

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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Civil Action No. C2-06-896
	:	Judge Algenon L. Marbley
Plaintiffs,	:	
vs.	:	<b>MEMORANDUM IN REPLY TO DEFENDANTS' MEMORANDA IN OPPOSITION TO NEOCH'S COMBINED MOTION TO ENJOIN THE OHIO SUPREME COURT'S ORDER AND <u>ENFORCE THE JUDGMENT</u></b>
JENNIFER BRUNNER, in her official capacity as Secretary of State of Ohio, et al.,	:	
Defendants.	:	

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The order issued by the Ohio Supreme Court on December 5, 2008 in *State ex rel. Skaggs v. Brunner*, Case No. 08-2206 (“State Court Order”) conflicts with this Court’s orders issued on October 24 and 27, 2008 (“Federal Court Orders”) with regard to whether to count provisional ballots that have the voter’s printed name but not the voter’s signature. The Federal Court Orders require all 88 Ohio Boards of Elections to count these ballots. The State Court Order requires one Board of Elections—in Franklin County—to reject and not count them.

By creating conflicting rules for whether to count these provisional ballots in both the November 2008 election and all future elections, the State Court Order threatens to undermine the efficacy and continued viability of the Federal Court Orders. Therefore, Plaintiff Northeast Ohio Coalition for the Homeless (“NEOCH”) has sought to enjoin the State Court Order and require the rescission of Directive 2008-118, which implements that Order. NEOCH has also renewed its prior Motion (Doc. No. 162) to enforce the Federal Court Orders.

Both Defendants have opposed NEOCH’s Combined Motion. For the reasons stated below, their opposition is not well-taken and the Motion should be granted.

I. **THE ISSUES RAISED IN NEOCH'S COMBINED MOTION ARE NOT HYPOTHETICAL BECAUSE THE CONFLICTING ORDERS AND DIRECTIVES WERE NOT LIMITED TO THE NOVEMBER 2008 ELECTION.**

Defendants argue that the issues raised in NEOCH's Motion to Enforce are moot and hypothetical because the November 2008 election is over. However, the conflicting Orders and Directives are not limited by their terms to the November 2008 election, but instead set forth rules for all future elections. There is nothing hypothetical about them. They represent the current state of the law. NEOCH has as much a right to challenge them as it does to challenge any other election law that threatens to harm its members.

Defendants argue that NEOCH should first wait to see if the state of the law changes, and if it does not, then NEOCH will have "ample time" to seek relief before the next election. This argument is in stark and startling contrast to the Defendants' usual arguments that NEOCH is barred from obtaining relief because it "waited too long" to bring its challenge, and it is improper and harmful to change the rules before an election. It is unclear when, exactly, the Defendants would have NEOCH (or any other voting-rights plaintiff) challenge an election law.

This conundrum is well-illustrated by the present Motion. When NEOCH filed its first motion to enforce to enforce the Federal Court Orders (Doc. No. 162), it did so before the Ohio Supreme Court issued the State Court Order. Defendant Brunner opposed the motion on the grounds that it was too soon. (See Doc. No. 163). Now Defendant Brunner argues that it is too late. But she cannot have it both ways, as it would mean that neither NEOCH nor any of the other Plaintiffs could ever seek to enforce the Federal Court Orders. That cannot be the law.

For all of these reasons, Defendants' argument that the current dispute is hypothetical, moot, unripe and merely seeks an advisory opinion should be rejected.

II. **THE FEDERAL COURT ORDERS AND STATE COURT ORDER DO CONFLICT WITH EACH OTHER.**

Defendant State of Ohio (but not Defendant Brunner) argues that NEOCH's Motion should be denied because the Orders do not actually conflict with each other. This Defendant first contends that the October 24 Federal Court Order and the State Court Order do not conflict with each other because they refer to the same portion of the statute. That is true as far as it goes, but ignores the critical fact that the Federal Court Order requires those ballots to be counted whereas the State Court Order requires them to be rejected. Since the Orders require that the same ballots be treated differently, they conflict with each other.

Similarly, Defendant argues that the October 27 Federal Court Order and the State Court Order do not conflict with each other because the Ohio Supreme Court left open the possibility of proving that a poll worker error had occurred. However, as explained at length in NEOCH's Motion, the poll worker must have erred if the voter unintentionally failed to sign the provisional ballot, because he or she is required by statute to sign an affirmation that verifies that the voter signed the ballot. Because there must have been a poll worker error, the October 27 Federal Court Order requires these ballots to be counted. The State Court Order, however, requires them to be rejected. Since the same ballots are treated differently, the Orders conflict with each other.

III. **THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY.**

Finally, Defendant State of Ohio (but not Defendant Brunner) argues that NEOCH's Motion must be denied for lack of subject-matter jurisdiction because only the United States Supreme Court has the power to review and enjoin the challenged State Court Order. This argument, which is commonly referred to as the *Rooker-Feldman* doctrine, also must fail.

The United States Supreme Court recently limited the *Rooker-Feldman* doctrine to cases where the plaintiff files the federal court case after the state court case was filed and bases its

claims on an attack on a judgment in the state court case. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517 (2005). See *McCormick v. Braverman*, 451 F.3d 382, 395 (6<sup>th</sup> Cir. 2006) (“The Supreme Court made clear in *Exxon Mobil* that the doctrine is confined to those cases exemplified by *Rooker* and *Feldman* themselves: when a plaintiff asserts before a federal district court that a state court judgment itself was unconstitutional or in violation of federal law.”).

The Sixth Circuit has held that under *Exxon Mobil*, the jurisdictional inquiry turns on the source of the injury alleged by the federal plaintiff in its complaint. “If the source of the injury is the state court decision, then the *Rooker-Feldman* doctrine would prevent the district court from asserting jurisdiction. If there is some other source of injury, such as a third party’s actions, then the plaintiff asserts an independent claim” and the district court has jurisdiction. *McCormick*, 451 F.3d at 393.

Here, the source of the injury cited in NEOCH’s Complaint and Supplemental Complaint is the challenged Provisional Ballot laws themselves, which are so vague and ambiguous that they inevitably will be (and have been) applied in a non-uniform and unconstitutional manner by Ohio’s 88 Boards of Elections. The source of this injury does not depend on—and in fact pre-dates—the State Court Order. Moreover, NEOCH and the other Plaintiffs filed this federal lawsuit more than two years before the *Skaggs* plaintiffs filed their state-court lawsuit. The *Rooker-Feldman* doctrine therefore does not deprive this Court of subject-matter jurisdiction, and this Defendant’s final argument fails.

IV. **CONCLUSION.**

Defendants have raised only three arguments in opposition to NEOCH's Combined Motion to Enjoin the State Court Order and Enforce the Federal Court Orders. For the foregoing reasons, each argument fails. NEOCH's Combined Motion should therefore be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 27<sup>th</sup>, 2009, 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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