88 boards of elections. The decree specified that boards of elections may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification if the voter cast a provisional ballot in the correct polling place, but-for reasons attributable to poll-worker error-in the wrong precinct.

{¶ 8} On November 1, 2010, the secretary of state issued Directives 2010-73 and 2010-74 to boards of elections, which incorporated the provisions of the consent decree. In Directive 2010-73, the secretary of state stated that the "consent decree provides that an individual voting a provisional ballot using the last four digits of his/her social security number may not be deprived of the fundamental right to vote because of a failure of a poll worker to follow Ohio law," but that "poll worker error will not be presumed and must be demonstrated through evidence."

{¶ 9} In Directive 2010-74, which provides guidelines to boards of elections for determining the validity of provisional ballots, the secretary of state reiterated ***21** that the boards may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification because the voter cast the provisional ballot in the wrong precinct but the correct polling place for reasons attributable to poll-worker error. The secretary of state noted an example of this type of poll-worker error and suggested an investigative procedure ****789** for the board's determination of poll-worker error in multiple-precinct polling places:

{¶ 10} "Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct."

{¶ 11} On November 30, eight days after Judge

Dlott issued her injunctive order in the federal district court case, the secretary of state issued Directive 2010-79 to the Hamilton County Board of Elections for instructions on supplemental procedures regarding the provisional ballots. According to the secretary of state, the directive was prompted by the board's rejection of over 1,000 provisional ballots cast in the November 2, 2010 general election and the board's lack of any "conclusive review or inquiry to demonstrate the existence or lack thereof of poll worker error in specific provisional ballot situations" in accordance with the consent decree and Directives 2010-73 and 2010-74. The secretary of state reiterated her admonition in Directive 2010-73 that "poll worker error will not be presumed and must be demonstrated through evidence" and her instructions in Directive 2010-74 for the questioning of poll workers when multiple provisional ballots are voted in the correct polling place but the wrong precinct. The directive was limited to the provisional voters specified in the *Northeast Ohio Coalition for the Homeless* consent decree-those voters using only the last four digits of their Social Security numbers as identification to obtain a provisional ballot.

{¶ 12} Directive 2010-79 further defined poll-worker error as occurring "when a poll worker acts contrary to or fails to comply with federal or Ohio law or directive issued by the Secretary of State" and set forth "objective criteria" for determining poll-worker error.

***22** {¶ 13} On December 8, pursuant to Directive 2010-79, board of elections staff determined that 12 of the 850 provisional ballots that it had previously invalidated for being cast in the wrong precinct fell within the category of ballots in the directive that required the questioning of poll workers.

{¶ 14} The next day, after becoming aware of the federal court of appeals' dissolution of its earlier stay of Judge Dlott's preliminary injunction, the secretary of state issued Directive 2010-80. In her directive, the secretary of state observed that although "Judge Dlott's order only applies to the [850] provisional ballots cast in the wrong precinct that were not previously counted by the board of elections," "the investigation of poll worker error required by Judge Dlott's order is broader in scope than Directives 2010-73, 2010-74, and 2010-79 in that, for the [850] provisional ballots at issue, the determination of poll worker error is not limited to persons who voted using only the last four digits of their Social Security number." The secretary of state held that in conducting the investigation ordered by the federal district court, the board must identify the precincts and poll workers for the precincts****790** in which the 850 provisional ballots were cast, contact each poll worker to determine whether he or she followed the board's instructions for ensuring that voters were directed to the correct precinct, question each poll worker to determine whether he or she followed the applicable law, directives, and procedures for casting and processing provisional ballots, and examine the poll books for each precinct and the envelopes for the 850 provisional ballots for indications of poll-worker error in directing voters to the wrong precinct. The secretary of state concluded that if the board determined through its investigation that any of the provisional ballots were cast in the wrong precinct because of poll-worker error, then those ballots should be counted, as required by Judge Dlott's order.

{¶ 15} On December 11, the board of elections voted unanimously to follow Directive 2010-80 by issuing subpoenas to 2,200 poll workers who had worked at the November 2 election in the precincts and polling places in which the 850 provisional ballots that were the subject of the federal district court's order were cast. The board had previously deadlocked two-to-two on whether to send questionnaires to poll workers in lieu of requiring their statements under oath. The board also resolved to notify the Supreme Court of Ohio of the "potential for a vacancy on the Hamilton County Court of Common Pleas, Juvenile Division on January 1, 2011 if the board has not concluded its investigation and contact with each poll worker." The board

began issuing subpoenas to poll workers on December 13.

{¶ 16} On December 14, the secretary of state issued Advisory 2010-08, which-in addition to the procedures previously set forth in Directives 2010-79 and 2010-80-authorized the board to subpoena poll workers to testify "under ***23** oath and recorded by a court reporter, about instructions the poll workers gave to voters who cast provisional ballots in the precincts being investigated and other relevant matters to determine whether poll worker error occurred regarding the provisional ballots in question" or issue questionnaires to poll workers, who could complete the questionnaire and return it within seven days in lieu of testifying pursuant to a subpoena.

{¶ 17} The board's investigation of poll workers began on December 16 and continued the following day, with a total of 75 poll workers examined during those days. On the afternoon of the second day of testimony, the secretary of state issued Directive 2010-87, which ordered the board to accelerate its investigation and determination. According to the secretary, she was concerned that at the board's December 9 and 11 meetings, it had deadlocked on six different matters concerning the steps to be taken to complete the investigation ordered by Judge Dlott, which jeopardized compliance with the judge's order to conduct the investigation "immediately." The secretary was also concerned that there would not be a judge on the Hamilton County Juvenile Court for the open seat when the term commenced on January 1, 2011.

{¶ 18} Therefore, the secretary of state ordered that the board take the following steps to complete the investigation ordered by Judge Dlott: (1) identify and subpoena all poll workers in those precincts where the 850 provisional ballots had been cast that had been invalidated for having been voted in the wrong precinct, with the subpoenas to be issued no later than December 20 and interviews of poll workers subpoenaed to be completed no later than December 23, (2) issue questionnaires no later than December 20 to all poll workers who had not yet testified and give them ****791** two calendar days to complete and send their responses to avoid having to testify, (3) review all documents from the pertinent precincts in which the provisional ballots were cast to determine any indications of poll-worker error, with the review to be completed no later than December 27, (4) conduct a board meeting no later than December 28 to review the results of interviews, questionnaires, and documents to determine whether there was evidence that poll-worker error caused any of the 850 provisional ballots to be cast in the wrong precinct, (5) count any of the 850 provisional ballots for which there was evidence that poll-worker error caused the voter to cast the ballot in the wrong precinct, (6) submit any tie votes that arose in the investigation to the secretary of state with supporting arguments and statements within 48 hours of the vote to permit the matter to be resolved so that the judge who was elected could timely take office, and (7) submit any currently unresolved tie votes to the secretary of state by December 21 or meet on that date to revote these matters.

Writ Case

{¶ 19} Three days after the secretary of state issued Directive 2010-87, on December 20, relators, Williams and John W. Painter, a Hamilton County elector, ***24** filed this action for a writ of mandamus to compel the secretary of state to rescind Directives 2010-80 and 2010-87 as erroneous interpretations of Ohio law and to compel the board of elections to rescind its decision to subpoena poll workers to testify before the board and instead to review the 850 provisional ballots that are the subject of Judge Dlott's order 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, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary. Relators also requested a writ of prohibition requiring the board of elections to refrain from further contact with and questioning of poll workers.

{¶ 20} Relators additionally filed a motion for temporary injunctive relief pending the court's consideration of their request for mandamus relief, a motion for expedited consideration, and a motion for expedited issuance of an alternative writ. We ordered that respondents file expedited responses to relators' motions. *State ex rel. Painter v. Brunner*, 127 Ohio St.3d 1466, 2010-Ohio-6284, 938 N.E.2d 367. After the respondents filed their responses, we granted the motions of Hunter, the Northeast Ohio Coalition for the Homeless, and the Ohio Democratic Party to intervene as additional respondents, granted relators' motion for temporary injunctive relief, granted an alternative writ on relators' mandamus claim, and issued an expedited briefing and evidence schedule. *State ex rel. Painter v. Brunner*, 127 Ohio St.3d 463, 2010-Ohio-6461, 940 N.E.2d 978. We also dismissed relators' prohibition claim. Id.

{¶ 21} On December 20, because it was impossible for the board to finish questioning the poll workers in the brief time ordered by the secretary of state in Directive 2010-87, the board requested, and the secretary granted, a waiver of the requirement of subpoenaing further poll workers, and questionnaires were sent to the remaining poll workers. On December 27, Judge Dlott denied a motion of the intervening respondents to enjoin this writ case.

{¶ 22} On December 28, the board met and concluded its investigation, which generated a record of the testimony of 77 witnesses and over 800 completed questionnaires. The board unanimously approved the counting of 16 of the disputed ****792** 850 provisional ballots and unanimously rejected 565 of them. That left 269 provisional ballots that had been cast in the right polling location but in the wrong precinct. The board split two-to-two on whether to count these 269 provisional ballots. On December 30, the two sides submitted letters to the secretary of state to break the tie vote.

{¶ 23} The parties submitted their evidence and briefs in this case, and the Ohio Republican Party filed an amicus curiae brief in support of relators. This cause is now before this court for our consideration of relators' mandamus claim.

***25 Legal Analysis**

Jurisdiction

[1] {¶ 24} We reject the argument of the secretary of state and the intervening respondents Northeast Ohio Coalition for the Homeless and Ohio Democratic Party that we lack subject-matter jurisdiction over relators' mandamus claim because it is a disguised action for a declaratory judgment and a prohibitory injunction. When the issue is whether the secretary of state has misdirected boards of elections regarding their duties-which is relators' claim here-we have consistently rejected this jurisdictional contention. See, generally, *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶ 9, and cases cited therein.

Laches

[2][3][4] {¶ 25} Hunter and the secretary of state argue that relators' mandamus claim is barred by laches. "Laches may bar an action for relief in an election-related matter if the persons seeking this relief fail to act with the requisite diligence." *Smith v. Scioto Cty. Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, 918 N.E.2d 131, ¶ 11. "The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143, 145, 656 N.E.2d 1277.

{¶ 26} Hunter claims that because relators are indirectly challenging the suggestion in Secretary of State Directive 2010-74 that boards of elections investigate poll-worker error by questioning poll workers if the board finds multiple provisional ballots voted in the correct polling location but wrong precinct, which is repeated in Directive 2010-79, and because the first directive was issued on November 1, relators' 49-day delay in filing this

mandamus action on December 20 constituted an unreasonable delay. Similarly, the secretary of state claims that any challenge to Directive 2010-79, which was issued on November 30, was unreasonably delayed.

{¶ 27} Respondents are wrong. Relators are challenging Directives 2010-80 and 2010-87, which were issued on December 9 and 17. Directives 2010-74 and 2010-79 were restricted to those situations covered by the federal consent decree in *Northeast Ohio Coalition for the Homeless* and are not challenged by relators in this action. Relators' 11-day and three-day delays to contest Directives 2010-80 and 2010-87 were not unreasonably long, and because of the abbreviated statutory time period to generally resolve these disputes, an expedited schedule for briefing and evidence would have been warranted even if relators had filed this action on December 17. Although the secretary of state also argues that the ***26** R.C. 3505.32(A) deadline for finishing the board's canvass would probably expire before a recount after resolution of the pending litigation, given the delays attributable to the litigation by both Hunter and Williams, we are persuaded ****793** that this is a deadline that might pass even under the best of circumstances. See *State ex rel. Squire v. Taft* (1994), 69 Ohio St.3d 365, 369, 632 N.E.2d 883. No prejudice to respondents thus occurred.

{¶ 28} Therefore, because under the circumstances, relators acted with the requisite diligence in instituting this action for extraordinary relief, we reject Hunter's claim that this case is barred by laches.

Mandamus

{¶ 29} Relators request a writ of mandamus to compel the secretary of state to rescind Directives 2010-80 and 2010-87 because they are an erroneous interpretation of law and to compel the board of elections to refrain from taking action to comply with the secretary of state's instructions. In addition, relators request a writ of mandamus directing the board of elections to review the disputed provisional ballots with exactly the same procedures and scrutiny applied to the board's review of provisional ballots leading to its November 16 decisions, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary.

[5][6][7] {¶ 30} "To be entitled to the requested writ, relators must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the secretary of state [and the board of elections] to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007-Ohio-5838, 876 N.E.2d 1231, ¶ 13; see also *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 8. "[I]f the secretary of state 'has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.' " *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 20, quoting *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226, 43 O.O. 36, 94 N.E.2d 785. Notwithstanding the secretary's argument to the contrary, because of our recognition of mandamus as the appropriate remedy and the need to resolve this election dispute in a timely fashion, relators lack an adequate remedy in the ordinary course of the law. Id. at ¶ 31.

{¶ 31} For the reasons that follow, the secretary of state erred in issuing the postelection directives and instructions concerning the investigation of provisional ballots that had previously been invalidated by the board of elections because they had been cast in the wrong precinct.

***27** *Ohio Statutory Law for Provisional Ballots Cast in the Incorrect Precinct*

[8][9][10] {¶ 32} Initially, the United States Constitution " 'leaves the conduct of state elections to the states.' " *Warf v. Bd. of Elections of Green Cty., Ky.* (C.A.6, 2010), 619 F.3d 553, 559, quoting *Gamza v. Aguirre* (C.A.5, 1980), 619 F.2d 449, 453. For example, the Help America Vote Act, Sec-

tion 15301 et seq., Title 42, U.S.Code, " 'conspicuously leaves * * * to the States' the determination of 'whether a provisional ballot will be counted as a valid ballot.' " *State ex rel. Skaggs v. Brunner* (C.A.6, 2008), 549 F.3d 468, 477, quoting *Sandusky Cty. Democratic Party v. Blackwell* (C.A.6, 2004), 387 F.3d 565, 577.

{¶ 33} "One aspect common to elections in almost every state is that voters are required to vote in a particular precinct. Indeed, in at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct." *Sandusky Cty. Democratic Party*, 387 F.3d at 568. "The advantages of the precinct system are significant and numerous: it caps the number of voters ****794** attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences." Id. at 569.

[11] {¶ 34} "Under Ohio law, then, only ballots cast in the correct precinct may be counted as valid." Id. at 578. The plain language of several statutes so provides. See R.C. 3503.01(A) (every qualified elector "may vote at all elections in the precinct in which the citizen resides"); R.C. 3505.181(C)(2)(a) (providing that "if an individual refuses to travel to the polling place for the correct jurisdiction * * * [a] provisional ballot cast by that individual shall not be opened or counted" if the "individual is not properly registered in that jurisdiction") and (E)(1) (defining "jurisdiction" for purposes of provisional-ballot provisions as "the precinct in which a person is a legally qualified elector"); R.C. 3505.182 (requiring each individual casting a provisional ballot to execute a written affirmation stating that he or she "understand[s] that * * * if the board of elections determines that" the individual is not a resident of the precinct in which the ballot was cast, the provisional ballot will not be counted); R.C. 3505.183(B)(4)(a)(ii) (if board determines that the "individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot," "the provisional ballot envelope shall not be opened, and the ballot shall not be counted"); and R.C. 3599.12(A)(1) (prohibiting any person from voting or attempting to vote in any election "in a precinct in which that person is ***28** not a legally qualified elector") and (B) (making a violation of that section a felony of the fourth degree). In fact, as recently as November 2009, the secretary of state's office acknowledged that Ohio law "does not provide any exception when the ballot is cast in the wrong precinct due to poll worker error."

[12][13] {¶ 35} These statutes do not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted. " '[T]he general rule is that unless there is language allowing substantial compliance, election statutes are mandatory and must be strictly complied with.' " *State ex rel. Stewart v. Clinton Cty. Bd. of Elections*, 124 Ohio St.3d 584, 2010-Ohio-1176, 925 N.E.2d 601, ¶ 27, quoting *Husted*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 15. We are not authorized to add an exception that is not contained in the express language of these statutory provisions. *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214, ¶ 39 ("the statute contains no exception, and we cannot add one to its express language"); cf. *State ex rel. Reese v. Cuyahoga Cty. Bd. of Elections*, 115 Ohio St.3d 126, 2007-Ohio-4588, 873 N.E.2d 1251, ¶ 31, and cases cited therein (mistaken or erroneous statement or advice by board of elections did not estop board from acting contrary to statement by invalidating petition).

{¶ 36} Therefore, under Ohio statutory law, the

secretary of state's instructions to the board of elections, which required an investigation into whether poll-worker error caused any of the 850 provisional ballots to be cast in the wrong precinct, were erroneous because there is no exception to the statutory requirement that provisional ballots be cast in the voter's correct precinct.

****795** *Federal Consent Decree and Injunction*

[14] {¶ 37} Nevertheless, the secretary of state and the intervening respondents assert that the secretary's postelection instructions were warranted because of the federal consent decree in *Northeast Ohio Coalition for the Homeless* (Apr. 19, 2010), S.D. Ohio (E.D.) No. C2-06-896, as well as Judge Dlott's November 22 injunctive order in *Hunter* (Nov. 22, 2010), S.D. Ohio (W.D.) No. 1:10CV820, 2010 WL 4878957. As the state's chief election officer pursuant to R.C. 3501.04, the secretary of state has many election-related duties, including the duties to "[i]ssue instructions by directives and advisories * * * to members of the boards as to the proper methods of conducting elections," "[p]repare rules and instructions for the conduct of elections," and "[c]ompel the observance by election officers in the several counties of the requirements of the election laws." R.C. 3501.05(B), (C), and (M). There is nothing in these statutes that restricts the secretary of state's instructions to boards of elections to *state* election law. Therefore, the secretary of state also has a duty to instruct election officials on the applicable requirements of federal election law as well as federal court orders that are applicable to them.

[15] ***29** {¶ 38} The federal district court's consent decree in *Northeast Ohio Coalition for the Homeless* (Apr. 19, 2010), S.D. Ohio (E.D.) No. C2-06-896, however, does not justify the secretary of state's issuance of Directives 2010-80 and 2010-87 and Advisory 2010-08 to require the board of elections to contact poll workers for each of the disputed provisional ballots that were cast in the wrong precinct and to question them to determine whether poll-worker error caused the ballots to be cast in the improper precinct. The decree specifies only that boards of elections may not reject a provisional ballot "cast by a voter, *who uses only the last four digits of his or her social security number as identification*" for any of several reasons, including that 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." (Emphasis added.) Id. at 4. The secretary of state's postelection directives and advisory applied more expansively to the 850 provisional ballots cast in the wrong precinct.

{¶ 39} Notably, the secretary of state's preelection Directive 2010-74, which was issued on November 1, 2010, and postelection Directive 2010-79, issued on November 30, 2010, both of which suggested that the board question poll workers to determine whether poll-worker error caused provisional ballots in multiple-precinct polling locations to be cast in the wrong precinct, were accordingly limited to provisional ballots cast by voters who used only the last four digits of their Social Security numbers as identification.

[16] {¶ 40} Nor did the federal district court's November 22, 2010 injunctive order in *Hunter*, S.D. Ohio No. 1:10CV820, 2010 WL 4878957, justify the secretary of state's postelection instructions directing the board of elections to question poll workers concerning the 850 provisional ballots cast in the wrong precincts. The court's order was premised on the fact that the board of elections had carved out an exception from the general Ohio rule that provisional ballots not be counted if they were cast in the wrong precinct, apart from the exception provided by the federal consent decree in *Northeast Ohio Coalition for the Homeless* (Apr. 19, 2010), S.D. Ohio (E.D.) No. C2-06-896, for voters using only the last four digits of their Social Security number as identification who cast provisional ballots in the wrong precinct due to poll-worker error. *Hunter*, 2010 WL 4878957, at *4. The district court-as ****796** well as the court of appeals in its decision denying Williams's motion for stay-relied

on the board's determination that 27 provisional ballots cast in the wrong precinct at the board of elections should be counted because the evidence established that the improper casting of these votes must have been attributable to poll-worker error. Id. But there is no indication that any poll workers had been contacted and questioned by the board when it made its November 16 decision to count these provisional ballots, so any equal-protection claim did not require an investigation-it merely required the same inquiry that ***30** the board had engaged in for its initial determination of the validity of the provisional ballots.

{¶ 41} In fact, insofar as the secretary of state's postelection instructions conflict with her preelection instructions regarding the validity of provisional ballots cast at improper precincts, they are erroneous. Cf. *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 58 ("By changing her instructions for one county but not for others after the election at the request of a candidate, the secretary of state failed to ensure that the same rules would be applied to each provisional voter of every county in the state"). That is, in attempting to resolve equal-protection concerns implicated by the board's counting 27 provisional ballots cast in the wrong precinct at the board, the secretary of state may have caused much greater equal-protection concerns. See *Bush v. Gore* (2000), 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 ("the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter"); *League of Women Voters of Ohio v. Brunner* (C.A.6, 2008), 548 F.3d 463, 476 ("[t]he right to vote includes the right to have one's vote counted on equal terms with others").

{¶ 42} And if the secretary's directives requiring the questioning of poll workers for provisional ballots cast in the wrong precinct were extended to the entire state, it is doubtful that the time limits for resolving elections would ever be met. See R.C. 3505.183(E)(2) (board of elections shall examine eligibility of persons who cast provisional ballots by, at the latest, the 11th day after election); R.C. 3505.32(A) (board of elections shall complete canvass of election returns not later than the 21st day after the election, and canvass shall be deemed final 81 days after the election).

[17][18] {¶ 43} The secretary of state and boards of elections have general investigative authority over election irregularities, but this power is generally limited to reporting possible violations to the attorney general or prosecuting attorney for prosecution. See R.C. 3501.05(N)(1) and 3501.11(J). In this case, where the federal court orders did not require the specific type of investigation directed by the secretary of state and conducted by the board of elections, and the investigation was plainly otherwise violative of Ohio law, we hold that the secretary and the board erred in so acting.[FN2]

> FN2. The secretary of state, however, by issuing Directive 2010-87, did not act in clear disregard of R.C. 3501.11(X) by truncating the 14-day period to a two-day period for a board of elections to submit a tie vote to the secretary for resolution. See R.C. 3501.11(X) ("In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy, not later than fourteen days after the tie vote or the disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final"). As the secretary of state observes, there may be circumstances that warrant the secretary's instructing board members that any statutory limits be shortened to further expedite matters in election situations.

****797 *31** {¶ 44} Therefore, the secretary of state's postelection instructions to the board of elections are not justified by either federal court decision.

Federalism and Collateral Attack

[19][20] {¶ 45} Respondents argue that the requested writ of mandamus should be denied because of the Supremacy Clause and the collateral-attack doctrine.

[21] {¶ 46} Clause 2, Article VI of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." "It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law." *State v. Burnett* (2001), 93 Ohio St.3d 419, 422, 755 N.E.2d 857. But as for decisions of lower federal courts, this court has observed, "We are reluctant to abandon our role in the system of federalism created by the United States Constitution until the United States Supreme Court directs us otherwise." Id. at 424, 755 N.E.2d 857. Thus, "we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court. We will, however, accord those decisions some persuasive weight." Id.; cf. *Skaggs*, 549 F.3d at 477, quoting *Planned Parenthood of Cincinnati Region v. Strickland* (C.A.6, 2008), 531 F.3d 406, 410 ("To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count-under state law-would deprive state courts of their long-established role as the 'final arbiter on matters of state law' ").

[22][23] {¶ 47} Moreover, collateral or indirect attacks on judgments are disfavored. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 22. A collateral attack is " 'an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.' " *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681, quoting *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 458, 47 N.E. 541.

{¶ 48} Neither the Supremacy Clause nor the collateral-attack doctrine prevents the requested extraordinary relief here. As noted previously, the two federal court orders do not resolve the issues raised here. The *Northeast Ohio Coalition for the Homeless* consent decree did not require the investigative procedures specified by the secretary of state for ballots cast in the wrong ***32** precinct that were not covered by the decree, and while the *Hunter* injunction ordered an investigation and an examination of the disputed provisional ballots, it did not require the specific investigation ordered by the secretary of state and conducted by the board of elections. As Judge Dlott herself recognized in her order in *Hunter* denying the motion of the intervening respondents in this case to enjoin this state-court action, "[i]t is within the province of the Ohio Supreme Court to determine whether Secretary of State Jennifer L. Brunner's directives comply with state law governing election ****798** procedures, and this Court will not enjoin the Ohio Supreme Court from doing so."

Presumption against Poll-Worker Error

[24] {¶ 49} Relators also request a writ of mandamus to compel the board of elections to review the disputed provisional ballots with the same procedures it used in its review of the provisional ballots in its initial November 16 determination, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary. This request has merit. As noted previously, under Ohio law, these ballots should not be counted, so no investigation would normally be warranted. And Judge Dlott's injunctive order did not require the investigation ordered by the secretary of state and conducted by the board of elections here. At best, any equal-protection claim would have merely required the same examination that the board conducted in concluding-incorrectly under Ohio law-that

27 provisional ballots cast in the wrong precinct at the board of elections during the early-voting period should be counted, even though they were cast in the wrong precinct due to poll-worker error. That review was limited to an examination of the poll books, help-line records, and provisional-ballot envelopes and emanated from the uncontroverted evidence that these ballots were cast in the wrong precinct due to poll-worker error.

{¶ 50} Moreover, as we explicitly held in another case challenging the secretary of state's instructions concerning the validity of disputed provisional ballots, see *Skaggs*, 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, at ¶ 51, quoting *State ex rel. Speeth v. Carney* (1955), 163 Ohio St. 159, 186, 56 O.O. 194, 126 N.E.2d 449, election officials err in presuming poll-worker error because " '[i]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.' "

{¶ 51} Insofar as two of the board members appear to presume poll-worker error in connection with the 269 provisional ballots cast in the wrong precinct but correct location in a multiple-precinct polling place, this is incorrect. Neither they nor respondents could rely on evidence obtained from the improper investigation ordered by the secretary of state and conducted by the board. Finally, ***33** the board members erred in relying on a statistical analysis comparable to the one we rejected in *State ex rel. Yiamouyiannis v. Taft* (1992), 65 Ohio St.3d 205, 208-209, 602 N.E.2d 644, to support their claim that poll-worker error occurred.

Conclusion

{¶ 52} Based on the foregoing, relators have established their entitlement to the requested extraordinary relief in mandamus. The secretary of state's postelection instructions to the board of elections were not justified by Ohio law or the pertinent federal court orders. Therefore, we grant relators a writ of mandamus to compel the secretary of state to rescind Directives 2010-80 and 2010-87 and to compel the board of elections to rescind its decisions made pursuant to those directives and to instead 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, without assuming that poll-worker error occurred in the absence of specific evidence to the contrary.

Writ granted.

****799** O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, and CUPP, JJ., concur.
PFEIFER and McGEE BROWN, JJ., dissent.

PFEIFER, J., dissenting.

{¶ 53} I dissent from today's decision but not on the merits. Instead, my concern is the unnecessary expediting of this case. The rush to judgment was started by the secretary of state in a fairly transparent attempt to play a role in the resolution of the election before her successor takes office on January 10. Now, this court is along for the ride.

{¶ 54} The two-judge juvenile court remains in good hands in Cincinnati: Judge Karla Grady remains on the bench, and former Chief Justice Eric Brown assigned retired juvenile judge Thomas Louden to preside as the second juvenile judge through February while this election remains unresolved. Thus, we have time to make a decision. This court would benefit from ordering relators to file a reply brief in this case because some of the defenses, e.g., laches, lack of jurisdiction, the Supremacy Clause, and the collateral-attack doctrine, raised by respondents in their briefs have arguably not been sufficiently addressed by relators in their merit brief. I would order relators to file a reply brief by January 13, 2011, so that all the pertinent

issues have been addressed. And in a case that may involve the profound unfairness of votes not being counted because ***34** registered voters were directed by poll workers to the wrong table in a multiple-precinct polling place, we should make the most informed decision possible.

{¶ 55} Moreover, although the secretary of state is in her final days of office, she does have a successor. And it is possible that this writ case will be rendered moot if her successor, who takes office on Monday, January 10, rescinds the challenged directives. There is thus no need to resolve this case before the secretary of state elect has had the opportunity to give his opinion on this matter. By acting more quickly than is necessary under these circumstances, we are acting contrary to "our general rules precluding advisory opinions and extolling judicial restraint." See *State ex rel. LetOhioVote.Org v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 928 N.E.2d 1066, ¶ 22. Therefore, I dissent.

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