

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

THE NORTHEAST OHIO COALITION FOR :
THE HOMELESS and :

SERVICE EMPLOYEES :
INTERNATIONAL UNION, LOCAL 1199, :

Plaintiffs, :

v. :

JENNIFER BRUNNER, :
OHIO SECRETARY OF STATE, :

Defendant. :

Case No. C2-06-896
JUDGE MARBLEY

THE NORTHEAST OHIO COALITION FOR :
THE HOMELESS and :

SERVICE EMPLOYEES :
INTERNATIONAL UNION, LOCAL 1199, :

Plaintiffs, :

v. :

THE STATE OF OHIO, :

Intervenor-Defendant. :

OHIO REPUBLICAN PARTY, et al. :

Plaintiffs, :

v. :

JENNIFER BRUNNER, :
Secretary of State of Ohio, :

Defendant. :

Case No. 2:08CV913
JUDGE SMITH
MAGISTRATE JUDGE KING

**MOTION TO CONSOLIDATE OF
DEFENDANT SECRETARY OF STATE JENNIFER BRUNNER**

Pursuant to Fed. R. Civ. P. 42(a), Defendant Secretary of State Jennifer Brunner moves for consolidation of Plaintiffs' Amended and Supplemental Complaint For Preliminary and Permanent Injunction, filed November 4, 2008 (Doc. 64), with *Northeast Ohio Coalition For The Homeless v. Brunner*, S.D. Ohio Case No. C2-06-896. Consolidation is justified because the two cases present identical legal issues and because of the urgent need to avoid inconsistent legal rulings in the short time remaining for the counting of ballots in the November 2008 general election. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. The Two Cases Present Identical Legal Issues.

Federal Rule of Civil Procedure 42(a) provides that the Court may order consolidation “when actions involving a common question of law or fact are pending before the court.” In addition to ordering consolidation, the court “may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Plaintiffs’ Amended Complaint specifically adds new allegations challenging the Secretary’s instructions to the county boards of elections in Directives 2008-101 and 2008-105 regarding the counting of ballots. See Am. Compl., ¶¶ 34-40. The new claims in Plaintiffs’ Amended Complaint are identical to the claims currently being adjudicated in *Northeast Ohio Coalition For The Homeless v. Brunner* (“*NEOHC*”). In fact, on October 27, 2008, Judge Sargus issued an order in *NEOHC* adopting the Secretary of State’s Directive 2008-101 and stating that “an eligible voter casting a provisional ballot should not be disenfranchises because of poll worker error in processing a provisional ballot.” See Order (Oct. 27, 2008), *NEOHC v. Brunner*, Case No. C2-06-896, attached as Ex. A. Thus, the subject matter and allegations contained in *NEOHC*, which deals with the casting and counting of provisional ballots, is identical to the issues in *Ohio Republican Party*. Since both cases address provisional ballots and the *NOEHC* case already issued an order concerning this issue, these cases should be consolidated.

Furthermore, the Plaintiffs’ allegations regarding Directive 2008-105 also reach at the issue of tabulating votes. Therefore, as warranted under Fed. R. Civ. P. 42(a), the two cases should be consolidated to prevent the expenditure of costs and resources and to prevent inconsistent rulings regarding the counting of ballots. There is little to no risk to Plaintiffs if the

cases are consolidated. However, the separate adjudication of these two cases will likely result in great prejudice to the voting public from the inconsistent application of law.

II. Consolidation Is Justified By The Short Amount Of Time Remaining For The Counting of Ballots.

Furthermore, consolidation is justified here because of the short amount of time remaining for the counting of ballots cast in the general election. Plaintiffs have filed their Amended Complaint on Election Day, leaving inadequate time for the orderly adjudication of new claims regarding the counting and tabulation of votes. Specifically, the boards of elections must tabulate and submit the results for the unofficial canvass by noon on November 5, 2008. See Directive 2008-105; R.C. 3505.30. The Court, through *NEOHC* is already intimately familiar with Directive 2008-101 and the manner in which provisional ballots are cast and counted based upon the Court's prior rulings from 2006. Given the time-sensitive and fact-specific inquiry of Plaintiffs' new challenge, it is likely that different judges may apply different frameworks and arrive at inconsistent conclusions. Meanwhile, the lack of objective criteria creates uncertainty for the boards of elections, leaving the Secretary in a position once again to make decisions with no clear guidance from statute or case precedent and will almost certainly result in more litigation and challenges.

III. CONCLUSION

For the reasons stated above, Defendant Secretary of State Brunner moves for consolidation of Plaintiffs' new claims in their Amended Complaint with *Northeast Ohio Coalition For The Homeless v. Brunner*, S.D. Ohio Case No. C2-06-896 for adjudication before Judge Marbley.

Respectfully submitted,

NANCY H. ROGERS
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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic notification system on this 4th day of November, 2008.

/s Richard N. Coglianesse

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

**THE NORTHEAST OHIO COALITION
FOR THE HOMELESS, et al.,**

Plaintiffs,

CASE NO. C2-06-896

JUDGE ALGENON L. MARBLEY

MAGISTRATE JUDGE TERENCE P. KEMP

v.

**JENNIFER BRUNNER,
in her official capacity as
Secretary of State of Ohio,**

Defendant.

ORDER

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction. The Court has carefully considered the parties' submissions in support of and opposing the preliminary injunction, the oral arguments by counsel, evidence presented by the parties, and the relevant statutory and case law.

On October 24, 2008, this Court issued an Order adopting the Secretary of State's Directive 2008-101. The Court's October 24, 2008 Order, however, did not resolve the parties' disputes regarding the effect of poll worker error and the validity of addresses for persons without permanent addresses. This Order is based upon the agreement of the Plaintiffs and the Secretary of State and addresses these two issues.

Poll worker Error

Consistent with this Court's October 24, 2008 Order and Directive 2008-101, an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot.

The expedited discovery taken by Plaintiffs has revealed that some county boards of elections do not currently count a provisional ballot if the poll worker, for unknown reasons, has not signed the provisional ballot. The failure of a poll worker to sign a provisional ballot, standing alone, does not constitute a valid reason to reject a provisional ballot.

In addition, no provisional ballot cast by an eligible elector should be rejected because of a poll worker's failure to comply with duties mandated by R.C. 3505.181, which governs the procedure for casting a provisional ballot.

Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Election that provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181.


Addresses for Persons Without Permanent Addresses

Similarly, some discovery in this case indicated that at least one county might reject provisional ballots if a person uses their actual residence location if that location is not a building. Pursuant to Advisory 2008-25 and R.C. 3503.02(I), if a person does not have a fixed place of habitation, the shelter or other place where the person intends to return shall be deemed his residence for purposes of voting.

Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Elections that provisional ballots may not be rejected for failing to list a building address on the provisional ballot envelope if the voter resides at a location that does not have an address.

IT IS SO ORDERED.

10-27-2008
DATED



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE