No. 10A989

IN THE SUPREME COURT OF THE UNITED STATES

HAMILTON COUNTY BOARD OF ELECTIONS, et al.,

Petitioners,

v.

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

Respondents.

On Application To Recall And Stay Mandate Of United States Court Of Appeals For The Sixth Circuit Pending Certiorari

BRIEF FOR RESPONDENTS

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I. INTRODUCTION.

If a government worker causes a voter to vote in the wrong precinct it is fundamentally unfair to reject that ballot solely because of that worker's error—particularly where, as here, the Board of Elections has arbitrarily decided to count some wrong-precinct ballots and reject others. Based on these facts, the Sixth Circuit correctly decided that Respondents had demonstrated a likelihood of success on their Equal Protection claim, affirmed the District Court's preliminary injunction and remanded the matter to the District Court for further proceedings.

Petitioners John Williams and Hamilton County Board of Elections now seek to stay the operation of a preliminary injunction that the Sixth Circuit has repeatedly refused to stay, both before and after the Petitioners' unsuccessful appeal of that injunction to that court. Respondents Tracie Hunter, Northeast Ohio Coalition for the Homeless ("NEOCH") and Ohio Democratic Party ("ODP") oppose the Petitioners' Application To Recall And Stay Mandate.

As shown below, Petitioners have not met their burden of showing that extraordinary circumstances warrant a stay of the District Court's preliminary injunction. They have not shown that there is a reasonable probability that four justices will vote to hear this case. They have not demonstrated that there is a fair prospect that a majority of this Court would reverse the Sixth Circuit's decision. They have also failed to show, and cannot show, a likelihood of irreparable harm. Neither Petitioner will be irreparably harmed if the District Court proceeds. To the contrary, delaying those proceedings will delay the results of the election, will not serve the public interest and will cause substantial harm to the Respondents. For all of these reasons, Respondents respectfully request that the Application be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

The complicated facts and eventful procedural history of this case are well-described in the Sixth Circuit opinion. With the exception of the statement that the 27 wrong-precinct ballots cast at the Board's office and counted by the Board were all cast *before* Election Day (see Part III-B), the Sixth Circuit's recitation is incorporated by reference as if fully restated here.

III. PETITIONERS HAVE NOT MET THEIR BURDEN OF SHOWING THAT THE CIRCUMSTANCES JUSTIFY A STAY.

A. A Single Justice Will Issue A Stay Only In Extraordinary Circumstances, Which Do Not Exist Here.

A party who asks a single Justice of this Court to stay a lower court's order bears the burden of showing that extraordinary circumstances justify a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S. Ct. 1 (1980) (Brennan, J.). Petitioners must show that there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 129 S. Ct. 1861 (2009) (Ginsburg, J.) (internal quotations and citation omitted). "In addition, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* (citation omitted).

Petitioners have not made any of these showings. Their Application should therefore be denied.[1]

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[1] Respondents note that although this Court has previously stayed preliminary injunctions, which are inherently interlocutory in nature, the governing statute applies by its terms only to final judgments. 28 U.S.C. § 2101(f) ("In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of (continued...)

B. There Is Not A Reasonable Probability That Four Justices Will Vote To Grant The Petitioners' Writ Of Certiorari.

Respondents agree that this case presents important issues, including the application and proper interpretation of *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000). But this case is still in its very early stages. The preliminary injunction that Petitioners seek to stay was issued the day after this case was filed: November 22, 2010. The investigation that the District Court ordered the Board to conduct was truncated by the Ohio Supreme Court's decision in *State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 2011-Ohio-35, the subsequent Directive by newly-elected Ohio Secretary of State Husted to reject the disputed ballots, and Petitioners' unsuccessful appeals.

Simply put, the factual record still needs to be developed. There has been no discovery. The parties need more information about the disputed ballots before the District Court (or this Court) can finally determine which ones should be counted. The unfortunate consequences of an incomplete factual record are shown by Petitioners' admission to this Court, late yesterday, that it had just learned that the factual underpinning for some of its arguments is incorrect:

> In the Board's Application to Recall and Stay Mandate in the above matter, the twenty-seven ballots cast at the office of the Board have been characterized as 'cast prior to' or 'before' Election Day. This characterization appears on page seven of the Board's Application in the second full paragraph, and again on page eight in the first paragraph. It was brought to my attention late yesterday afternoon that ***eight of the twenty-seven ballots cast at the Board's office were cast on Election Day and not prior***

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such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."); *see also Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 107 S. Ct. 682 (1986) (Scalia, J.) (holding that Section 2101(f) applies only to final orders, and that interlocutory orders must meet the more demanding standards that apply under the All Writs Act to justify a stay). Because the Court has previously stayed preliminary injunctions under the standards that apply to petitions under Section 2101(f), however, Respondents will assume that the Court would also apply those standards here.

> ***thereto.*** Counsel for Respondents were informed by e-mail today and are being sent a copy of this letter.

Letter dated April 14, 2011 from D. Stevenson to Justice Kagan (emphasis added).

This is no small error. Petitioners previously represented to this Court that the lower courts' finding of a likely Equal Protection violation is based "solely on" a comparison of two dissimilar 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***." Application at 7 (emphasis added). Deprived of this temporal distinction, Petitioners must now argue that these two categories are dissimilar solely because of *where* they occurred, i.e., at the Board office or in polling locations. They can no longer argue that it is appropriate to treat these 27 ballots differently because they were all cast before Election Day.

The danger of basing a decision on an incomplete record is illustrated by Judge Rogers' concurring opinion in *Hunter v. Hamilton County Board of Elections*. Twice in his brief opinion, he cited the supposed temporal distinction between these two categories of ballots as showing that they were "sufficiently different" to justify differing treatment. 2011 WL 242344, __F. 3d.__, at *24-25 (C.A. 6 Ohio) (Rogers, J., concurring op.) (noting that the 27 ballots were cast "prior to the election" whereas the other ballots were cast "in the election-day polling place situations"). Now that this temporal distinction is gone, these two groups of ballots may not be as different as they initially seemed to Judge Rogers. Even if he would still reach the same conclusion, his opinion and rationale are less certain today because they are based upon inaccurate facts.

The better course is to allow the parties to conduct discovery and create a factual record, allow the District Court to finish its proceedings, and then decide whether this case merits this

Court's review. For these reasons, there is not a reasonable probability that four Justices would grant certiorari at this time.

C. There Is Not A Fair Prospect That A Majority Of The Court Will Conclude That The Decision Was Erroneous.

There is not a fair prospect that a majority of this Court would reverse the Sixth Circuit's careful and well-supported opinion. Not only did all three members of the panel agree to affirm the District Court's November 22 preliminary injunction, but also not a single active judge on the Sixth Circuit called for a vote on Petitioners' requests for en banc review. This uniform response weighs against finding a fair prospect that this Court would reverse the Sixth Circuit's decision.

Nor does the substance of that decision create a fair prospect that it would be reversed by this Court. Petitioners argue that the Sixth Circuit erred in at least three respects. First, they argue that the Sixth Circuit wrongly rejected their argument that a 1944 decision from this Court requires a showing of intentional discrimination. Next, they argue that the Sixth Circuit wrongly held that federal courts can adjudicate federal claims arising from state and local elections. Finally, they argue that the Sixth Circuit's holding conflicts with five decisions, one of which is from a state court. None of these arguments is persuasive.

1. The Sixth Circuit panel unanimously affirmed the District Court's preliminary injunction and no Sixth Circuit judge even requested a vote on the petitions for en banc review, which were denied.

The Sixth Circuit panel unanimously affirmed the District Court's decision. Although only two judges joined in the majority opinion, the third judge "agree[d] largely with much of the majority opinion" and concurred in the judgment. *Hunter*, 2011 WL 242344, at *24. None of the panel members dissented.

The Sixth Circuit also denied Petitioners' requests for en banc review. Importantly, no active judge on the Sixth Circuit even requested a vote on those en banc petitions. The absence

of even a single dissenting voice on the Sixth Circuit weighs against finding a fair prospect that a majority of this Court would overturn the panel decision. *Rubin v. U.S.*, 524 U.S. 1301, 1302, 119 S. Ct. 1 (1998) (Rehnquist, C.J.) (finding that reversal by a majority of the Court was not likely where, among other things, "none of the nine judges of the Court of Appeals even requested a vote on the applicant's suggestion for rehearing en banc.").

2. The Sixth Circuit correctly held that intentional discrimination is not required.

Petitioners argue that the Sixth Circuit decision is flawed because *Snowden v. Hughes*, 321 U.S. 1 (1944), requires a finding of intentional discrimination in voting rights cases brought under the Equal Protection Clause. Application at 14-15. Petitioners claim that a government error that deprives a voter of his or her right to vote does not violate the Equal Protection Clause absent a showing of intentional discrimination. The Sixth Circuit properly rejected this assertion in a footnote in its decision. *Hunter*, 2011 WL 242344, at *12 n.13.

The Equal Protection Clause protects the right to vote from *invidious* discrimination. Discrimination is "invidious" if it is arbitrary, irrational and not reasonably related to a legitimate purpose. Black's Law Dict. 573 (6th ed. abridged 1991). This Court has repeatedly held that the touchstone in voting-rights cases brought under the Equal Protection Clause is whether the discrimination is *arbitrary* or *invidious*. *E.g., Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 189, 128 S. Ct. 1610 (2008) ("[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications"); *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525 (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."); *American Party of Texas v. White*, 415 U.S. 767, 795, 94 S. Ct. 1296 (1974) ("[P]ermitting absentee voting by some classes of voters and denying the privilege to other

classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."); *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274 (1974) ("[T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause."); *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 666, 86 S. Ct. 1079 (1966) ("Our cases demonstrate that the Equal Protection Clause ... restrains the States from fixing voter qualifications which invidiously discriminate.").

By contrast, this Court does not require a showing of *intentional* discrimination in voting rights cases. That is, it does not require a showing that the defendant had a particular design, purpose, state of mind or determination to act in a certain way. Black's Law Dict. 559-60 (6th ed. abridged 1991). Instead, this Court has ruled in favor of many voting rights plaintiffs who were not required to show intentional discrimination when challenging laws or conduct that infringed on the right to vote. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963) (plaintiff voter not required to show intent); *Harper*, 383 U.S. at 666 (plaintiff voters not required to show intent); *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (plaintiff political parties not required to show intent); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969) (plaintiff voter not required to show intent); *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752 (1970) (plaintiffs refused the right to register to vote not required to show intent); *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849 (1972) (plaintiff candidates not required to show intent); *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972) (plaintiff refused the right to register to vote not required to show intent); *Bush*, 531 U.S. at 104-08 (plaintiff candidates not required to show intent).

Snowden does not require a contrary result. It is not even a traditional voting-rights case. Joseph Snowden ran as a candidate in an Illinois county Republican primary and placed second, which entitled him to run in the general election. But the State Canvassing Board failed to issue him the required certificate, allegedly as the result of a willful and malicious conspiracy against him. The lower court dismissed his complaint based upon the Fourteenth Amendment. The Supreme Court affirmed, holding that Snowden had failed to state a claim for violation of the Privileges and Immunities Clause, the Due Process Clause or the Equal Protection Clause. 321 U.S. at 6-10.

The Court held that Snowden had failed to state an Equal Protection claim, in part, because he had not alleged "intentional or purposeful discrimination." *Id.* at 8. It stated that such discrimination cannot be presumed, but must be clear and intentional. As an example, the Court cited to cases *that allowed African-Americans to be excluded from juries* absent evidence of intentional and purposeful discrimination:

> Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 L.Ed. 567; *Norris v. State of Alabama*, 294 U.S. 587, 589, 55 S. Ct. 579, 580, 79 L.Ed. 1074; *Pierre v. State of Louisiana*, 306 U.S. 354, 357, 59 S. Ct. 536, 538, 83 L.Ed. 757; *Smith v. State of Texas*, 311 U.S. 128, 130, 131, 61 S. Ct. 164, 165, 85 L.Ed. 84; *Hill v. State of Texas*, 316 U.S. 400, 404, 62 S. Ct. 1159, 1161, 86 L.Ed. 1559. ***But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race.*** *State of Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.Ed. 667; *Martin v. State of Texas*, 200 U.S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L.Ed. 497; *Thomas v. State of Texas*, 212 U.S. 278, 282, 29 S. Ct. 393, 394, 53 L.Ed. 512; cf. *Williams v. State of Mississippi*, 170 U.S. 213, 225, 18 S. Ct. 583, 588, 42 L.Ed. 1012.

Snowden, 321 U.S. at 8-9 (emphasis added).

The law has come a long way since *Snowden* and its cited cases were decided. This Court held in *Swain v. Alabama*, 380 U.S. 202 (1965), that the exclusion of African-Americans from juries violates the Equal Protection Clause if there is a county-wide, systematic practice of striking African-Americans from juries. And in *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court overruled *Swain* and held that a prosecutor who excludes African-American jurors without stating a valid cause for doing so thereby violates the Equal Protection Clause. Thus, intentional discrimination is no longer required in such cases, contrary to *Snowden*.

The same can be said of *Snowden*'s suggestion that intentional discrimination is required to state a violation of the Equal Protection Clause in voting-rights cases. The numerous voting-rights cases cited above conclusively demonstrate that intentional discrimination is no longer required (assuming that it ever was). In these cases, all of which were decided after *Snowden*, this Court unambiguously held that the relevant inquiry is whether the alleged discrimination was arbitrary or invidious, and did not require the plaintiff to show intentional discrimination. The Sixth Circuit therefore correctly rejected Petitioners' reliance on *Snowden*. There is not a fair prospect that a majority of this Court would disagree.

3. The Sixth Circuit correctly held that federal courts have the power to redress violations of the Equal Protection Clause that occur in state and local elections, and need not defer to state courts.

Petitioners also argue that "this case implicates the more general question of the extent to which federal courts ought to be involved in state or local elections." Application at 13-14. This argument requires some context. In the proceedings below, Petitioners argued that the District Court and Sixth Circuit should defer to the Ohio Supreme Court's ruling in *State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 2011-Ohio-35, a case that Petitioner Williams filed *after* Respondent Hunter had brought this lawsuit in federal court and obtained a preliminary

injunction. Petitioners argued that *Painter* settled the dispute and that the federal courts should defer to its ruling.

The Sixth Circuit disagreed. It noted that *Painter*'s resolution of the state-law issues that were before it "do not resolve the federal constitutional question in this case." *Hunter*, 2011 WL 242344, at *17. It explained that *Painter*'s instruction to review the disputed ballots "'with exactly the same procedures and scrutiny applied to any provisional ballots ... [prior to] November 16' is not based on state-law principles." *Id.* Instead, the Sixth Circuit found that the Ohio Supreme Court's order that the Board limit its review of the disputed ballots to poll books, help-line records, and provisional-ballot envelopes "is based on its own analysis of the district court's order and Plaintiff's equal protection claim." *Id.* The Sixth Circuit held that it was not required to defer to a state court's interpretation of a federal claim pending before it:

> It is not for the state court, however, to resolve the equal-protection claim previously filed and still pending in federal court. *Cf. Madej*, 371 F.3d at 899-900 ("It is for the federal judiciary, not the [state], to determine the force of [the federal court's] orders."). 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.

Hunter, 2011 WL 242344, at *17. Consequently, the Sixth Circuit rejected Petitioners' arguments that it "should defer to the Ohio Supreme Court's views on the substantial federal constitutional questions before us." *Id.* There is not a fair prospect that a majority of this Court would disagree.

Nor is there a fair prospect that a majority of this Court would overrule the Sixth Circuit's holding that it (and the District Court) had subject-matter jurisdiction over this action. The Sixth Circuit rejected Petitioners' argument that Respondents must seek relief under state law and cannot assert claims under federal law. *Hunter*, 2011 WL 242344, at *10-11. The Sixth Circuit

noted that the United States Constitution protects the fundamental right to vote, and that "[i]t is firmly established that we have jurisdiction to hear claims 'arising under the Constitution' and alleging unconstitutional practices taken under color of state law." *Id.* at *10 (citing 28 U.S.C. §§ 1331, 1343 & 42 U.S.C. § 1983). While recognizing that "garden variety election irregularities" may not rise to the level of a Due Process violation, and that "federalism concerns 'limit the power of federal courts to intervene in state elections,'" the Sixth Circuit also observed that the mere fact that states regulate elections does not defeat federal jurisdiction. *Id.* at *11 (citations omitted). "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." *Id.* These statements are well-supported by the cited cases and are entirely correct. They do not support Petitioners' contention that the circumstances of this case justify a stay.

4. The Sixth Circuit decision does not conflict with the cited decisions.

Finally, Petitioners argue that the Sixth Circuit's decision conflicts with "numerous other circuit court decisions and the highest court of a state decided both before and after *Bush v. Gore*[.]" Application at 3. To support this argument, Petitioners cite only five opinions issued in the last thirty years, one of which is (as Petitioners acknowledge) not even a federal opinion. These opinions offer little support for the extraordinary relief Petitioners seek, for three reasons.

The first reason is that these five opinions bear no resemblance to the present case. The Equal Protection claim asserted here centers on the Board's decision to "consider[ ] evidence of poll-worker error and accordingly vote[ ] to count . . . 27 provisional ballots that were cast at the Board's office, but in the wrong precinct" while at the same time refusing to consider whether there was similar poll-worker error that required them to count "provisional ballots that were cast . . . at [the right] polling location, but in the wrong precinct." *Hunter*, 2011 WL 242344, at *13-

15. This case involves the arbitrary and disparate treatment of similarly situated ballots by one board of elections in one jurisdiction. In comparison, the cases that Petitioners cite involved:

(1) "[v]ariations in local [Minnesota jurisdictions'] practices for implementing absentee voting procedures" leading to "differing application and implementation by election officials of the statutory requirements for absentee voting" in the 2008 Minnesota race for the U.S. Senate (*Coleman v. Franken*, 767 N.W.2d 453, 463, 466 (Minn. 2009));

(2) a decision by the Board of Elections of the City of New York to "deny[ ] [New York City] voters the legal right to cast a write-in vote during the 2000 Democratic Primary for United States Senator" and the Board's "fail[ure] to provide information and instructions on write-in voting" (*Gelb v. Bd. of Elections of City of N.Y.*, 155 F. App'x. 12, 14 (2d Cir. 2005));

(3) an error in the order in which the candidates for a 1978 Texas school board race were listed on voting machines in three precincts, which led to several of the plaintiff's votes being counted for the eventual winner (*see Gamza v. Aguirre*, 619 F.2d 449, 451 (5th Cir. 1980));

(4) a decision by the Board of Election Commissioners for the City of Chicago to comply with an order of the Supreme Court of Illinois requiring the Board to invalidate votes for a candidate whom the Court found ineligible to run in a 2007 primary election for ward alderman (*see Parra v. Neal*, 614 F.3d 635, 636 (7th Cir. 2010)); and

(5) one Alabama county's conscious decision to count, and three other Alabama counties' accidental counting of, invalid absentee ballots in Alabama's 1994

general election (*see Roe v. Alabama*, 68 F.3d 404, 405-406, 407 n.4 (11th Cir. 1995)).

The facts of these cases are not similar to, much less on all fours with, the facts of the present case. They are also distinguishable for other reasons. In *Parra*, the plaintiffs made an Equal Protection claim even though they had not "allege[d], let alone offer[ed] proof of, any wrongdoing on the part of the defendants." *Parra*, 614 F.3d at 637. By contrast, Petitioners here acknowledge that the Board violated state elections law. Application at 8. In *Coleman* and *Roe*, the primary Equal Protection claims related to "local jurisdictions' differences in application . . . of the requirements for absentee voting[.]" *Coleman*, 767 N.W.2d at 464; *accord Roe*, 68 F.3d at 406 ("the second claim alleged that the State defendants would deny the Class the equal protection of the laws if they counted contested ballots in some counties but not in others"). Here, by contrast, "[t]he inconsistent treatment of . . . ballots across Ohio counties . . . is not at issue[.]" *Hunter*, 2011 WL 242344, at *19. And the remaining two cases – *Gelb* and *Gamza* – involved Equal Protection claims stemming from an "erroneous interpretation" of state voting laws (*Gelb*, 155 F. App'x at 14) and a polling machine error (*Gamza*, 619 F.2d at 451). What is at issue here is not simply an "erroneous interpretation" of Ohio voting laws or polling machine error, but rather the Board's decision to "consider evidence of poll-worker error for some [provisional] ballots, but not others, thereby treating voters' ballots arbitrarily[.]" *Hunter*, 2011 WL 242344, at *20. Thus, these five cases are all distinguishable.

The second reason why the Petitioners' cited cases are inapplicable is because none of them apply *Bush*, the opinion that underlies much of the Sixth Circuit's legal analysis. *See, e.g.*, *Hunter*, 2011 WL 242344, at *12-13. Two of the federal opinions, *Gamza* and *Roe,* predate *Bush*. The other two federal opinions, *Gelb* and *Parra*, make no mention of *Bush.* And the state

opinion concluded that *Bush* did not apply. *See Coleman*, 767 N.W.2d at 466. There is no conflict where cases decided before *Bush*, or that declined to apply *Bush*, applied different standards than an opinion that relied on and applied *Bush*.

The third reason why the Petitioners' argument fails is because at least two cases do not even stand for the cited proposition. Petitioners attempt to frame the Seventh Circuit's decision in *Parra* as a continuation of older Equal Protection cases requiring a showing of intentional discrimination. Application at 13. Yet *Parra* makes no reference to *Bush* or any of this Court's pre-*Bush* equal protection jurisprudence. Instead, the Seventh Circuit relied on circuit precedent that required a plaintiff asserting a Section 1983 claim to make a showing of "*willful* conduct which undermines the organic processes by which candidates are elected." *Parra*, 614 F.3d at 637 (*quoting Kozusek v. Brewer*, 546 F.3d 485, 488 (7th Cir. 2008) (further citation omitted)). Under Seventh Circuit precedent, the plaintiffs were required to show that "the defendants acted with the intent of subverting the electoral process or impairing a citizen's right to vote." *Id.* (*citing Kozusek*, 546 F.3d at 488 (further citation omitted)). Thus, *Parra* sheds little light on Equal Protection jurisprudence outside the Seventh Circuit. Moreover, *Parra*'s citation of the Seventh Circuit's standard for Section 1983 claims is *dictum*. The "willful[ness]" of the Board of Election Commissioners for the City of Chicago's actions was not determinative in *Parra* because the Seventh Circuit concluded that the Board did nothing wrong. *See id.*

Petitioners also misconstrue the Eleventh Circuit's decision in *Roe*. *Roe* did not hold, as Petitioners suggest, that "isolated errors by local boards of elections" cannot violate the Equal Protection Clause or that only "systematic, statewide error[s] . . . implicate[ ] the Equal Protection Clause in an election context." Application at 11. Instead, the Eleventh Circuit's conclusion that "[t]he fact that a small number of contested ballots (forty-nine) slipped through is

of no consequence" was based on the number of contested ballots at issue. Unlike this case, the margins of victory in the affected races (262 votes in one race, 1032 votes in the other) far exceeded the number of contested ballots. *See Roe*, 68 F.3d at 407 n.4.

In sum, the five opinions that Petitioners cite have little in common with this case. Petitioners' cases do not present a significant inter-circuit conflict because none of the federal cases cites or applies *Bush*. And none of these cases demonstrates that Petitioners are likely to prevail on the merits. Even if they uniformly "support[ed] the view that isolated mistakes by local officials in the counting of ballots or administration of elections are not equal protection violations" (Application at 14)—and they do not, for the reasons stated above—that is not the issue here. Respondents' Equal Protection claim arose from "an arbitrary and uneven exercise of discretion" by a single government actor. *Hunter*, 2011 WL 242344 at *17. The Sixth Circuit properly held that such conduct is actionable. There is not a fair prospect that a majority of this Court would disagree.

D. Petitioners Have Not Shown A Likelihood Of Irreparable Harm.

Petitioners have also failed to show that they are likely to be irreparably harmed if the Court does not stay the District Court's preliminary injunction. The key word is "irreparable." While Petitioner Williams obviously would prefer to avoid having additional votes be counted at this time, as they may harm him in some intangible respect by removing him as the presumptive winner of the election, the final winner will not be known until this litigation has been completely concluded, including all appeals.

Therefore, as long as the disputed ballots can be "uncounted" if an appellate court so orders, no irreparable harm will result from declining to stay the District Court's preliminary injunction. Significantly, the parties learned during the proceedings below that the Board does not separate wrong-precinct ballots from their envelopes. It instead remakes the ballot, leaves

the original miscast ballot with the envelope, and counts the remade ballot. This process allows the ballots at issue in this case to be "uncounted." Therefore, no irreparable harm will occur if the District Court is allowed to proceed with implementing the preliminary injunction. *Cf. Nken v. Holder*, 129 S. Ct. 1749 (2009) (Roberts, C.J.) (holding that petitioner seeking to stay removal order failed to show irreparable harm because "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.").

E. A Stay Will Harm Respondents And Will Not Serve The Public Interest.

Delaying the District Court proceedings will cause substantial harm to the Respondents. It has already been nearly six months since the election was held. The issue of whether a ballot was cast in the wrong precinct because of poll-worker error depends in part upon the recollection of witnesses, including voters, poll-workers, presiding judges and other election officials. As more time passes, witnesses' memories will continue to fade and the ability to collect and present evidence will be hampered. Respondents have an interest in obtaining that evidence without any further delay, so that an accurate factual record can be assembled. Respondents will thus be harmed by a stay of the District Court's injunction and a further delay in its proceedings.

Respondent Hunter will also be substantially harmed by a stay. More than anyone, she has an interest in learning whether she has been elected as a Juvenile Court Judge in Hamilton County. She is a sole practitioner. If she has won the election, then further delays in resolving this dispute will cause her harm in the form of lost wages and lost opportunity to perform her elected duties. If she has not, then additional delays will harm her by depriving her of opportunities to pursue other work.

The public interest also would not be served by a stay. To the contrary, the public interest will best be served by allowing the District Court proceedings to continue and then come

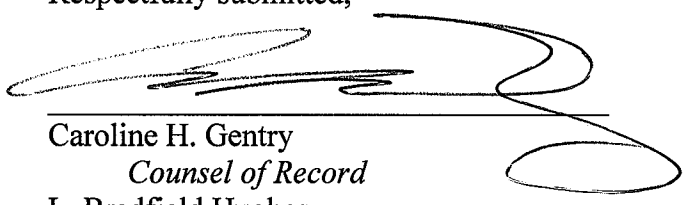
to a conclusion. The election was held nearly six months ago. The District Court issued its injunction nearly five months ago, and it was affirmed by the Sixth Circuit nearly three months ago. Nevertheless, the District Court has been unable to implement its injunction because of Petitioners' unsuccessful appeals. The public has an interest in allowing this litigation to proceed. It is high time to finish counting the votes, declare a winner and let him or her take office and begin serving the public.

In sum, the requested stay would harm Respondents and the public interest. If this were a close case, that harm would tip the balance against granting Petitioners' request. Since this is not a close case, these arguments should not be necessary to the Court's decision. They are asserted here solely in the interest of completeness.

IV. CONCLUSION.

For the foregoing reasons, Petitioners' Application should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 15th, 2011, I served copies of the foregoing Brief of Respondents, by electronic mail and first class U.S. mail, postage prepaid, on the following counsel of record:

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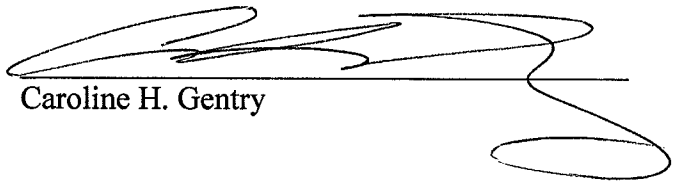

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