

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

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

Plaintiffs,

v.

JENNIFER BRUNNER, in her official
capacity as Secretary of State of Ohio,

Defendant.

Case No. C2-06-896

Judge Algenon L. Marbley
Magistrate Judge Terence P. Kemp

**MOTION TO CONSOLIDATE ACTIONS AND MEMORANDUM IN SUPPORT
OF OHIO DEMOCRATIC PARTY**

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 42(A), the Ohio Democratic Party, Intervenor, hereby moves to consolidate *Ohio Republican Party v. Brunner*, (“*Brunner*”), Case No. 2:08-CV-913, with the above-captioned case entitled *NEOCH v. Brunner*, filed on October 24, 2006 (“*NEOCH*”). The grounds for this motion are that these two actions present common questions of law and fact, and that this action was the first-filed of the two. Specifically, the *Brunner* action challenges the validity of Ohio Directive 2008-101, concerning guidelines for processing and counting provisional ballots. *E.g.*, *Brunner* Complaint at ¶¶ 34-35, 86, 92. Directive 2008-101 was the central focus of the *NEOCH* action, and in fact was adopted as an Order of the *NEOCH* Court, as part of an agreement by the parties in that suit. The two suits

plainly therefore involve the same legal issues, and concerns of judicial economy and avoiding inconsistent outcomes plainly counsel for consolidation here. Under settled practice in this District, these cases should be consolidated into the *NEOCH* action before this Court.

The *Brunner* action seeks declaratory and injunctive relief. The Complaint was filed on September 26, 2008. It alleges in relevant part that Directive 2008-101 is unlawful. The *Brunner* Plaintiffs assert six counts in their complaint against Jennifer Brunner in her official capacity as Ohio Secretary of State. The *NEOCH* action also seeks declaratory and injunctive relief. It raises allegations concerning the manner in which provisional ballots are counted in Ohio. Both suits involve common questions of law and fact, and consolidation is in the interest of judicial economy. The standard for consolidation under Fed. R. Civ. Proc. 42 is therefore easily satisfied.¹

ARGUMENT

Rule 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

“Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court” *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993).

The Sixth Circuit has stated that a trial court determining whether to consolidate must consider “whether the specific risks of prejudice and possible confusion [are] overborne by the

¹ The Plaintiffs and the Secretary of State have consented to the filing of this motion.

risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.” *Id.* at 1011 (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985)); *see also State of Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500, 503 (S.D. Ohio 1995) (in determining whether consolidation is appropriate, “the court balances the value of time and effort saved by consolidation against the inconvenience, delay, or expense increased by it”); *Blasko v. Washington Metro. Area Transit Authority*, 243 F.R.D. 13, 15 (D.D.C. 2007) (“Actions that involve the same parties are apt candidates for consolidation . . . [and] consolidation is particularly appropriate when the actions are likely to involve substantially the same witnesses and arise from the same series of events or facts.”); *Vasquez Rivera v. Congar Int’l Corp.*, 241 F.R.D. 94, 95 (D.P.R. 2007) (explaining that consolidation is intended to avoid overlapping trials containing duplicative proof, excess cost incurred by all parties and the government, and the waste of valuable court time in the trial of repetitive claims, among other considerations).

Moreover, it is settled practice in this District to consolidate cases into the first-filed case – here, the instant action. *Kohus v. Toys ”R” Us, Inc.*, Case No. C-1-05-517, Case No. C-1-05-671, 2006 U.S. Dist. LEXIS 33470 (May 25, 2006) is directly on point: “As the parties note, it is common practice in the Southern District of Ohio to consolidate cases into the first-filed case. Defendants have not convinced this Court that there is any reason to depart from that common practice. Consolidating these two cases for discovery and a Markman hearing would save both the courts and the parties time and money, and prevent the parties from proceeding to trial with inconsistent adjudications of the exact same claims.” *Id.* at *7.

The Court therefore should consolidate before this Court the suits that are the subject of this motion. Both suits involve common questions of law and fact. Specifically, the *NEOCH* suit concerns the guidelines for determining the validity of provisional ballots, and resulted in the issuance of Directive 2008-101, which is Ohio's comprehensive directive concerning provisional ballots. In particular, Directive 2008-101 provides comprehensive guidelines for counting and processing provisional ballots. The *Brunner* suit similarly concerns the manner in which Ohio officials count provisional ballots, and specifically alleges that Directive 2008-101 is unlawful because it "ensures that local boards will not have uniform procedures for the counting of provisional ballots." Brunner Complaint at ¶ 34. Moreover, the *Brunner* complaint alleges that Directive 2008-101 creates "vague and confusing instructions concerning the matching of the signature of a voting casting a provisional ballot with the signature on file for that voter." Brunner Complaint at ¶ 35. Put simply, the *Brunner* action challenges the very directive that is at issue in the *NEOCH* suit.

Moreover, there is very little risk of prejudice or confusion. To the contrary, the *NEOCH* action is clearly the appropriate place to litigate challenges to Ohio's directives concerning the guidelines for counting and processing ballots, including provisional ballots. The *NEOCH* Court has the expertise and familiarity with these issues, and no party will be prejudiced by the adjudication of its claims before such a forum. The only risk of confusion arises if Directive 2008-101's validity were to be litigated before a different court than the one that has been considering these issues for the last two years. Thus, in stark contrast with the low risk of prejudice from consolidating, there exists a great risk of inconsistent adjudications of common factual and legal issues should these actions not be consolidated. For these reasons, litigating

these cases separately rather than in a single consolidated case will place a greater burden on parties, witnesses and available judicial resources.

Accordingly, the balance of interests favors consolidation of these cases.

CONCLUSION

For the reasons set forth above, the Ohio Democratic Party respectfully requests that this Court enter an order consolidating the *Brunner* and *NEOCH* actions.

Respectfully submitted,

s/ Donald J. McTigue

Donald J. McTigue (OH 0022849), Trial Counsel

Mark A. McGinnis (OH 0076275)

McTIGUE LAW GROUP

550 East Walnut Street

Columbus, OH 43215

Tel: (614) 263-7000

Fax: (614) 263-7078

mctiguelaw@roho.com

*Counsel for Proposed Intervenor
Ohio Democratic Party*

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 4th day of November, 2008.

/s Mark A. McGinnis
Mark A. McGinnis (OH 0076275)
Attorney at Law