

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

SERVICE EMPLOYEES	:	Case No. 2:12-CV-562
INTERNATIONAL UNION, LOCAL 1, <i>et</i>	:	
<i>al.</i> ,	:	Judge Algenon L. Marbley
	:	
Plaintiffs	:	Magistrate Judge Terence P. Kemp
	:	
vs.	:	PLAINTIFFS' RENEWED MOTION
	:	FOR PRELIMINARY INJUNCTION
JON HUSTED, <i>et al.</i> ,	:	WITH RESPECT TO WRONG-
	:	LOCATION PROVISIONAL
Defendants.	:	BALLOTS; MEMORANDUM OF
	:	LAW IN SUPPORT

**RENEWED MOTION FOR PRELIMINARY INJUNCTION WITH RESPECT TO
WRONG-LOCATION PROVISIONAL BALLOTS**

In light of the Sixth Circuit’s October 11, 2012, decision affirming the wrong-precinct provisional ballot preliminary injunction in this case, Plaintiffs Service Employees International Union, Local 1 (“SEIU Local 1”), *et al.*, hereby renew their motion for a preliminary injunction that extends to *all* wrong-precinct provisional ballots caused by poll-worker error cast in the correct county, including those given to voters in the wrong polling location. This extension of the existing injunction is necessary to prevent the unconstitutional denial of the right to vote to thousands of Ohio voters in the upcoming November 2012 general election because of poll-worker error.

In affirming this Court’s injunction prohibiting Ohio from rejecting wrong-precinct ballots cast in the correct polling location that are caused by poll-worker error, the Sixth Circuit expressly did not reach the constitutional issues regarding Ohio’s automatic disqualification of wrong-location/wrong-precinct provisional ballots. Rather, the Court provided:

Our ruling does not preclude the SEIU appellees or others from seeking broader relief for poll-worker induced wrong-place/wrong-precinct provisional ballots upon a showing that Ohio’s law unconstitutionally burdens those voters’ rights. As those issues are not before us, we express no view on their merits.

NEOCH v. Husted, ___ F.3d ___, 2012 WL 4829033 *7 n.6 (6th Cir. Oct. 11, 2012).¹

The uncontroverted evidence in the existing preliminary injunction record establishes a likelihood of success on Plaintiffs’ equal protection and due process claims with respect to these additional ballots. This evidence demonstrates that poll-worker error also systemically results in wrong-precinct ballots being provided to voters in the wrong polling location, for many of the exact same reasons that result in wrong-precinct/correct-location ballots (including poll workers’

¹ Although the injunction was issued in *SEIU Local 1 v. Husted*, and affirmed in the appeal in that case, Sixth Circuit Case No. 12-4069, the appeal was consolidated for resolution with the related case *NEOCH v. Husted*, Sixth Circuit Case No. 12- 3916, and the Sixth Circuit’s opinion was issued under that lead case name. Plaintiffs therefore refer to the consolidated appellate opinion resolving both appeals as *NEOCH v. Husted*.

inability to correctly determine voter precincts). The record evidence also demonstrates that significant numbers of voters statewide are affirmatively misdirected by Ohio poll workers to the wrong polling locations, where they are then, in further error, given wrong-precinct ballots. This evidence establishes an unconstitutional burden on the right to vote. Balanced against this showing of a burden, there is no record evidence of any legitimate state interest actually furthered by Ohio's rule that these ballots must be disqualified after the election, and therefore, under *Burdick v. Takushi*, 504 U.S. 428 (1992), *Crawford v. Marion County Bd. of Elections*, 553 U.S. 181 (2008), *NEOCH*, 2012 WL 4829033, and *Obama for America v. Husted*, ___ F.3d ___, 2012 WL 4753397 (6th Cir. Oct. 5, 2012), Ohio's disqualification of these votes runs afoul of equal protection.

Because poll-worker error induces voters who are in the wrong polling location to cast invalid ballots rather than travel to the right polling location, the disqualification of these ballots also violates due process, for the same reasons given by this Court and the Sixth Circuit in support of the existing injunction, Doc. 67 at 50-51; *NEOCH*, 2012 WL 4829033 *13, and in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 243-44 (6th Cir. 2011), where the Sixth Circuit's due process analysis did not distinguish between "right location" and "wrong location" ballots.

The remaining preliminary injunction factors also weigh heavily in favor of extending the existing injunction to wrong-location provisional ballots: thousands of voters will undeniably be severely and irreparably harmed in the upcoming election by the rejection of their ballots, while counting these ballots will cause no harm to others and serves the public interest.

As described in the accompanying Proposed Order, Plaintiffs seek an injunction ordering the Secretary of State to instruct county boards of election *not* to reject any wrong-location provisional ballots cast by lawfully registered voters in the correct county, under the same standards set forth in this Court's existing August 27, 2012 injunction for right-location/wrong-precinct ballots. A memorandum in support and proposed order are attached.

Dated: October 17, 2012

Respectfully submitted

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ RENEWED MOTION FOR
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INTRODUCTION

When voters arrive at any polling location in Ohio, poll workers must determine whether the voter is in the correct location and which precinct ballot to provide the voter. The existing factual record compiled from Secretary of State and county board of elections records from every recent election establishes that the very same types of poll-worker error that result in wrong-precinct ballots being given to voters who appear at the correct location – that poll workers systemically fail to properly determine voters’ precincts and misunderstand the purpose of provisional ballots – also result in voters being mistakenly instructed to vote thousands of wrong-precinct ballots in the wrong voting location.² This record evidence also establishes that many voters who arrive at the wrong polling location do so because they are directed there, in error, by poll workers. And the record evidence demonstrates that no legitimate interest is served by county boards disqualifying rather than counting these votes after the election.

In light of the record, applying *Burdick v. Takushi*, 504 U.S. 428 (1992), *Crawford v. Marion County Bd. of Elections*, 553 U.S. 181 (2008), *NEOCH v. Husted*, 2012 WL 4829033 *9-13 (6th Cir. Oct. 11, 2012), and *Obama for America v. Husted*, ___ F.3d ___, 2012 WL 4753397 *4-7 (6th Cir. Oct. 5, 2012), this Court should conclude (just as it did with respect to correct-location provisional ballots) that Ohio’s disqualification of wrong-location ballots likely violates equal protection. In addition, in light of this evidence, the disqualification of these ballots induced by poll-worker error violates due process for the reasons recognized by this Court and the Sixth Circuit. Doc. 67 at 50-51; *NEOCH*, 2012 WL 4829033 *13; *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 243-44 (6th Cir. 2011). In affirming this Court’s wrong-precinct injunction, the Sixth Circuit expressly left open the issue of wrong-location provisional ballots cast in the voter’s county of residence, and this Court should extend its injunction to prevent the unconstitutional disqualification of those votes.

² Plaintiffs incorporate and rely on the existing factual record submitted with respect to Plaintiffs’ previous motion for preliminary injunction. Rather than burden the Court by re-filing this evidence, Plaintiffs refer to the docket numbers of evidence already in the record.

BACKGROUND

A. Procedural Background

Plaintiffs filed this lawsuit on June 22, 2012 challenging Ohio's provisional ballot counting law and immediately moved for a preliminary injunction. Doc. 1; Doc. 4 at 4-5; Doc. 56-1 at 2-3; Doc. 63. On August 27, 2012, this Court granted the preliminary injunction and, with respect to wrong-precinct provisional ballots, ordered the Secretary to direct county boards not to "reject any provisional ballots cast by lawfully-registered voters in the November 2012 general election" on the ground that "[t]he voter cast his or her provisional ballot in the wrong precinct" unless the poll worker properly performed his duties. Doc. 67 at 56-57.

On September 11, 2012, the Secretary issued a directive implementing the injunction that provides uniform instructions and mandates use of a form by which poll workers can record whether they properly instructed a voter regarding his/her precinct, and whether the voter insisted on voting an invalid ballot. Doc. 77-1 (Directive 2012-44). The Directive applies only to wrong-precinct ballots cast in correct multi-precinct polling locations.

The State of Ohio appealed this portion of the injunction. On October 11, 2012, the Sixth Circuit issued a consolidated decision in this case and *NEOCH v. Husted*, affirming the preliminary injunction with respect to disqualification of wrong-precinct ballots cast in voters' correct polling locations. 2012 WL 4829033 *9-15. The Sixth Circuit held that Plaintiffs had demonstrated likely success on their equal protection and due process claims, that the State failed to show that legitimate interests supported the strict disqualification rule, and that the equities weighed in favor of an injunction. *Id.*

Although the Sixth Circuit recognized that Plaintiffs had not confined their requested relief to right-location/wrong-precinct provisional ballots, it read this Court's "wrong-precinct remedy to encompass only those [right-place/wrong-precinct] votes." *Id.* at *7. But in doing so, it expressly provided that its ruling "did not preclude the SEIU appellees or others from seeking broader relief for poll-worker-induced wrong-place/wrong-precinct provisional ballots upon a showing that Ohio's law unconstitutionally burdens those voters' rights." *Id.* at *7 n.6.

B. Ohio’s Provisional Ballot System

The relevant facts regarding Ohio’s provisional voting system largely overlap with those described in detail in this Court’s August 27, 2012 Plenary Opinion and Order. Doc. 67 at 3-9.

Ohio divides registered voters into precincts, and assigns precincts to increasingly consolidated polling locations. *Id.* at 6 & n.10; Doc. 45 ¶5 & Doc. 45-1; Doc. 9-2 at 8-10. On election day, no voter – regardless of whether he or she has appeared in the correct polling location – can obtain or cast a provisional ballot without first being processed by poll workers. As this Court found, “[p]oll workers have significant and specific legal responsibilities.” Doc. 67 at 7. Until a poll worker correctly performs those duties, the poll worker does not know whether the voter is in the correct location.

Initially, poll workers must determine whether voters may cast a regular ballot, or fall into one of thirteen categories that require provisional ballots. O.R.C. §3505.181(A); Doc. 67 at 7. Next, as the Sixth Circuit noted, Ohio poll workers have the legal duty to determine the voter’s correct precinct and direct the voter to that precinct (and that precinct’s polling location). 2012 WL 4829033 *10; O.R.C. §3505.181(C)(1). If the poll worker determines that a voter is attempting to vote in the wrong polling location, the poll worker must (1) “direct” the voter “to the polling place for the jurisdiction in which the individual appears to be eligible to vote”; (2) “explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct”; and (3) “provide the telephone number of the board of elections in case the individual has additional questions.” *Id.* §3505.181(C)(1). Then, only if “the individual refuses to travel to the polling place for the correct [precinct] or to the office of the board of elections to cast a ballot,” shall the individual “be permitted to vote a provisional ballot at that [precinct].” *Id.* §3505.181(C)(2); *see also id.* §3505.181(E)(1).

At all polling locations, poll workers must use a “precinct voting location guide” to identify voters’ proper precinct. *Id.* §3505.181(C)(1). These guides include an electronic or printed record of all streets in the county, and the precinct and polling place that corresponds to the addresses on those streets. *Id.* §3505.181(C)(1), (E)(2)(a).

County boards of election count provisional ballots after election day. Doc. 67 at 4; O.R.C. §§3505.181(B)(4), 3505.183. Ohio law requires county boards to determine whether each provisional ballot was cast by a lawfully registered voter. *Id.* §3505.181(C)(2)(a); *see also* Doc. 24-13 at 3 (Directive 2012-01). County boards must reject a provisional ballot even when cast by a lawfully registered voter if “[t]he individual named on the affirmation is not eligible to cast a ballot in the precinct . . . in which the individual cast the provisional ballot.” O.R.C. §3505.183(B)(4)(a)(ii); *see also id.* §3503.183(B)(3)(a)-(c).

Voters are neither notified nor given the opportunity to correct any problems with provisional ballots prior to the decision to count or reject them. O.R.C. §3505.183(B)(4). Even voters who have independently determined that they were misdirected by poll workers and voted in the wrong location as a result, and informed board staff of this error have no remedy to prevent disqualification of their votes. *E.g.*, Doc. 12 ¶54 (Clermont 2008) (husband and wife discovered after voting on election day that wife was directed to wrong polling place by poll workers and therefore voted wrong-precinct ballot).

State ex rel. Painter v. Brunner, 941 N.E.2d 782 (Ohio 2011), construed Ohio law to require county boards to reject all wrong-precinct ballots, including those cast in both correct and incorrect polling locations, regardless of whether poll-worker error resulted in the wrong-precinct ballot. Prior to *Painter*, some boards were exercising their discretion to count wrong-precinct provisional ballots that resulted from poll-worker error. Several boards did not distinguish between right and wrong location ballots when counting ballots. *See, e.g.*, Doc. 41 ¶9 (Delaware 2010); Doc. 38 ¶17 (Lucas 2008); Doc. 12 ¶37 (Ross 2010).

C. Poll-Worker Error

As this Court previously recognized, despite poll workers’ duty to determine each voter’s correct precinct and polling location, thousands of provisional ballots have been rejected in every recent election for being cast in the wrong precinct in the voters’ counties of residence. Doc. 67 at 25-26. Rejected ballots include those cast in both correct and incorrect polling locations. In

the 2011 general election, more ballots were rejected for being cast in the wrong precinct/wrong location (2,392) than in the wrong precinct/correct location (1,826). Doc. 9-2 at 23-24.³

If poll workers correctly perform their duty to determine each voter's correct precinct and polling location, and to direct voters to those locations, voters should not cast provisional ballots in the wrong polling location. As this Court and the Sixth Circuit concluded, it would be "irrational" for a voter who took the time to vote on election day and was properly instructed by a poll worker to refuse to go to the correct polling location when directed there, and instead to insist on casting a ballot that he or she has been told will simply be discarded:

As a matter of law, if a person casts a provisional ballot in the wrong precinct, it is always going to be due to poll-worker error unless the poll worker has instructed the individual where the correct polling location is and that individual "refuses to travel to the polling place for the correct [precinct] or to the office of the board of elections to cast a ballot." Ohio Rev. Code §§ 3505.181(C)(2), 181(E)(1). Such an act would be an irrational and futile exercise by the voter, because, as required by Ohio Rev. Code § 3505.181(C)(1), the poll worker must first inform him that if he insists on voting in the wrong precinct, his ballot will not be counted.

NEOCH, 2012 WL 4829033 at *11 (quoting Doc. 67 at 8). And just as Defendants "presented no evidence of alternate causes" of correct-location/wrong-precinct ballots, *id.*, they presented no evidence that other factors cause voters knowingly to cast wrong-location/wrong-precinct ballots. Nor did Defendants present any evidence that a single wrong-precinct ballot in any election was cast due to a voter's refusal to travel to the correct polling location. Doc. 28.

The contemporaneous record evidence demonstrates that, just as with wrong-precinct/correct-location ballots, poll-worker error results in voters being given and casting these wrong-location provisional ballots. Statewide record evidence reveals that Ohio voters commonly are affirmatively misdirected to the wrong polling location by poll workers who are attempting to direct them to the proper polling location. In Ashtabula County in 2011, for

³ The problem did not improve in the 2012 primary, with 20% of all rejected provisional ballots (465 out of 2,556), rejected as cast in the wrong precinct and location, compared to 232 rejected wrong-precinct/correct-location ballots. *See* Secretary election data, available at <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx>.

example, poll workers complained that another polling location was repeatedly “just sending voter[s] to them” without checking whether it was the correct polling location. *See, e.g.*, Doc. 41 ¶19 & 41-13 at 5 (Ashtabula 2011 Incident Reports).⁴

⁴ *See also, e.g.*, Doc. 11 ¶5c & Doc. 11-3 at 4 (Clark 2008 Incident Reports) (“I voted in primary 2008 at Lincoln School, as in previous general election. With no change in address or registration, this time Lincoln told me I needed to come to St. Joseph’s, 6th Precinct, to vote, as I was not on their roll. However, I was not on that roll either, so had to do a provisional ballot.”); Doc. 12 ¶54 & Doc. 12-41 at 12 (Clermont 2010 Incident Reports) (“B of E employees sent a handicapped [provisional voter] to New Richmond when they belonged here... The difficulties of wandering around in the wrong place are amplified when in a wheelchair.”); Doc. 12 ¶54 & Doc. 12-41 at 18 (Clermont 2008 Incident Reports) (“A number of people were erroneously sent from the Middle School polling places to vote @ township precincts instead of village precincts w/ the same letter.” (emphasis in original)); Doc. 12 ¶54 & Doc. 12-41 at 21 (Clermont 2008 Incident Reports) (“Lots of voters complaining about being sent to wrong places.”); Doc. 53 ¶9 & Doc. 53-2 (Clinton 2008 Incident Reports) (“Precinct officials sent voter to 2 or 3 different places.”); Doc. 12 ¶54 & 12-43 at 2 (Cuyahoga 2011 Incident Reports) (“I must inform you of the many (at least 40 voters) who were misguided and directed to vote at our station. Most of them informed me that they were sent by [a poll worker at another precinct] in error. Some of the voters claimed they were sent to as many as (3) different locations – by mistake.”); Doc. 12 ¶54 & Doc. 12-45 at 10 (Franklin 2011 Incident Reports) (“Polling Location sent them to another location 2 times.”); Doc. 11 ¶5a & 11-3 at 2 (Lucas 2008 Incident Reports) (Voter “went to East Toledo Family Center where [she] voted in primary. There I was told to come to East Side Central... they told her... to go back to East Toledo Family Center – that the people there were ‘reading the book’ wrong. We’re calling this in to find out the right place before going back to the Family Center”); Doc. 38 ¶28 & Doc. 38-22 (Lucas 2008 Incident Reports) (“Good Sheppard Church has sent 3-4 people to us in error.”); Doc. 41 ¶19 & 41-13 at 7 (Medina 2008 Incident Reports) (“People were sent to our precinct that did not belong with us. One couple had been to 3 places.”); Doc. 12 ¶54 & Doc. 12-47 at 11 (Montgomery 2008 Incident Reports) (“Several voters have been sent to our location because they are in our Poll Book under their old address. We are concerned because we can’t process them as they must vote where they currently live. It is frustrating to voters to have to go back and forth. Could this please be covered more thoroughly in training and in the manuals?”); Doc. 12 ¶54 & Doc. 12-52 at 7 (Trumbull 2010 Incident Reports) (Voter “lives in War 3-C . . . was sent over to HOW-S who sent him to HOW-A in another building. He came back to us . . . We apologized profusely.”).

Boards of elections have also mailed incorrect polling location information. In Clermont County in 2012 poll workers complained that “[q]uite a few voters” were incorrectly sent instructions “to vote at Milford Church of Christ – 844 St. Rt. 131 instead of Milford Assembly of God Church – 1301 St. Rt. 131.” Doc. 12 ¶54 & Doc. 12-41 at 2. All of these incident reports reflect only those instances when poll workers were aware of misdirection, and not the likely additional misdirection that never comes to the attention of poll workers or voters.

Even voters who initially arrived at the *correct* polling location have been misdirected to vote at the incorrect polling location. For example, in Franklin County in 2011, an “upset voter” who arrived at the correct location was sent to an incorrect polling location, which then sent him to a second incorrect location. Doc. 12 ¶54 & Doc. 12-45 at 11 (Franklin 2011); *see also, e.g.*, Doc. 11 ¶5b & Doc. 11-3 at 3 (Summit 2008) (“I attempted to vote at the church on S. main by Caston Rd, but I was turned away and told to vote at my last precinct. I came to the church on Manchester Rd where they identified the problem and told me I had to vote where I lived.”).

Even a voter who has initially arrived at an incorrect polling location (because, for example, the voter appeared at his or her previous polling location, unaware of having been reassigned) cannot cast a wrong-precinct provisional ballot unless a poll worker provides him with that incorrect ballot, in violation of the worker’s duty to determine the correct precinct and polling location. As the Sixth Circuit recognized, “the SEIU plaintiffs presented voluminous evidence that poll workers give voters wrong-precinct ballots for a number of reasons, ranging from misunderstanding counties’ precinct location guides to failing to understand the vote-disqualifying ramifications of handing out wrong-precinct ballots.” 2012 WL 4829033 *11; *see also* Doc. 67 at 8-10; *see also Hunter v. Hamilton County Bd. of Elections*, 850 F.Supp.2d 795, 821-22 (S.D. Ohio 2012). The types of errors that cause a poll worker to provide voter with a wrong-precinct ballot are exactly the same regardless of whether (unbeknownst to the voter or poll worker) the voter is in the incorrect or correct location.

For example, poll workers often provide voters with the wrong-precinct ballots because they incorrectly identify the voter’s precinct, thereby preventing accurate identification of the voter’s correct polling location.⁵ Poll workers throughout Ohio report that they attempted to provide correct ballots but later realized they had mistakenly instructed voters to cast wrong-

⁵ *See* Doc. 12 ¶¶17, 41, 51-52, 56-57, Doc. 38 ¶¶18, 25, Doc. 41 ¶¶16, 22.

precinct ballots.⁶ As the Sixth Circuit recognized, these errors systemically result from the uniformly confusing “precinct voting location guides.” O.R.C. §3505.181(C)(1); *NEOCH*, 2012 WL 4829033 *11 (Franklin County guide excerpt “demonstrates how easily poll workers can make mistakes under the pressures of election day”); *see also Hunter II*, 850 F.Supp.2d at 819 (“many [Hamilton County] poll workers mistakenly identified the voter’s precinct in situations where the voter’s street was divided into different precincts based on the house number,” and “some poll workers did not notice that some rows in the Green Book pertained only to even house numbers and a different row pertained to odd house numbers on the same street.”). The confusing guides contain streets that pass through multiple precincts, streets with identical names assigned to different precincts, unlabeled columns and abbreviations, and many precincts divided between odd and even sides of the street.⁷ Unsurprisingly, poll workers throughout Ohio report difficulty using the guide to determine voters’ proper precinct and polling locations.⁸

⁶ *See, e.g.*, Doc. 12 ¶51 (Clermont 2010); Doc. 41 ¶16 (Medina 2011); Doc. 38 ¶25 (Ross 2012, 2011); Doc. 12 ¶¶51-52 (Trumbull 2011, 2008); Doc. 12 ¶17 (Franklin 2010); Doc. 38 ¶18 (Montgomery 2012).

⁷ *See, e.g.*, Doc. 12 ¶71 & Doc. 13-6 through Doc. 13-24.

⁸ *See, e.g.*, Doc. 12 ¶56 (Clermont 2011) (poll worker misread voter’s voting location because of confusion about location abbreviations); Doc. 53 ¶10 (Clinton 2012) (poll worker “had a problem looking up someone in the street guide . . . wasn’t looking it up correctly”); Doc. 12 ¶56 (Franklin 2012) (poll worker “did not know how to read the voter street guide” so unable to find address and had voter vote provisionally); Doc. 41 ¶21 (Medina 2011) (precinct maps not readable); Doc. 12 ¶56 (Trumbull 2010) (poll worker misread street guide and directed voter to wrong location); Doc. 12 ¶41 (Summit 2011); Doc. 12 ¶57 (Stark 2011) (several reports of “[c]onfusion over E/O [even/odd] in CW street range guide”); Doc. 12 ¶57 (Clermont 2011) (same); Doc. 41 ¶22 (Medina 2008) (same); Doc. 12 ¶57 (Montgomery 2008) (same); Doc. 12 ¶57 (Trumbull 2008) (same). Poll-worker error in using these guides is compounded by frequent errors in the materials, including missing streets, precincts, and polling locations. *See, e.g.*, Doc. 41 ¶20 (Medina 2011); Doc. 12 ¶55 (Montgomery 2012); Doc. 12 ¶55 (Clermont 2010); Doc. 12 ¶55 (Franklin 2011); Doc. 12 ¶55 (Stark 2012); Doc. 38 ¶42 (Lucas 2011). Poll workers also frequently report not being provided with street guides at all, or insufficient numbers of guides. *See, e.g.*, Doc. 12 ¶61 (Franklin 2012, 2011); Doc. 53 ¶13 (Clinton 2008).

⁸ *See, e.g.*, Doc. 38 ¶25 (Clinton 2012); Doc. 38 ¶27 (Franklin 2012); Doc. 53 ¶8 (Jackson 2011); Doc. 41 ¶17 (Medina County 2011, 2008).

The evidence further establishes that poll workers commonly err by providing voters with wrong-precinct provisional ballots *even when they know* voters are not assigned to that precinct or polling location, because poll workers do not understand that wrong-precinct ballots will be rejected.⁹ Poll workers throughout Ohio also commonly give out provisional ballots automatically to anyone not on their precinct register without attempting to determine the correct precinct or polling location, because they mistakenly think that they are helping people vote.¹⁰

The evidence also documented wrong-precinct ballots resulting from misinformation provided by board staff to poll workers and voters. A Clinton County poll worker who asked the board of elections “[h]ow to handle a voter who is not in signature book” was told that if “the

⁹ See, e.g., Doc. 38 ¶25 (Clinton 2012); Doc. 38 ¶27 (Franklin 2012); Doc. 53 ¶8 (Jackson 2011); Doc. 41 ¶17 (Medina County 2011, 2008).

¹⁰ In *Hunter*, 34 of 50 testifying poll workers stated they had given voters provisional ballots without using the voters’ address to determine whether they were in the correct precinct. 850 F.Supp.2d at 819; see, e.g., Doc. 7 & Doc. 7-11 (*Hunter* transcripts) at 3-120:1-6. The district court concluded that poll workers consistently failed to direct voters to the right precinct “either because they mistakenly thought the voter was in the right precinct or they mistakenly thought they did not have to direct the voter to the correct precinct for the vote to count,” and they sometimes “assum[ed] another poll worker had already made that determination.” *Hunter II*, 850 F.Supp.2d at 818, 840 n.31; see also Doc. 12 ¶51 (Erie 2011); Doc. 38 ¶25 (Franklin); Doc. 53 ¶8 (Jackson 2012, 2011); Doc. 12 ¶¶51-52 (Crawford 2011); Doc. 41 ¶17 (Medina 2008); Doc. 12 ¶51 (Portage 2011, 2010); Doc. 41 ¶17 (Richland 2012); Doc. 12 ¶51 (Stark 2010); Doc. 12 ¶¶51-52 (Trumbull 2011, 2008). For board minutes discussing similar errors, see, e.g., Doc. 12 ¶¶35-36 (Ross 2012); Doc. 41 ¶6 (Auglaize 2010); Doc. 12 ¶12 (Clark 2010); Doc. 38 ¶8 (Huron 2010); Doc. 12 ¶43 (Summit 2010); Doc. 41 ¶14 (Washington 2010). For additional reports from boards recording that poll workers erred by providing voters with wrong-precinct ballots, see, e.g., Doc. 12 ¶51 (Allen 2011, 2008) (poll workers in numerous precincts gave voters “wrong precinct” ballots); Doc. 12 ¶51 (Hocking County) (in numerous precincts, poll workers negatively evaluated for “[p]rovisional voters in the wrong precinct”); Doc. 12 ¶51 (Summit 2012) (numerous poll workers marked down in column for whether “provisional ballots issued properly” and for “issued an out-of-precinct voter a provisional ballot”); see also Doc. 38 ¶25 (Athens 2011); Doc. 12 ¶51 (Clermont 2011, 2008); Doc. 12 ¶51-52 (Crawford 2011, 2010); Doc. 12 ¶51 (Cuyahoga 2008); Doc. 41 ¶17 (Hardin 2010); Doc. 38 ¶25-26 (Lucas 2008); Doc. 12 ¶51 (Portage 2011, 2009); Doc. 12 ¶52 (Stark 2011); Doc. 53 ¶8 (Wayne 2011); Doc. 38 ¶17 (Lucas 2008); Doc. 38 ¶19 (Montgomery 2011).

voter does not live in the precinct . . . then vote a provisional.” Doc. 41 ¶24 (Ashtabula 2011); Doc. 53 ¶12 (Clinton 2008).¹²

Having failed to properly determine precincts and polling locations, poll workers consistently fail to inform voters that if they vote a wrong-precinct ballot it will not count, before telling a voter to cast that wrong-precinct provisional ballot.¹³ Just as there was no record evidence that any voter in the correct location insisted on voting a wrong-precinct ballot after having been properly informed, there is no record evidence that even a single voter appeared at the wrong location, was directed to the correct location, and insisted on voting the wrong ballot that he was told would not count. Doc. 67 at 29.¹⁴ Indeed, voters repeatedly testified in the Erie County elections contest that if they had been properly directed they would have traveled to the correct location to ensure their vote would count. Doc. 11-1 (transcripts from *Paul v. Jeffery*, Erie County Court of Common Pleas Case No. 2010-CV-0983) at 35:1-5 (“[I]f they would have said, hey you know, you can’t vote here . . . I would have went a mile and a half down the road where The Chapel’s at and voted.”); *id.* at 29:21-23 (would have gone to correct location if told to do so); *id.* at 54:19-21 (same); *id.* at 73:19-21 (same); *id.* at 141:2-4 (same); *id.* at 171:1-4 (same); *id.* at 184:15-22 (same); *id.* at 191:3-5 (same); *id.* at 55:7-17 (same).

¹² Poll workers also reported inability to get timely advice on provisional ballots from the board. For example, poll workers reported, “[w]e needed answers regarding voters voting provisional – 2 of us called [the board of elections] for a 15 minute period without getting an answer.” Doc. 12 ¶60 (Clermont 2008); *see also, e.g.*, Doc. 38 ¶31 (Lucas 2008); Doc. 41 ¶24 (Medina 2011); Doc. 12 ¶60 (Trumbull 2010).

¹³ *Hunter*, 850 F.Supp.2d at 820-21 (poll workers testified they neither directed voters to correct precinct nor informed voters their votes would not count if cast in incorrect precinct; voters testified similarly); *see also* Doc. 11 & 11-1 (transcripts from *Paul v. Jeffery*) at 53:10-54:24 (voters testified they were not informed they were in wrong precinct or that their votes would not count); *id.* at 72:19-73:21; *id.* at 28:7-29:20; *id.* at 139:20-140:21.

¹⁴ *See* Doc. 10 ¶3, Doc. 12 ¶¶7-49, Doc. 38 ¶¶8-23, Doc. 41 ¶¶5-14, Doc. 53 ¶6, Doc. 55¶7 (compiling county board minutes and transcripts); Doc. 12 ¶¶50-63, Doc. 38 ¶¶24-35, Doc. 41 ¶¶15-28, Doc. 53 ¶¶7-15 (compiling county board election day incident reports). *See also Hunter II*, 850 F.Supp.2d at 822; Doc. 7-5 at 2-118:4-8; Doc. 7-7 at 2-198:9-12; Doc. 7-15 at 4-132:18-21; Doc. 7-16 at 4-148:13-21; *see also* Doc. 7-18 at 6-17:15-18 (*Hunter II* transcripts).

The boards and Secretary are well aware of the nature of poll-worker errors that result in voters being provided wrong-precinct ballots in the wrong polling locations. The errors are documented in detailed election day reports provided to the county boards, and the boards – in board minutes and board meeting transcripts from throughout Ohio relating to elections from 2008 through 2012 – acknowledge poll-worker error is the cause of wrong-precinct ballots.¹⁵ Records also reflect the boards repeatedly informing the Secretary that they are rejecting wrong-precinct ballots caused by poll-worker error.¹⁶

Just as this Court concluded with respect to right-location ballots, “[e]very documented instance in the record” of a wrong-location ballot was “the result of the poll-worker failing in his or her statutory duty to ensure that voters are given the correct ballot and vote in the correct precinct.” Doc. 67 at 29 (internal quotations and alterations omitted). And, “[t]hat poll workers err – and will continue to err in 2012 – by providing qualified voters with wrong-precinct provisional ballots is not a contested matter.” Doc. 67 at 25.

ARGUMENT

I. Preliminary Injunction Standard

In reviewing Plaintiffs’ preliminary injunction request, the Court must consider and balance: “(1) [Plaintiffs’] likelihood of success on the merits; (2) whether [Plaintiffs] may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial

¹⁵ For board meeting minutes and transcripts acknowledging poll worker error with respect to wrong-precinct ballots including those cast in the wrong polling location, *see* Doc. 12 ¶7 (Adams 2008), Doc. 12 ¶12 (Clark 2010), Doc. 12 ¶¶19-20 (Franklin 2008), Doc. 41 ¶10 (Hancock 2010), Doc. 38 ¶8 (Huron 2010), Doc. 53 ¶6 (Jackson 2008), Doc. 12 ¶32 (Lake 2008), Doc. 38 ¶13 (Lucas 2012), Doc. 38 ¶15 (Lucas 2011), Doc. 38 ¶17 (Lucas 2008), Doc. 38 ¶19 (Montgomery 2011), Doc. 38 ¶20 (Montgomery 2010), Doc. 12 ¶37 (Ross 2010), Doc. 12 ¶39 (Scioto 2008), Doc. 12 ¶46 (Trumbull 2012), Doc. 41 ¶14 (Washington 2010). *See also* Doc. 38 ¶9 (Licking 2012) (noting generally poll-worker error with respect to provisional ballots), Doc. 38 ¶10 (Licking 2011) (same).

¹⁶ *See, e.g.*, Doc. 55 ¶9 (Athens 2011); Doc. 55 ¶12 (Auglaize 2012); Doc. 38 ¶42 (Franklin 2011); Doc. 55 ¶9 (Lorain 2012); Doc. 38 ¶42 (Lucas 2011); Doc. 38 ¶42 (Madison 2010).

harm to others; and (4) the impact of an injunction upon the public interest.” *Deja Vu of Nashville, Inc. v. Metropolitan Gov’t of Nashville & Davidson Cty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001). The “four considerations . . . are factors to be balanced, not prerequisites that must be met.” *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997). As the Sixth Circuit recognized in this case, a plaintiff “need not ‘prove the case in full’” to demonstrate likely success on the merits. *NEOCH*, 2012 WL 4829033 *8 (quoting *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d at 535, 543 (6th Cir. 2007)). “It is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation.” *Id.* (quoting *Six Clinics*, 119 F.3d at 402).

II. Plaintiffs Are Likely to Succeed in Their Constitutional Challenge to Ohio’s Mandatory Rejection of Wrong-Precinct Provisional Ballots Cast in the Wrong Polling Location Regardless of Poll-Worker Error

A. Mandating that County Boards Disqualify the Entire Ballots Cast by Lawfully Registered Voters Because They Were Given Those Provisional Ballots in the Wrong Polling Location Burdens the Right to Vote for No Legitimate Reason in Violation of Equal Protection

In keeping with the Sixth Circuit and this Court’s decisions that Ohio’s mandatory disqualification of wrong-precinct ballots cast in the right polling location likely violates equal protection (*see* 2012 WL 4829033 *9-13; Doc. 67 at 22-41), Plaintiffs are also likely to succeed in challenging mandatory disqualification of wrong-precinct ballots cast in the wrong polling location as the result of poll-worker error. The substantial statewide record evidence that poll-worker error results in voters unknowingly casting provisional ballots in the wrong polling location establishes that disqualifying these ballots imposes a substantial burden on the right to vote. Balanced against this substantial burden, there is no evidence of any specific legitimate state interest actually furthered by disqualifying these ballots after the election. Therefore, under *Burdick*, 504 U.S. at 433-34, *Crawford*, 553 U.S. at 190-91 (plurality), *NEOCH*, 2012 WL

4829033 *9-13, and *Obama for America*, 2012 WL 4753397 *4-7, disqualifying these votes violates equal protection.¹⁷

1. Disqualifying wrong-precinct ballots cast in the wrong location imposes a substantial burden on the right to vote

The Sixth Circuit agreed with this Court that Ohio’s mandatory ballot disqualification rule imposes a “substantial burden on provisional voters” by the “systemic disqualification of thousands of wrong precinct provisional ballots” in light of the “strong likelihood that the majority of these miscast votes result from poll-worker error.” *NEOCH*, 2012 WL 4829033 *10-11. The evidence of poll-worker error resulting in disqualification of wrong-precinct/wrong-location ballots establishes a similar burden on the right to vote.

The systemic rejection of wrong-precinct/wrong-location ballots is of a scale comparable to the numbers of wrong-precinct/right-location ballots before the Sixth Circuit and this Court in this case. 2012 WL 4829033 *10; Doc. 67 at 25-26. In recent elections, Ohio has systemically disqualified thousands of wrong-precinct provisional ballots that were mistakenly given to voters in the wrong polling location. In 2011 and 2012, the number of rejected wrong-location ballots exceeded the number of correct-location/wrong-precinct ballots. *See supra* at 5.

As previously explained, the record demonstrates that the same types of errors that result in poll workers mistakenly handing wrong-precinct ballots to voters within the correct polling location also cause poll workers to mistakenly give wrong-precinct ballots to voters who appear at the wrong polling location, instead of directing those voters to the right polling location. *See supra* at 5-10. The poll workers’ statutory duty to direct voters to the correct precinct, as recognized by this Court and the Sixth Circuit (Doc. 67 at 29; 2012 WL 4829033 *11), applies to

¹⁷ The Sixth Circuit conclusively rejected Ohio’s arguments that equal protection applies only to facially discriminatory election laws, rather than all election regulations that burden the right to vote. As the Court held, the *Burdick* test, as reaffirmed in *Crawford*, is the proper means to determine whether a facially neutral law that burdens the right to vote violates equal protection. *NEOCH*, 2012 WL 4829033 at *9-10; *Obama for America*, 2012 WL 4753397 *4-6.

every voter, regardless of whether that voter was in the correct or incorrect polling location. In both circumstances, the voter and the poll worker believe that the voter is voting in the correct location, and the voter received the wrong ballot only because the poll worker has failed to properly confirm the correct precinct assigned to the voter.

Specifically, the record evidence demonstrates that poll workers err in the following ways, all of which apply to voters in correct or incorrect polling places:

- Poll workers often provide voters with the wrong-precinct ballot in the wrong location because the poll worker incorrectly determines the precinct that applies to the voter's address by erring in using the precinct voting location guide. *Supra* at 7-8.
- Poll workers commonly err by providing voters with wrong-precinct provisional ballots in the wrong location even when they know voters are not assigned to that precinct, because the poll workers do not understand that such ballots will be rejected. *Supra* at 9.
- Poll workers commonly hand out wrong-precinct provisional ballots in the wrong location to anyone not on their precinct register without attempting to use the voter's address to determine the correct precinct, because they mistakenly think they are helping people vote. *Supra* at 9.
- Poll workers misdirect voters to vote wrong precinct ballots in the wrong location as a result of incorrect direction from county boards. *Supra* at 9-10.

Evidence further demonstrates that many voters who cast ballots in the wrong polling location were affirmatively misdirected to that wrong location by poll workers, where, compounding that initial error, another poll worker mistakenly provides them with a wrong-precinct ballot. *See supra* at 5-7. For example, a poll worker reported the following:

I must inform you of the many (at least 40 voters) who were misguided and directed to vote at our station. Most of them informed me that they were sent by [a poll worker at another precinct] in error. Some of the voters claimed they were sent to as many as (3) different locations – by mistake.

Doc. 12 ¶54 (Cuyahoga 2011).

Some county records report voters actually arrived at the *correct* polling location, only to be misdirected by poll workers to the wrong one. *See supra* at 7. A poll worker, for example,

reported that other poll workers from the voters' correct location had mistakenly directed voters to an incorrect polling location: "This is about [the] 4th time today that someone has finally found us *after being here earlier* & told by precinct TE-G that TE-D is [at the] community center. Could someone pls train them on reading the street index & then looking up where the voting place is." Doc. 12 ¶54 (Clermont 2008) (emphasis added); *see also supra* at 7.

County boards' documentation of these incidents, and discussion of poll-worker error at board meetings, demonstrates that county boards know that their poll workers are responsible for these wrong-precinct/wrong-location ballots. *See supra* at 11. And voter testimony in the record, including from *Hunter*, is unanimous in explaining that had a poll worker actually told voters they were in the wrong location, rather than giving them a wrong-precinct ballot, the voters would have traveled to the correct location in order to vote. *See supra* at 10. There is simply no record evidence, just as there was no evidence with respect to correct-location ballots, that any voter who was given a wrong-precinct ballot in the wrong polling location was properly informed and *refused* to travel to the correct location. *See supra* at 10.

As the Sixth Circuit explained in relation to correct-location ballots, application of Ohio's ballot disqualification law "effectively requires voters to have a greater knowledge of their precinct, precinct ballot, and polling place than poll workers. Absent such omniscience, the State will permanently reject their ballots." 2012 WL 4829033 *11. The same is true of voters who end up casting ballots at the wrong location due to poll-worker error.

A substantial number of these voters, as explained above, have done everything the State has asked of them, because they were affirmatively misdirected to the wrong location. For these voters the substantial burden on the right to vote is precisely the same as that identified by this Court and the Sixth Circuit with respect to correct-location ballots. To be sure, some voters affected by the disqualification rule may have arrived at the incorrect polling location in error, because they were unaware that their polling location had moved, did not know their polling location, or for some other reason. Even with respect to these voters, the ultimate error that leads to the unwitting casting of the invalid ballot is the poll worker's. A poll worker's mistaken

provision of an invalid ballot goes far beyond the “merely inconvenient.” *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). That mistake is impossible to overcome in the absence of voter “omniscience” or knowledge exceeding the poll worker. *NEOCH*, 2012 WL 4829033 *11.

The mandatory disqualification of these voters’ ballots, when the poll worker caused that disqualification by providing the voter with the wrong-precinct ballot instead of directing the voter to the right polling location, represents a substantial burden upon the right to vote that must be justified by a sufficiently important state interest. *Crawford*, 553 U.S. at 190 (plurality) (“However slight [the] burden” on the right to vote “may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

2. No legitimate state interest is furthered by disqualifying all the votes on these ballots cast by lawfully registered voters in the wrong location in their county of residence due to poll-worker error after the election

As the Sixth Circuit reaffirmed in this case, the burden the ballot disqualification rule imposes upon wrong-location voters must be justified by an important state interest actually served by post-election disqualification. 2012 WL 4829033 *9-13; *Crawford*, 553 U.S. at 190 (plurality); *id.* at 205 (Scalia, J., concurring); *Burdick*, 504 U.S. at 434. No such interest has been demonstrated here.

Ohio’s primary interest asserted on appeal was that counting wrong-precinct ballots would somehow lead to increased post-election litigation. The Sixth Circuit correctly rejected this argument, and recognized that this Court’s injunction and the Secretary’s implementing Directive will not result in increased implementation errors or disputes. 2012 WL 4829033 *11-12, 15. Expanding the existing injunction to require counting wrong-location ballots will likewise raise no implementation issues. *Id.* at *12 (“the State’s chief election official, who adopted Directive No. 2012-44 and Form 12-D, apparently believes that poll workers and county boards can both implement the district court’s injunctive relief and perform their other election duties within the time allotted.”).

In this Court and on appeal, Defendants also relied upon the general state interests in a precinct-based voting system recognized in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); but this Court and the Sixth Circuit held that requiring county boards to count correct-location/wrong-precinct ballots resulting from poll-worker error did not undermine such interests. Doc. 67 at 34-39; 2012 WL 4829033 *11-12. For similar reasons, mandatory disqualification of wrong-location ballots caused by poll-worker error does not further these interests. Thus, requiring such ballots be counted in races for which the voter is otherwise eligible would not impinge upon those interests.

Initially, this Court and the Sixth Circuit recognized that four of these general precinct-based interests have no relevance to whether correct-location/wrong-precinct ballots should be counted after the election. For the same reasons, ballot content, “monitoring” the voting process, preventing fraud, and the location of polling places are all unaffected by whether these ballots are counted. Doc. 67 at 34-39; 2012 WL 4829033 *11-12.

The only factor that could even theoretically be relevant here is capping the number of voters attempting to vote at a particular location. *Sandusky*, 387 F.3d at 569. But the *evidence* in this case demonstrates that the decision whether to count these ballots after the election will have no impact on the overall numbers of voters appearing to vote at Ohio polling locations.

First and foremost, the proposed injunction is *not* a “vote anywhere” remedy. No voter who is properly instructed by a poll worker as to his or her correct precinct and polling location and *refuses* to travel there will have her vote counted. *See* accompanying Proposed Order; Doc. 67 at 56-57; Doc. 77 (Directive 2012-44).¹⁸ The conclusion that this rule will *increase* the number of voters who intentionally appear at the wrong location defies logic: No rational voter would intentionally arrive at the wrong location hoping that the poll worker will get it wrong, because if the poll worker correctly performs her duties, the ballot will not count. Indeed, as the

¹⁸ As the Sixth Circuit made clear, Plaintiffs in this case do not seek to count votes cast outside the voter’s county of residence. 2012 WL 4829033 *7.

Sixth Circuit pointed out, the Directive implementing this Court's injunction may have the collateral effect of "further decreas[ing] the likelihood that opportunistic voters will engage in precinct-shopping, because voters will actually *see* poll-workers documenting non-compliance with poll-worker instructions." 2012 WL 4829033 *12 n.10 (emphasis in original).

Second, the record evidence demonstrates that thousands of voters appear at the wrong polling locations for unintentional reasons including confusion or affirmative misdirection from poll-workers. There is no basis in the record to conclude that Ohio's law mandating rejection of wrong-precinct ballots given in error to such voters *decreases* the number of voters who make such mistakes or are affirmatively misdirected.

Moreover, it is illustrative that as of 2012 approximately half of the states either count up-ballot races on wrong-precinct ballots cast in the wrong precinct and polling location, or permit voters to vote anywhere using same-day registration at the polls. Protecting voters from post-election disenfranchisement can be readily accomplished without undermining the State's ability to assign voters to precincts or conduct elections.²⁰

Only illogical speculation would support this asserted interest. The Constitution requires close scrutiny of the connection between the purported state interest and the precise regulation that burdens the right to vote. *Burdick*, 504 U.S. at 433-34; *Crawford*, 553 U.S. at 190-91 (plurality); *NEOCH*, 2012 WL 4829033 *9-13; *Obama for America*, 2012 WL 4753397 *4-7. No record evidence demonstrates that whether county boards after the election, unbeknownst to the affected voters, count or reject these ballots will have any impact on the number of voters who appear on election day at any given polling location. Such a speculative and unsupported interest cannot support the mandatory ballot disqualification rule's burden on the right to vote.

²⁰ Prior to the 2011 *Painter* decision, some counties were not distinguishing between right-location and wrong-location ballots when deciding whether to count wrong-precinct provisional ballots caused by known poll-worker error, with no demonstrated adverse impact on Ohio's precinct-based voting system in general. *See supra* at 4.

Plaintiffs have therefore demonstrated a likely violation of equal protection. At the very least, Plaintiffs have raised “questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation,” to warrant a preliminary injunction requiring these votes to be counted in the upcoming election. *NEOCH*, 2012 WL 4829033 *8 (quoting *Six Clinics*, 119 F.3d at 402).

B. Mandatory Disqualification of These Provisional Ballots Regardless of Poll-Worker Error Also Violates Due Process

The Sixth Circuit’s discussion of due process in *Hunter I*, 635 F.3d at 243, did not turn on the distinction between correct location and wrong location ballots, but rather the evidence that poll-worker error results in wrong precinct provisional ballots. As that court explained:

Ohio has created a system in which state actors (poll workers) are given the ultimate responsibility of directing voters *to the right location to vote*. Yet, the state law penalizes the voter when a poll worker directs the voter to the wrong precinct, and the penalty, disenfranchisement, is a harsh one indeed. To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair. *Cf. Purcell [v. Gonzales]*, 549 U.S. 1, 4 (2006) (“[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.”). Particularly when there is evidence of poll-worker error, the categorical treatment of miscast ballots provided by Ohio law is troubling.

Hunter I, 635 F.3d at 243 (emphasis added). In the appeal in this case, the Sixth Circuit agreed with the *Hunter I* due process analysis and affirmed this Court’s injunction because “the SEIU plaintiffs have shown, and the State does not deny, that poll-worker error causes thousands of qualified voters to cast wrong precinct ballots from the correct polling locations.” *NEOCH*, 2012 WL 4829033 *13. That same analysis supports extending the injunction here.

As previously discussed, *see supra* at 4-11, the statewide evidence from recent elections demonstrates the extent to which rejected wrong precinct ballots cast in the wrong polling location result from (1) the same types of poll-worker error in determining voters’ correct precincts as affects wrong precinct/correct location ballots, and (2) the additional error of misdirecting voters to the wrong polling location. The Ohio provisional ballot system twice

recognized as fundamentally unfair by the Sixth Circuit is the same: poll workers are still required to attempt to determine voters' correct precinct and polling location, yet they fail to provide them with the correct information, and elect instead to provide a provisional ballot without complying with their duty to inform the voter that his vote will never be counted. Thus, the voter is provided no notice or opportunity to correct the error that led him to unknowingly vote an invalid ballot. In light of this uncontroverted evidence of poll-worker error resulting in wrong-location ballots, Plaintiffs have shown likely success on substantive due process.

III. The Balance of Harms Weighs Strongly In Favor of Issuing a Preliminary Injunction Covering the Upcoming November 2012 Election

The balance of harms weighs strongly in favor of enjoining the disqualification of ballots in the November 2012 election cast by lawfully registered voters in their county of residence but in the wrong location due to poll-worker error. The harm to Plaintiffs' members and other Ohio voters who will be disenfranchised by this law cannot be disputed. *NEOCH*, 2012 WL 4829033 *15. (Indeed, when Plaintiffs initially moved for an injunction that would cover both correct and incorrect location wrong precinct ballots, Defendants did not contest irreparable harm. Doc. 67 at 21 n.22.) That harm alone weighs very heavily in favor of an injunction.

Just as counting the ballots covered by the existing injunction causes no harm to others, counting these additional wrong-precinct ballots will cause no such harm. This Court and the Sixth Circuit have already rejected Ohio's arguments as to the alleged problems caused by this Court's existing narrowly tailored injunction, and an equally narrow equivalent remedy extending the Directive to these voters will likewise raise no concerns regarding implementation. *NEOCH*, 2012 WL 4829033 *15; Doc. 67 at 51-56.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to grant this renewed motion for an injunction ordering the Secretary of State to direct the county boards to count wrong-precinct ballots cast in the voter's county of residence in both correct and incorrect polling locations due to poll-worker error.

Dated: October 17, 2012

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on October 17, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this case.

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