Case Nos. 12-4069, 12-4070, 12-4079

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, *et al.*,
Plaintiffs-Appellees

v.

JON HUSTED, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court,
Southern District of Ohio
Case No. 2:12-cv-00562

BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF OHIO AND COMMON CAUSE OHIO IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF JUDGMENT BELOW

Attorneys for Amici Curiae

Daniel P. Tokaji
THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW*
55 W. 12th Avenue
Columbus, OH 43210
310.266.0402
dtokaji@gmail.com
*Institutional affiliation for identification only

Vishal Agraharkar
Wendy R. Weiser
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013
646.292.8376
vishal.agraharkar@nyu.edu

Sonia Gill
Bob Kengle
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
202.662.8600

John A. Freedman
Bassel C. Korkor
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
202.942.5000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Sixth Circuit Rule 26.1, Proposed *amicus curiae* the League of Women Voters of Ohio makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of these cases?

   No.

Pursuant to Fed. R. App. P. 26.1 and Sixth Circuit Rule 26.1, Proposed *amicus curiae* Common Cause Ohio makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of these cases?

   No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTORY PROVISIONS

LAW REVIEW ARTICLES

OTHER AUTHORITIES

INTEREST OF AMICI

The League of Women Voters of Ohio (LWVO) is a nonpartisan political organization, which encourages informed and active participation in government. There are 33 local Leagues around the State and a national league in Washington - the League of Women Voters of the United States. LWVO believes that voting is a fundamental citizen right that must be guaranteed and has testified in opposition to Ohio legislation which would restrict this right. In its testimony, LWVO argued that not counting votes cast in the wrong precinct due to poll worker error deprives legitimate voters of their right to vote. The LWVO strongly believes such votes should be counted for all races and issues for which the voter is eligible to vote.

Common Cause Ohio is the statewide organization of Common Cause, a nonpartisan, nonprofit advocacy organization founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Today, Common Cause is one of the most active, effective, and respected nonprofit organizations working for accountability and reform in America. With nearly 500,000 members and supporters and 36 state organizations, Common Cause fights for honest, open, and accountable government at all levels. Common Cause's primary goal is governmental accountability and responsiveness, which it promotes through lobbying, oversight, education, outreach, and litigation programs. Common Cause

Ohio has almost 15,000 members and affiliates in Ohio—all of whom have a substantial interest in maintain the integrity of the voting system.

INTRODUCTION

Although Ohio's provisional voting laws are complicated, the legal question in this case is straightforward: Does it violate the Fourteenth Amendment to reject provisional votes that are miscast *due to poll-worker error*. It is undisputed that thousands of provisional ballots have been rejected in previous elections. The most serious dimension of this problem, and the one upon which this brief focuses, concerns provisional votes that are cast in the *wrong precinct* due to poll-worker error, even though voters actually appeared at the right polling location on Election Day. This is a problem so common in Ohio that it has a name: the "right church/wrong pew" problem. Ohio Secretary of State Directive 2012-44 at 2 (Sept. 11, 2012), R. 77-1 at PageID # 6028.

Under Ohio law, poll workers are required to direct voters to the correct precinct. If a poll worker does so and the voter refuses to comply, no one denies that the provisional ballot may be rejected. The question is what happens when the poll worker fails to follow the rules, resulting in the provisional vote being cast at the wrong precinct. To reject provisional ballots in these circumstances—as Ohio has done in past elections and will do in this one absent relief—is contrary to common sense, basic fairness, and established constitutional law. Specifically, the

rejection of provisional votes cast in the wrong precinct due to poll-worker error violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. For each individual voter affected by this problem, the abridgement of the vote is not just "severe," *Burdick v. Takushi*, 504 U.S. 428, 435 (1992); the denial of the right to vote is absolute. The constitutional problem with this system, as applied to these voters, is only exacerbated by the fact that provisional ballots are subject to differential treatment depending on the county in which they happen to live. *See Bush v. Gore*, 531 U.S. 98, 107 (2000).

The State of Ohio attempts to minimize the thousands of votes denied for this reason as "garden variety" errors (State of Ohio Br. at 52), but there is nothing ordinary or acceptable about a U.S. citizen being denied her fundamental right to vote due to someone else's mistake. Nor can these be dismissed as isolated incidents. As the district court found, and as we further explain below, the rejection of provisional votes due to poll-worker error is a persistent and recurring problem that the State has failed to correct over a series of elections. The litigation culminating in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011), is just the latest example. Again, the district court made specific findings on this point. Plenary Opinion & Order, R. 67 at PageID # 5836–37, 5855–60. Appellants do not and cannot seriously argue that these findings are clearly erroneous, especially since most of the evidence was uncontested.

The remainder of this brief proceeds in two parts. First, it addresses the district court's findings and underlying evidence showing that Ohio's provisional-voting system results in the denial of provisional ballots cast in the wrong precinct due to poll-worker error, in violation of the Fourteenth Amendment. This brief specifically focuses on the very real injury to the voting rights of thousands of Ohio voters, whose votes have been rejected due to someone else's mistake. Second, the brief discusses the narrowly-crafted remedy that the district court adopted for this constitutional violation. The district court's order is tailored to fix the constitutional problem, while reducing the risk of extensive post-election disputes of the kind that culminated in *Hunter*. By providing clear rules well in advance of Election Day, the district court's order both eliminates the constitutional violation and eliminates the risk of future election results being thrown into protracted doubt.

ARGUMENT

I. Ohio's Rejection of Wrong-Precinct Provisional Ballots Cast Because of Poll-Worker Error Violates the Fourteenth Amendment.

The district court correctly applied the established test for evaluating constitutional challenges to state rules that burden the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983); *Burdick*, 504 U.S. at 433-34. Under this test, a court must "first consider the character and magnitude of the asserted injury to [the right to vote] that the plaintiff seeks to vindicate," and then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789, *Burdick*, 504 U.S. at 434. This test applies to challenges under the Equal Protection Clause, like the one at issue in this case. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008) (lead opinion by Justice Stevens), *id.* at 204 (Scalia, J., concurring), *id.* at 210-11 (Souter, J., dissenting) (all applying *Anderson-Burdick* test).

As the lead opinion in *Crawford* noted, there is no "'litmus test' that would neatly separate valid from invalid restrictions." *Id.* at 190. Instead, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* Once the burden on the voter is identified, the question is whether the state has demonstrated "a corresponding interest sufficiently weighty to justify the limitation." *Id.* If the burden on the voter is "severe," then strict

scrutiny applies. *Id.*; *Burdick*, 504 U.S. at 434; *Norman v. Reed*, 502 U.S. 279, 289 (1992). On the other hand, "reasonable, nondiscriminatory" restrictions may generally be justified by "important regulatory interests." *Burdick*, 504 U.S. at 434. Under the Due Process Clause, the operative question is whether the state's voting system is "fundamentally unfair." *Hunter*, 635 F.3d at 243 (quoting *Warff v. Bd. of Elections of Green*, 619 F.3d 553, 559-60 (6th Cir. 2010)).[1]

Under Ohio law, as discussed below, county boards of elections are directed to reject provisional ballots cast in the wrong precinct *even when they are the result of poll-worker error*. This restriction disenfranchises properly registered and qualified voters whose only mistake was to follow the instructions of an election official. The district court properly found that, with respect to the class of voters who arrive at their correct polling place but are misdirected due to poll-worker error, the rule "imposes a severe burden on their right to vote—i.e. summary, arbitrary, and irreversible rejection of their entire ballot without notice." (Plenary Opinion & Order, R. 67 at PageID # 5864–65.) Appellants are wrong to characterize this burden as either "reasonable" or "nondiscriminatory." The burden on the right to vote when a ballot is rejected due to someone else's mistake

[1] This brief's discussion of the constitutional standards is brief, since we anticipate that these standards will be addressed more comprehensively in Plaintiffs-Appellees' brief.

cannot fairly be characterized as incidental, slight, or indirect. To the contrary, the burden on the individual voter's constitutional right is absolute.

A. There is Abundant Evidence of Voters Having Their Provisional Ballots Rejected Due to Poll-Worker Error.

Ohio relies heavily on provisional ballots in comparison with other states, with over 200,000 cast in the last presidential election.[2] In that election, over 10,000 provisional ballots were rejected on the ground that the voter, though registered, received and cast a wrong-precinct ballot.[3] Ohio consistently rejects among the highest number of wrong-precinct provisional ballots of any state.[4] Most of Ohio's 88 counties use "multi-precinct" polling locations, and 78.9 percent

---

[2] U.S. Election Assistance Commission, 2008 Election Administration & Voting Survey at Tbl. 35, *available at* http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf ("2008 EAC Survey").

[3] Ohio boards of elections rejected 10,187 wrong-precinct provisional ballots in 2008, 2008 EAC Survey, Tbl. 36A.

[4] Ohio rejected more wrong-precinct ballots than any other state in both 2006 (10,610) and 2010 (5,248). *See* 2006 EAC Survey at Tbl. 29b, *available at http://www.eac.gov/assets/1/AssetManager/2006%20EAVS%20Report%20(All%20Chapters).pdf* ; 2010 EAC Survey at Tbl. 35A, available at http://www.eac.gov/assets/1/Documents/990-281_EAC_EAVS_508_revised.pdf ("2010 EAC Survey"). Only two states (New York and Arizona) rejected more wrong-precinct ballots in 2008. 2008 EAC Survey, Tbl. 36A. In 2011, Ohio rejected 3,380 wrong-precinct provisional ballots. *See* Mot. For Prelim. Inj., R. 4 at PageID # 71. Voter turnout, provisional ballots, and the number of rejected provisional ballots all tend to be higher in presidential election years than in other federal election years and, in turn, higher in federal election years than odd-numbered years.

of all precincts in Ohio are located in multi-precinct polling locations. DeRobertis-Theye Decl., R. 45 at ¶6.

The evidence amply supports the district court's finding that the overwhelming majority of wrong-precinct provisional ballots were miscast because of poll-worker error.[5] Most wrong-precinct provisional ballots are the result of poll-worker error *as a matter of law*, because Ohio law "delegates to poll workers the duty to ensure that voters, provisional and otherwise, are given the correct ballot and vote in the correct precinct." Plenary Opinion and Order, R. 67, PageID # 5838 (citing *Hunter*, 635 F.3d at 223). As the Ohio Supreme Court has unambiguously stated, "it is a poll worker's duty to ensure that the voter is directed to the correct precinct." *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 789 (Ohio 2011).

The district court found that the problem of poll-worker error is exacerbated by Ohio's extensive use of multi-precinct polling locations, where poll workers are routinely tasked with determining a provisional voter's correct precinct before directing the voter to the correct precinct or offering the voter the appropriate ballot. *See* Plenary Opinion and Order, R. 67 at PageID # 5836–37. It is not

[5] Plenary Opinion and Order, R. 67, PageID # 5859 ("No party has identified a single example, from the past four years' elections, of a wrong-precinct provisional ballot being cast because the voter refused to vote in the correct precinct. Every documented instance in the record of a correct location / wrong-precinct ballot and being disqualified was the result of the poll-worker failing in his or her statutory duty . . .").

uncommon for voters to be directed to the wrong precinct at multi-precinct polling locations because, among other things:

> [M]ulti-precinct voting creates great pressures on poll workers, who are expected to learn a complicated provisional voting process and navigate an obfuscatory addressbook after a mere three-hour training course. Poll workers in these circumstances are more likely to make mistakes in processing provisional voters than Board staff working at the Board office, where a staff person need only enter a voter's address into a computer to discern which ballot to provide.

Hunter v. Hamilton Cnty. Bd. of Elections, 2012 WL 404786, at *9 (S.D. Ohio Feb. 8, 2012).

Appellants do not seriously dispute the evidence showing serious problems with multi-precinct locations, and for good reasons. The record is replete with evidence of extensive poll-worker confusion and error caused by poll workers having to contend with and direct voters from multiple precincts. In many instances, poll workers find precinct guides ambiguous or confusing, *see* Miller Decl., R. 12 at PageID # 1514;[6] feel overwhelmed by the added work of looking up precincts, *see id.* at 1516; are given inadequate materials and assistance from their county boards of election in resolving precinct issues, *see id.* at 1516–17; fail to

[6] For example, some poll-workers in various counties did not understand that voters living on the same street might belong to different precincts depending on whether their street address was an odd or even number. *See* Miller Reply Decl, R. 41 at ¶ 22; R. 41-13 at PageID # 4312; R. 12 at ¶ 41; R. 12-33.)

understand that they must direct voters to the correct precinct, *see id.* at 1501–02;[7] and report inadequate signage informing voters of precinct locations *within* a polling location, *see id.* at 1517. The records of Adams, Allen, Butler, Clark, Clermont, Clinton, Crawford, Cuyahoga, Delaware, Erie, Franklin, Hamilton, Hancock, Henry, Hocking, Huron, Jackson, Jefferson, Lake, Medina, Mercer, Montgomery, Portage, Ross, Scioto, Stark, Summit, Trumbull, Warren, and Washington counties similarly recount how poll-worker error resulted in disqualification of otherwise eligible voters. *See* Miller Decl., R. 12 at PageID # 1489–1508; Miller Reply Decl., R. 41 at PageID # 4231-35; Miller Second Supp. Decl. R. 53 at PageID # 5558.

The district courts in this case and in *Hunter* are not the first to note the serious problems engendered by Ohio's extensive use of provisional ballots and multi-precinct polling places. Election officials themselves have repeatedly expressed concern and frustration with the rule against counting all wrong-precinct

[7] When a member of the Ross County Board of Elections asked how wrong-precinct ballots had been cast in the right location, another board member explained that voters "went to the wrong table [in the correct polling location] and the poll worker is not supposed to vote them unless they're in their book and if they're not in their book they're supposed to call us to see what precinct to send them to. They didn't. They just voted them a provisional ballot." Miller Decl., R. 12 at Page ID 1501–02. *See also Hunter v. Hamilton Cnty. Bd. Of Elections*, 850 F.Supp.2d 795, 820–21 (S.D. Ohio 2012) (noting that the testimony of poll workers revealed that many failed to warn voters that a wrong-precinct ballot would not be counted because they either did not know voters were casting such ballots or because they did know such ballots are not counted).

provisional ballots. For example, the Hamilton County Board of Elections stated its strong preference for disregarding the policy because it unfairly disenfranchises voters, but ultimately officials acknowledged little recourse. Miller Decl., R. 12 at Page ID # 1496–97 (upon learning that a voter was deprived of his vote after being handed the wrong ballot, one member stated that he "ha[d] a serious problem with that," and asked, "How can we justify not counting this vote under these circumstances?"). Similarly, at a November 2010 meeting, a Franklin County Board of Elections staff member testified that, at a multi-precinct voting location, there was "a single table and a single set of poll workers assigned to the task of provisional ballots for all precincts in a location, [and] it would be pretty difficult in this county to conceive of a situation where it would be voter error." *Id*. at 1497, Ex. O.

While there is ample evidence that wrong-precinct provisional ballots have been rejected due to poll-worker error, there is no evidence that Ohio has solved or mitigated this problem. Though Appellants mostly ignore this issue, county officials have identified inadequate training and preparedness as key contributing factors to poll-worker error and wrong-precinct ballots. In a November 2011 Cuyahoga County Board of Elections meeting, Director Platten recognized that wrong-precinct ballots was an issue that could be traced to staffing and advised that the County needed to improve poll-worker training and provide additional

safety nets to eliminate the incidence of wrong-precinct ballots. Miller Decl. R. 12 at PageID # 1492. (At that same meeting, the Board voted to throw out 499 ballots cast by lawfully registered voters who voted in the correct polling locations but were given the wrong precinct ballot. *Id*.)

The evidence of record in this case thus amply documents that Ohio has a serious and continuing problem with wrong-precinct provisional ballots being cast due to poll-worker error. These problems cannot be dismissed, as Appellants would have it, as isolated incidents. To the contrary, they are signs of a systemic problem that has affected thousands of voters in each election cycle, and that is certain to occur again this year were it not for the relief issued by the district court.

B. The Rejection of Wrong-Precinct Provisional Ballots Cast Because of Poll-Worker Error Imposes a Severe Burden on the Voter, Which the State Cannot Justify.

Under the now-settled legal test for assessing burdens on voting under the Equal Protection Clause, Ohio's system for counting provisional ballots cannot be sustained. As noted above, "severe" burdens must be narrowly tailored to a compelling interest, while lesser burdens must be justified by "important" state interests. *Burdick*, 504 U.S. at 434. As set forth above, the burdens documented in the record are severe. But Ohio's rejection of provisional ballots miscast due to poll-worker error cannot stand under any level of scrutiny, because its policy is not justified by any important or even legitimate state interest. For the same reason,

the rejection of provisional ballots miscast due to poll worker error is fundamentally unfair, and therefore in violation of the Due Process Clause. *See Hunter*, 635 F.3d at 243.

There is no good reason—let alone a compelling one—for rejecting wrong-precinct provisional ballots cast because of poll-worker error. Contrary to Appellants' argument, the court order does not undermine the precinct-based voting system in Ohio. State of Ohio Br. at 44, 49. That is simply not what this case is about. The question, instead, is whether Ohio may continue to reject provisional ballots miscast due to poll-worker error. The suggestion that this will somehow result in voters intentionally going to the wrong precinct, *id.* at 47, is entirely a figment of the State's imagination. They cite no evidence whatsoever of this happening and, from the perspective of the individual voter, such a move would be foolhardy. As set forth in Part II-B-1 below, a voter who casts a wrong precinct provisional ballot *will not have his or her vote counted* if the poll worker follows required law and procedures. Nor will there be any adverse or unfair effect on down-ballot races. *See* State Br. at 48. Under the Secretary of State's directive, provisional ballots cast in the wrong precinct will only be counted for those contests in which the voter was eligible to participate. Ohio Secretary of State Directive 2012-44, PageID # 6028. There will, accordingly, be no adverse effect for other down-ballot contests, again contrary to the State's argument. The

State's final argument, that the district court's order will somehow compromise its interest in "making ballots less confusing," State of Ohio Br. at 48, makes no sense at all. As is obvious from both the court order and the Secretary of State's directive implementing it, no change to Ohio's ballots are required.

Accordingly, Ohio's rejection of wrong-precinct provisional ballots violates both equal protection and due process, as applied to voters whose ballots were miscast due to poll worker error.

II. The District Court's Remedy Is Carefully Tailored to Correct the Constitutional Problems It Identified While Minimizing the Risk of Future Post-Election Litigation.

The district court's preliminary injunction provides a common sense and easily-administered remedy for a serious constitutional problem. No voter should be disenfranchised because of an election official's mistake, and a state cannot maintain a policy of systematically disenfranchising voters because of common, poll-worker mistakes.[8] The District Court acted well within its broad discretion prohibiting counties from throwing out provisional ballots miscast due to poll-worker error. Such provisional ballots will be counted only where poll workers

[8] To be clear, *amici curiae* do not claim that voters have a right to a mistake-free system of elections. But here, the poll workers' mistakes are systemic, well known, in contravention of a state-created duty, and capable of—but prevented under state law from—being rectified by boards of elections. Further, a rule that leads to the rejection of voters' provisional ballots leave voters with no further remedy. *Cf. Crawford*, 553 U.S. at 197–98 (noting that the availability of the right to cast a provisional ballot can help to mitigate other burdens on the right to vote).

failed to follow specified procedures—including, most importantly, verification that they have directed voters to the proper precinct. This remedy provides a clear and consistent standard that will not only ensure uniform treatment of voters across the state, but will also prevent protracted post-election litigation over discarded provisional ballots.

A. District Courts Have Broad Discretion To Fashion Appropriate Injunctive Relief.

Federal courts enjoy broad discretion to fashion equitable remedies. *See Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 460 (6th Cir. 2004); *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable"); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) ("the essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case"). In wielding that discretion, federal courts have the duty to balance the rights of all parties, as well as of the public. *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005).

A district court's grant of a preliminary injunction is therefore reviewed for abuse of discretion. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). A district court abuses its discretion when it "relies upon clearly erroneous

findings of fact, improperly applies the governing law, or uses an erroneous legal standard." *Id.* (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

B. The Injunctive Relief Ordered by the District Court Addresses the Constitutional Violation While Providing Clarity, Limiting Discretion, and Decreasing the Risk of Protracted Post-Election Litigation.

1. The injunctive relief ordered by the district court is carefully crafted to address the constitutional violation it found.

The district court acted well within its discretion in requiring county boards of elections to count provisional ballots cast in the wrong precinct, where the poll worker who processed the ballots failed to comply with required procedures, including verification that the voter was directed to the correct precinct. In the 2011 general election—an odd-year election that draws lower turnout—5,772 voters in Ohio cast wrong-precinct provisional ballots.[9] The overwhelming majority of these ballots were cast in the wrong precinct as the result of poll-worker error. *See supra* Part I-A.

It is true that there is one circumstance under which an individual may cast a provisional ballot in the wrong precinct despite the poll worker's compliance with Ohio law—namely, where the poll worker directs the individual to his or her

[9]Absentee and Provisional Ballot Information, Secretary of State's Office. http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/absenteeandprovisional.aspx.

correct polling location, informs him or her that a ballot cast in the wrong precinct will not be counted, and the individual nevertheless *chooses* to cast an invalid ballot rather than travel to the correct precinct or the office of the board of elections. *See* Ohio Rev. Code § 3505.189(C)(1)–(2). For obvious reasons, this circumstance is quite rare.[10] Nothing in the injunction prevents county boards of elections from rejecting ballots where poll workers discharged their duties as required by law. The district court thus crafted an injunction that is tailored to fix the problem. It sweeps no more broadly than necessary, striking the appropriate balance between preventing disenfranchisement due to poll-worker error and allowing disenfranchisement of voters who fail to follow directions.

2. The district court's clear rule for which wrong-precinct provisional ballots will count will avoid future constitutional violations, drawn-out post-election disputes, and the perception of bias in the election process.

In addition to being tailored to address the harm, the preliminary injunction in this case will also prevent problems—constitutional and practical— from arising in the future. By instituting a clear rule for which provisional ballots will count

[10] Previous litigation over wrong-precinct provisional ballots cast in Hunter County, Ohio, in 2011 suggests that this is a rare occurrence. Despite finding extensive evidence of poll-worker error, the Southern District of Ohio concluded that, "Voters generally did what poll workers told them to do. There was no evidence that any poll worker ever instructed a voter to go to a different precinct table within a location to cast a ballot and the voter refused." *Hunter v. Hamilton Cnty. Bd. Of Elections*, 850 F.Supp.2d 795, 822 (S.D.Ohio 2012).

and which will not, the district court's order eliminates the risk of protracted post-election litigation of the type that Ohio has recently witnessed.

As this Court and others have recognized, the lack of clear, uniform standards for the conduct of elections may lead to equal-protection violations. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (plaintiffs stated valid equal-protection and substantive-due-process claims where they alleged that Ohio's voting system was plagued with poll-worker confusion, inadequate training, inadequate allocation of voting machines, and an election system that was "devoid of standards and procedures"); *see also Bush v. Gore*, 531 U.S. 98, 103 (2000) (concluding that "the use of standardless manual recounts" violates the Equal Protection clause). In the absence of clear standards prescribed well in advance of an election—such as the one prescribed by the order below—local election administrators are more likely to apply inconsistent rules in processing ballots, leading to disparate treatment of voters across the state. Where important details about the implementation of election laws are left to local election officials, they may exercise that discretion in ways that benefit their preferred candidates, or that lead the public to perceive bias in the election process.[11]

[11] *See* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1248 (2005).

The need for clear rules set in advance of an election is especially acute in Ohio when it comes to provisional ballots. Past Ohio elections have consistently shown high rates and numbers of provisional ballots cast, as well as thousands of ballots cast by registered voters who arrived at the correct location and were provided a wrong-precinct ballot. In any close election, provisional ballots have been and will continue to be a likely source of the post-election fight over who really won. The injunction provides clear rules for which provisional ballots are attributable to poll-worker error, and should therefore be counted.[12] These rules will prevent such a fight. By contrast, an injunction merely stating that provisional ballots should count if cast in the wrong precinct "due to poll worker error" would open the door to post-election litigation. In a close election, this litigation would

[12] The Secretary's directive implementing the injunction demonstrates that the injunction provides a clear way for boards of elections to determine whether to count a wrong-precinct ballot. The Secretary promulgated a form for poll workers to complete with respect to each wrong-precinct provisional ballot, on which they must affirm that they directed the voter to the correct precinct, informed the voter that a wrong-precinct ballot would be rejected, and that the voter insisted on voting a wrong-precinct ballot. Form 12-D, R. 77-2 at PageID # 6030. The directive instructs boards of elections that where a completed Form 12-D is not attached to a wrong-precinct ballot, it must be counted for up-ballot races. But if it *is* attached to a wrong-precinct provisional ballot, then the board must verify that the precinct noted on the form is actually the voter's correct precinct, and if so, reject the ballot. SOS Directive 2012-44, R.77-1 at PageID # 6028. Thus, under the Secretary's directives implementing the injunction, boards of elections are largely tasked with determining whether a one-page form has been properly completed and appended to a provisional ballot, instead of engaging in an elaborate investigation for poll-worker error. *Id.* Notably, the Secretary does not assert on appeal that this directive will be difficult for boards of elections or poll workers to implement. *See generally* Secretary Br.

involve convoluted questions of fact for both election boards and courts. As a practical matter, poll workers may be difficult to track down after the fact. There are likely to be factual disputes between poll workers and voters over who really erred. This inquiry, moreover, leaves wide latitude for discretion on the part of boards of elections in determining whether something constitutes a poll-worker error, whereas the injunction ensures uniform treatment of voters throughout the state.

These harmful effects are not merely speculative. They were evident in litigation surrounding wrong-precinct provisional ballots cast in a 2010 judicial election in Hunter County, Ohio. There,

> "the testimony [of voters and poll-workers] revealed a chaotic process in which, despite their training, some poll workers did not know that a ballot cast in the wrong precinct would not be counted, some poll workers understood that voters had to cast their ballot in the correct precinct but failed to confirm that the voter was in the right precinct before giving the voter a provisional ballot, and some poll workers did not direct voters to the correct precinct because they made mistakes when using the complicated precinct voting location guide."

Hunter v. Hamilton Cnty. Bd. Of Elections, 850 F.Supp.2d 795, 811-12 (S.D.Ohio 2012) ("*Hunter II*").

In advance of the 2010 election, the Ohio Secretary of State had issued directives to county boards of elections to comply with a consent decree entered earlier that year in *Northeast Ohio Coal. for the Homeless v. Brunner*, No. C2-06-

896 (S.D.Ohio 2008) ("*NEOCH*"). The directives required boards of elections to count provisional ballots cast in the correct location but wrong precinct for reasons attributable to poll-worker error, where the voters provided the last four digits of their social security number.[13] The directives provided that "poll worker error will not be presumed and must be demonstrated through evidence," noted a few examples of evidence of poll-worker error, and directed the board to carry out investigations by questioning poll workers in writing or at board meetings when there is evidence of correct-location, wrong-precinct voting. *See Hunter II*, 850 F.Supp.2d at 811–12.

Despite these directives, poll workers in Hunter County failed to separate out wrong-precinct ballots on which voters used their social security numbers as identification, and failed to question poll workers regarding whether such voters had been directed to the correct precinct. *Id.* at 824. Instead, the Hunter County board of elections decided to count 27 wrong-precinct ballots cast at the board of elections' office, while not counting 849 wrong-precinct provisional ballots cast at multiple-precinct polling locations. This led to another round of litigation and a federal court injunction ordering extensive investigation—including the issuance

[13] *See* Ohio Secretary of State Directive 2010-73 (Issued Pursuant to Court Order), Nov. 1, 2010, http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-73.pdf; Ohio Secretary of State Directive 2010-74, Nov. 1, 2010, http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-74.pdf

of subpoenas to 2,200 poll-workers—into whether those 849 ballots were also cast in the wrong precinct due to poll-worker error. *See Painter v. Brunner*, 941 N.E.2d 782, 789–92 (Ohio 2011). However, the ensuing investigation proceeded at a slower-than-anticipated pace when members of the board deadlocked repeatedly on procedural issues. At least one member of the board suggested, with the impending change in state administrations looming in the background, that partisan concerns motivated the desire to expedite the decisionmaking, while the Secretary suggested in response that similar concerns were responsible for the investigation's delay. *See* Ohio Secretary of State Directive 2010-87 at 2, Dec. 17, 2010.[14]

This episode highlights the need for clear rules set well in advance of the election, as provided by the preliminary injunction in this case. Vague rules leave

[14] The Secretary noted in the directive that, At the Board's December 9, 2010 meeting, Board Chair Alex Triantafilou stated on the record that there was no reason to expedite the Board's tie vote submission:

> "The law says we have 14 days. I think it would be partisan for us to decide to move this along because the Secretary of State might be of one party or another." While Board Chair Triantafilou believes that expediting the submission of the tie votes to the Secretary of State would amount to partisanship, so does the metaphorical dragging of feet to resolve this matter. Using process to affect outcome based on matters external to the election involved (change of state administrations) shakes the confidence of voters in a free, fair, open and honest election process.

See Ohio Secretary of State Directive 2010-87, Dec. 17, 2010, http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-87.pdf.

too much room for partisan maneuvering in post-election disputes.[15] They also make post-election disputes more likely to be protracted through court intervention. In the case of provisional ballots, this would mean an ugly fight over which provisional ballots were miscast due to poll-worker error and which were not—a virtual replay of the Florida 2000 post-election fight, with provisional ballots in place of punch-card ballots. As this Court has recognized, "federal courts should not be asked to count and validate ballots and enter into the details of the administration of the election," *League of Women Voters of Ohio*, 548 F.3d at 478 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978)) (alteration and internal quotation marks omitted). At the same time,"[c]onstitutional concerns regarding the review of provisional ballots by local boards of elections are especially great." *Hunter*, 635 F.3d at 235. The best time to address the constitutional concerns surrounding provisional ballots is now, before a post-election fight has occurred, rather than leaving courts to clean up the mess afterwards.

[15] *See, e.g.*, Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 977–83 (2005) (providing examples of partisan officials making discretionary decisions that had the potential to affect the outcome of elections); Tokaji, *supra* note 4 at 1248.

3. The district court's clear counting rule serve an especially important function in a presidential election year, because the Electoral College schedule requires recounts to be completed on a short time frame.

The possibility of drawn-out post-election disputes poses special concerns in a *presidential* election year because federal law requires states to resolve post-election disputes within thirty-five days of Election Day in order to be assured that its chosen slate of electors will be recognized. *See* 3 U.S.C. § 5; *see also* Daniel P. Tokaji, *An Unsafe Harbor: Recounts, Contests, and the Electoral College*, 101 Mich. L. Rev. First Impressions, 84, 84–85 (2008). In the 2012 presidential election, that date falls on December 11, 2012. Each state is then required to cast its electoral votes in the state capital on December 17, 2012, and the Electoral College totals are then counted in Congress on January 6, 2013.

The federally required schedule for the Electoral College means that a protracted post-election dispute over provisional ballots, of the type that Hamilton County recently saw, would be catastrophic if it occurred in a presidential race instead of a local judicial race. This is so not merely because of the exponentially greater number of provisional ballots in dispute, but also because of the federal-law requirement that states resolve presidential elections within a set time-frame, if the voters' choices are to be honored.

The preliminary injunction the district court issued eliminates the risk of such a nightmare scenario occurring in Ohio's 2012 presidential election. It

provides clear rules for which provisional ballots will count and which will not, rather than requiring an after-the-fact forensic analysis of whether the ballot was really cast due to poll-worker error—the very process that proved so nettlesome in the Hamilton County judicial race.

In sum, the relief ordered by the district court is tailored to prevent voters from being disenfranchised due to poll-worker error, while also preventing another dispute over provisional ballots, on a much larger scale than in *Hunter*. The injunction provides clear rules in advance of the election, is easily-administered by county boards of elections, and will allow Ohio to avoid protracted post-election litigation.

CONCLUSION

For the foregoing reasons, Amici League of Women Voters of Ohio and Common Cause Ohio respectfully submit that this Court should affirm the district court's order with respect to provisional ballots cast in the wrong precinct due to poll-worker error.

Respectfully Submitted,

/s/ Bassel C. Korkor
Bassel C. Korkor
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)
Bassel.Korkor@aporter.com

Counsel for Amici Curiae League of Women Voters of Ohio and Common Cause Ohio

Dated: September 21, 2012

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* in support of Appellees complies with the type-volume limitation specified in the Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is proportionately spaced, has a typeface of 14 points or more and contains [] words, as determined by the word-count function of Microsoft Word, which was used to prepare this brief.

/s/ Bassel C. Korkor
Bassel C. Korkor
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)
Bassel.Korkor@aporter.com

Counsel for Amici Curiae League of Women Voters of Ohio and Common Cause Ohio

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2012, I electronically filed the foregoing *Brief of Amici Curiae League of Women Voters of Ohio and Common Cause Ohio* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit via the Court's appellate Case Management/Electronic Case Files (CM/ECF) system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time.

/s/ Bassel C. Korkor
Bassel C. Korkor
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)
Bassel.Korkor@aporter.com

Counsel for Amici Curiae League of Women Voters of Ohio and Common Cause Ohio

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS