

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)

**NORTHEAST OHIO COALITION
FOR THE HOMELESS
3631 Perkins Ave., #3A-3
Cleveland, OH 44114**

Case No. 1:10-cv-820

Judge Susan J. Dlott

and

**OHIO DEMOCRATIC PARTY
340 East Fulton Street
Columbus, OH 43215**

**FIRST AMENDED COMPLAINT OF
INTERVENOR-PLAINTIFFS
NORTHEAST OHIO COALITION FOR
THE HOMELESS AND
OHIO DEMOCRATIC PARTY**

Intervenor-Plaintiffs,

v.

**HAMILTON COUNTY BOARD OF
ELECTIONS
804 Broadway
Cincinnati, OH 45202**

and

**ALEX TRIANTAFILOU, Chair of
Hamilton County Board of Elections,
and members TIMOTHY BURKE,
CALEB FAUX and CHARLES
“CHIP” GERHARDT, III
804 Broadway
Cincinnati, OH 45202**

*All sued in their official capacities as
Chair and members of the Hamilton
County Board of Elections,*

Defendants.

1. This is a civil rights action in which Plaintiff Tracie Hunter and Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless and Ohio Democratic Party seek an Order requiring the Defendants, among other things, to investigate and count certain provisional ballots

that were cast by voters in Hamilton County in the November 2010 election but have not been investigated and/or counted by the Defendants.

2. Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless (“NEOCH”) and the Ohio Democratic Party (“ODP”) also seek an Order requiring the Defendants to comply with the terms of the Consent Decree entered on April 19, 2010 (copy attached as Exhibit 1), in the case of *Northeast Ohio Coalition for the Homeless v. Ohio Secretary of State*, Case No. 06-CV-896 (S.D. Ohio) (Marbley, J.) (hereinafter, the “*NEOCH* Consent Decree”) and the terms of Directive 2010-48, issued by the Ohio Secretary of State on April 27, 2010 (copy attached as Exhibit 2).

3. NEOCH and ODP also seek an Order requiring the Defendants to comply with the terms of Directives 2010-73 (copy attached as Exhibit 3) and 2010-74 (copy attached as Exhibit 4), issued by the Ohio Secretary of State on November 1, 2010, which require Ohio’s Boards of Elections, including the Defendants, to investigate and count provisional ballots that are subject to the terms of the *NEOCH* Consent Decree.

4. NEOCH and ODP also seek an Order requiring the Defendants to comply with the terms of Directive 2010-79 (copy attached as Exhibit 5), issued by the Ohio Secretary of State on November 30, 2010 to the Hamilton County Board of Elections, Members, Director, and Deputy Director, which required the Defendants to investigate and count provisional ballots that are subject to the terms of the *NEOCH* Consent Decree. The Ohio Secretary of State issued this Directive after learning that no conclusive review or inquiry to demonstrate the existence or lack thereof of poll worker error in specific provisional ballot situations had been undertaken by the Defendants pursuant Directive 2010-74, Directive 2010-73, and the *NEOCH* Consent Decree.

JURISDICTION AND VENUE

5. This case arises under the Constitution and laws of the United States. This Court has subject-matter jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(3) & (4). This suit is authorized by 42 U.S.C. § 1983. This Court has jurisdiction to grant both declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

6. Venue in this district and division is proper under 28 U.S.C. § 1391(b) because this action is predicated upon a federal question and a substantial part of the events or omissions giving rise to the claims alleged in this complaint have occurred, and will continue to occur, in this district.

THE PARTIES

7. Intervenor-Plaintiff NEOCH is a non-profit charitable organization operating in the City of Cleveland that provides services to approximately 25,000 homeless people each year. NEOCH has 40-50 members who are currently homeless. NEOCH provides services for homeless people, including its homeless members, in the areas of housing, health care, economic justice and civil rights. As stated in NEOCH's Homeless Advocacy Initiatives, Goals for 2005-2010, one of NEOCH's civil rights initiatives is to "work to assure that all homeless people are registered to vote, and reduce barriers to registering and homeless people actually voting." NEOCH has helped hundreds of homeless people, including some of its homeless members, register to vote and obtain the necessary identification to register to vote. NEOCH is the lead plaintiff in the case captioned *Northeast Ohio Coalition for the Homeless v. Ohio Secretary of State*, Case No. 06-CV-896 (S.D. Ohio) (Marbley, J.) (the "NEOCH case") and is a party to the NEOCH Consent Decree as described in greater detail below.

8. This Court granted NEOCH's motion to intervene on November 22, 2010.

9. Intervenor-Plaintiff ODP is a political party in the State of Ohio. ODP is an intervenor-plaintiff in the *NEOCH* case and, like NEOCH, is a party to the *NEOCH* Consent Decree.

10. Plaintiff Tracie Hunter is a resident of Hamilton County, Ohio. She is registered to vote in Hamilton County, Ohio. She is a candidate for Hamilton County Juvenile Court Judge in the November 2, 2010 general election.

11. Defendant Hamilton County Board of Elections (“Board”) is responsible for determining which provisional ballots shall be approved and therefore counted, and which shall be rejected, for the general election held in November 2010.

12. The chair and members of the Hamilton County Board of Elections (“Members”) are responsible for determining which provisional ballots shall be approved and therefore counted, and which shall be rejected, in the general election held in November 2010. The Members are sued solely in their official capacities.

FACTUAL ALLEGATIONS

The NEOCH Consent Decree Entered By U.S. District Judge Marbley and Directive 2010-48

13. As noted above, NEOCH is the lead plaintiff in the *NEOCH v. Ohio Secretary of State* case pending before United States District Judge Marbley in the United States District Court for the Southern District of Ohio, Eastern Division, Case No. C2-06-896. ODP is an intervenor-plaintiff in that action.

14. NEOCH and other plaintiffs brought the *NEOCH* case against Ohio’s Secretary of State in October 2006, alleging that Ohio’s Voter ID laws were unconstitutional. The State of Ohio intervened as a Defendant in the *NEOCH* case.

15. On April 19, 2010, District Judge Marbley signed the *NEOCH* Consent Decree in resolution of the *NEOCH* action. All parties to the *NEOCH* case, including NEOCH, ODP, the Ohio Secretary of State, and the State of Ohio, agreed “to the entry of this Decree as final and binding” and agreed to the jurisdiction of the District Court over the parties and the subject matter of the action. (Ex. 1 at 2).

16. The *NEOCH* Consent Decree states that it “shall be binding upon the Defendants and their employees, agents and representatives. The Secretary of State will issue Directives to the Boards of Elections to follow this Decree, and will use her best efforts to enforce the Decree and all related Directives if put on notice of any alleged violations.” (Ex. 1 at 3). By its terms, the *NEOCH* Consent Decree remains in effect until June 30, 2013. (Ex. 1 at 6).

17. The *NEOCH* Consent Decree includes a section titled “GENERAL INJUNCTIVE RELIEF” which provides, in relevant part:

5. Defendant Secretary of State, her agents, employees and representatives will instruct Ohio’s county Boards of Elections to adhere to the following rules regarding the casting and counting of provisional ballots for persons without identification other than a social security number:

b. Boards of Elections may not reject a provisional ballot cast by a voter, who uses only the last four digits of his or her social security number as identification, for any of the following reasons:

v. The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error.

vi. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error.

vii. The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statutes.

(Ex. 1 at 3-4).

18. Neither Defendant Hamilton County Board of Elections nor any of its Members intervened in the *NEOCH* case pending before District Judge Marbley to challenge the terms of the *NEOCH* Consent Decree or to question the authority of the Defendant Secretary of State or Intervenor-Defendant State of Ohio to enter into the *NEOCH* Consent Decree.

19. Defendant Hamilton County Board of Elections has admitted that the *NEOCH* Consent Decree is binding upon and must be followed by Ohio's Boards of Elections.

20. On April 27, 2010, the Ohio Secretary of State's office issued Directive 2010-48 to all County Boards of Election, explaining the *NEOCH* Consent Decree and its requirements for County Boards of Elections, and attaching a copy of the *NEOCH* Consent Decree (*See* Ex. 2).

21. Defendant Hamilton County Board of Elections, its Members, and Staff have previously identified certain provisional ballots cast in the November 2010 election as "NEOCH ballots" that were allegedly investigated for poll worker error pursuant to the requirements of the *NEOCH* Consent Decree.

Secretary Of State Directives 2010-73, 2010-74 and 2010-79

22. On November 1, 2010, then- Secretary of State Jennifer Brunner issued Directives 2010-73 and 2010-74. (Ex. 3 & 4).

23. Directive 2010-73 was issued pursuant to the *NEOCH* Consent Decree's requirement that the Secretary of State issue a directive before every primary and general

election instructing boards of election to comply with the injunctive relief set forth in the *NEOCH* Consent Decree. (Ex. 3 at 1).

24. Directive 2010-73 includes a copy of the injunctive relief ordered in the *NEOCH* Consent Decree which was previously distributed to the County Boards of Elections in Directive 2010-48. (Ex. 3 at 2-4).

25. Directive 2010-74, provided to Ohio's Boards of Elections, including the Defendants, sets forth "Guidelines for Determining the Validity of Provisional Ballots" which "incorporates relevant rulings from the Ohio Supreme Court *** and the United States District Court for the Southern District of Ohio in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896." (Ex. 4 at 1.)

26. Directive 2010-74 included a Section titled "PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR." In this Section, the Secretary of State provided the following non-exclusive "Examples of Evidence of Poll Worker Error":

A. One example of the type of poll worker error contemplated under the *NEOCH* consent decree occurs when a voter fails to sign the provisional ballot affirmation statement portion of SOS Form 12-B, but the poll worker completes and signs the verification statement portion of SOS Form 12-B indicating that the voter **has** completed the affirmation. If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day. Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement provide objective evidence that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B.

B. Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations

indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct.

C. Failure of a poll worker to complete and sign the "Election Official Verification Statement" portion of SOS Form 12-B is clear evidence of poll worker error because election officials are required by R.C. 3505.182 to complete this information.

(Ex. 4 at 11- 12) (emphasis in original; internal footnote omitted).

27. Thus, Directive 2010-74 requires Ohio's Boards of Elections to investigate for poll worker error when a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification is rejected due to the voter's failure to sign the provisional ballot affirmation statement on the ballot envelope or because the voter voted in the correct polling location but the wrong precinct.

28. Directives 2010-73 and 2010-74 remain binding upon Ohio's Boards of Elections and have not been superseded by any other Directive issued by the Secretary of State.

29. On November 30, 2010, then- Ohio Secretary of State Brunner issued Directive 2010-79 to the Hamilton County Board of Elections, Members, Director, and Deputy Director , which required the Defendants to investigate and count provisional ballots that are subject to the terms of the *NEOCH* Consent Decree. The Ohio Secretary of State issued this Directive after "learning that no conclusive review or inquiry to demonstrate the existence or lack thereof of

poll worker error in specific provisional ballot situations had been undertaken by the Defendants pursuant Directive 2010-74, Directive 2010-73, and the *NEOCH* Consent Decree.”

30. Directive 2010-79 also includes a Section titled “PROVISIONAL BALLOTS THAT MAY NOT BE REJECTED DUE TO POLL WORKER ERROR.” In this Section, the Secretary of State provided “**Examples of Evidence of Poll Worker Error for Which Provisional Ballots May Not be Rejected**”

A. PROVISIONAL BALLOT AFFIRMATION STATEMENT:

One example of the type of poll worker error contemplated under the *NEOCH* consent decree occurs when a voter fails to sign the provisional ballot affirmation statement portion of SOS Form 12-B, but the poll worker completes and signs the verification statement portion of SOS Form 12-B indicating that the voter has completed the affirmation and without indicating that the voter declined to complete the affirmation. **If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day.** Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement, taken together, provide objective evidence of poll worker error in that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

B. RIGHT POLLING LOCATION, WRONG PRECINCT:

Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. **Similarly,**

if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

C. Failure of a poll worker to complete and sign the "Election Official Verification Statement" portion of SOS Form 12-B is clear evidence of poll worker error because election officials are required by R.C. 3505. 182 to complete this information. If the board finds that poll worker error of this nature existed, it shall not reject the provisional ballot, unless other valid reasons for rejection exist, and the board shall count the votes for all races and issues for which the elector was eligible to vote.

(Ex. 5 at 2-3).

31. Directive 2010-79 also includes a section titled "OBJECTIVE CRITERIA FOR DETERMINING POLL WORKER ERROR." In this section, the Directive provides:

As a general matter, poll worker error occurs when a poll worker acts contrary to or fails to comply with federal or Ohio law or directive issued by the Secretary of State. Poll workers have a duty to follow federal and state election laws, the directives of the Secretary of State and the rules, instructions and policies explicitly outlined in the Poll Worker Manual.

In determining whether poll worker error occurred, a board of elections should apply the following criteria:

- 1) Did the poll worker carry out his/her duties in accordance with directives and federal and state law?
- 2) Did the poll worker adhere to the procedures/guidelines outlined in the Poll Worker Manual regarding provisional voting? For example, did the poll worker properly do the following:

- Check-in each voter? Review the Supplemental Voter List in the back of the Signature Poll Book to find the voter's name (if applicable)?
- Check the Precinct Voting Location Guide pursuant to R.C. 3505.181(E)(2), also known as the Precinct Street Directory, to verify if the voter's current address is in, or out of, the precinct?
- Examine the ID provided by the voter to determine if it is a valid form of ID?

(Ex. 5 at 3).

32. Moreover, the Directive ordered the Defendants to take additional steps to determine whether the provisional ballots that were cast by voters using the last four digits of their Social Security number as identification were improperly rejected for any reason stated in Section I of Directive 2010-79 (setting forth the list from the NEOCH Consent Decree) or as a result of poll worker error. (*See* Ex. 5 at 3).

33. Directive 2010-79 remains binding upon the Hamilton County Board of Elections, Members, Director and Deputy Director and has not been superseded by any other Directive issued by the Secretary of State.

***The Defendants' Failures To Comply With The NEOCH Consent Decree
And Directives 2010-48, 2010-73, 2010-74 and 2010-79***

34. In processing the provisional ballots that were cast on Election Day in the November 2010 election, the Defendants violated the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74, and later-issued 2010-79 in multiple ways.

35. As a threshold matter, the Defendants failed to undertake the investigation for poll worker error that is required by the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 with respect to multiple provisional ballots that were cast by voters using only the last four digits of their Social Security numbers as identification, in circumstances where: (1) the "ID PROVIDED" box was checked underneath the signature line for the

“Witnessing Election Official” on the front page of the Provisional Ballot Affirmation; yet (2) no other form of identification besides the last four digits of the voter’s social security number is identified, either in Step 7 of the Provisional Ballot Affirmation, Step 3 of the Election Official Verification Statement, or elsewhere.

36. The Defendants erroneously concluded, in other words, that simply checking the “ID PROVIDED” box at the bottom of the Provisional Ballot Affirmation form, without specifying any form of identification provided by the voter *besides* the last four digits of the voter’s social security number, suffices to *remove* the provisional ballot in question from the category of NEOCH ballots that must be investigated and (if appropriate) counted pursuant to the *NEOCH* Consent Decree and Directives.

37. The Defendants’ admitted practice of excluding these “last 4 SSN/ID PROVIDED” provisional ballots from the category of NEOCH ballots that must be investigated and (if appropriate) counted pursuant to the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and later-issued 2010-79 finds no support in the Decree, the Directives, or applicable law.

38. R.C. 3505.181(A)(2) specifically permits an individual to vote a provisional ballot using the last four digits of his/her social security number only. Such an individual does not have to show the poll worker his/her social security card.

39. Moreover, under R.C. 3505.181(B)(8), an individual who votes a provisional ballot and provides the last four digits of his/her social security number is not required to take any additional steps or to provide additional information to the board of elections in the ten days after the election in order for the provisional ballot to be counted. This provision of Ohio law became effective in 2006 and *was not changed* by the *NEOCH* Consent Decree.

40. Because the last four digits of a voter's social security number *itself* permitted a voter to cast a valid provisional ballot in the November 2010 election (and in previous elections), the fact that the "ID PROVIDED" box is checked at the bottom of the Provisional Ballot Affirmation form for such a voter does not indicate that any *other* form of acceptable identification was provided by the voter at the polls, and thus provides the Defendants no basis to *exclude* such provisional ballots from the investigation and counting that is required by the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, 2010-74, and later-issued 2010-79.

41. Second, the Defendants violated the *NEOCH* Consent Decree and Directives 2010, 48, 2010-73, 2010-74 and later issued 2010-79 by failing to investigate properly and count provisional ballots that were cast by voters who used only the last four digits of their social security numbers as identification, and who cast their ballots in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error.

42. As noted above, Section III.5.b.v. of the *NEOCH* Consent Decree provides that Boards of Elections may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her social security number as identification, where "[t]he voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error[.]" (Ex. 1 at 4).

43. For multiple rejected "right location/wrong precinct" provisional ballots, Defendants failed to question the relevant poll workers to determine whether they followed the instructions for ensuring that voters were directed to the correct precinct as directed in 2010-74 and later issued 2010-79. (Ex. 4 at 12; Ex. 5 at 2).

44. Third, the Defendants violated the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and later-issued 2010-79 by failing to properly investigate and count

provisional ballots cast by voters who used only the last four digits of their social security numbers as identification, and who did not properly complete and/or sign their provisional ballot applications for reasons attributable to poll worker error.

45. As noted above, Section III.5.b.vi. of the *NEOCH* Consent Decree provides that Boards of Elections may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her social security number as identification, where “[t]he voter did not properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error.” (Ex. 1 at 4).

46. For multiple rejected “name/signature” provisional ballots, Defendants failed to question the relevant poll workers to determine whether they followed the instructions for completing the verification statement portion of the provisional ballot envelope. (Ex. 4 at 11; Ex. 5 at 2).

47. Fourth, the Defendants have violated the *NEOCH* Consent Decree and Directive 2010-74 by failing to count the provisional ballots cast by voters who used only the last four digits of their social security numbers as identification, where the information appearing on the face of the Provisional Ballot Affirmation form and Election Official Verification Statement (the provisional ballot application), either by itself or in conjunction with information obtained during an investigation into poll worker error, demonstrates that poll worker error caused any defect in the provisional ballot.

48. This Court, the Board, its Members, and/or its Staff have already investigated certain provisional ballots that are subject to the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, Directive 2010-74, and 2010-79 and the Board has erroneously chosen not to count

them, even where it is apparent, based on directives and guidance from the Secretary of State, that poll worker error caused the provisional ballot to be defective.

49. In addition, certain provisional ballots subject to the *NEOCH* Consent Decree that were cast in the wrong precinct at the Hamilton County Board of Elections in the November 2, 2010 election were accepted and counted by the Defendants after determining the provisional ballots were cast in the wrong precinct due to poll worker error.

COUNT ONE

(Defendants' Failure To Investigate And Count The "Last 4 SSN/ID PROVIDED" Provisional Ballots That Are Subject To The *NEOCH* Consent Decree And Directives 2010, 48, 2010-73, 2010-74, and 2010-79)

50. Intervenor-Plaintiffs incorporate by reference paragraphs 1-49 as if fully rewritten here.

51. Defendants have violated the terms of the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 by failing to treat as *NEOCH* ballots those provisional ballots that were cast by voters using only the last four digits of his or her social security number as identification, in circumstances where: (1) the "ID PROVIDED" box was checked underneath the signature line for the "Witnessing Election Official" on the front page of the Provisional Ballot Affirmation; yet (2) no other form of identification besides the last four digits of the voter's social security number is identified, either in Step 7 of the Provisional Ballot Affirmation, Step 3 of the Election Official Verification Statement, or elsewhere.

52. Defendants should be enjoined from violating the *NEOCH* Consent Decree and these directives and ordered to investigate (to the extent such an investigation has not already been undertaken by Defendants and/or this Court) and count all provisional ballots consistent with the requirements of the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79,

where the contents of the Provisional Ballot Affirmations and Election Official Verification Statements (the provisional ballot application) do not specify any form of identification provided by the voters besides the last four digits of their Social Security numbers.

COUNT TWO

(Defendants' Failure To Investigate And Count The Right Location/Wrong Precinct Provisional Ballots That Are Subject To The *NEOCH* Consent Decree And Directives 2010-48, 2010-73, 2010-74 and 2010-79)

53. Intervenor-Plaintiffs incorporate by reference paragraphs 1-52 as if fully rewritten here.

54. Defendants have violated the terms of the *NEOCH* Consent Decree and Directive 2010-74 by failing to investigate and count provisional ballots that were cast by voters who used only the last four digits of their social security numbers as identification and who cast their ballots in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error.

55. Defendants should be enjoined from violating the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 and ordered to investigate (to the extent such an investigation has not already been undertaken by Defendants and/or this Court) and count all provisional ballots consistent with the requirements of the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79, where the provisional ballots were cast in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error.

COUNT THREE

(Defendants' Failure To Investigate And Count The "Incomplete Application/No Signature on Application" Provisional Ballots That Are Subject To The *NEOCH* Consent Decree And Directives 2010-48, 2010-73, 2010-74 and 2010-79)

56. Intervenor-Plaintiffs incorporate by reference paragraphs 1-55 as if fully rewritten here.

57. Defendants have violated the terms of the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 by failing to investigate and count provisional ballots that were cast by voters who used only the last four digits of their social security numbers as identification and who did not properly complete and/or sign their provisional ballot applications for reasons attributable to poll worker error.

58. Defendants should be enjoined from violating the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 and ordered to investigate (to the extent such an investigation has not already been undertaken by Defendants and/or this Court) and count all provisional ballots consistent with the requirements of the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79, where the provisional ballots were cast by voters who used only the last four digits of their social security numbers as identification and who did not properly complete and/or sign their provisional ballot applications for reasons attributable to poll worker error.

COUNT FOUR

(Defendants' Failure To Count Those *NEOCH* Ballots Where The Documents Alone Or In Conjunction With An Investigation Already Reveal The Presence Of Poll Worker Error)

59. Intervenor-Plaintiffs incorporate by reference paragraphs 1-58 as if fully rewritten here.

60. Defendants have violated the terms of the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 by failing to count provisional ballots that were cast by voters who used only the last four digits of their social security numbers as identification, where the information appearing on the face of the Provisional Ballot Affirmation form and Election Official Verification Statement (the provisional ballot application), either by itself or in conjunction with information obtained during an investigation into poll worker error, demonstrates that poll worker error caused any defect in the provisional ballot.

61. Defendants should be enjoined from violating the *NEOCH* Consent Decree and Directives 2010-48, 2010-73, 2010-74 and 2010-79 and ordered to count all provisional ballots consistent with the requirements of the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79, where the information appearing on the face of the Provisional Ballot Affirmation form and Election Official Verification Statement (the provisional ballot application), either by itself or in conjunction with information obtained during an investigation into poll worker error, demonstrates that poll worker error caused any defect in the provisional ballot.

COUNT FIVE

(Violation of Equal Protection and Due Process – 42 U.S.C. § 1983)

62. Intervenor-Plaintiffs incorporate by reference paragraphs 1-61 as if fully rewritten here.

63. Defendants, acting under color of law, have violated rights secured to Intervenor-Plaintiffs and the voters who cast the provisional ballots at issue in this lawsuit by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

64. Defendants have deprived Plaintiff-Intervenors and certain provisional voters of equal protection and due process by applying Ohio Provisional Ballot Laws and the *NEOCH* Consent Decree differently and unequally as to particular provisional ballots cast and at issue in this case.

65. Specifically, certain provisional ballots subject to the *NEOCH* Consent Decree that were cast in the wrong precinct at the Hamilton County Board of Elections in the November 2, 2010 election were accepted and counted by the Defendants after determining the provisional ballots were cast in the wrong precinct due to poll worker error.

66. Defendants have investigated some, but not all, provisional ballots subject to the *NEOCH* Consent Decree that were cast in the November 2, 2010 election.

67. However, Defendants failed to accept and count similarly situated provisional ballots that were also subject to the *NEOCH* Consent Decree and were cast in the wrong precinct due to poll worker error at locations other than the Hamilton County Board of Elections.

68. Defendants have failed to accept some of the provisional ballots investigated, despite a showing of poll worker error.

69. Defendants should be enjoined from unequally applying and violating the *NEOCH* Consent Decree, and violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and ordered to count all provisional ballots consistent with the requirements of the *NEOCH* Consent Decree and Directives 2010-74 and 2010-79, where the information appearing on the face of the Provisional Ballot Affirmation form and Election Official Verification Statement (the provisional ballot application), either by itself or in conjunction with information obtained during an investigation into poll worker error, demonstrates that poll worker error caused any defect in the provisional ballot.

WHEREFORE, Intervenor-Plaintiffs asks that this Court enter judgment in their favor and demand the following relief:

A. Declaratory relief in the form of a Declaration that the Defendants have violated the *NEOCH* Consent Decree and/or Directives 2010-48, 2010-73, 2010-74, and 2010-79;

B. Preliminary and permanent injunctive relief that enjoins the Defendants from continuing to violate the *NEOCH* Consent Decree, Directives 2010-48, 2010-73, 2010-74 and 2010-79 and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and requires the Defendants to investigate (to the extent such an investigation has not already been undertaken by Defendants and/or this Court) and count the provisional ballots subject to the *NEOCH* Consent Decree according to the terms of that Decree and Directives 2010-74 and 2010-79;

C. Intervenor-Plaintiffs' reasonable attorneys' fees and costs; and

D. Any other relief which this Court deems just and equitable.

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