EXPEDITED REVIEW REQUESTED

No. 10A989

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.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

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

ARGUMENT

1. a. Respondents acknowledge that this case presents "important issues," which this Court should review. (*See* Opp. 3.) Respondents merely disagree with the timing. They assert that this case is, essentially, not ripe for review by this Court based upon purported factual issues with respect to the 27 miscast, miscounted ballots that have given rise to the equal protection finding in the case. But the admittedly important legal questions that Petitioners present will be unaffected by any factual development.

The issues here are whether it is legally possible for an equal protection violation to occur where a local board of elections committed an isolated error by counting certain miscast ballots, based on its misunderstanding of what state law permitted, and whether the legally permissible remedy to that violation would be the counting of perhaps hundreds of additional ballots that were also miscast under state law. The Sixth Circuit answered affirmatively, which conflicts with decisions of other circuits and at least one state supreme court and implicates *Bush v. Gore*, 531 U.S. 98 (2000).[1]

Further development of the record will not impact resolution of these issues, as it has already been determined by the Ohio Supreme Court that the 27 votes (whether cast before or on Election Day) were not eligible to be counted under state

[1] Furthermore, it appears from Respondent's Opposition that they will challenge the ongoing viability of this Court's decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), which has been continually relied upon by lower courts in similar cases for 65 years. (*See* Opp. 8-9.)

law because they were cast in the wrong precinct. *See State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 794, 798 (Ohio 2011).

Indeed, it is strange that Respondents now argue that the record needs further development after pressing for quick decisions at every stage of this case (until now) and after presenting no evidence at the original hearing, except on rebuttal. And even now, Respondents contend not only that the record is adequate enough to decide an election but that to not do so would cause irreparable harm and be against the public interest. (Opp. 16-17.) The "important issues" presented by Petitioners here can and should be decided by this Court now and there remains a reasonable probability that certiorari will be granted.

b. Respondents attempt to obscure the legal conflict presented by this case, but that attempt is unavailing. The Sixth Circuit's decision conflicts with the law in at least four circuits and the highest court of at least one state.

Respondents' main argument is that the conflict cases have different facts from this one, but if that were the criteria for judging a legal conflict, this Court would never review a case. Instead, the key is that in every one of the cited cases, the court rejected an equal protection argument in a situation where local election officials made isolated errors in the interpretation and execution of state election laws. In so doing, those cases rely on (and in some instances quote from) a case

that Respondents now suggest is dead-letter, *Snowden v. Hughes*, 321 U.S. 1 (1944).[2] (Opp. 9.)

The issue in this case is an erroneous application of Ohio voting laws by the local board of elections. (C*ompare* Opp. 13.) The Ohio Supreme Court recognized that the Board "concluded incorrectly under Ohio law" that the 27 wrong-precinct ballots cast at the board of elections should be counted because the ballots were miscast due to poll worker error. *See Painter*, 941 N.E.2d at 798. The Board's decision was erroneous under a state statute that provides that wrong-precinct ballots are not to be counted. *Id*. There is no question that the actions of the Board here would not have given rise to an equal protection violation in at least the Second, Fifth, Seventh, or Eleventh Circuits, or the State of Minnesota. The Board made a mistake, but that "[u]neven or erroneous application of an otherwise valid statute," without more, does not violate equal protection. *See Gelb*, 155 Fed. Appx. at 14.

Respondents rather weakly question the quantity of conflict cases cited by Petitioners – four circuits and one state supreme court.[3] (Opp. 11.) But the

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[2] *Coleman v. Franken*, 767 N.W.2d 453, 463-64 (Minn. 2009), *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980), and *Gelb v. Bd. of Elections of City of N.Y.*, 155 Fed. Appx. 12, 14 (2d Cir. 2005) directly rely on and quote *Snowden*. And *Parra v. Neal*, 614 F.3d 635 (7th Cir. 2010) relies on a line of Seventh Circuit cases that all trace back to *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975), the leading Seventh Circuit equal protection election decision, which relies on *Snowden*.

[3] Respondents apparently do not even regard a conflict with a state supreme court to be worthy of consideration, dismissing *Coleman v. Franken* as "not even a federal opinion" (Opp. 11). But conflicts among federal circuit courts and state courts deciding federal questions clearly concern this Court as evidenced both by this Court's rules and past practice. *See* S. Ct. R. 10(a) ("a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort"); *see*, *e.g.*, *Johnson v. California*, 545 U.S. 162, 164 (2005); *Florida v. White*, 526 U.S. 559, 563 (1999); *United States v. Estate of Romani*, 523 U.S. 517, 521-22 (1998); and *Hagen v. Utah*, 510 U.S. 399, 409 (1994).

number of cases is hardly relevant to the question of whether the law of those circuits and Minnesota (which together happen to cover a huge swath of the country) is in conflict with the decision here, which it is. And Respondents fail to cite any cases from those jurisdictions that suggest the law is otherwise.

Perhaps Respondents are suggesting that the issues raised by this case are not important or recurring. But Respondents concede that they are "important," and the fact that not every mistake or misinterpretation of state election law by local election officials makes it into federal court illustrates the conflict here.[4] That was certainly the law before *Bush v. Gore* and almost certainly remains the law after. The opinion below will lead to just the opposite – more federal litigation over local elections.

The fact that these circuits and the Minnesota Supreme Court did not "apply" *Bush* does not affect the legal conflict. Indeed, the Minnesota Supreme Court considered *Bush* and explicitly declined to apply it, in part because *Bush* (on its own terms) does not speak to "whether local entities, in the exercise of the[ir] expertise, may develop different systems for implementing elections." *Coleman*, 767 N.W.2d at 466 (quoting *Bush*, 531 U.S. at 109). The other post-*Bush* decisions rightly believe that *Bush* simply does not speak to the scenarios presented by cases like this one. There is no way to look at the cases that Petitioners have cited (and

[4] In any event, an amicus below cited more than a dozen other circuit court decisions that stand for the more general proposition that election irregularities without intentional or invidious discrimination do not rise to the level of a constitutional violation. *See* Amicus Curiae Ohio Republican Party's Petition in Support of Appellants' Petitions for Rehearing En Banc, filed March 11, 2011, at 1-3.

others) and not accept that the Sixth Circuit's decision here presents an important legal conflict that this Court must resolve.

2. Furthermore, the fact that the circuit court cases decided since *Bush* do not rely on it evidences why the Sixth Circuit is wrong in this case and why this Court is likely to reverse the Sixth Circuit. Respondents and the Sixth Circuit try to force what occurred in this case into the line of voting cases that includes *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663 (1966), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), using *Bush* as the shoehorn. (Opp. 7.) But that attempt fails, and this Court will agree.

This case falls more naturally in the *Snowden* line of cases, which hold that isolated errors in voting cases made by election officials are not equal protection violations unless the officials intended to take away a person's right to vote. Cases like *Harper* involve statewide laws or policies affecting the right to vote – *Bush* falls into this line. Moreover, Respondents now make the remarkable claim that *Snowden*, which is relied upon regularly by lower courts, has essentially been overruled. (Opp. 9.)

This Court has never called *Snowden* into question, and it has not called into question any of the cited lower court cases that conflict with the Sixth Circuit's decision here.[5] There is no allegation in this case that the Board intended to violate

[5] Respondents suggest that the Sixth Circuit's decision is correct based on a distinction that they draw between "invidious" and "intentional" discrimination. But that is simply an application of *Bush v. Gore*, which only begs the question of whether *Bush v. Gore* has altered the isolated error line of cases. It has not for the reasons given above. Moreover, invidiousness clearly implies some level of intent. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (Court cited with approval the dictionary definition of the term "invidious" as "[t]ending to excite odium, ill will,

anyone's right to vote, and there is no statewide law or policy at issue (indeed, the Board's actions were mistakenly contrary to Ohio law). As a result, the Board's erroneous decision to count certain miscast votes cannot form the basis of an equal protection violation. Thus, there remains a reasonable chance that this Court will reverse the Sixth Circuit.

3. Rather than contest irreparable harm, Respondents reinforce its existence here. They argue that it might be possible to "uncount" (illegally cast and counted) votes someday if it is later determined that the Sixth Circuit was wrong. In doing so, Respondents advocate the exact "count first, sort it out later" approach that Justice Scalia admonished would cause irreparable harm. (App. 16 (quoting *Bush v. Gore*, 531 U.S. 1046 (2000) (Scalia, J., concurring)).) They also claim that Respondent Hunter might lose wages. None of this militates against a stay. This case, after all, is not about Respondent's purported right to be a judge. It is about voters' rights to equal protection. The important legal question here should first be resolved. That protects the Board and the candidates from harm and provides the best "recipe" for valid election results. The rush to judgment that has characterized this case has undermined the ability of the courts to resolve these issues, it makes no sense to continue that course in this Court – especially where the juvenile court seat at issue remains filled.

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or envy; likely to give offense; esp., unjustly and irritatingly discriminating" (citing Webster's Second International Dictionary 1306 (1954))).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Application, the Court should recall and stay the Sixth Circuit's mandate pending certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th 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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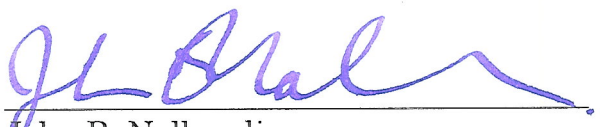

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