

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

NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Civil Action No. C2-06-896
Plaintiffs,	:	Judge Marbley
vs.	:	
J. KENNETH BLACKWELL,	:	<u>PLAINTIFFS' MOTION TO ENFORCE CONSENT ORDER</u>
Defendant.	:	

Plaintiffs move this Court to enforce the November 1, 2006 Consent Order entered into by all parties and the Court, specifically with regard to determining the eligibility of provisional ballots to be counted. Given that the results of the election must be certified within 25 days of November 7, 2006, Plaintiffs respectfully request that the Court rule on this Motion immediately.

The grounds for this Motion are more fully set forth in the attached memorandum and supported by the declarations, affidavits and newspaper article attached as Exhibits B, C and D. A proposed order is attached as Exhibit A.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO ENFORCE CONSENT ORDER**

On November 1, 2006, the parties to this action and the Court signed a Consent Order (attached as Exhibit B) governing the casting and counting of votes in the November 7, 2006 election. The Consent Order provided, among other things, that voters who provided a driver's license with a former address would be permitted to cast a regular ballot. The Consent Order further provided that provisional ballots that satisfy an eight-part test will be counted.

As shown by the evidence, discussed in detail below, the Consent Order has been and is being violated by at least some Boards of Elections. Specifically, some voters who should have been allowed to cast regular ballots were instead wrongly required to cast provisional ballots. Also, there is evidence that some provisional ballots are being wrongly rejected in violation of the Consent Order.

The Court should enforce its Consent Order to ensure that provisional ballots that should be counted are indeed counted. Some of these ballots should never have been provisional at all because the voter was wrongly denied the right to cast a regular ballot, in violation of the Consent Order. These ballots should be automatically counted and not be subjected to the eight-part test to determine their eligibility to be counted. Other provisional ballots are being wrongly rejected, in violation of the Consent Order. Plaintiffs respectfully move this Court for an order that will enforce the Consent Order and remedy, to the extent possible, past violations of the Consent Order. A proposed Order is attached as Exhibit A.

I. THE SECRETARY OF STATE IS RESPONSIBLE FOR ENSURING THAT BOARDS OF ELECTIONS COMPLY WITH THE LAW AND THE CONSENT ORDER, BUT SOME BOARDS OF ELECTIONS HAVE VIOLATED AND ARE VIOLATING THE LAW AND SAID ORDER

A. The Secretary Of State Is Responsible For The Conduct Of Elections In The State Of Ohio

As Secretary of State, Defendant Blackwell is the chief election officer of the State of Ohio. Ohio Rev. Code § 3501.04. The duties and powers prescribed by statute require him, among other things, to: (1) appoint all members of Boards of Elections, (2) issue instructions to those Boards of Elections in the form of directives and advisories, (3) prepare rules and instructions for the conduct of elections, (4) require such reports from the Boards of Elections as he considers necessary, (5) compel Boards of Elections to observe the election laws, and (6) investigate the administration of the election laws and any irregularities in the elections in any county. Ohio Rev. Code § 3501.05(A), (B), (C), (L), (M), (N)(1).

Boards of Elections are subject to the authority of the Secretary of State. Their members are appointed by the Secretary of State to serve “as the secretary’s representatives.” Ohio Rev. Code § 3501.06. The Secretary of State may summarily remove or suspend his representatives for neglect of duty, malfeasance, misfeasance, nonfeasance, any willful violation of the Ohio Election Code, or any other good and sufficient cause. *Id.*, § 3501.16. Boards of Elections may make and issue rules and instructions but they cannot be inconsistent with the rules, directives or advisories issued by the Secretary of State. *Id.* § 3501.11(E). Finally, Boards of Elections must perform whatever duties are prescribed by the rules, directives, or advisories of the Secretary of State. *Id.*, § 3501.11(P).

In sum, members of Boards of Elections serve as representatives of the Secretary of State and must perform whatever duties he prescribes, and follow his rules and instructions. The

Secretary of State is the Chief Election Officer and is responsible for appointing members of Boards of Elections, removing or suspending them, and compelling their observance of the election laws. Accordingly, under the Ohio Election Code, Defendant Blackwell is responsible for the conduct of elections in Ohio and, in particular, the observance by Boards of Elections of the Consent Order that was entered into by the parties and this Court on November 1, 2006.

B. Boards Of Elections Violated The Consent Order On Election Day

The Consent Order required Boards of Elections to allow voters to cast regular ballots if they provided specified forms of identification, including paychecks with current addresses, bank statements with current addresses, utility bills with current addresses, government documents with current addresses, and driver's licenses with current *or former* addresses. Consent Order, ¶¶ 3-4.

The declarations, affidavits and newspaper article attached as Exhibit C show that at least some Boards of Elections violated these provisions of the Consent Order on November 7, 2006.

Specifically:

- In Hamilton County, Michele Berry provided a valid Ohio driver's license with a former address and was instructed to use a provisional ballot. After arguing with the poll worker, she was finally allowed to cast a regular ballot. The poll worker did not record the last four digits of her driver's license number, as he was required to do. Ms. Berry voted in the afternoon and is concerned that voters who voted at her precinct earlier in the day were subjected to the wrong rules.
- In Hamilton County, Janis Berwitt provided a current utility bill with her address and was instructed to use a provisional ballot. Ms. Berwitt protested and the poll workers "had an argument amongst themselves, until one of them said, 'Let's look at the manual.'" After consulting the manual the poll worker allowed Ms. Berwitt to cast a regular ballot. Ms. Berwitt voted in mid-morning and is concerned that voters who voted at her precinct earlier in the day were subjected to the wrong rules.

- In Hamilton County, Margaret Fox provided a current bank statement with her address and was instructed to use a provisional ballot. After arguing with the poll worker, she was finally allowed to cast a regular ballot.
- The Cincinnati Enquirer reported that United States Representative Steve Chabot was turned away from the polls in Hamilton County and directed to bring back additional identification when he presented a driver's license that listed his business address rather than his home address. The Director of the Hamilton County Board of Elections, Tim Burke, was reported as saying that Rep. Chabot should have been allowed to vote the first time. Mr. Burke was quoted as saying that "[t]here was a lot of confusion on the part of both voters and poll workers on voter ID."
- The Cincinnati Enquirer further reported that one of its hot line contributors, Zach Pittsenbarger, experienced problems over the identification requirement when he voted in Hamilton County. Mr. Pittsenbarger was quoted as stating: "I went to vote at my polling place at 6:30 a.m., and (was) told to cast a provisional ballot because my ID did not have the same street address as my registration location. My roommate went to the same polling place the same morning with an ID and registration with different addresses and was allowed to vote, no problem."
- A voter in Oberlin, Ohio witnessed poll workers tell a woman who provided a paycheck with an address that she was not allowed to vote by regular ballot, but instead must vote by provisional ballot.
- In Cuyahoga County, Jared Klaus provided a driver's license with his former address and was required to vote by provisional ballot.
- In Cuyahoga County, Matthew Kall provided a driver's license with his former address and was told by the poll worker and her supervisor that he must vote by provisional ballot. After he protested, they checked their paperwork and agreed that he was allowed to vote by regular ballot. Mr. Kall subsequently called the Board of Elections to complain and was informed by Susan Poole that voters with driver's licenses with old addresses were required to vote by provisional ballot. After re-reading the rules, she agreed that her previous statement was incorrect.
- In Franklin County, Herbert Rankin, Jr. provided a temporary driving permit issued by the Ohio Bureau of Motor Vehicles. He was told that because he did not provide a photo identification, he must cast a provisional ballot.

C. Boards Of Elections Are Currently Violating The Consent Order

The Consent Order allowed voters who lacked the identification necessary to cast a regular ballot to provide the last four digits of their Social Security number and cast a provisional

ballot. Consent Order, ¶ 5. Those ballots shall be counted if the voter: (1) is qualified (i.e., registered and eligible to vote), (2) is properly registered to vote, (3) is eligible to vote in that precinct, (4) is eligible to vote in the November 7, 2006 election, (5) provided all of the information required by Section 3505.183(B)(1) in the affirmation accompanying the provisional ballot (i.e., the voter’s name, signature, a statement that he is registered and a statement that he is eligible), and (6) had not already cast a ballot in the November 7, 2006 election. *Id.*, ¶ 8. The last two factors—that the individual provided any additional information within ten days, and that any challenge hearing be resolved in favor of the voter—should not apply to these ballots.

The attached declaration of Dora Rose shows that these provisions are being violated by the Cuyahoga County Board of Elections. Specifically, Ms. Rose observed elections officials place provisional ballots with no birth dates on them, or with no addresses on them, into “rejected” piles. Rose Declaration, ¶¶ 6-7 (attached as Exhibit D). However, nothing in the law or the Consent Order requires these ballots to have birth dates or addresses in order to be counted. Indeed, members of Plaintiff NEOCH do not have addresses and vote in Cuyahoga County. Absent intervention by this Court, none of their votes will be counted.

II. THE COURT SHOULD ENTER AN ORDER ENFORCING THE CONSENT ORDER

A. The Court Has The Authority To Enforce The Consent Order

This Court has the jurisdiction and authority to enforce the Consent Order. Consent decrees “are settlement agreements ‘subject to continued judicial policing.’” *Grand Traverse Band v. Director, Michigan Dept. of Nat. Resources*, 141 F.3d 635, 641 (6th Cir. 1998) (citations omitted). “[T]he prospective provisions” of the Consent Order “operate as an injunction” which requires this Court to retain jurisdiction, protect the integrity of the Consent Order with its

contempt powers, and modify the decree if changed circumstances subvert its intended purpose. *Waste Management of Ohio v. City of Dayton*, 132 F.3d 1142, 1145-46 (6th Cir. 1997) (citations omitted). “Courts, therefore, have a duty to enforce, interpret, modify, and terminate their consent decrees as required by circumstance.” *Id.* at 1146.

This Court’s powers extend to its authority to enjoin third parties, including the Boards of Elections, from interfering with the Consent Order. For example, the Sixth Circuit affirmed a grant of declaratory relief to an Indian tribe (GTB) seeking to enforce a consent order entered into with the State of Michigan against defendant municipalities that were not parties to that order, explaining that such a result was necessary to effectuate the order:

The consent order at issue in this case expressly provided GTB the right to fish in its traditional fishing grounds.... [I]n furtherance of the consent order, then, GTB is permitted to moor its vessels at the marinas. To do otherwise would interfere with the express purpose of the consent order.

Although the municipalities were not named parties to the order, it is well settled that third parties who interfere with a court order may be enjoined from doing so. *See Washington State Commercial Passenger Fishing Vessel*, 443 U.S. at 693 n.32. In *Washington State Commercial Passenger Fishing Vessel*, the Supreme Court found that commercial fishing associations who were interfering with the district court’s order pursuant to a Native American treaty, could be bound by the order, although they were not parties to the proceeding that led to the issuance of the order. *Id.* The Court found in the alternative, that the fishing association’s members, as citizens of the State of Washington which was a party to the prior proceedings, could be bound on that basis as well. *Id.* We find *Washington State Commercial Passenger Fishing Vessel* is applicable because the Village of Northport and the Township of Leland are instrumentalities of the state....

Grand Traverse Band, 141 F.3d at 641-42.

Similarly, here, this Court can issue declaratory or injunctive relief against Boards of Elections that are interfering with the performance of the Consent Order, both because the Boards of Elections are, in effect, agents of Defendant Blackwell, and because this Court can independently enjoin third parties from interfering with the Consent Order.

B. The Proposed Order Is Narrowly Tailored To Remedy Past Violations And Ensure Compliance With Regard To The Provisional Ballots

The proposed order attached as Exhibit A is narrowly tailored to address the violations of the Consent Order that have occurred to date, and to ensure that no future violations occur in the counting of provisional ballots. It requires Boards of Elections to count provisional ballots that should have been regular ballots without subjecting them to the eight-part test set forth in paragraph 8 of the Consent Order. It requires Boards of Elections to follow the eight-part test for all other provisional ballots and not reject them for reasons not specified in that test, including the lack of a date of birth or address.

Finally, it requires Boards of Elections to provide certain information to observers and their counsel so that timely objections may be made for provisional ballots that should not be rejected. Specifically, Boards of Elections shall permit duly assigned observers or their substitutes, together with their counsel, to review the following information in sufficient time to make such objections: (1) photocopies of all provisional ballot applications proposed to be rejected, with the Social Security number and driver's license number visibly redacted, (2) the name of the voter, (3) the identification number of the ballot envelope, (4) the names of the officials who determined the validity of the ballot, (5) the date and time of that determination, and (6) the reason that the ballot is proposed to be rejected. Defendant Blackwell has proposed providing the information in (1), and the statute requires the information in (2)-(6) to be recorded

for all provisional ballots that are rejected. Ohio Rev. Code § 3505.183(C)(1). Therefore, none of this information is unduly burdensome or unavailable. Instead, the proposed Order is as narrowly tailored as possible to ensure compliance with this Court's Consent Order.

III. CONCLUSION

For the reasons stated, this Court should grant this Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

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