

ALEX TRIANTAFILOU
Chairman
TIMOTHY M. BURKE
CALEB A. FAUX
CHARLES H. GERHARDT, III

Board of Elections
HAMILTON COUNTY, OHIO
824 BROADWAY
CINCINNATI, OHIO 45202-1345
513 / 632-7000
FAX 513 / 579-0988 – 513 / 744-9038
www.votehamiltoncounty.org

SALLY J. KRISSEL
Director of Elections
AMY L. SEARCY
Deputy Director of Elections

tburke@manleyburke.com

February 15, 2012

The Honorable Jon Husted
Secretary of State
State of Ohio
180 E. Broad Street
Columbus, Ohio 43215

**Re: Decision to Appeal *Hunter v. Hamilton County Board of Elections*,
U.S. District Court Case No. 1:10CV820**

Dear Secretary Husted:

Caleb Faux and I, the two Democrats on the Hamilton County Board of Elections, ask that you join with us in bringing an end to the 2010 election for Juvenile Court Judge in Hamilton County. As your office is aware, that election has been the subject of long-running litigation over the issue of whether or not certain provisional ballots should be counted. In the process, this dispute has, unfortunately, undermined public confidence in the integrity of elections, both here in Hamilton County and more broadly throughout Ohio. Continuing the controversy with yet another appeal only increases the magnitude of that distrust.

I won't belabor the procedural history except to note that following a three-week federal court trial, the Honorable Chief Judge Susan J. Dlott recently issued a decision requiring that 283 votes be counted and an additional 10 be reviewed. Of the 283, the bulk, 267, involve voters who voted in the right location but at the wrong table. Yes, we recognize that they voted in the incorrect precinct, but evidence obtained both when the Board of Elections conducted its own investigation and subsequently during the federal court trial, documents that when a voter gets to the right place, the reason that they vote at the wrong table is because a poll worker has for one reason or another not recognized the error and failed to get that voter to the right table.

The other ballots ordered to be counted include 9 which the Board previously determined were erroneously found by Board staff to have been invalid for one reason or another, when in fact they were valid ballots. On those 9, the Board had agreed unanimously that they should be counted. They have not been counted yet. Similarly, the Board also found unanimously 7 other votes were miscast because of clear poll worker error and should be counted. They have not yet been counted.

When a poll worker misdirects a voter or leads them to believe that they are in the right place, but they are not, the voter has been deprived of both their equal protection and due process rights to have their ballots counted just as the ballots of those who were fortunate enough to have gotten to the right table had their ballots counted. Similarly, where there was a clear mistake made by the Board of Elections staff and a ballot was discounted when it should have been

Jon Husted
February 15, 2012
Page 2

counted, those voters too are in danger of losing their fundamental democratic right to have their ballots counted because of a mistake for which they had no responsibility.

It is time to bring this election to an end. The ballots identified by the Court should be counted and a winner declared.

This case can now be resolved on the relatively narrow basis upon which the Court made its decision and as a result affect only the race at issue. If not resolved on that basis, it is quite likely that a much broader decision will be made having an impact on races throughout the State of Ohio in the future. It is clear from Judge Dlott's decision that she was on the verge of declaring current state law unconstitutional. While some of us would welcome such a decision, others would find that less to their liking than the limited decision currently at issue.

Additional risks associated with an appeal of this litigation include the explosion of liability for additional legal fees. This case has been brought, in part, as a federal civil rights action under 42 USC § 1983. As prevailing parties, the plaintiffs are entitled to seek an award of legal fees under 42 USC § 1988. Those fees for the plaintiffs are already estimated to be in the area of \$800,000.00. That is with no multiplier being imposed, which a court may very well grant and in similar matters has. Extending this case out for an additional year or more with all of the additional legal fees involved as a result of additional briefings and arguments, only creates greater exposure to massive legal fees.

We can continue this argument, but litigating this through the Sixth Circuit and ultimately the United States Supreme Court could create the very real possibility that we would still be litigating this case when the term the election was intended to fill expires.

We sincerely ask that you join with us in voting not to appeal this case.

Let the votes be counted. Allow the seat to be filled.

Sincerely,

/s/ Timothy M. Burke

Timothy M. Burke

/s/ Caleb Faux

Caleb Faux