

**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

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

Defendant Brunner's sole argument in opposition to Plaintiff NEOCH's Motion to Enforce the Court's October 27 Order ("Motion") is that the relief sought is allegedly moot. That contention surely comes as a surprise to the Ohio Supreme Court and the plaintiffs in the Skaggs Case, who are seeking to reverse the very same vote cast by Defendant Brunner that is at issue here.

A brief review of the Skaggs Case is necessary here. In their Complaint filed in the Ohio Supreme Court (attached as Exhibit A), the *Skaggs* plaintiffs allege that Defendant Brunner wrongly instructed the Franklin County Board of Elections ("Board") to count the Disputed Ballots, and further allege that her instruction is erroneous and contrary to Ohio law. (Ex. A, para. 1, 32-33). They claim that they are entitled to a writ of mandamus either because the Board

will follow this allegedly erroneous advice, or because Defendant Brunner will break a tie vote in a manner consistent with her advice:

Inasmuch as the Secretary of State will impose her erroneous interpretations of these statutorily mandated requirements and inasmuch as the Board of Elections will follow the erroneous interpretations of the Secretary of State on these two issues *or, alternatively, the Secretary of State will impose her erroneous interpretations pursuant to her authority under R.C. 35011.11(X) to break ties among the members of the Board of Elections*, Relators lack an adequate remedy in the ordinary course of the law to protect their rights as electors and prevent an illegal diminution of their votes. (Ex. A, para. 35) (emphasis added).

As Defendant Brunner observes, the eventuality described in the above-emphasized text has now occurred. Defendant Brunner voted to break the tie in favor of counting the Disputed Ballots. The question is, what effect does that have on the relief that the Skaggs plaintiffs seek?

In the Complaint that they filed on November 13, the Skaggs plaintiffs sought essentially two forms of relief. First, they sought to compel Defendant Brunner to advise the Board that they must vote to reject the Disputed Ballots. (Ex. A, para. 1). However, that avenue of relief was effectively mooted when the Board voted 2-2 on the issue, resulting in a tie vote that must, by law, be broken by Defendant Brunner. This Court recognized as much when it explained that the Board became a nominal party as a result of this tie vote, as it “no longer controls the determination of how provisional ballots will be counted where the voter did not provide both name and signature, which is the subject matter of this litigation.” (Skaggs Case, 11/20 Order at 13). A writ compelling Defendant Brunner to provide contrary advice to the Board will not achieve the result that the Skaggs plaintiffs seek. That avenue of relief appears to be moot.

Accordingly, the Skaggs plaintiffs apparently must rely on their second avenue of relief, which is a writ of mandamus compelling Defendant Brunner to break the Board’s tie vote in a manner that does not count the Disputed Ballots. It was for this reason that Plaintiff NEOCH

sought an order from this Court requiring Defendant Brunner to cast her vote in favor of counting the Disputed Ballots. (Ex. A, para. 35). Although it might be more precise to require Defendant Brunner to “maintain and not change” her vote, the difference is purely semantic. Plaintiff NEOCH seeks an order requiring Defendant Brunner to exercise her authority in favor of counting the Disputed Ballots, which is the opposite result sought by the Skaggs plaintiffs.

Given this factual scenario, the relief requested is clearly not moot. A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *L.A. County v. Davis*, 440 U.S. 625, 631 (1979) (citation omitted). A defendant’s voluntary cessation of wrongful conduct can only moot a case where it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (citation omitted). The party asserting mootness bears a “heavy burden” of persuasion. *Id.*

Here, the issue presented in the Motion is very much a live issue, as Defendant Brunner’s vote on the issue—which vote was cast voluntarily, and was not required by any Court order—is under attack in a lawsuit pending before the Ohio Supreme Court that will be decided next week. Moreover, it is not “absolutely clear” that Defendant Brunner “could not reasonably be” required to reverse her vote by an order issued by the Ohio Supreme Court in the Skaggs Case. Under the foregoing case law, the issues presented in the Motion are far from moot.

Accordingly, Defendant Brunner’s mootness argument is not well-founded and must be rejected. Moreover, any other ruling would require Plaintiff NEOCH to wait until the Ohio Supreme Court has ruled on the merits of the Skaggs Case and has actually ordered Defendant Brunner to reverse her vote, at which time there would be little if any time left to seek a contrary

order from this Court. Defendant Brunner should not be allowed to avoid the Court's October 27 Order in this fashion.

In sum, Defendant Brunner has opposed the Motion solely on the ground of mootness. Since that argument should be rejected, NEOCH respectfully requests that the Court enter an order granting its Motion without delay.

Respectfully submitted,

s/ Caroline 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 Gentry

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