

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

_____)	
)	
AMERICAN BROADCASTING COMPANIES, INC., THE)	
ASSOCIATED PRESS, CABLE NEWS NETWORK LP,)	
LLLP, CBS BROADCASTING INC., FOX NEWS)	
NETWORK LLC and NBC UNIVERSAL, INC.,)	
	Plaintiffs,)	Cause No. 1:04CV750
)	District Judge Michael Watson
	- against -)	
)	
J. KENNETH BLACKWELL, in his official capacity as)	
the SECRETARY OF STATE OF OHIO,)	
	Defendant.)	
_____)	

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION
PURSUANT TO FRCP 70 TO ENFORCE THIS COURT'S INJUNCTION AND DECREE**

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Plaintiffs respectfully submit this reply memorandum of law in further support of their motion to enforce this Court's judgment and decree.

If Defendant had taken as much effort to comply with this Court's injunction and decree as he has taken to defend his non-compliance, we would not be before this Court again. That was not to be. But for all the bluster and insults, the Secretary is unable to explain anywhere in his 17-page submission to this Court why he deliberately flouted this Court's injunction. Plaintiffs seek a simple solution to the problem caused by Blackwell's defiance of this Court's authority: an order requiring Blackwell to circulate the very language of the Court's own decree so that there is no ambiguity as to what this Court ruled and no ambiguity about Plaintiffs' right to conduct exit polls within 100 feet of Ohio polling places on November 7, 2006 and on election days in the future.

We address Defendant's most ridiculous argument first: that Plaintiffs have failed to submit evidence of the Secretary's non-compliance with this Court's order. Def. Mem. at 9-11.¹ The evidence, of course, is the October 13 Directive itself. The Court need look no further for "evidence" of the Secretary's non-compliance.²

The Court's injunction and decree required that the Secretary issue a directive which prominently contained specific language set forth by the Court. Nowhere in his lengthy sub-

¹ The argument leads us to remember, and not fondly, the Secretary's equally specious claim that he had not issued the oral directive that gave rise to this litigation in the first place.

² Throughout his brief, Defendant Blackwell keeps referring to some "Assistant Secretary" in explaining why the "Assistant Secretary" really didn't defy this Court's injunction and decree. We assume Defendant must be referring to Mr. Lobb, the person who signed the October 13 Directive. Of course this Court ordered **Secretary Blackwell** to comply with this Court's injunction and decree and it is **Secretary Blackwell** who is required to do so. If Defendant is saying that Secretary Blackwell did nothing at all, his doing nothing is a violation of this Court's injunction and decree as well.

mission does Defendant even attempt to explain why he did not do so. Instead, the Secretary claims that the Court's language really was prominent because it was "indented." Indented, indeed. Many other portions of the October 13 Directive, all of which preceded this Court's language, were "indented." But none were "indented" in type smaller than any other in the document and none were buried on page 3 of his new directive. The Secretary has no answer to this outrage because there is none.

The Secretary also urges that because the October 13 Directive tracked some of the language of his April 2005 Directive, he should be safe from criticism and goes so far as to claim that Plaintiffs' motion is really an effort to reargue that the April 2005 Directive was unconstitutionally vague. Def. Mem. at 6-9. We seek no such reargument. Plaintiffs respect this Court's ruling. If we had wanted to reargue the point we would have filed a motion for reargument.³ What Defendant ignores is that while this Court found that the April 2005 Directive was not unconstitutionally vague it also specifically decreed that the Loitering Statutes "cannot be interpreted to prohibit exits polls within the 100 foot designated area around polling places without violating the First Amendment to the U.S. Constitution." Opinion and Order at 45. Yet, the October 13 Directive says that they **can** be. Plaintiffs were indeed unsuccessful on their vagueness claim but they were entirely successful on their substantive First Amendment claim. Plaintiffs do not claim that the October 13 Directive is vague. Our point is that the October 13 Directive cannot be reconciled with, and indeed deliberately flouts, this Court's substantive First Amendment ruling and this Court's clear and unambiguous injunction.

Even assuming that the Secretary was permitted to consider language from his April

³ Why Plaintiffs would want to reargue a claim that is now moot — the April 2005 Directive has been rescinded after all — is left unexplained in Defendant's papers.

2005 Directive in crafting the new one required by the Court — notwithstanding this Court’s clear and unambiguous ruling that the Loitering Statutes “cannot be interpreted to prohibit exit polls within the 100 foot designated area around polling places without violating the First Amendment to the U.S. Constitution” — he failed to do that either. As the Court stressed in its Opinion and Order of September 26, 2006, the April 2005 Directive had explicitly stated that the Loitering Statutes “do not necessarily preclude exit polling” and then went on to suggest that if a renegade exit poll reporter was otherwise violating a specific provision of the Loitering Statutes, that he or she could be found in violation of that provision. Opinion and Order at 43. The October 13 Directive does no such thing and contains no such language.⁴ Indeed, the October 13 Directive encourages Ohio election officials to consider whether exit polling violates the Loitering Statutes in the face of this Court’s binding decree that it doesn’t. The Secretary’s argument is as disingenuous as it is insulting to this Court.

Unable to defend his extraordinary disregard for this Court’s injunction and decree, Defendant resorts to two procedural arguments, both of which are unavailing.⁵ First, Defendant argues that there is nothing this Court can do about his noncompliance with the

⁴ The only reasonable inference to be drawn is that the language was intentionally omitted notwithstanding this Court’s explicit reliance on it. *See* Opinion and Order at 43.

⁵ Defendant also claims (to what effect is not clear) that because Plaintiffs’ agents sent letters to county election officials in Ohio advising them that they would be conducting exit polls at precincts in their counties on November 7, 2006 and would abide by “state law” this somehow reflects that Plaintiffs really don’t care about this Court’s ruling and will happily conduct their exit polls at a distance of 100 feet from Ohio polling places. Def. Mem. at 6. The argument is absurd. The referenced letter — duplicate versions of which are sent to every affected county official in the country — does nothing to demean Plaintiffs’ objections to Defendant’s unconstitutional actions. Plaintiffs will abide by state law as properly construed by this Court. Defendant can be well assured that, if necessary, every exit poll reporter in Ohio will be armed with a copy of this Court’s 46-page Opinion and Order of September 26, 2006 — which we suspect they will have some problem digesting under the pressure of their election day duties in the face of Defendant’s contradictory directive — and any subsequent Order this Court should issue.

injunction and decree — no matter how much of its plain language he ignored — because he filed a notice of appeal on Wednesday night. Def. Mem. at 13-14. The argument is simply incredible. Defendant waited until the last possible moment to file his notice of appeal and now urges that it gets him completely off the hook for failing to obey this Court’s unambiguous injunction and decree. That is not the law nor could it be.⁶

It is well-established that the filing of a notice of appeal does not deprive district courts of jurisdiction to enforce their own orders and judgments. Defendant Blackwell admits this, because he must, in his opposition brief. Def. Mem. at 14-15. (“[A] district court ‘has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded[.]’”) (citing *National Labor Relations Board v. Cincinnati Bronze*, 829 F.2d 585, 588 (6th Cir. 1987)). Defendant’s only answer to this well-established principle is to say that Plaintiffs’ are not just seeking to *enforce* the September 26 injunction and decree, but that Plaintiffs want the Court to “exceed and expand” on it. *Id.* at 15. That is just not true. As set forth in Plaintiffs’ opening brief in support of this motion, Plaintiffs are merely seeking:

[an] order, *tracking the language of the decree and injunction previously entered by the Court*, and direct[ing] Defendant to provide copies of that order to all Ohio election officials together with a cover directive: 1) instructing election officials to abide by and enforce this Court’s injunction and decree and 2) rescinding the October 13 Directive.

Pl. Mem. at 8-9.

Plaintiffs are not seeking an amendment of the Court’s injunction and decree; nor

⁶ We do not think it coincidental that Defendant filed his notice of appeal on Wednesday night and then turned around on Thursday afternoon to urge that its filing somehow divests this Court of jurisdiction to enforce its own orders and decrees.

are they seeking to enlarge or expand it in any way. Instead, Plaintiffs are asking the Court to *enforce* its order by requiring Defendant to disseminate *the very language* of the Court's injunction and decree to election officials. Defendant had his chance to issue a directive that complied with the original injunction and decree and he chose not to do so. The obvious remedy is for the Court to now step in to enforce its order as Plaintiffs request. Not only would such relief be fully consistent with the original injunction and decree, it would have no bearing whatsoever on the substantive ruling in this case or otherwise impact the Court of Appeals' consideration of the matter. The law is clear that in such circumstances, district courts are free to enforce their own orders notwithstanding the filing of a notice of appeal. *See American Town Center v. Hall*, 912 F.2d 104, 110 (6th Cir. 1990); *Cook v. All State Home Mortgage, Inc.*, 2006 WL 2794702 (N.D. Ohio Sept. 27, 2006).

Defendant makes the equally desperate and wholly unconvincing argument that Plaintiff's motion should be denied because (i) "nothing within the Judgment [entered by the Clerk on September 27, 2006] imposed any obligation" upon him and (ii) this Court's September 26, 2006 injunction and decree "technically does not have the effect of mandating any action or inaction on the part of the parties" and thus cannot be enforced. Def. Mem. at 15-16. Apparently, then, it is the Secretary's position that there is *nothing* this Court can do to remedy his noncompliance with this Court's clear instructions. Even if Defendant had issued no directive at all following the Court's decision, and even if he had taken no other steps to comply with the injunction and decree, he would, according to his opposition brief, face no consequences. That simply cannot be, and is not, the law.

In any event, even if Defendant is correct that "there is nothing within the judgment to violate" (Def. Mem. at 15), it is well established that district courts have inherent power to enforce orders as well as judgments. *See Shillitani v. United States*, 384 U.S. 364,

370 (1966); *United States v. Production Plated Plastics, Inc.*, 61 F.3d 904 (Table), 1995 WL 428451, at *7 (6th Cir. July 19, 1995). Rule 70 of the Federal Rules of Civil Procedure, one basis of the present motion, also empowers courts to enforce judgments and orders alike, *see* 12 C. Wright & A. Miller, *Federal Practice and Procedure*, Civil § 3021 (1973) (“Rule 70 gives the courts ample power to deal with parties who seek to thwart judgments by refusals to comply with *orders to perform specific acts.*”) (emphasis added), and on its face, the Rule includes text referring to both orders and judgments, demonstrating its broad reach. *See* Fed.R.Civ.P. 70 (“When any *order or judgment* is for the delivery of possession”). *See also* *Production Plated Plastics, Inc.*, 61 F.3d 904 (Table), 1995 WL 428451, at *7 (6th Cir. July 19, 1995) (unpublished) (holding that district court was “well within its authority” in appointing a receiver to enforce court order pursuant to Rule 70).

There is no justification for Defendant Blackwell’s willful disobedience of this Court’s injunction and Defendant has offered none. His desperate attempts to find such a justification — going so far as to argue that he is essentially immune from the consequence of noncompliance — is perhaps the most telling part of his overheated and ultimately unpersuasive submission.

CONCLUSION

Plaintiffs respectfully request that this Court issue its own order, tracking the language of the injunction and decree previously entered by the Court, and direct Defendant to provide copies of that order to all Ohio election officials together with a cover directive: 1) instructing election officials to abide by and enforce this Court's injunction and decree and 2) rescinding the October 13 Directive. Proposed orders have been filed with the Court.

Dated: October 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Plaintiffs' Emergency Motion Pursuant to FRCP 70 to Enforce this Court's Injunction and Decree was served upon Defendant electronically via the court's electronic filing system this 27th day of October, 2006.

/s/Richard M. Goehler