

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

THE NORTHEAST OHIO COALITION FOR :  
THE HOMELESS and :

SERVICE EMPLOYEES :  
INTERNATIONAL UNION, LOCAL 1199, :

Plaintiffs, :

v. :

JENNIFER BRUNNER, :  
OHIO SECRETARY OF STATE, :

Defendant. :

Case No. C2-06-896  
JUDGE MARBLEY

---

THE NORTHEAST OHIO COALITION FOR :  
THE HOMELESS and :

SERVICE EMPLOYEES :  
INTERNATIONAL UNION, LOCAL 1199, :

Plaintiffs, :

v. :

THE STATE OF OHIO, :

Intervenor-Defendant. :

---

OHIO REPUBLICAN PARTY, et al. :

Plaintiffs, :

v. :

JENNIFER BRUNNER, :  
Secretary of State of Ohio, :

Defendant. :

Case No. 2:08CV913

JUDGE SMITH

MAGISTRATE JUDGE KING

---

---

**REPLY IN SUPPORT OF DEFENDANT SECRETARY OF STATE JENNIFER  
BRUNNER’S MOTION TO CONSOLIDATE**

---

Plaintiffs’ inability to produce a viable reason not to consolidate these cases is telling. *See* Plaintiffs’ Memorandum in Response to Defendant’s Motion to Consolidate (Doc. 69). Again, consolidation is appropriate under the Federal Rule of Civil Procedure 42(a) where “actions involving a common question of law or fact are pending before the court.” That is exactly the situation here. Most of Plaintiffs’ original claims have either been either disposed of by the Ohio Supreme Court and the United States Supreme Court or rendered moot. Plaintiffs’ newly-filed claims constitute the bulk of the remaining issues awaiting disposition in this case, and inarguably share a common nucleus of fact and law with *Northeast Ohio Coalition For The Homeless v. Brunner*, Case No. C2-06-896 (S.D. Ohio) (ALM). Furthermore, Plaintiffs have failed to suggest that they would be prejudiced by consolidation. The factors clearly weigh in favor of consolidation.

**1. Plaintiffs’ newly-filed claims constitute the bulk of their remaining claims before this Court.**

Plaintiffs’ assertion to this Court in its Memorandum in Opposition to Consolidation that they have “no [fewer] than five other pending federal claims” is patently false. As demonstrated by Plaintiffs’ own allegations in their Amended and Supplemental Complaint, there are actually *no* federal claims currently pending before this Court:

- a. In Count I, Plaintiffs challenged SOS Directive 2008-63 under state law and Art. II § 1 of the United States Constitution. This claim was rejected by the Ohio Supreme Court in *State ex rel Colvin v. Brunner*, No. 2008-1813, 2008 Ohio Lexis 2588 (Ohio Sept. 29, 2008) (affirming the advisory’s interpretation of state law).

- b. In Count II, Plaintiffs claimed various violations of the Section 303 of the Help America Vote Act (HAVA). The U.S. Supreme Court unanimously held that there is no private right of action under Section 303.
- c. In Count III, Plaintiffs alleged violation of the Voting Rights Act. This issue is currently before the U.S. Court of Appeals for the Sixth Circuit, and is thus not pending before this Court.
- d. Plaintiffs' Count IV, alleging violations of the National Voter Registration Act, attempted to enjoin Secretary Brunner's Directive regarding same-day voter registration and voting from September 30 through October 6, 2008. Because that time period has passed, this claim is moot.
- e. Plaintiffs' Count V also pertained to same-day registration and voting, as well as the allowance of election observers during the same time period of September 30 through October 6, 2008. Because that time period has passed, this claim is moot.

As this analysis of Plaintiffs' claims indicates, what remains before this Court is almost *exclusively* those claims that were brought today. Plaintiffs simply ask this Court to ignore the fact that one of two Directives they challenged this morning, Directive 2008-101, focuses on one of the central issues in *NEOCH*: the processing of provisional ballots in this 2008 general election.

**2. Inconsistent rulings in this case are a definite possibility and could cause great harm to the general public.**

The fact that Judge Sargus already issued an order in *NEOCH* incorporating SOS Directive 2008-101 does nothing to diminish the possibility of an inconsistent ruling from the *ORP* case, should consolidation of the cases not be granted. In fact, it is precisely *because* of last week's ruling that the cases should be litigated together; if an inconsistent ruling were issued, the conflicting rules could create utter chaos in the post-election-day counting of votes leading up to the official certification and electoral college. This is of particular concern, as the Secretary argued in her Motion to Consolidate, given the press of time and the invitation of additional challenged and litigation that an inconsistent ruling could precipitate.

**3. Consolidation would conserve judicial resources.**

The values of judicial economy and efficiency counsel in favor of consolidation, not against it. Plaintiffs argue that it would be “imprudent” to consolidate because of the amount of judicial resources already expended in their numerous unsuccessful and withdrawn bids to undermine Secretary’s ability to administer this election. To the contrary, what matters is the amount of judicial resources it will take to resolve the remaining claims, and there is no need to expend the resources of two chambers to resolve identical issues. Additionally, failure to consolidate could result in more, not less adjudication, as inconsistent rulings would undoubtedly be appealed to the higher courts for resolution.

**4. Plaintiffs do not allege any risk of prejudice.**

Finally, Plaintiffs did not even suggest that consolidation would prejudice them in any cognizable way, whereas the risk of separate adjudications to the public at large could well be severe. “A motion for consolidation will usually be granted unless the party opposing it can show ‘demonstrable prejudice.’” *Seguro de Servicio de Salud v. McAuto Systems Group, Inc.*, 878 F.2d 5, 8 (1st Cir. 1989).

**III. CONCLUSION**

For the reasons stated above, Defendant Secretary of State Brunner requests that her Motion to Consolidate this case with *Northeast Ohio Coalition For The Homeless v. Brunner*, S.D. Ohio Case No. C2-06-896, be granted.

Respectfully submitted,

NANCY H. ROGERS  
ATTORNEY GENERAL

/s Pearl M. Chin  
Richard N. Coglianese (0066830) Trial Attorney

Damian W. Sikora (0075224)  
Pearl M. Chin (0078810)  
Dan Roth (D.C. Bar No. 503236)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
rcoglianesse@ag.state.oh.us  
(614) 466-2872 – phone  
(614) 728-7592 – fax  
*Attorneys for Defendant*  
*Ohio Secretary of State Jennifer Brunner*

**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 notification system on this 4th day of November, 2008.

*/s Pearl M. Chin*