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

TRACIE HUNTER,	:	Case No. 1:10-CV-820
	:	
Plaintiff,	:	Judge Susan J. Dlott
	:	
vs.	:	Post-Trial Memorandum of Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless and Ohio Democratic Party
	:	
HAMILTON COUNTY BOARD OF ELECTIONS, et al.,	:	
	:	
Defendants.	:	

I. INTRODUCTION

At the conclusion of trial in this case, this Court instructed the parties about four categories of post-trial briefing. First, the Court asked Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless ("NEOCH") and Ohio Democratic Party ("ODP") to file a Proposed Amended Complaint, specifying the claims raised and supported by evidence adduced at trial. NEOCH and ODP sought leave to file an Amended Complaint on August 8, 2011 (Doc. 177), and the Court subsequently granted leave (Doc. 179). Second, the Court asked the parties to re-file their Proposed Findings of Fact and Conclusions of Law, including citations to the trial record. Contemporaneously herewith, NEOCH and ODP shall file their Proposed Findings of Fact and Conclusions of Law jointly with Plaintiff Tracie Hunter. Third, the Court asked the Plaintiffs to file a document categorizing ballot envelopes in groups correlating with Plaintiffs' arguments in favor of counting those ballots. Plaintiff Hunter, along with NEOCH and ODP, made that joint filing on August 19, 2011. (Doc. 182.) Finally, the Court stated that the parties were otherwise free to brief the topics of their choosing in post-trial memoranda, subject to a 30-page limit.

Here, then, in their Post-Trial Memorandum, NEOCH and ODP focus on the following discrete topics that have been raised by the parties in their respective pleadings, dispositive motions, and at trial. First, Intervenor-Plaintiffs shall address the Defendants' repeated assertion that NEOCH and ODP lack Article III standing in this case – an assertion that is based largely on the Defendants' impermissible (and legally meritless) collateral attacks on the validity of the *NEOCH* Consent Decree that both NEOCH and ODP intervened in this lawsuit to enforce. Next, Intervenor-Plaintiffs shall describe how the Board's arbitrary and disparate processing of provisional ballots cast by voters using only the last four digits of their Social Security numbers (hereinafter "NEOCH ballots") violates the Equal Protection Clause of the United States Constitution. With respect to the Board's failures to comply with the terms of the *NEOCH* Consent Decree in its processing of specific categories of NEOCH ballots, and the specific relief that the Court should grant based on those failures, Intervenor-Plaintiffs hereby incorporate in full and by reference the arguments on these topics that are contained in Plaintiffs' Joint Proposed Findings of Fact and Conclusions of Law.

II. THE *NEOCH* CONSENT DECREE IS VALID AND BOTH NEOCH AND ODP HAVE STANDING HERE TO ENFORCE IT

The Board asserts in its Trial Brief (Doc. 88), its Motion for Summary Judgment (Doc. 94), and its Response to Plaintiffs' Trial Brief (Doc. 112) that both NEOCH and ODP lack standing to pursue their claims in this case. Despite conceding that the Board must follow the *NEOCH* Consent Decree at the evidentiary hearing itself, (TR (Board of Elections' Opening Statement by Grossmann) 11-151: 23-24), and despite failing to challenge the validity of the *NEOCH* Consent Decree before the Sixth Circuit (when this Court's January 12 Order requiring the Board to comply with the Decree was at issue), the Board asserts that the *NEOCH* Consent Decree violates the Ohio Constitution, and therefore, Intervening-Plaintiffs NEOCH and ODP

lack standing to enforce it. (Doc. 122 at 12.) The Board elaborates on this argument in its Reply in Support of Summary Judgment (Doc. 181) and also referenced the argument at the evidentiary hearing, admitting that it is a legal issue that the parties could address in post-trial briefs. (TR (Stevenson Comments Before Board of Elections' Opening Statement) 11-141; 16-21).[1]

Not only is the Board's recent attack on the validity of the *NEOCH* Consent Decree an improper collateral attack on a district court's judgment, it is the law of this case that the *NEOCH* Consent Decree applies and should be followed. *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (6th Cir. 2011). Furthermore, in his 2011 Directives to local Boards of Election, Secretary of State Husted reaffirmed the applicability of the *NEOCH* Consent Decree to all Ohio Boards of Election and specifically reminded the Hamilton County Board of Elections that it must comply with the *NEOCH* Consent Decree and former Secretary of State Brunner's Directives 2010-74 and 2010-79.[2]

In addition to being an improper collateral attack on a consent judgment that is belied by the Board's own actions, the Board's challenge to the validity of the *NEOCH* Consent Decree also fails on the merits. Despite the Board's characterization otherwise, the State of Ohio was indeed a party to the *NEOCH* case that resulted in the *NEOCH* Consent Decree, intervening *specifically on behalf of the Ohio General Assembly* so that the General Assembly's distinct interests were advocated in that litigation. The State of Ohio (which intervened on behalf of the

---

[1] As Mr. Stevenson mentioned before the Board's Opening Statement, "We would also indicate that we are again asserting the standing issues with respect to NEOCH. We intend to offer some evidence on that. After discussing it with Miss Cooperrider, we agree that that's a legal issue and that we may address that issue more specifically. They may address it in their response to summary judgment but more specifically in the trial briefs..." (TR (Stevenson Comments Before Board of Elections' Opening Statement) 11-141; 16-21).

[2] *See* Husted Directive 2011-05: "Directive 2011-04 and the Mandatory Recount for Hamilton County Juvenile Court Judge" dated January 12, 2011 ("In addition, during the recount, the board should examine those provisional ballots that are subject to the consent decree in *Northeast Ohio Coalition for the Homeless*, in accordance with the requirements of Directives 2010-74 and 2010-79") (JX 42).

General Assembly) and the Ohio Secretary of State defended the constitutionality of the Ohio statutes challenged by NEOCH in that litigation and entered into a narrowly tailored consent decree to remedy the problem created by the Ohio legislature when it created mandatory poll worker duties but failed to address the consequences of poll worker error. Boards of Elections, as representatives of the Ohio Secretary of State, are bound by the explicit terms of the *NEOCH* Consent Decree. (PX 2008 p. 3). The Hamilton County Board of Elections members and staff accepted that they were bound by the *NEOCH* Consent Decree (as evidenced by the actions they took, and as explained by the staff and board members at the evidentiary hearing)[3], but have now, at this late stage, decided to change course and argue that the *NEOCH* Consent Decree is "void" and cannot apply to them.

For the following reasons, this Court should reject the Board's attempts to question the standing of NEOCH and ODP, as well as the underlying validity of the Consent Decree that they intervened in this case to enforce.

A. NEOCH And ODP Unquestionably Have Standing To Enforce The NEOCH Consent Decree.

As NEOCH and ODP have continuously maintained, NEOCH and ODP intervened in Plaintiff Hunter's action seeking an order to require the Defendants to comply with the terms of the Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 06-cv-896 (S.D. Ohio) (Marbley, J.). (Doc 8-1 at ¶ 2; Doc. 172 p. 16; Doc. 180 at ¶2). It is undisputed that both NEOCH and ODP are parties to that Decree.

[3] The Board produced at the evidentiary hearing information regarding certain provisional ballots that its Staff had previously identified as being subject to the requirements of the *NEOCH* Consent Decree. *See* "Wrong Precinct Provisionals Rejected Ballots Sorted by NEOCH" (JX 1015) (identifying seven provisional ballots as right location-wrong precinct ballots and explained by Board Staff member Sherry Poland at the evidentiary hearing as the proper way to locate the *NEOCH* provisional ballots identified by Board staff (TR (Poland Direct) 5-113 - 114); "Timeline of Events Surrounding Hunter v. BOE Litigation" (DX 1001 p. 3) (discussing Board Staff's original interpretation of the *NEOCH* Consent Decree, as clarified by the Secretary of State); *id.* at 7 (setting forth that on January 28th, 2011, the Sixth Circuit "Affirm[ed] order to investigate pursuant to NEOCH Consent Decree."); *id.* at 8 ("Staff prepares NEOCH spreadsheet listing P#, reason for rejection and precinct voted-in for discovery purposes.").

(PX 2008 p. 1; Doc. 8-1 at ¶¶ 5-6). As the Southern District of Ohio recently noted, parties to consent decrees "unquestionably" have standing to enforce them. *Ragland v. City of Chillicothe*, No. 2:10-cv-879, 2011 WL 1044013, *2 (S.D. Ohio March 16, 2011). As such, the Board's claim that NEOCH and ODP have failed to allege that they represent any Hamilton County voters who voted in the specific election at issue here is beside the point.

The Board also inappropriately relies on the Sixth Circuit's Opinion five years ago in *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), to question NEOCH's standing in *this* case. In that Opinion, issued in an expedited appeal from a temporary restraining order issued only days before the November 2006 election, the record before the Sixth Circuit consisted only of NEOCH's unverified complaint against the Secretary of State. As such, no factual record had yet been developed with respect to NEOCH's standing. On remand, NEOCH developed that factual record, and District Judge Marbley later issued a detailed Opinion and Order denying, in relevant part, the State's motion to dismiss NEOCH's case for lack of standing. *See* Opinion and Order, *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06-cv-00896 (Marbley, J., Sept. 30, 2008). Judge Marbley concluded that NEOCH "demonstrated all three requirements for organizational standing with respect to Counts Three, Four, Eight, Nine, Ten, Twelve, and Thirteen of their Complaint." *Id.* at p. 15. In the same Opinion and Order, Judge Marbley declared that NEOCH was a "prevailing party" entitled to an award of attorneys' fees. *Id*. at pp. 18-19. Although the State sought reconsideration of Judge Marbley's September 30, 2008 Opinion and Order, the State did not challenge that portion of Judge Marbley's Order relating to NEOCH's standing. *See* Motion for Reconsideration, *NEOCH v. Brunner*, No. 2:06-cv-00896, Doc. 191. And although the State later appealed Judge Marbley's orders to the Sixth Circuit, that appeal was dismissed for lack of prosecution when Judge Marbley entered the consent decree that NEOCH

intervened in *this* case to enforce. *See id.* at Docs. 210 and 211. Accordingly, Judge Marbley's determination that NEOCH possessed the requisite Article III standing to pursue its case against the Secretary of State – the case which ultimately led to entry of the *NEOCH* Consent Decree at issue here – has not been questioned by the Sixth Circuit.

Again, however, this argument by the Board is beside the point, because the *NEOCH* Consent Decree is valid, NEOCH and ODP are undisputed parties to the *NEOCH* Consent Decree, and parties to consent decrees "unquestionably" have standing to enforce them. *Ragland,* 2011 WL 1044013, *2.

B. The Board's Argument That The *NEOCH* Consent Decree Is Void Is An Improper Collateral Attack.

As the intervening plaintiffs stated at the evidentiary hearing and in their Response to the Board's Motion for Summary Judgment, the Board's argument that the *NEOCH* Consent Decree is unconstitutional and void is an improper collateral attack on the *NEOCH* Consent Decree. (TR (Cooperrider)12-6, 9); (Doc. 172 at 18). Collateral attacks on consent decrees entered in civil rights cases are not permitted where the district court that entered the decree has maintained jurisdiction. *Black & White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972) (affirming district court's holding that complaint was properly dismissed on ground that suit was an attempt collaterally to attack desegregation order entered in the principal case; since the District Court had maintained jurisdiction of the case, the proper avenue for relief if there were unanticipated problems which had developed in carrying out the order was by way of an application to intervene and a motion for additional relief in the principal case); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir.1982), cert. denied, 464 U.S. 900, 104 S.Ct. 255, 78 L.Ed.2d 241 (1983) (holding that plaintiffs, who were not parties to the

consent decrees they attacked, were launching improper collateral attacks on consent decrees and that "it is settled that a consent decree is not subject to collateral attack.").

As a representative of the Ohio Secretary of State – one of the parties to the *NEOCH* Consent Decree – the appropriate place for the Board to present challenges, or any unanticipated problems implementing the *NEOCH* Consent Decree, is in the case pending before Judge Marbley in which the decree was entered as the court's judgment.[4] *Black & White Children of Pontiac School System*, 464 F.2d at 1031, quoting *Kelley v. Metropolitan County Board of Education of Nashville, Tennessee*, 463 F.2d 732 (6th Cir. 1972) ("The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future."). The Consent Decree entered by Judge Marbley in the underlying *NEOCH* case specifically retained jurisdiction and stated that the Decree "shall remain in effect until June 30, 2013." (PX 2008 p. 6). This retention of jurisdiction is most recently evidenced by a filing made by Secretary of State Husted in that case on August 1, 2011, notifying the Court of changes in Ohio law related to the Decree. *See* Case No. 06-cv-896 (S.D. Ohio) (Marbley J.) Doc. 240. Accordingly, the Board's improper collateral attack on the *NEOCH* Consent Decree fails to support its argument that the Intervening-Plaintiffs lack standing, or that the Board does not have to comply with the *NEOCH* Consent Decree. That the Board admitted for some time that it is required to comply with the Decree speaks volumes about the merits of the Board's new and absurd argument.

---

[4] Case No. 06-cv-896 (S.D. Ohio) (Marbley J.).

C. The Law Of This Case Is That The NEOCH Consent Decree Applies And Should Be Followed.

The Sixth Circuit affirmed this Court's January 12, 2011 Order that the Board investigate all ballots subject to the *NEOCH* Consent Decree for poll worker error and count those ballots as required by that Decree, stating "all parties agree that [the *NEOCH* Consent Decree] remains and should be followed." *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (6th Cir. 2011). Accordingly, it is also the law of the case that the *NEOCH* Consent Decree remains and should be followed. *See Consolidation Coal Co. v. McMahon*, 77 F.3d 898 (6th Cir. 1996) (under the law-of-the-case doctrine, a district court is precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case). This Court is precluded from reexamining an issue previously decided by this Court in its January 12, 2011 Order and also decided by the U.S. Court of Appeals for the Sixth Circuit in its Opinion and Order affirming this Court's January 12, 2011 Order. *Hunter*, 635 F.3d at 247. To the extent the Board sought to challenge the applicability to the *NEOCH* Consent Decree, the Board should have done so before the Sixth Circuit when this Court's Order requiring the Board to comply with the *NEOCH* Consent Decree was being appealed. In response to the Board's argument that it has not previously raised the argument that the *NEOCH* Consent Decree is void as unconstitutional, as previously stated, the appropriate place for the Board to raise that specious argument is before Judge Marbley in the pending *NEOCH* case. *See Black & White Children of Pontiac School System*, 464 F.2d at 1031.

D. The Central Repeated Theme Of The Board's Collateral Attack On The *NEOCH* Consent Decree, That The General Assembly Was Not Involved In The *NEOCH* Case, Is Inaccurate.

As described above, the Board challenges the standing of NEOCH/ODP by collaterally attacking the underlying validity of the *NEOCH* Consent Decree that NEOCH/ODP intervened

in this case to enforce. (Doc. 181 at pp. 14-21.) A central, repeated theme of the Board's attack on the *NEOCH* Consent Decree is that only the General Assembly may suspend or change the operation of Ohio law and that the General Assembly was in no way involved in the *NEOCH* case in which Judge Marbley entered the Consent Decree. For example, the Board makes the following assertions in attacking the validity of the *NEOCH* Consent Decree:

- "The NEOCH consent decree, however, is not valid and is void because it suspends Ohio law and was entered into *by the Ohio Secretary of State and the Ohio Attorney General on behalf of the State of Ohio without any authority on their part to suspend or change Ohio law. The only entity that may suspend or change the operation of Ohio law is the General Assembly of Ohio*." (Doc. 181 at p. 14) (emphasis added).

- "Here the NEOCH consent decree was issued without proper jurisdiction or authority because the decree suspended and changed Ohio law based upon *the consent of Ohio officials who had no authority to do so*." (*Id*. at p. 17) (emphasis added).

- "The NEOCH court was not compelled by the U.S. Constitution to create a poll worker error exception. *It just did it with the partisan acquiescence of the Ohio Secretary of State, the Ohio Attorney General, the Ohio Democratic Party, and NEOCH. That was a change or suspension of Ohio law as to which those offices and entities could not consent*, and the NEOCH court therefore had no authority to issue the NEOCH judgment insofar as it changed and/or suspended provisions of Ohio law." (*Id*. at p. 20) (emphasis added).

The Board's repeated assertions that Ohio's General Assembly was not involved in the *NEOCH* case and did not "acquiesce" to Judge Marbley's entry of the *NEOCH* Consent Decree are flagrant misrepresentations of the procedural record in the *NEOCH* case.

In the *NEOCH* case, NEOCH filed its Complaint against Ohio's Secretary of State on October 24, 2006, naming (as the single defendant) then-Secretary of State J. Kenneth Blackwell, in his official capacity. (S.D. Ohio Case No. 06-896, Doc. 2.) The following day, Assistant Attorneys General Richard Coglianese and Damian Sikora submitted a response in opposition to NEOCH's request for a temporary restraining order on behalf of their client, the Secretary of State. (*Id*. at Doc. 9.) Just three days later, the State of Ohio, represented by

different Assistant Attorneys General (Sharon Jennings and Holly Hunt), filed a Motion to Intervene in the *NEOCH* case. (*Id.* at Doc. 22.) In that Motion to Intervene, these Assistant Attorneys General highlighted the reasons why the General Assembly's distinct interests and participation in the *NEOCH* case were crucial and warranted intervention, saying:

- "This Court should grant this motion to intervene as the State of Ohio has interests that differ from those of the Secretary of State, *given the different roles of the Secretary and the General Assembly regarding the Voter ID Law*. The State of Ohio has an interest in *defending the constitutionality of the statutes enacted by the General Assembly*, while the Secretary's primary interest is in administering these statutes and all others that apply to elections in Ohio." (S.D. Ohio Case No. 06-896, Doc. 22, at p. 2) (emphasis added).

- "Plaintiffs allege that the statutes are unconstitutional; the State of Ohio will present argument regarding why the statutes are constitutional, and is in a better position to make those arguments than the Secretary of State, because *the evidence is within the control of the General Assembly and the General Assembly is better situated to address any questions regarding statutory interpretation and legislative intent that may arise*." (*Id.* at p. 5) (emphasis added).

- "Indeed, the intervention of the State of Ohio should be favored, because of the opportunity for the Court to hear *the unique viewpoint of the General Assembly* regarding the enactment of this statute." (*Id.* at p. 6) (emphasis added).

Although District Judge Marbley orally denied the State of Ohio's Motion to Intervene on the same day it was filed (S.D. Ohio Case No. 06-896, Doc. 25), the State successfully appealed that decision to the Sixth Circuit, which granted the State's request to intervene just four days later, on October 31, 2006. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006). In its Opinion, the Sixth Circuit made it crystal clear that the State of Ohio sought (and should be granted) intervention in the *NEOCH* case to ensure the participation of its client, the General Assembly, in litigation regarding the constitutionality of its statutes, saying:

- "The State of Ohio moves to intervene to represent the interests of the people of Ohio *and the General Assembly* in defending the constitutionality of the statute." *Id.*, 467 F.3d at 1002 (emphasis added).

- "In this case, the Secretary's primary interest is in ensuring the smooth administration of the election, while the State *and General Assembly* have an independent interest in

> defending the validity of Ohio laws and ensuring that those laws are enforced." *Id.* at 1008 (emphasis added).

From that day forward, the State of Ohio, Secretary of State, and General Assembly were all parties to the *NEOCH* case. Richard Coglianese, the same Assistant Attorney General who successfully represented the distinct interests of the General Assembly before the Sixth Circuit in seeking (and obtaining) intervention in the *NEOCH* case, negotiated and agreed to the Consent Decree that NEOCH and ODP intervened here in *Hunter* to enforce. As such, the Board's repeated attempt to negate the General Assembly's participation in the *NEOCH* case and its agreement to the terms of the *NEOCH* Consent Decree should be summarily rejected by this Court.

III. THE BOARD'S ARBITRARY AND DISPARATE PROCESSING OF NEOCH BALLOTS VIOLATED THE REQUIREMENTS OF EQUAL PROTECTION.[5]

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects not only "[t]he right to vote" but also "the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-105, 121 S.Ct. 525 (2000) (*citing Harper v. Virginia Bd. of Elecs.*, 383 U.S. 663, 665 (1966)). Put differently, "[t]he right to vote includes the right to have one's vote counted on equal terms with others." *League of Women Voters v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (*citing Bush*, 531 U.S. at 104) (other citations omitted). Consequently, "state actions in election processes must not result in 'arbitrary and disparate treatment' of votes." *Hunter v. Hamilton Cty. Bd. of Elecs.*, 635 F.3d 219, 234 (6th Cir. 2011). In particular, "when the Board is exercising its

[5] NEOCH and ODP adopt and incorporate by reference Plaintiff Tracie Hunter's arguments regarding the Board of Elections' violations of the federal Constitution's Due Process Clause. This Brief focuses, instead, on NEOCH and ODP's Equal Protection Clause claims.

discretion in areas 'relevant to the casting and counting of ballots,' like evaluating evidence of poll-worker error[,] . . . such a discretionary review must apply similar treatment to equivalent ballots.' *Id.* at 235 (citation omitted).

In this case, Defendant Board of Elections treated equivalent NEOCH ballots differently, depending only on where they were cast. The Board counted wrong-precinct NEOCH ballots that were cast at the Board of Elections' office without any investigation of poll-worker error.[6] For most of the wrong-precinct NEOCH ballots cast at other polling locations, however, the Board's staff gave the ballot envelopes and signature poll book note pages a cursory review for obvious references to poll-worker error and then rejected the ballots as miscast. After this Court's injunction was issued, the Board gave some provisional ballots more review by interviewing poll workers and counting some of the ballots where poll worker error was shown. However, other provisional ballots, including all the NEOCH ballots, were given no such additional review. This arbitrary and disparate treatment of equivalent ballots runs afoul of the Equal Protection Clause's guarantees. Given the absence of any evidence to the contrary, the Court can infer that poll-worker error is to blame for the miscasting of the remaining right-location/wrong-precinct NEOCH ballots and order the Board to count those ballots in the same way that it counted the wrong-precinct NEOCH ballots that were cast at the Board's office.

A. The Board Treated NEOCH Ballots Cast At The Board Of Elections' Office But In The Wrong Precinct Differently From NEOCH Ballots Cast At Other Permissible Polling Places But In The Wrong Precinct.

In the November 2010 general election in Hamilton County, Defendant Board of Elections arbitrarily treated NEOCH ballots cast in the right location but the wrong precinct differently from NEOCH ballots cast at the Board's office but the wrong precinct.

---

[6] PX 2011 p. 5, 19, 21, 27, 31, 33, 35, 39, 43, 55.

In its Opinion affirming this Court's November 22, 2010 preliminary injunction, the Sixth Circuit held that the Board had failed to "apply specific and uniform standards" in determining whether ballots cast in the right location but the wrong precinct "were miscast as a result of poll-worker error." *Hunter*, 635 F.3d at 236 (citation omitted). The Court held:

> When the Board reviewed the 27 provisional ballots cast at the Board's office, despite those ballots being cast in the wrong precinct, the Board considered evidence of the location where the ballots were cast in concluding that those ballots were miscast as a result of poll-worker error. . . . But in contrast to these instances in which the Board considered evidence of poll-worker error in its review of wrong-precinct provisional ballots, . . . the Board explicitly refused to separate from the 849 wrong-precinct ballots those ballots cast at the right polling location but wrong precinct. The evidence of poll-worker error with respect to those [ ] ballots — that the ballots were cast at the correct multiple-precinct polling location — is substantially similar to the location evidence considered by the Board with respect to the ballots cast at its office. In both instances, there is no direct evidence that the poll worker erred. . . . For the 27 ballots cast at [the Board's] office . . . [t]he voter went to the correct location, i.e., the Board's office, and the staff at the Board's office was required to give the voter the correct ballot; thus, there is little chance that the voter erred, and the wrong-precinct ballot must be due to poll-worker error. Similarly, at the multiple-precinct polling locations, voters went to the correct location and the poll workers were required to direct voters to the correct precinct. . . . [T]he situations of voters at the Board office and at multiple-precinct polling locations are substantially similar.

Id. at 236-237 (footnote omitted). The Sixth Circuit concluded that:

> Plaintiffs have provided evidence that, in the November election, the Board considered evidence of poll-worker error with respect to some ballots cast in the wrong precinct but not other similarly situated ballots when it evaluated which ballots to count. In so doing, the Board exercised discretion, without a uniform standard to apply, in determining whether to count provisional ballots miscast due to poll-worker error that otherwise would be invalid under state law.

Id. at 238.

The evidence adduced at trial confirmed that the Board arbitrarily treated wrong-precinct NEOCH ballots cast at the Board of Elections' office differently from wrong-precinct/right-location NEOCH ballots cast at other polling locations. Of the 31 provisional ballots that were

cast in the wrong precinct at the Board of Elections' offices, but were counted nonetheless (PX 2011, *see* TR 12-119 – 120), ten of those ballots were NEOCH ballots. (*See* PX 2011, at P5953, P10228, P10247, P10245, P10246, P10248, P10227, P10231, P10242, P10239). The Board did not investigate to determine whether any of these ballots (including the NEOCH ballots) were miscast due to poll-worker error. Tim Burke, a member of the Hamilton County Board of Elections (TR 1-29), testified that the Board simply *assumed* that the ballots were miscast due to poll-worker error, based on the location at which they were cast:

> Q. . . . you voted with all the other Board members to count 27 ballots that were miscast at the Board of Elections?
>
> A. Happily.
>
> . . .
>
> Q. Now, when the Board voted on these 27, did the Board ask for specific examples of what the poll worker or the Board staffer did wrong? . . .
>
> A. No. We just all recognized immediately that a voter who comes to the Board of Elections to vote early, the only thing they have to do, in addition to providing an appropriate ID, they gave their address to one of our staff people, and the staff people put that in.
>
> Q. Is it possible that the voter made a mistake and either spoke their address wrong or miss – or transposed some numbers?
>
> A. I suppose anything like that is theoretically possible.
>
> Q. Did the Board – was the Board concerned about that on November 16th and want to do any investigation into possible voter error?
>
> A. No. Even our staff was indicating to us that this was an error that occurred from our staff at the Board. There was no dispute about it at all.
>
> Q. A few days later, four more ballots came to the Board's attention that also were miscast at the Board of Elections. Were those also approved by the Board?
>
> A. Yes.

Q. So that's how we get to the number of 31?

A. Correct.

(TR 1-177; TR 1-180 – 181). Sherry Poland, the operations administrator for the Board of Elections (*see* TR 5-89), confirmed that the Board staff did not investigate those 31 ballots for poll worker error. (*See* TR 7-280; TR 7-282). Caleb Faux, a member of the Hamilton County Board of Elections (*see* TR 11-7), also testified that there was no investigation into poll worker error for the 31 ballots cast in the wrong precinct at the Board offices. (*See* TR 11-14).

In contrast, the NEOCH ballots that were cast *outside* the Board offices, and in the right polling location but the wrong precinct, were treated differently. There were 849 provisional ballots cast in Hamilton County in the November 2010 general election that were rejected because they were cast in the wrong county or precinct. (*See* TR 1-83). Of these, 269 were cast in the right polling location, but the wrong precinct. (*See*, *e.g.*, TR 12-166). The NEOCH right-location/wrong-precinct ballots are a subset of the 269 right-location/wrong-precinct ballots. (*See* Poland (Direct), TR 5-123). As the Sixth Circuit held (*see supra*), poll-worker error was obviously to blame for the miscasting of these ballots. Mr. Burke explained at trial:

> A. . . . As I reviewed our directives, our training to our inside poll workers, I came to the conclusion that if a voter goes to the trouble of finding out where their polling place is and goes to the correct polling place, we darn well – our paid poll workers darn well ought to be able to get them to the right table; and if they don't, it's their fault. And that's poll worker error, in my view.

(TR 1-192 - 193). "[I]f a voter voted in the right place but at the wrong table, there was good circumstantial evidence to believe that our poll workers did not follow their directions to help ensure that voters got to the correct table." (TR 1-184). Defendant Mr. Faux agreed that "the fact that a person made it to the right polling place but went to the wrong precinct in and of itself is [evidence of] poll worker error[.]" (TR 11-17- 18).

Nonetheless, for the right-location/wrong-precinct ballots, which included NEOCH ballots, Ms. Poland testified that "the Board staff looked for demonstrated evidence of poll work[er] error[.]" (TR 5-121). She explained that the Board staff "examined the notes pages of the signature poll book to see if there [were] any notations whatsoever about this provisional voter or provisional voting in general from those notes pages." (TR 5-122; *see also id.* (explaining that "[t]hey were reviewing the notes for the ones that were voted at the correct location" because they were "look[ing] for evidence of poll work[er] error.")). Because "[t]here were no notations regarding provisional voters" for those ballots, the Board's staff concluded there was "no evidence of poll worker error." (TR 5-121; TR 5-124). Despite the essential similarities between the two groups of wrong-precinct NEOCH ballots, in sum, one group was *counted* without any investigation for evidence of poll-worker error, and the other group was *rejected* after a cursory review for direct evidence of poll-worker error.

At trial, the Chairman of the Hamilton County Board of Elections, Alex Triantafilou (*see* TR 12-131), affirmed that the Board took different actions with respect to the 849 provisional ballots that were rejected as improperly cast in the wrong precinct (*see* TR 12-146) than it took with respect to the 31 ballots that were cast at the Board of Elections in the wrong precinct but still counted (*see* TR 12-147- 148). (*See* TR 12-186 (agreeing that the Board's actions with respect to the 849 rejected wrong-precinct ballots were different from its actions with respect to the 31 wrong-precinct ballots that were cast at the Board's offices and counted)). As there were NEOCH ballots within each of these groups of ballots, it follows that the Board treated wrong-precinct NEOCH ballots cast at the Board of Elections' office differently from wrong-precinct NEOCH ballots cast at other permissible polling places, even though poll-worker error was evident for each group of ballots based on the same kind of circumstantial evidence. The

Board's arbitrary and disparate treatment of these two categories of NEOCH ballots violates the Equal Protection Clause.

B. The Board of Elections Investigated Some NEOCH Ballots For Poll Worker Error But Not Others.

The Board's disparate treatment of NEOCH ballots was made even more disparate by the Board's incomplete and aborted attempt to conduct a more thorough investigation of poll worker error. Sally Krisel, the director of the Hamilton County Board of Elections (*see* TR 1-29), testified that there were approximately 2000 "poll workers who were involved in the 849 wrong-precinct voted ballots" (TR 1-115). That meant there were approximately 2000 poll workers "who were involved in the precincts where the 849 provisional envelopes were disputed." (TR 1-121). The Board prepared to subpoena each of these 2000 workers, but "only ended up sending out the [subpoenas] for . . . the first two days[.]" (TR 1-117).

In those two days, the Board interviewed 71 poll workers. (*See* TR 1-120). The Board showed the interviewed poll workers copies of the provisional ballot envelopes that were in question for those poll workers, as well as signature books and poll books, and asked the poll workers to look up the voters' addresses in the so-called "Green Book" (county street listing). (*See* TR 1-123 - 124). By interviewing those 71 poll workers, the Board found 7 cases in which the poll workers admitted that they made a mistake when looking the voters' addresses up in the street listing. (*See* TR 1-124). The Board subsequently voted to count those 7 ballots (*see* TR 1-128 - 129), which were numbered P-9764, P-9580, P-9398, P-9399, P-9738, P-10154, and P-9769 (*see* JX 27 at 70, 73). Board Chairman Triantafilou said, in voting to count these ballots, that he believed there was "clear and convincing" evidence of "poll worker error," based on "poll worker testimony, . . . questionnaires, . . . poll books, notes, [and] call logs[.]" (JX 27 at 70-71). *Two of these ballots – P-9398 and P-9580 – were NEOCH ballots*. (*See* JX 12 at 41, 431).

For the more than 1900 poll workers who were not interviewed, though, the Board simply distributed written questionnaires. (Triantafilou, TR 12-245; *see also* Poland, TR 5-128 (testifying that the Board sent questionnaires to each of the poll workers involved in the 849 right-location/wrong-precinct ballots, "which included the NEOCHs")). These questionnaires did not ask the same questions that the Board had been asking poll workers in the in-person interviews. (*See* Krisel, TR 1-121 - 123). The Director of the Board admitted that one of the questions on the questionnaire was "a little confusing[.]" (*Id.*, TR 1-126). The Board's staff did not review the answered questionnaires or do any type of analysis of the poll workers' responses. (Poland, TR 5-182 - 183). And, Board Chairman Triantafilou candidly testified that "the questionnaire was just not helpful" for determining whether any given provisional ballot was miscast due to poll-worker error. (TR 12-165).

Thus, even within the category of ballots that were cast in the proper polling locations but the wrong precincts, the Board's treatment of NEOCH ballots was arbitrary and disparate. For *some* right-location/wrong-precinct NEOCH ballots, the Board interviewed the relevant poll workers in person, found evidence of poll worker error, and counted the ballots. For *other* right-location/wrong-precinct NEOCH ballots, in contrast, the Board did not interview the relevant poll workers, and instead just sent out vague and poorly drafted questionnaires, which the Board's staff ignored and which the Board's Director and Chairman admitted were "confusing" and "not helpful[.]" By giving dissimilar treatment to equivalent NEOCH ballots, the Board yet again violated the Equal Protection Clause.

IV. CONCLUSION

NEOCH and ODP intervened in this dispute to vindicate the requirements of a federal consent decree that NEOCH obtained more than four years ago here in the Southern District of

Ohio. At trial, Plaintiffs introduced substantial evidence proving that the Hamilton County Board of Elections violated the terms of that binding decree by failing to properly investigate and count certain provisional ballots that were cast by voters who used only the last four digits of their Social Security numbers as identification. Although the Sixth Circuit has already noted in this case that "all parties agree that the [*NEOCH*] consent decree remains and should be followed," and although both the Ohio Supreme Court (in *Painter*) and the Ohio Secretary of State (via Directives binding on the Board) have acknowledged the *NEOCH* Consent Decree, the Board persists in its meritless collateral attacks on the validity of that Decree. For the reasons described above and in the Plaintiffs' Proposed Findings of Fact and Conclusions of Law, this Court should reject those attacks and proceed to the merits of the Intervenor-Plaintiffs' claims. In doing so, the Court will be able to fashion relief appropriate to remedy not only the Board's violations of the specific terms of the *NEOCH* Consent Decree, but also the Board's unconstitutionally arbitrary and disparate treatment of NEOCH ballots.

Respectfully submitted,

s/ Caroline H. Gentry

Caroline H. Gentry, Trial Attorney (0066138)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748 / (937) 449-6820 Fax
cgentry@porterwright.com

and

Lawrence Bradfield Hughes (0070997)
Eric Benjamin Gallon (0071465)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 S. High Street, Suite 2800
Columbus, OH 43215-6194
Mr. Hughes: 614-227-2053
Mr. Gallon: 614-227-2190
Fax: 614-227-2100
bhughes@porterwright.com
egallon@porterwright.com

and

Sara Marie Cooperrider (0085993)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
250 E. Fifth Street, Suite 2200
Cincinnati, OH 45202
513-369-4244 / 513-421-0991 (Fax)
scooperrider@porterwright.com

and

Subodh Chandra (0069233)
THE CHANDRA LAW FIRM, LLC
1265 W. 6th Street, Suite 400
Cleveland, OH 44113-1326
(216) 578-1700 / (216) 578-1800 Fax
Email: Subodh.Chandra@StanfordAlumni.org

Attorneys for Intervenor Northeast Ohio Coalition for the Homeless

and

s/ Donald J. McTigue
Donald J. McTigue, Trial Attorney (0022849)
Mark A. McGinnis (0076275)
MCTIGUE LAW GROUP
550 East Walnut Street
Columbus, OH 43215
(614) 263-7000 / (614) 263-7078 Fax
mctiguelaw@rrohio.com

Attorneys for Intervenor

Ohio Democratic Party

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2011, I electronically filed the foregoing Post-Trial Memorandum with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/*s*/ Sara M. Cooperrider

ATTORNEY FOR INTERVENOR-PLAINTIFF