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February 17, 2012

Hon. Jon Husted
180 East Broad Street
Columbus, OH 43215

Dear Secretary Husted,

On February 13, 2012 the Hamilton County Board of Elections voted 2-2 on whether to pursue an appeal of the decision of federal District Judge Susan Dlott issued on February 8, 2012 in the ongoing dispute over the vacant Hamilton County Juvenile Court seat. We write today pursuant to Ohio R.C. 3501.11(X) and ask that you review the tie vote and vote with us to allow our Board to pursue this appeal.

I. **Previous Appeals**

This Board has previously voted to appeal decisions of the federal courts and your office has cast the deciding vote in favor of allowing an appeal. (See tie-vote opinions issued by the Secretary of State on January 15, 2011 and on February 2, 2011). The issues outlined in our position then are very similar to where we find ourselves today.

In your February 2, 2012 decision, you wrote:

> *"Here there is a question of exceptional importance: Whether a federal court has the authority to direct how ballots in a county judicial race should be counted when the highest court in the state has already directed that the ballots be counted consistent with Ohio law. Accordingly further review of the Hunter decision is required."*

Because we believe that the state's election law is being significantly changed by a federal court order—rather than by our state institutions—we believe an appeal is in order.

II. **We Must Continue to Appeal**

As you know, the race for the Hamilton County Juvenile Court has become a labyrinth of court rulings, directives, and legal arguments. The case drags into its second year because of the complicated legal situation created by losing candidate Tracie Hunter's lawsuit. Ms. Hunter lost this extraordinarily close race to John Williams by 23 votes. John Williams is the certified winner of this election. Ms. Hunter has challenged that victory by bringing this lawsuit in federal court to change Ohio election law and to allow illegal, wrong precinct votes to be counted after she lost this race. It is important to note that Ms. Hunter opted to bring her case to the federal courts rather than to follow the elections challenge procedures outlined in state law (Chapter 3515 of the O.R.C.). Had this case

been brought under the state law provisions for challenging the outcome of an election, this matter would likely have been decided long ago as state law provides very tight deadlines and recognizes the importance of bringing finality to the elections process.

We bring this to your attention to support our position that this federal court decision deserves further scrutiny by the courts and that we should not allow fatigue to be a reason to end this important fight for the state's right to modify election law. We must continue this fight—even to the United States Supreme Court.

And here's why:

1. The federal court's ruling, coupled with the consent decree entered into by Secretary Jennifer Brunner in the *NEOCH* case, has created a new exception to the precinct voting law in Ohio. Under this current ruling and *NEOCH*, we now have a "poll worker error" exception to Ohio's precinct voting system. This new "rule" was never in any legislation passed into law by our legislature.

2. The federal court's decision goes even further: it purports to have every vote cast in the right location, but at the wrong precinct, automatically counted without a demonstration of "clear poll worker error" as required under the *NEOCH* decree and subsequent directives of the Secretary of State. If this ruling stands, it would create chaos on Election Day as voters enter multi-precinct voting locations and then simply vote at whatever "table" they prefer. The decision opens the way for that type of chaos.

3. The federal court's ruling could force Boards of Elections to do the impossible: to engage in a lengthy, unwieldy, and boundless investigation into "poll worker error" in every election. In reaching her decision, Judge Dlott conducted a twelve-day trial where she heard testimony from over 70 witnesses. Poll workers were examined. Voters were examined. Board of Elections staff were examined. Three of the four Board members were questioned. All of this occurred in July-August of 2011, a full 7 months after the election of 2010. This type of examination into poll worker error would be impossible to conduct in every election cycle.

4. The federal court's ruling could give rise to a Due Process challenge to Ohio's entire election voting mechanism thereby creating chaos in the 2012 election cycle. Ms. Hunter's legal team has already begun the process of using this court ruling to dismantle the state election process that state lawmakers have mandated.

5. The federal court's ruling continues to be at odds with the Ohio Supreme Court's opinion in *State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 33 (2011). There is little in the opinion of Judge Dlott's February 8 decision that differs from her original order of November 22. A conflict exists between these two decisions leaving the Board of Elections in a difficult position.

6. The Board of Elections followed every Directive, every court order, and both state and federal law in how it conducted post-election procedures in the 2010 election. Judge Dlott's ruling ignores the investigation done by the Board of Elections on the question of poll worker error and makes its own findings after a 2-week trial. The Board conducted a review for poll worker error by issuing questionnaires and interviewing poll workers. Because Ms. Hunter did not like the expected outcome of that investigation, she asked a court to step-in and re-do the investigation the board had already done. This case could have ended on

January 12, 2011.

7. This case is now much more important than one race in one county for one judgeship. It raises many important legal questions that can and will change election procedure in Ohio for the foreseeable future. The simple mantra of "count the votes" may sound nice. But, it tells only part of the story. A court order that leaves us counting illegal votes, after an election, and changing established state law in the process is improper and should be appealed to the highest court in the land.

For these reasons, and many others, we believe that an appeal to the Sixth Circuit Court of Appeals, and beyond, is necessary and we respectfully request that you break the tie-vote in our favor.

Thank you for your consideration.

Sincerely,

/s/Alex Triantafilou

Alex M. Triantafilou, Esq.

/s/Charles H. Gerhardt, III

Charles H. Gerhardt, III, Esq.