

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TRACIE HUNTER, et al.	:	CASE NO. 1:10-cv-820
Plaintiffs	:	Judge Susan J. Dlott
vs.	:	
HAMILTON COUNTY BOARD OF ELECTIONS, et al.	:	DEFENDANTS HAMILTON COUNTY BOARD OF ELECTIONS AND BOARD MEMBERS
Defendants	:	TRIANTIFILOU, BURKE, GERHARDT, AND FAUX
	:	MOTION TO DISMISS AMENDED COMPLAINT

Defendants Hamilton County Board of Elections and Board Members Alex Triantifilou, Charles Gerhardt, Timothy Burke and Caleb Faux (the “Board”) submit this motion to dismiss the First Amended Complaint of Intervenors-Plaintiffs NEOCH and ODP pursuant to Fed. R. Civ. Pro. Rules 12(B)(1), 12(B)(6), and 12(B)(7).

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION

Plaintiffs’ Amended Complaint should be dismissed because NEOCH and ODP lack standing to pursue the claims they have asserted and because the NEOCH consent decree is void and a nullity which may not be enforced by this Court.

A. NEOCH and ODP Lack Standing

NEOCH and ODP fail to satisfy the standing requirements in this case. The rules of standing are “threshold determinants of the propriety of judicial intervention.” *Warth v. Seldin*, 422 U.S. 490, 517 (1975). Because federal courts are not courts of general jurisdiction and have power only authorized by Article III, subject-matter jurisdiction may be raised at any time, even after trial or entry of judgment, by a party or by a court on its own

initiative. See Fed. R. Civ. Proc. 12(b)(1); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (explaining that subject-matter jurisdiction may never be forfeited or waived and courts have authority to review subject-matter jurisdiction absent a challenge from any party); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986) (every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review). An organization has standing to bring litigation on behalf of its members if the members “or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.” *Warth* at 511.

NEOCH and the ODP do not claim to represent the interests of Hamilton County voters who voted in the November 2, 2010 election. See Amended Complaint ¶¶ 7-9 (Doc 180 at 3,4). Likewise, NEOCH and ODP do not assert that any of its alleged members, which NEOCH has refused to identify, is a Hamilton County voter or is in any way injured by the alleged conduct of the Board. For that reason, NEOCH and ODP have no traditional standing based upon such a claim, and this is why the Sixth Circuit found that NEOCH in particular had no standing to challenge Ohio’s absentee voter identification law. *NEOCH v. Blackwell*, 467 F.3d 999, 1010 and n.4 (6th Cir. 2006) (see also the concurring opinion of Judge McKeague at 1012 to 1013).¹ To avoid this standing problem, NEOCH and ODP assert that their sole interest in this case is to enforce the NEOCH consent decree as parties to that decree.

¹ Plaintiffs assert that the Sixth Circuit has not “questioned” NEOCH’s standing with regard to the consent decree. But Plaintiffs also concede that the Ohio Secretary of State (after a change of administration) decided not to pursue a second appeal on that issue in the Sixth Circuit. So the Sixth Circuit never had another chance to evaluate NEOCH’s standing. In fact the only opinion regarding NEOCH’s standing in the Sixth Circuit remains *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006).

B. The NEOCH Consent Decree is Void

NEOCH and ODP claim standing to enforce the NEOCH consent decree because they are parties to it. Plaintiffs Response Brief at 16-17 (Doc 172). Plaintiffs try to defend the NEOCH consent decree against the obvious problem with that decree, which was raised by the Board in its Response to the Plaintiffs' Trial Brief, Defendants' MSJ and at trial, to the effect that the NEOCH consent decree is void and contrary to law because SOS Brunner and the State had no right to enter into a decree that changed Ohio law. The following is beyond dispute: all Ohio voters, including provisional voters, are obligated to vote in their correct precinct where they reside on Election Day and if they do not do so their vote will not count regardless of poll worker error. R.C. §§ 3505.183(B)(4)(a)(ii) and (iii); *Painter v. Brunner*, 128 Ohio St.3d 17, 941 N.E.2d 782 (Ohio 2011). The Board and its staff followed this law and informed all provisional voters in writing, including on the provisional ballot envelopes, that they had to vote in the precinct where they resided or their vote would not count. The NEOCH consent decree on its face suspends and changes Ohio law because it inserts a poll worker error exception into Ohio law when such an exception is not the law of Ohio.

NEOCH and ODP rely upon the NEOCH consent decree to give them standing. To rely upon that decree, the decree must be valid and not void. 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. Ohio Const. Art. I, Section 18. Moreover, the Board itself is not a signatory to that agreement.

In an attempt to deal with this fatal problem, Plaintiffs advance four arguments. First, Plaintiffs claim the law of the case doctrine defeats the Board's argument. Generally, the law of the case doctrine only applies to issues that are contested and decided on appeal, and it is in any event an "amorphous concept." *Arizona v. California*, 460 U.S. 605, 618 (1983). Whether the NEOCH consent decree is void and invalid was not raised, contested, tried, litigated or decided by this Court prior to the Sixth Circuit's decision in *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), nor was it decided in *Hunter*. All *Hunter* stated was that because the Trial Court's preliminary January 12, 2011 order requiring that NEOCH ballots be investigated was not contested, that part of the order was affirmed. *Id.* at 247. That is not a final decision on a contested issue, much less the matter now at issue, and therefore the law of the case doctrine should not apply to the validity of the NEOCH consent decree. NEOCH and ODP claim that the Board "should have" challenged the NEOCH consent decree in the interlocutory appeals taken in the case on this Court's preliminary injunction. There was no requirement to do that.

In addition, the Sixth Circuit decision in *Hunter* was dealing with an appeal from the Trial Court's preliminary injunction of November 22, 2010 and the order of January 12, 2011 granting in part and denying in part Plaintiffs' motion to enforce the preliminary injunction. Both orders were preliminary in nature and issued without a final hearing or a complete exposition of the law or the evidence. In such cases, the "law of the case doctrine" does not apply. "Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits, or that are avowedly preliminary or tentative, do not trigger law of the case consequences." *Wilcox D.O., P.C. Employees' Defined Benefit*

Trust v. United States, 888 F.2d 1111, 1113 (6th Cir. 1989). A court's determination of substantive issues in deciding a motion for preliminary injunction do not constitute the "law of the case" for purposes of a decision on the merits of the case. *Id.* NEOCH and the ODP do not dispute this, but ignore this point in their Post Trial Brief demonstrating that they have no response.

Even if the law of the case doctrine were to apply based upon the fact that the non-contested preliminary order of this Court to investigate NEOCH ballots was affirmed in *Hunter*, the Sixth Circuit will not apply the doctrine "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (citing *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). At trial, the Board set forth undisputed evidence that SOS Brunner and the Ohio Attorney General had no authority to enter into the NEOCH consent decree; that the NEOCH consent decree changed Ohio law; and that the decree was void, invalid on its face and violated the Ohio Constitution. The evidence raised by the Board at trial is different from what was before this Court when the January 12, 2011 preliminary order was issued and when the Sixth Circuit affirmed part of that order. Next, to the extent that Plaintiffs are saying that the Sixth Circuit has ruled definitively on the issue of the legality of the NEOCH consent decree, even though it has not, such an imagined ruling would be clearly erroneous and would work a manifest injustice. Accordingly, the law of the case doctrine does not preclude the challenge to NEOCH and ODP standing based upon the fact that the NEOCH consent decree is void and illegal.

Second, Plaintiffs claim that the Board's challenge to the NEOCH consent decree is an improper collateral attack on that decree. Plaintiffs Response Brief at 18 (Doc 172). This is not true. Because the NEOCH consent decree is illegal and void, it may be challenged in this proceeding. It has long been the law that if a court is "without authority, its judgments and orders are regarded as nullities." *Elliot v. Piersol's Lessee*, 26 U.S. 328, 340 (1828). Judgments issued without authority "are not voidable, but simply void" and "all persons concerned in executing such judgments . . . are considered, in law, as trespassers." *Id.* See also, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere."); *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). When a court lacks inherent power to enter a particular judgment, such a judgment can be attacked at any time, in any court, either directly or collaterally. E.g., *Long v. Shorebank Development Corp.*, 182 F.3d 548, 561 (7th Cir. 1999); *Blanchard v. Terry & Wright, Inc.*, 218 F. Supp. 910, 912 (W.D. Ky. 1963) ("If jurisdiction is absent, the judgment is void."); *Patton v. Diemer*, 518 N.E.2d 941 (Ohio 1988) (syllabus paragraph four) (Ohio courts have inherent authority to vacate void judgments); *State v. Blankenship*, 675 N.E.2d 1303, 1304 (Ohio App. 9 Dist. 1996) (a void judgment is one entered by a court without jurisdiction to enter such judgment). The cases are legion which stand for the proposition that void judgments are nullities and can be challenged at any time either collaterally or directly. E.g., *Chester v. Arkansas State Board of Chiropractic Examiners*, 435 S.W.2d 100, 103-04 (Ark. 1968); *Ramagli Realty Co. v. Craver*, 121 So.2d 648, 654 (Fla. 1960); *In re Estate of Steinfeld*, 630 N.E.2d 801, 806 (Ill. 1994); *Stidham v. Whelchel*, 698 N.E.2d 1152, 1154 (Ind. 1998); *In re Marriage*

of Welliver, 869 P.2d 653, 656 (Kan. 1994); *In re Hatcher*, 505 N.W.2d 834, 840 (Mich. 1993); *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1956); *Marshall v. Marshall*, 482 N.W.2d 1, 4 (Neb. 1992); *Chavez v. County of Valencia*, 521 P.2d 1154, 1158 (N.M. 1974); *Carpenter v. Carpenter*, 93 S.E.2d 617, 623 (N.C. 1956); *Thomas & Howard Co. v. T.W. Graham and Co.*, 457 S.E.2d 340, 343 (S.C. 1995); *State v. Richie*, 20 S.W.3d 624, 630 (Tenn. 2000); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990); *Bresolin v. Morris*, 543 P.2d 325, 328 (Wash. 1975); *Neylan v. Vorwald*, 368 N.W.2d 648, 656 (Wis. 1985). 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. The NEOCH court had no authority or power to accept the “consent decree” as its judgment.

A judgment is also void on its face if the trial court exceeded its jurisdiction by granting relief it had no power to grant. Jurisdiction cannot be conferred on a trial court by “consent of the parties.” E.g., *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). Nor can a jurisdictional defect be waived by the parties. E.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Therefore, the fact that a judgment is entered by consent or stipulation does not insulate it from being void. Under Fed. R. Civ. P. 60(b)(4) (which provides for relief from any judgment that is void), it is a per se abuse of discretion for a lower court to uphold a void judgment, and void judgments may not be given any effect as they are nullities. *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998) (it is a per se abuse of discretion to uphold a void judgment); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (“[i]f the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant’s

motion to vacate the judgment under Rule 60(b)(4)’” (quoting *United States, v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply*, 55 F.3d 1311, 1317 (7th Cir. 1995)); *Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994) (when a judgment is void, relief is not discretionary, it is mandatory); *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (judgment against defendant void when it was determined that action was in admiralty and should have been brought only against the US); *Compton v. Alton SS Co.*, 608 F.2d 96, 104 (4th Cir. 1979) (when a default judgment was awarded under an inapplicable statute, the judgment was void); *V.T.A. Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 and n.8 (10th Cir. 1979) (“If voidness is found, relief is not a discretionary matter; it is mandatory.”); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2^d Cir. 1963) (30 year old consent judgment void because court had no power to issue unconstitutional prior restraint). Consent decrees may also be collaterally attacked when they are the “product of corruption, duress, fraud, collusion, or mistake” *Martin v. Wilks*, 490 U.S. 755, 771 (1989) (Stevens dissenting).

NEOCH and ODP do not address any of the above authority cited by the Board in support of its position that the NEOCH consent decree is void and illegal and may be attacked collaterally at any time. Instead, NEOCH and the ODP claim that “collateral attacks on consent decrees . . . are not permitted where the district court that entered the decree has maintained jurisdiction.” NEOCH and ODP Post Trial Brief (Doc 185 at 6). NEOCH and ODP cite the Sixth Circuit’s decision in *Black & White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972) for this proposition. *Black & White Children* did not involve a void consent decree, and the complaining parties were plaintiffs who brought an action alleging “difficulties in

carrying out” a desegregation order. *Id.* at 1030. Here, the Board is a defendant. It did not choose to bring suit in federal court challenging another court’s consent decree. NEOCH, the ODP and Hunter chose this forum, not the Board. The Board has every right to defend that the NEOCH decree is void when it has been asserted that the Board violated this decree, and nothing in the *Black & White Children* case says otherwise. *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), also cited by NEOCH and ODP, is inapposite for the same reason that *Black & White Children* is.

Moreover, the “impermissible collateral attack” rule in consent decree cases involving discrimination claims, which NEOCH and ODP are relying upon, was rejected by the US Supreme Court in *Martin v. Wilkes*, 490 U.S. 755, 762 and n. 3 (1989) (the Supreme Court rejected the “impermissible collateral attack” rule set forth by the Sixth Circuit in *Striff v. Mason*, 849 F.2d 240, 245 (6th Cir. 1988) (citing *Black & White Children*) and *Thaggard*). Thus, neither *Black & White Children* or *Thaggard* are good law any longer, and NEOCH and ODP are, therefore, relying on inapposite cases that have been reversed while ignoring the extensive body of law holding that void orders may be attacked in any court at any time by any person or entity, either collaterally or directly, and that no court may enforce or uphold void orders as they are nullities.

The problem with the NEOCH consent decree is not a problem with “implementing” the decree as suggested by NEOCH and ODP, as they try mightily to fit within the reversed case law they have cited and in arguing that the Board’s remedy is to go before Judge Marbley. The problem with the NEOCH consent decree is that it changed Ohio law to add a “poll worker error” exception contrary to the Ohio Constitution mandating that only the General Assembly of Ohio could suspend or change

Ohio law. This is not an “implementation” problem but a fundamental defect in the consent decree as there was no authority of the NEOCH parties to consent to such a change of Ohio law or for the district court to accept the decree as submitted to it by the parties in that case. If NEOCH and ODP were correct, parties could collusively enter into illegal consent decrees changing the law of Ohio and then enforce their new “statutes” on other persons in other courts, and the other persons would have no right to challenge the voidness of the consent decree in the courts into which they have been forced. Nothing in the law supports such illegality or commands federal courts to enforce void consent decree judgments.

The Board also was not a party to the NEOCH case and did not have the opportunity to litigate the legality of the consent decree. “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). See also *762 Parklane Hosiery Co., v. Shore*, 439 U.S. 322, n.7 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-29 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). The rule that everyone should have their day in court is a “deep-rooted historic tradition”. 18 A Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4449 at 346-47 (2002). Before the Board is held to be in violation of the NEOCH consent decree, it should have the opportunity to contest the application of the decree to the Board and in particular to show that the decree is illegal and void.

NEOCH and ODP state that the Board has flagrantly misrepresented the procedural record in the NEOCH case and claim that the Ohio General Assembly was a party to the NEOCH case. NEOCH and ODP Post Trial Brief (Doc 185 at 10). In fact the Ohio General Assembly was not a party to the NEOCH case, never requested that it be made a party, and never asked to intervene in the case. The Ohio General Assembly also did not consent to NEOCH consent decree or authorize anyone to do so on its behalf as proven by the assembly's journals and resolutions for 2007-2008 and 2009-2010, which covers the entire period of the NEOCH case. See NEOCH Consent Decree (PX 2008); Journals and Resolutions from the 127th General Assembly and 128th General Assembly of Ohio (DX 1038). If the Ohio General Assembly did not act on entering the NEOCH case and/or accept the NEOCH consent decree, and it did not, it was not a proper party and did not adopt the changes to Ohio law set forth in the consent decree. Since all acts of the Ohio General Assembly are set forth in the Journals and Resolutions of the General Assembly and since there is no record of the General Assembly ever seeking to enter the NEOCH case, agreeing to be a party in the NEOCH case or accepting the NEOCH judgment, this means that the Ohio General Assembly did not enter the case, was not a party and did not agree to the consent judgment. The Ohio Attorney General moved to allow the State of Ohio to intervene in the NEOCH case to defend the constitutionality of a statute enacted by the Ohio General Assembly, the Voter ID Law. The intervention was on behalf of the State, not the General Assembly. Even though the motion papers mention the interests of the Ohio General Assembly in having its statutes defended, this entity did not move to intervene, and the Ohio Attorney General never moved to make the General Assembly a party. Consistent with the motion actually filed,

only the State of Ohio was made a party defendant by intervention. While the Sixth Circuit reversed Judge Marbley's order denying Ohio's motion to intervene and noted that the state had an interest in intervening to "represent the interests of the people of Ohio and the General Assembly," that does not mean that the General Assembly was made a party. It was not. NEOCH and ODP's protestations to the contrary are not supported by the NEOCH consent decree itself, the record of the NEOCH case (which never sets forth the Ohio General Assembly as a party) or the journals and resolutions of the Ohio General Assembly for the period in question.

Third, Plaintiffs claim that the NEOCH consent decree is not constitutionally defective and that NEOCH could enjoin the enforcement of an unconstitutional state law. Plaintiffs Response Brief (Doc 172 at 18). While it is true that unconstitutional state laws may be enjoined, it is entirely beside the point. The NEOCH consent decree makes no finding that any portion of Ohio law is unconstitutional, either *in toto* or as applied. The decree specifically states that it "shall in no way constitute a finding on the merits . . . nor be construed as an admission by the Defendants of any wrongdoing or violation of any applicable federal or state law or regulation." PX 2008 at 2. The decree specifically contemplates that the Ohio provisional ballot statutes will continue; but then proceeds to create, and engraft, onto these statutes a "poll worker error" exception which is strictly limited to a single class of voters.

The NEOCH consent decree provision requiring a poll worker error exception (1) for those provisional voters who use the last four digits of their Social Security number as identification, and then with regard to that group alone, (2) only for those who vote at multi-precinct locations, is not required by the US Constitution. There is no authority

which provides that Ohio is prohibited, as it does, from requiring voters to vote in the precinct where they live and to never count votes cast on Election Day in the wrong precinct regardless of poll worker error. As explained in *Painter*: Ohio law does “not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted.” 941 N.E.2d 782, 794 (Ohio 2011). Plaintiffs in this case are not challenging the constitutionality of that Ohio law. The constitutionality of Ohio’s precinct based voting system was upheld in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). The NEOCH court was not compelled by the US 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.

Even if the NEOCH court and/or the parties in that case may have thought they had a better idea about how to re-write Ohio law by including a poll worker error exception under certain circumstances, it was not the province of that court, the parties or any court to rewrite Ohio law. “Courts may not rewrite the language of a statute in the guise of interpreting it in order to further what they deem to be a better policy than the one Congress wrote into the statute.” *Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 1300-01 (11th Cir. 2010) (citing *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (“Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.”)). See also, *Commissioner v. Lundy*, 516 U.S. 235, 252

(1996) (“We are bound by the language of the statute as it is written . . . even if the rule [petitioner] advocates might ‘accor[d] with good policy’”); *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) (“Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.”); *Vainisi v. Commissioner.*, 599 F.3d 567, 572 (7th Cir. 2010) (appellate court may not rewrite statutes merely because the court thinks the statutes imperfectly express legislative intent or wise social policy); *Doe v. Dep’t of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008) (“Our role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch.”); *Albritton v. Cagle’s, Inc.*, 508 F.3d 1012, 1027 (11th Cir. 2007) (“We are not empowered to rewrite statutes.”); *In re Sunterra Corp.*, 361 F.3d 257, 269 (4th Cir. 2004) (modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress, not to courts); *In re Adams*, 302 B.R. 535, 545-46 (B.A.P. 6th Cir. 2003) (“courts simply do not have the power to resolve pure policy questions” which “is especially true when it comes to rewriting statutes with the intention of improving them”); *Wright v. Sec’y, Dep’t of Corrs.*, 278 F.3d 1245, 1255 (11th Cir. 2002) (“Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to ‘improve’ statutes by altering them.”).)

Finally, Plaintiffs argue that because Ohio was a party to the NEOCH case and represented by the Ohio Attorney General, the NEOCH consent decree is valid. That fact does not change the above analysis. The Ohio constitutional provision at issue is mandatory and exclusive. Only the state general assembly may suspend or change the

law. For this reason, the NEOCH consent decree is illegal and void and NEOCH and the ODP have no standing to enforce it.

II. PLAINTIFFS HAVE FAILED TO JOIN A NECESSARY PARTY

The Amended Complaint also should be dismissed pursuant to Fed.R.Civ.P. 12(B)(7). The State of Ohio is not a party contrary to Fed. R. Civ. P. 19(a)(1), which states that a party must be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest;

The State is an indispensable party in this case because the Plaintiffs' challenges extend beyond the actions of the Board and to the constitutionality of R.C. §§ 3505.181, 3505.183. The 6th Circuit recognized that the constitutionality of Ohio election law is squarely at issue. See *Hunter* at 34.

Plaintiffs claims should be dismissed for failure to join a necessary party. As explained *infra*, Plaintiffs assert violations to the NEOCH consent decree which is void and unconstitutionally changed Ohio election law. The Amended Complaint goes even further than only claiming violations of the consent decree. NEOCH and ODP now argue that the Amended Complaint expands the "poll worker error" exception unlawfully created by the consent decree. In particular, Count One of the Amended Complaint asserts a poll worker error exception where none previously existed. NEOCH and ODP now allege that a voter is still a "NEOCH voter" even if the poll worker indicated that identification was provided. NEOCH/ODP Amended Complaint at ¶¶ 50-52 (Doc. 180, p.

15,16.) This exception is not found in the decree. In fact, the first purpose of the consent decree is to ensure that:

The fundamental right to vote is fully protected for registered and qualified voters who *lack the identification required by the Ohio Voter ID Laws*, including indigent and homeless voters –such as the Individual Plaintiffs and certain members of the Coalitions- who do not have a current address and cannot readily purchase a State of Ohio ID card;

NEOCH Consent Decree, Section I.1.a (PX 2008 at 2) (emphasis added). It is incongruous for Plaintiffs to now claim that the Board’s acceptance a poll worker’s representation that identification was shown is, by itself, poll worker error. The stated purpose of the consent decree was to enfranchise voters who lack identification and the Board did so. The Board never rejected a ballot solely because the provisional voter provided only the last four digits of their social security number. This constitutes an additional challenge to Ohio’s voter identification laws and the State of Ohio should be joined in this litigation.

The Board is an arm of the State, but its jurisdiction is limited to Hamilton County, Ohio. This litigation may impact how the Secretary of State and all county boards of elections conduct elections. Therefore, Plaintiffs cannot proceed to challenge R.C. 3505.181 and R.C. 3505.183 without State of Ohio notice and involvement in this litigation.

III. PLAINTIFFS NEOCH AND ODP FAILED TO STATE A CLAIM

Plaintiffs NEOCH and ODP have failed to state a claim upon which relief may be granted. It is well settled that:

[t]he familiar standard for reviewing dismissals under Rule 12(b)(6) is that “the factual allegations in the complaint must be regarded as true. The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Windsor v. The*

Tennessean, 719 F.2d 155, 158 (6th Cir.1983) (citing *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)), *cert. denied*, 469 U.S. 826, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984).

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). In addition to claiming violations of the consent decree, NEOCH and ODP claim that the Board violated equal protection and due process rights of voters. NEOCH/ODP Amended Complaint ¶¶ 62-69 (Doc 180 at 18,19).

NEOCH and ODP seek only retroactive relief despite the rewritten prayer for relief in the Amended Complaint. Compare NEOCH/ODP Complaint (Doc 8-1 at 5); NEOCH/ODP Amended Complaint (Doc 180 at 20). Plaintiffs want this Court to order the Board to undo their vote not to count certain provisional ballots on November 16, 2010. The relief sought is limited to the November 2010 election as opposed to asking this Court to prevent similar violations in future elections. These claims are not cognizable because the Board and its Members have Eleventh Amendment immunity for such relief for all of the reasons set forth in Defendants' Motion for Summary Judgment (Doc 94) and Reply in support thereof (Doc 181) and Defendants' Response to Plaintiffs' Trial Brief (Doc 112). The Board incorporates such motions herein by reference.

The Board and its Members are further not liable for the actions of its poll workers or for violations of state law under 42 U.S.C. § 1983 for all of the reasons set forth in Defendants' Motion for Summary Judgment (Doc 94) and Reply in support thereof (Doc 181), Defendants' Response to Plaintiffs' Trial Brief (Doc 112), and Defendants' Post Trial Brief (Doc 187). The Board incorporates such motions herein by reference.

IV. THE AMENDED COMPLAINT DOES NOT CONFORM TO THE EVIDENCE

Count Three of the Amended Complaint does not conform to the evidence established at the Board's meeting on November 16, 2010 concerning voters' affirmations and names on the provisional ballot envelopes. NEOCH/ODP Amended Complaint ¶¶ 56-58 (Doc 180 at 17). Accordingly, the Amended Complaint is futile and should be dismissed.

On November 16, 2010, the Board was presented with groups of ballots, including some NEOCH ballots, where the voter did not complete the name or affirmation statement properly on the ballot envelopes. November 16, 2010 Board Meeting (JX 28 at 50-57). Board Member Faux argued that this could be the result of poll worker error. Id at 56. Board Member Burke disagreed, stating: ". . . I don't think its pollworker error. The pollworkers are so busy, they glance at something, they see that there is something written on that line. I do not know that they need to take the time to determine if it was the full name or not." Id. Therefore, contrary to the statements in the Amended Complaint, the Board did consider poll worker error with regard to the provisional NEOCH ballots with an affirmation or printed name defect. The Board voted 3 to 1 that those provisional ballots should not be counted and that there was no poll worker error. Id at 57.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on August 30, 2011 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ David T. Stevenson
David T. Stevenson

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