

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

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

Plaintiffs,

v.

JENNIFER BRUNNER, OHIO SECRETARY
OF STATE, *et al.*,

Defendants.

Case No. C2-06-896

Judge Algenon L. Marbley

**MOTION OF THE NORTHEAST OHIO COALITION FOR THE HOMELESS
TO ENFORCE THIS COURT'S OCTOBER 27, 2008 ORDER**

Plaintiff Northeast Ohio Coalition for the Homeless (“NEOCH”) moves this Court to enforce the October 27, 2008 Order entered by the Court with the agreement of the parties, 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 4, 2008, NEOCH respectfully requests that the Court rule on this Motion immediately.

The grounds for this Motion are more fully set forth in the attached memorandum.

Respectfully submitted,

s/ Caroline H. Gentry

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**MEMORANDUM IN SUPPORT OF MOTION OF THE NORTHEAST OHIO
COALITION FOR THE HOMELESS TO ENFORCE THIS COURT'S
OCTOBER 27, 2008 ORDER**

On October 14, 2008, Plaintiff NEOCH filed a motion for preliminary injunction that sought, among other things, a Court Order requiring the uniform and equal interpretation of the laws with respect to determining the eligibility of provisional ballots to be counted. NEOCH sought this relief because some of its homeless members lack the identification required to cast a regular ballot on Election Day and so must cast provisional ballots in the November 2008 election. Because data from the November 2006 election showed that Boards of Elections had applied different rules when determining whether to count provisional ballots, NEOCH brought suit under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to obtain an order requiring the application of uniform rules in the November 2008 election.

NEOCH conducted expedited discovery, including one-hour depositions of officials from twenty Boards of Elections and a one-hour deposition of a designated representative from Defendant Brunner's office. That discovery revealed startling discrepancies in the rules that Boards of Elections planned to apply in the November 2008 election when determining whether to count provisional ballots. One of those discrepancies related to whether poll worker error would invalidate a provisional ballot.

On October 24 and 27, 2008, with the agreement of the parties, the Court entered two Orders (attached as Exhibits A and B, respectively) governing the casting and counting of provisional ballots in the November 4, 2008 election. The October 24 Order adopted a Directive issued by Defendant Brunner (Directive 2008-101) that set forth uniform rules that Boards of Elections must follow when determining whether provisional ballots are eligible to be counted.

The October 27 Order required Defendant Brunner to issue a Directive stating that provisional ballots may not be rejected for reasons due to poll worker error.

As this Court is well-aware from the briefing and decisions in the related case of *State of Ohio ex rel. Dana Skaggs v. Brunner*, Case No. 08-1077 (the “Skaggs Case”), about 1,000 provisional ballots cast in Franklin County are currently in dispute (“Disputed Ballots”) because they do not have the voter’s printed name, signature or both on the written affirmation contained on the outside of the Provisional Ballot Envelope. The four-member Board of Elections voted on whether to count the Disputed Ballots and has tied, two-to-two. Defendant Brunner is required by law to break the tie by voting either to accept or reject these ballots.

For the reasons stated below, Plaintiff NEOCH submits that under this Court’s October 27, 2008 Order, she must vote to count the Disputed Ballots. Based on the briefs filed by Defendant Brunner in the Skaggs Case, Plaintiff NEOCH expects that she would follow this Court’s October 27, 2008 Order if she could do so. However, the plaintiffs in the Skaggs Case are currently seeking to prevent her from doing so in an action filed in the Ohio Supreme Court that expressly disclaims any reliance on federal law. Defendant Brunner removed that case to this Court and obtained a ruling that the Disputed Ballots should be counted (see District Court Order attached as Exhibit C). However, the Sixth Circuit recently remanded the Skaggs Case to the Ohio Supreme Court (see Sixth Circuit Opinion attached as Exhibit D).

It is unclear whether the Ohio Supreme Court will choose an interpretation of state law that is consistent with this Court’s October 27 Order that resolved a federal constitutional challenge brought by NEOCH. What is clear, however, is that there is a substantial risk that the Ohio Supreme Court will not do so. It is also clear that there is very little time left in which to resolve the issue. Accordingly, Plaintiff NEOCH respectfully moves this Court to enforce its

October 27 Order and direct Defendant Brunner to cast her vote in favor of counting the Disputed Ballots.

I. STATEMENT OF FACTS.

In its initial Complaint, filed in October 2006, Plaintiff NEOCH challenged the constitutionality of Ohio's newly-enacted Provisional Ballot laws on the grounds that those laws were vague and ambiguous, would inevitably be applied unequally by Ohio's 88 Boards of Elections, and would violate the rights guaranteed to NEOCH's homeless members by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (Doc. No. 2, Complaint, ¶¶ 126-178, 220-229.)

Shortly before the November 2006 election, the parties resolved NEOCH's pending motion for a preliminary injunction by entering into a Consent Order. (Doc. No. 51.) Among other things, that Consent Order clarified the rules that should apply when determining whether provisional ballots were eligible to be counted.

Defendant Brunner moved to dismiss NEOCH's claims based on lack of standing. (Doc. No. 99.) NEOCH opposed the motion. (Doc. No. 102.) On September 30, 2008, this Court ruled that NEOCH lacked standing to pursue some claims but had standing to pursue other claims, including its claims challenging the Provisional Ballot laws. (Doc. No. 108 at 11.)

Two weeks later, NEOCH filed a proposed Supplemental Complaint and a Motion for Preliminary Injunction. (Doc. Nos. 110, 111.) In those filings, NEOCH argued that Ohio's Voter Identification laws imposed an unconstitutional poll tax on all Ohio voters, as well as an undue burden on NEOCH's homeless members, because Ohio does not provide free identification. NEOCH further argued that data from the November 2006 election showed that Ohio's 88 Boards of Elections applied the Provisional Ballot laws unequally, in violation of the

Due Process and Equal Protection Clauses. NEOCH sought expedited discovery in support of its Motion. (Doc. No. 112.)

The following week, NEOCH subpoenaed documents and deposed officials from twenty Ohio Boards of Elections, as well as a designated representative from Defendant Brunner's office. (See Doc. Nos. 135, 139.) Key portions of the deponents' testimony were summarized on charts submitted in support of NEOCH's Motion. (Doc. No. 141.)

The undisputed evidence established that in many respects, Ohio's Boards of Elections planned to apply different and unequal standards when determining whether to count provisional ballots cast in the November 2008 Election. (Doc. Nos. 135, 139, 141.) For example:

- Belmont County has previously rejected provisional ballots where the poll worker failed to sign the PBA, but was unsure what it would do this year. Butler County planned to contact the poll worker to find out why he did not sign the form, i.e., whether he simply forgot or was challenging the voter. Greene County has tended to accept such ballots. Clermont, Coshocton and Logan Counties were not sure what they would do. Clark, Cuyahoga and Hamilton Counties planned to count these provisional ballots.
- Clermont and Lorain Counties were improperly planning to reject any provisional ballot that did not contain the voter's date of birth, even though Ohio law does not require a date of birth. Greene County planned to reject such ballots but only after attempting to contact the voter to get a date of birth. Belmont County has previously rejected provisional ballots on this ground but was unsure if it would do so this year. Coshocton and Seneca Counties might have rejected the ballot unless the voter provided a date of birth within 10 days after the election. Butler,

Hamilton, Logan and Madison Counties would consider counting the ballot if they could otherwise verify the voter's identify. Clark, Cuyahoga, Franklin and Summit Counties properly planned to count these provisional ballots.

- Clark County was improperly planning to reject provisional ballots that contained the last four digits of a Social Security Number, but did not contain one of the listed forms of required identification. Miami County was unsure whether it would reject these ballots. Other Boards properly planned to count these provisional ballots.
- Cuyahoga County was improperly planning to reject provisional ballots that did not list the address of a building, even though Ohio law allows homeless voters to vote using the location of the shelter “or other location” where they regularly reside. Coshocton and Logan Counties said that they might count the ballot if they could verify the address. Butler County planned to “do further research” into the voter on a case-by-case basis. Belmont, Miami and Summit Counties were unsure whether they would count these ballots or not. At least seven Boards properly planned to count these provisional ballots.
- At least seven Boards were planning to contact voters to ask for additional information or clarification that might help the Board to decide to count the provisional ballots. Five other Boards were not planning to contact the voter. Logan County planned to contact the voter only if there were something that “really throws them off” to the point where the Board could not decide one way or the other.

- Ohio Revised Code § 3505.183 sets forth a five-factor test and a seven-factor test that apply when determining whether to count a provisional ballot. At least six counties planned to use both tests. However, Cuyahoga and Montgomery Counties planned to use only the five-factor test; Hamilton County said that it depends; Logan County did not know; and Clark County did not plan to use either one.

These are just some of the startling discrepancies that NEOCH's abbreviated discovery uncovered regarding whether Ohio's Boards of Elections intended to apply uniform standards when determining whether to count provisional ballots cast in the November 2008 election.

This Court scheduled a hearing for October 23, 2008, to take evidence relating to NEOCH's Motion for Preliminary Injunction. On that day and the next day, however, the parties and the Court negotiated two Orders that provided for the uniform treatment of provisional ballots. In exchange, NEOCH agreed to defer the portion of its Motion that challenged the constitutionality of the Voter ID laws.

The first Order was entered on October 24, 2008 and incorporated Directive 2008-101, which Defendant Brunner issued "as a means to settle" the NEOCH case. (Doc. No. 142.) Directive 2008-101 set forth uniform rules that apply when determining whether to count provisional ballots.

The second Order was entered the following Monday, on October 27, 2008. (Doc. No. 143.) It resolved two issues left unaddressed by Directive 2008-101, namely, whether provisional ballots cast by a voter who does not live in a building should be counted, and whether provisional ballots that are deficient because of poll worker error should be counted.

With the parties' agreement, the Court entered an Order requiring both of these categories of ballots to be counted.

The next day, Defendant Brunner issued Directive 2008-103, titled "Issued Pursuant to Court Order." That Directive provided, in relevant part:

[P]ursuant to the court order, I hereby instruct the boards of elections **that provisional ballots may not be rejected for reasons that are attributable to poll worker error**, including a poll worker's failure to sign a provisional ballot envelope *or failure to comply with any duty mandated by R.C. 3505.181*.

(Doc. No. 143 at 1 (first emphasis in original, second emphasis added).)

II. THE DISPUTED BALLOTS ARE IN DISPUTE BECAUSE OF POLL WORKER ERROR AND MUST BE COUNTED UNDER THE OCTOBER 27 ORDER.

R.C. 3505.181(B)(2) provides that if a voter is eligible to cast a provisional ballot, that "individual *shall be permitted* to cast a provisional ballot at that polling place *upon the execution of a written affirmation* by the individual before an election official at the polling place . . ." (Emphasis added). The content of the written affirmation is prescribed by R.C. 3505.182, which has a space for the voter's printed name and signature and requires the affirmation to be completed by the voter and signed and witnessed by a polling place official. *Id.* The poll worker must sign a statement that reads: "The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this . . . day of . . . (Month), . . . (Year)." *Id.*

Read separately and together, Ohio Revised Code Sections 3505.181 and 3505.182 require poll workers to confirm and verify that the provisional voter has both executed and signed the written affirmation on the PBA. Only after the poll worker verifies that the voter has executed and signed the affirmation can he or she lawfully "permit" the voter to cast a provisional ballot. Therefore, if the voter did not both print his name and sign (or affirmatively

decline to sign) the written affirmation, but was allowed to cast a provisional ballot anyway, that happened, at least in part, as a result of poll worker error.

The October 27 Order provides that provisional ballots may not be rejected for any reason attributable to poll worker error. Except in the circumstance where the voter expressly declined to sign the affirmation statement—in which event the ballot must be counted (see R.C. 3505.183(B)(1))—a missing printed name or signature is reasonably attributable to poll worker error. As stated above, R.C. 3505.181 requires the voter to execute the affirmation statement before a poll worker *before being permitted* to cast a provisional ballot. R.C. 3505.182 further requires the poll worker to sign a statement that the voter affirmation was signed and affirmed before the official. If the voter failed to print or sign his name, then he did not “execute” or “subscribe” the affirmation before a poll worker.

In such an instance, the poll worker may have made two errors. The first error was to sign the required statement that verified that “[t]he Provisional Ballot Affirmation printed above was *subscribed* and affirmed before me” R.C. 3505.182 (emphasis added). The word “subscribed” means “to sign one’s name to a document.” Webster’s II New Riverside Dictionary (Rev. Ed.). If the poll worker verified that the voter had signed his name—and he did not—then the poll worker clearly erred by signing the verification statement. Based on this error alone, all ballots that lack a voter’s signature must be counted, because the poll worker clearly erred by signing the verification statement.

The second error made by the poll worker was to give the voter a provisional ballot. The statute provides that voters are only permitted to cast a provisional ballot if they have executed the affirmation statement. R.C. 3505.181(B)(2) (“The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the

individual before an election official at the polling place”). If the voter did not execute the written affirmation—which requires both a printed name and signature—then he or she *should not have been permitted* to cast a provisional ballot. This error pertains to all ballots that lack a printed name, signature, or both, and requires that those ballots be counted.

III. THE COURT SHOULD ENTER AN ORDER ENFORCING ITS OCTOBER 27 ORDER.

This Court has the jurisdiction and authority to enforce the October 27 Order, which was entered with the agreement of the parties. 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 a consent decree “operate as an injunction” which requires this Court to retain jurisdiction, protect the integrity of the Order with its contempt powers, and modify the decree if changed circumstances subvert its intended purpose. *Waste Mgmt. 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.

As stated above, there is a significant risk that the Ohio Supreme Court—which is not being presented with any issues of federal law in the complaint filed by the Skaggs plaintiffs—will rule solely on issues of state law and, in so ruling, will reach a result that is inconsistent with this Court’s October 27 Order. There is also very little time left in which to resolve this dispute. Accordingly, Plaintiff NEOCH respectfully requests that this Court enter an Order enforcing its October 27 Order and directing Defendant Brunner to vote in favor of counting the Disputed Ballots. Given the short time left in which to count these ballots, Plaintiff NEOCH respectfully requests that the Court rule at its earliest opportunity on this motion.

Respectfully submitted,

s/ Caroline H. Gentry

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 26th day of November, 2008.

s/ Caroline H. Gentry

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