

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TRACIE HUNTER, et al.	:	CASE NO. 1:10-cv-820
Plaintiffs	:	Judge Susan J. Dlott
vs.	:	
HAMILTON COUNTY BOARD OF ELECTIONS, et al.	:	DEFENDANTS HAMILTON COUNTY BOARD OF ELECTIONS AND BOARD MEMBERS
Defendants	:	TRIANTILOU, BURKE, GERHARDT, AND FAUX
	:	REPLY IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

Defendants Hamilton County Board of Elections and its Members, Alex Triantifilou, Timothy Burke, Caleb Faux, and Charles Gerhardt, submit this Reply memorandum in support of their Motion to Dismiss the Amended Complaint of Intervenor/Plaintiffs NEOCH and ODP.

A. The Law of the Case Doctrine does not Protect the *NEOCH* Consent Decree

NEOCH and ODP revisit the standing arguments made in the Response to the Board’s Motion for Summary Judgment in their Response to the Board’s Motion to Dismiss that the law of the case doctrine prohibits the Board from challenging the fact that the *NEOCH* consent decree is void. At the outset, it should be remembered that the law of the case doctrine only “directs a court’s discretion, [but] it does not limit the tribunal’s power.” *Arizona v. California*, 460 U.S. 605, 618 (1983) (quoted by the Sixth Circuit in *Scott v. Churchill*, 377 F.3d 565, 567 (6th Cir. 2004)). Accordingly, the Sixth Circuit has held that the “‘law of the case doctrine’ is ‘directed to a court’s common sense’ and is not an ‘inexorable command.’” *McKenzie v. Bell South Telecomm. Inc.*, 219

F.3d 508, 5123 n.3 (6th Cir. 2000) (quoting *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)).

NEOCH and ODP claim that the Sixth Circuit “has already resolved the validity of the *NEOCH* Consent Decree.” (NEOCH and ODP Response, Doc.194 at 3.) The Sixth Circuit, however, never addressed or was asked to address whether the *NEOCH* consent decree was void and invalid. Cases like *Keith v. Bobby*, 618 F.3d 594 (6th Cir. 2010) and *Mitchell v. Rees*, 261 F.App'x 825 (6th Cir. 1994) are not on point as they actually dealt with the matters specifically ruled upon by the district and circuit courts. To get around this problem, NEOCH and ODP claim that the Board should have raised the argument that the *NEOCH* consent decree is void in the appeal from this Court’s January 12, 2011 order and because the Board did not, they claim that the Board may not do so now.

There are at least three problems with the above point. First, the Board did not challenge the *NEOCH* consent decree from the January 12, 2011 order because there was no factual predicate to do so at that point. The *NEOCH* consent decree is void because the Ohio General Assembly did not adopt, accept or ratify that decree or act to allow Ohio law to be changed or suspended as set forth in the consent decree. Art. 1 § 18 of the Ohio Constitution provides that only the Ohio General Assembly has the power to change or suspend Ohio laws. Thus, the voidness of the consent decree depends on a fact—whether the Ohio General Assembly acted upon the decree by approving, adopting or accepting it. The factual predicate for this Court’s November 22, 2010 and January 12, 2011 orders was set at the TRO and preliminary injunction hearing on November 22, 2010. The Board was given notice of just a few hours for that hearing. The Board was not obligated at that hearing to put on facts related to the validity of the *NEOCH* consent

decree and it did not, had no reason to, and had no factual basis to do so. Consequently, when the Board appealed this Court's January 12, 2011 order, there was no basis in the record to challenge the validity of the consent decree.

Second, no challenge to the validity of the *NEOCH* consent decree was appropriate from this Court's January 12, 2011 order because, at the time the appeal from that order was taken, the validity of the consent decree was irrelevant to the proceedings. The November 22, 2010 preliminary injunction granted the "Plaintiff's motion . . . [for] an order commanding Defendants to investigate whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error" (doc. 13 at 1) and ordered the Board to investigate "whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue . . ." (doc. 13 at 9). The 849 ballots refer to the "wrong precinct" provisional ballots unanimously rejected by the Board because they were cast in the wrong precinct. (11/22/10 Order, Doc. 13 at 3, 5, 7, 8 and 9.) Indeed, *NEOCH* and *ODP* in their original complaint only raised an issue as to the 849 wrong precinct provisional ballots. (*NEOCH* and *ODP* Complaint, Doc.98 at ¶¶ 10, 14, 17 and 20.) Thus, the *NEOCH/ODP* complaint and the November 22, 2010 order were specifically limited to wrong precinct provisional ballots. The Board completed its investigation of those ballots by December 31, 2010 as ordered by Secretary of State Jennifer Brunner, including all *NEOCH* ballots that may have been a part of the 849 wrong precinct provisional ballots. The level of review ordered by this Court for the 849 ballots was the same for all ballots, including any *NEOCH* ballots within the 849 ballots. Thus, objecting to the validity of the *NEOCH* consent decree from the November 22, 2010 or January 12, 2011 orders not only had no factual support at that

time, but was pointless and irrelevant and would have been a request for an inappropriate advisory opinion. Any ruling on the validity of the *NEOCH* consent decree from the January 12, 2011 order would not have changed the fact that *NEOCH* ballots, included in the 849, were to be given the same review and treatment as all of the other ballots pursuant to this Court's November 22, 2011 order. The validity of the *NEOCH* consent decree, therefore, did not matter, or at least the Board reasonably so believed, based upon *NEOCH/ODP's* original complaint and the November 22, 2010 order.

Subsequent to the Sixth Circuit's decision and the return of the case to this Court, the Plaintiffs made it clear prior to and during the pre-trial conference, in the joint pre-trial statement and the Plaintiffs' Trial Brief that they were seeking to include in the Court's review not just the 849 wrong precinct provisional ballots, but also *NEOCH* ballots not counted because of affirmation issues. This made the validity of the *NEOCH* consent decree relevant, and the Board promptly investigated its validity and then raised the fact that the decree was void in its Response to the Plaintiffs' Trial Brief. (Doc.112 at 12.) There was no "procrastination" by the Board on this issue at all. Once it was made clear that the Plaintiffs were attempting to address *NEOCH* ballots with problems other than voting in the wrong precinct, the Board in a timely and proper fashion raised the issue of the consent decree's validity.

Third, and most significantly, the Board's position is that the *NEOCH* consent decree is void. A void order may not be enforced and may be challenged at any time, directly or collaterally. (See Board's Motion to Dismiss, Doc.194 at 6-8; Reply in Support of the Board's Motion for Summary Judgment, Doc.181 at 16-21.) A void order is a nullity. To argue that the Sixth Circuit ruled on the voidness of the *NEOCH* consent

decree “implicitly” or by “inference” (NEOCH and ODP Response, Doc.194 at 5) misunderstands the fundamental nature of the problem with the decree.¹ Likewise, the suggestion that the Board “waived” this issue by not raising it in the initial appeal, which is false given the first two points above, also misapprehends the nature of the problem with the decree. The voidness of the decree was not mooted, rectified, corrected or waived, nor could it be, by the fact that this issue was not raised in the appeal from this Court’s preliminary orders. The decree is void regardless of the fact that this issue was not addressed initially. The voidness of the decree is a jurisdictional bar to its being enforced and is a problem regardless of the conduct of the Board. Because void orders may not be enforced and are nullities, this Court should and must rule on the merits of this contention directly.

Next, NEOCH and ODP’s attempt to get around the law of *Wilcox D.O., P.C. Employees Defined Benefit Trust v. United States*, 888 F.2d 1111 (6th Cir. 1989) is without merit. The Sixth Circuit in *Hunter*, with regard to this Court’s November 22, 2010 and January 12, 2011 orders, was dealing with orders relating to preliminary factual findings of this Court before a final hearing on the merits had been held, before the validity of the *NEOCH* consent decree was relevant and before any facts on its validity had been developed or presented to the Court. *Michigan State AFL-CIO, International Union v. Miller*, 6 F.Supp.2d 634 (E.D. Mich. 1998), relied upon by NEOCH and ODP, is not on point. It only held that when a “legal issue” had been determined directly by the

¹ The citation to *Burrell v. Henderson*, 483 F. Supp. 595 (S.D. Ohio 2007) is irrelevant. The Sixth Circuit only affirmed this Court’s order to investigate the *NEOCH* ballots because the Defendants had not contested that part of this Court’s order of January 12, 2011 for the reasons set forth in the text. The Sixth Circuit would have had to be clairvoyant to have “implicitly” or by “inference” have ruled upon the Board’s subsequent challenge to the *NEOCH* consent decree based upon the yet to be developed and introduced facts that the decree was issued without the approval, consent or ratification of the Ohio General Assembly contrary to the Ohio Constitution therefore rendering it void under Ohio law.

Sixth Circuit in an interlocutory appeal, it is the law of the case. *Id.* at 637. In *Miller*, the Sixth Circuit actually ruled on the legal issue in question, which was about the level of constitutional scrutiny to be given in a challenge to a Michigan law.² In this case, the issue of the voidness of the *NEOCH* consent decree is a combined issue of law and fact. Most importantly, there is a key factual question—what did the General Assembly do with regard to the consent decree? In *Miller*, the court distinguished *Wilcox* by noting that the ruling in *Wilcox* involved issues “which needed considerably more factual development” *Id.* at 638. That is precisely the Board’s point. As in *Wilcox*, the law of the case doctrine does not apply here because the interlocutory ruling in question at best dealt with a factual and legal issue which needed development.

NEOCH and ODP attempt to deal with the exceptions to the “law of the case” doctrine set forth in *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) by claiming that the Board, prior to the remand of the case from the Sixth Circuit, “did not raise evidence relating to the validity of the NEOCH consent decree in this Court or the Sixth Circuit.” (NEOCH and ODP Response, Doc.194 at 7.) The only time when the Board may have presented such evidence was at the preliminary injunction hearing. The Board had no obligation or burden to put on any evidence on November 22, 2010, much less to develop what was at that time an irrelevant point concerning the *NEOCH* consent decree. While the purpose of the law-of-the-case doctrine may be to promote “finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues’” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 816 (1988), the doctrine

² NEOCH and ODP’s citation of *Connection Dist. Co. v. Reno*, 46 F. App’x 837 (6th Cir. 2002) is also not on point as it only stands for the proposition that an interlocutory decision on a legal issue involving the level of constitutional scrutiny to be applied in a challenge to a law is the “law of the case.” *Connection* does not involve a fact issue which had not been ruled upon or presented and which was not ripe for review in the interlocutory appeal as is the case here.

was never intended to foreclose the litigation of issues that were not tried, settled or litigated.

NEOCH and ODP further state that the Board did not “properly introduce any evidence on this topic at the hearing [in July 2011], either.” (NEOCH and ODP Response, Doc.194 at 7.) That is obviously false. The Board submitted the Resolutions of the Ohio General Assembly as Defense Exhibit 1038 and Ohio Constitution Article 1 § 18 as Defense Exhibit 1052(D). Both exhibits were admitted and this Court properly took judicial notice of such evidence. (TR (8/5/11), Doc.174 at 12-7, 12-9.)

NEOCH and ODP also cite *JGR, Inc. v. Thomasville Furniture Industries, Inc.*, 550 F.3d 529 (6th Cir. 2008). *JGR* is not relevant. *JGR* applied the law of the case doctrine to a factual finding by a jury after a trial where the jury determined that the plaintiff was not entitled to recovery for lost profits and this determination by the jury was not appealed. Because the jury determination of no award of lost profits had not been appealed, the Sixth Circuit ruled that in subsequent proceedings after remand that the jury finding of no lost profits was the law of the case. *Id.* at 532-33. In *JGR* the precise factual question in issue was tried, determined by a jury and not appealed. The Sixth Circuit held that there was a “waiver” of the lost profits issue because there had been a final decision on the question from which no appeal had been taken. That is not at all the case here. The issue of the validity of the *NEOCH* consent decree was not tried prior to January 12, 2011; no evidence was presented or had to be presented on the issue prior to January 12, 2011; and the voidness of the decree was not addressed, much less determined, by this Court or the Sixth Circuit in any prior decisions.

While this Court ordered the Board to investigate *NEOCH* ballots on January 12, 2011, this was based upon and in furtherance of the Court's preliminary injunction order of November 22, 2010 which was limited to the 849 wrong precinct provisional ballots as explained above.³ The Board had complied with that order and investigated the *NEOCH* ballots as part of the investigation of the 849 ballots. The Board's investigation was completed by December 31, 2010. There was no factual basis or reason to contest the order to investigate *NEOCH* ballots when that investigation had been completed and was the same investigation ordered for all 849 ballots. In addition, the Board was given no opportunity to put on evidence related to the Court's January 12, 2011 order. Consequently, even had the Board had reason to challenge the validity of the *NEOCH* consent decree prior to January 12, 2011, which it did not have, it was not given an opportunity to do so.

B. The NEOCH Consent Decree may be Collaterally Attacked

NEOCH and *ODP* rely upon the "impermissible collateral attack" doctrine developed in discrimination consent decree cases prior to 1989. *NEOCH* and *ODP* failed to mention that the cases cited to this Court by Plaintiffs and that the "impermissible collateral attack" rule in discrimination cases had been reversed by the U.S. Supreme Court in *Martin v. Wilks*, 490 U.S. 755 (1989). *NEOCH* and *ODP* ironically chide the Board for not mentioning the Civil Rights Act of 1991 even though *NEOCH* and the *ODP* failed to cite the *Martin* case. *NEOCH* and *ODP* suggest that the *Martin* Court's reversal of case law cited by *NEOCH* and *ODP* as well as the "impermissible collateral attack" rule itself was reversed by Congress when it passed the Civil Rights Act of 1991. That is not true.

³ It was not until the first day of the hearing, July 18, 2011, that this Court specifically ruled that any *NEOCH* ballots other than wrong precinct *NEOCH* ballots were at issue. (TR (7/18/11), Doc.118 at 1-141.)

Congress passed in 1991 a series of amendments to Title VII, including new rules on when a Title VII consent decree could be challenged by non-parties, but that did not change the reversal of the common law “impermissible collateral attack” rule, which NEOCH and ODP have tried to transmogrify into some sort of general rule relating to all consent decrees, which it never was. Indeed, *Martin* is still cited and followed. E.g. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996) (“[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings” (quoting *Martin* at 762)); *City of Warren v. City of Detroit*, 495 F.3d 282, 286 (6th Cir. 2007) (“it is important to note that Warren is not a party to any of the consent judgments, is not bound by the judgments, and is entitled to its ‘own day in court’ to challenge actions taken under the judgments” (quoting *Martin* at 761-62)). NEOCH and ODP’s citation of *Rafferty v. City of Youngstown*, 54 F.3d 278 (6th Cir. 1995) for the proposition that the *Martin* case only applies to cases arising prior to the passage of the Civil Rights Act in 1991 is equally curious. The Board cited *Martin* because it reversed the pre-1989 cases cited by NEOCH and ODP and the pre-1989 “impermissible collateral attack” rule.⁴

⁴ NEOCH and ODP relied upon *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982) and *Black & White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972), both pre-1991 cases, for the application of the “impermissible collateral attack” rule. *Martin* expressly overruled *Thaggard* and *Striff v. Mason*, 849 F.2d 240 (6th Cir. 1988), which had relied upon and cited *Black & White Children* in its following of the “impermissible collateral attack” rule in consent decree cases. While NEOCH and ODP seem to jettison their reliance on *Thaggard*, they try to hold on to *Black & White Children*. (See NEOCH and ODP Response, Doc.194 at 14, n. 1.) The Board already demonstrated why *Black & White Children* is inapposite on its facts (Board’s Motion to Dismiss, Doc.191 at 8-9), but it is also highly suspect law since *Martin*. The Sixth Circuit in *Striff* relied upon *Black & White Children* for its ruling on not allowing collateral attacks in consent decree cases and then *Striff* was reversed. The *Martin* case reverses the notion that “consent decree” cases may not be collaterally attacked. The only cases that support this doctrine are pre-*Martin* cases. The reason it has no post-*Martin* support is because it is no longer good law. This is why NEOCH and ODP can only cite cases from the 1970s and early 1980s.

NEOCH also claims that the Board was adequately represented in the *NEOCH* case by the Ohio Secretary of State. Even if that were true, and it is not, this does not change the fact that the *NEOCH* consent decree is void. Once again, void orders are always subject to collateral attack and may not be enforced ever. Likewise, the Ohio Secretary of State did not adequately represent the Board, or any Ohio board of elections, by consenting to a void order contrary to the Ohio Constitution. Consenting to a void order cannot be considered “adequate” representation. Ultimately, the question comes down to whether the *NEOCH* consent decree is void. If it is not void, then as a general rule it may not be collaterally attacked, but if it is void, it can be attacked at any time and in any proceeding, and no claims about “adequate” representation matter. This Court should address the merits of the voidness claim.

NEOCH and ODP argue that Judge Marbley had subject matter jurisdiction over the *NEOCH* case and therefore suggest that he had power to issue any type of consent decree he wanted to issue, including a consent decree modifying Ohio law contrary to the Ohio Constitution. Subject matter jurisdiction refers to the power or authority of a court to act or issue orders on a matter before the court. The Board is claiming that Judge Marbley had no power or authority under any federal law to change Ohio law by creating a “poll worker error” exception in determining whether provisional ballots should be counted from the wrong precinct or whether voters had filled-out the provisional ballot envelopes correctly. Only the General Assembly may do so. If Judge Marbley had the power to modify or suspend Ohio law in a consent decree without the consent or action of the Ohio General Assembly contrary to the Ohio Constitution, then this should be squarely so held, but, if he did not have such authority, the consent decree is void.

NEOCH and ODP also never explain why a “poll worker error” exception is required by the US Constitution or any other federal law or why Ohio’s laws on precinct voting and uniform rule on not counting ballots cast in the wrong precinct on Election Day regardless of poll worker error is a violation of federal law. No explanation has been given for why a “poll worker error” exception is constitutionally mandated for those who identify themselves only with the last four digits of their social security number, but not for all other voters. And then because of the disparate treatment mandated by the *NEOCH* consent decree, it has been suggested that there could be an equal protection problem because of that disparate treatment itself. (11/22/10 Order, Doc.13 at 5.) NEOCH and ODP assert that the *NEOCH* consent decree is “a narrowly tailored remedy to the constitutional claims presented in the *NEOCH* case.” (NEOCH and ODP Response, Doc.194 at 25.) That is as close as they get to explaining why the “poll worker error” exception, which only applies to a miniscule number of Ohio voters, is mandated by federal law. In fact, NEOCH and ODP make no attempt to explain why the “poll worker error” exception is required by federal law or why such an exception is constitutionally required for voters who lack identification, but not voters in general. All other Ohio voters have to vote in their correct precinct or their vote does not count, except perhaps for provisional voters in Hamilton County’s 2010 juvenile court race where an exception may be imposed just for this race if Plaintiffs prevail.

NEOCH and ODP’s argument that the doctrines of laches and equitable estoppel bar a challenge to the validity of the consent decree is without merit. Void orders are nullities. They cannot be saved by doctrines like laches or estoppel. Moreover, the Board had no basis to contest a consent decree to which it was not a party and certainly was not

going to do so contrary to the Ohio Secretary of State, who was a party to the consent decree, particularly when the Secretary of State can remove and replace board members. R.C. 3501.06. The Board and its members had no interest or reason to address the validity of the consent decree when it was issued in the spring of 2010. They were not negligent in failing to “protect” their interests. They had no interests until they were sued and until the consent decree was relevant to the matters as to which the Board had been brought into court. That is completely different from *U.S. v. City of Loveland, Ohio*, 621 F.3d 465 (6th Cir. 2010), in which a party was held to have failed to protect its rights over a matter as to which it had notice and as to which it had a direct and significant interest, Loveland’s sewer system. As soon as the *NEOCH* consent decrees’ relevance and significance became clear, the Board and its members challenged it. There was no procrastination or laches.

The application of equitable estoppel is even more farfetched. It requires that the Board must have misrepresented a fact to NEOCH and ODP, that NEOCH and ODP must have relied upon that fact and that NEOCH and ODP were prejudiced by their reliance. The Board never made any relevant misrepresentation to NEOCH or ODP.

C. The Ohio General Assembly was not Involved with the Consent Decree

NEOCH and ODP argue that the State of Ohio and the General Assembly are the same party. The *NEOCH* case does not list the General Assembly as a party. The motion to intervene mentioned by NEOCH and ODP did not request that the General Assembly be made a party, only that the State of Ohio be made a party. While the Ohio Attorney General noted that the intervention of Ohio would give the state the ability to defend

“interests” of the General Assembly different from the Ohio Secretary of State, the General Assembly was not made a party.

The claim made by NEOCH and ODP that the General Assembly “presumably authorized its counsel to enter into the Decree” is unsupported conjecture and assumes that the General Assembly was a party and was represented by counsel in the case. There is no evidence to support such a contention. The General Assembly is a separately defined entity under Ohio law and by the Ohio Constitution. The General Assembly was created by Article 2 § 1 of the Ohio Constitution and that body is given the power to enact legislation. Thus, the General Assembly is the legislative body of Ohio, not the State itself. The Ohio Constitution also creates a Governor in Article 3 § 1 who is given the “executive power” of the State, and it creates a court system in Article 4 § 1 vested with the “judicial power” of the State. Just as the General Assembly is not the State of Ohio, neither is the Governor or Supreme Court of Ohio. Ohio is a separately recognized entity.

During oral argument, counsel for NEOCH asserted that the attorney/client privilege prevented it from knowing what communications the Ohio Attorney General had with the General Assembly related to the NEOCH consent decree. (TR (9/7/11), Doc.195 at 22, 23.) Therefore, counsel for NEOCH indicated that one could assume such communications took place and suggested that NEOCH’s failure to present direct evidence of this was not a problem because such information was not obtainable. *Id.* That is false. Even if the General Assembly had held an executive session with the Ohio Attorney General on this topic, that would be reflected in the records of the General Assembly. Pursuant to Article 2 § 9 of the Ohio Constitution, all action of the General

Assembly must be kept in a “journal of its proceedings” There is no record of an executive session on the NEOCH consent decree. Moreover, the substantive advice of counsel may be privileged, but the fact of counsel advice and consultation is not. NEOCH could have obtained and presented evidence that the General Assembly met and/or addressed the NEOCH consent decree with the Ohio Attorney General if such evidence existed. That evidence is not privileged. NEOCH and ODP did not do that because such evidence does not exist and the General Assembly and the Ohio Attorney General never met on this topic. Such meetings and consultation between the General Assembly and the Ohio Attorney General understandably never occurred because the General Assembly was not a party in the NEOCH case. Under the ethical rules for lawyers, had the General Assembly been a party to the NEOCH case, the Ohio Attorney General would have been required ethically to inform the General Assembly promptly of the proposed terms of the NEOCH consent decree and to have obtained the Assembly’s “informed consent” to the decree. Ohio Rules of Professional Conduct § 1.4(a). House Bill 194 also has nothing to do with the *NEOCH* consent decree and does not ratify that decree. Regardless, the provisions of HB 194 are not even effective yet.

NEOCH and ODP steadfastly refuse to address the relevant question. Did the General Assembly agree to suspend or modify Ohio law by adding a “poll worker error” exception, and if so how and when did the Assembly do that? As there (1) is no evidence of this, (2) has been no relevant action taken by the General Assembly on this issue and (3) is no basis to find that the General Assembly has suspended or modified Ohio Law on this point, the *NEOCH* consent decree is void. The Ohio Constitution is very specific. As this Court recognized, only the General Assembly may suspend, modify or change Ohio

law. Ohio Const. Art. 1 § 18. (TR (8/5/11), Doc.175 at 12-140.) NEOCH and ODP just ignore this issue by making all sorts of spurious and unsupported claims instead of pointing to clear action of the General Assembly. The Ohio Constitution does not authorize the Ohio Secretary of State or the Ohio Attorney General to suspend or modify Ohio law. Only the General Assembly may do this. As such, some action by the General Assembly supporting the change made in the *NEOCH* consent decree must be demonstrated. NEOCH and ODP fail to do that.

NEOCH and ODP also attempt to deal with *Brooks v. State Board of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994). The Board brought the *Brooks* case to the attention of this Court because it stands for the proposition that it is inappropriate for a federal district court and an “abuse of its power” to force a change of state law in a consent decree when there has been no finding that the law for which a change is sought violates and that the change itself is required by federal law (*id.* at 1564-1569), and because it holds that a state attorney general may not settle a law suit against a state in contravention of state law (*id.* at 1563). The *NEOCH* consent decree made a fundamental change in Ohio law by adopting a “poll worker error” exception which was not required by the U.S. Constitution or any other federal law. NEOCH and ODP point out some differences between the *Brooks* case and the *NEOCH* case, like the fact that the *Brooks* case was a class action and that it involved objections from intervening parties, which have nothing to do with the relevant holdings of *Brooks*. As recognized in *Brooks*, a federal district court “abuses its power” when it enters a consent decree changing state law when such a change is not required by U.S. law and a state attorney general may not bind the state to such a consent decree. NEOCH and ODP are clearly concerned about the *Brooks* case because it

supports the Board's claim that the *NEOCH* consent decree is void, that Judge Marbley had no authority to enter that decree and that the Ohio Attorney General could not bind the state to a decree in violation of state law.

Next, NEOCH and ODP attempt to distinguish *Brooks* by claiming that it dealt with more significant changes to Georgia law than the changes made in the NEOCH consent decree to Ohio law. The law of *Brooks* is not based upon some quantitative or qualitative analysis of the number or significance of the changes to a state law, but to the fact that there is a change of state law that is not required by federal law. NEOCH and ODP blithely comment without explanation that the *NEOCH* consent decree "creates a narrow category of provisional voters whose ballots will not be rejected for reasons attributable to poll worker error—a narrowly tailored remedy to the constitutional claims presented in the *NEOCH* case." (NEOCH and ODP Response, Doc.194 at 25.) The "poll worker error" exception is a huge change to Ohio law. Its effect will be - as in this case - a whole new class of challenges to state elections in federal court. The resolution of Ohio elections will be impeded for months, if not years, as it has in this case. Be that as it may, NEOCH and ODP once again also fail to explain why the "poll worker error" exception is mandated or required by federal law. That is the key question and they simply will not address it.

D. NEOCH and ODP do not have Standing to Bring Their Claims

NEOCH and ODP claim that a standing objection to their right to file their amended complaint is without merit because as intervenors standing is "irrelevant" if the Plaintiff has standing. (NEOCH and ODP Response, Doc.194 at 26.) Standing of intervenors is irrelevant when the "petitioner seeks only to present evidence and argument in support of

[plaintiff's] complaint." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537 (1972). This is not true here. Unlike the intervenors in the cases cited in their Response⁵, NEOCH and ODP have alleged different and distinct claims which were not asserted by Hunter and seek different remedies. *Id.* at 537, fn 8. (Compare NEOCH/ODP Amended Complaint Counts I-V, Doc.180 at 15-18 and Hunter Complaint, Doc.1 at 13-14.) Because each of NEOCH and ODP's claims rest entirely their right to enforce the NEOCH consent decree – a claim not made by Hunter – their standing is squarely at issue. Therefore, NEOCH and ODP must satisfy normal standing requirements as explained in the Motion to Dismiss the Amended Complaint.

ODP now claims that it has the right to intervene on behalf of Democratic voters in the November 2010 election and relies upon *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). *Sandusky* does not support standing in this case for ODP. As the Board has demonstrated, the Plaintiffs in this case are seeking retroactive relief. Specifically, Hunter, NEOCH and ODP are seeking an order requiring the Board to change the votes it took on November 16, 2010 on the counting of certain provisional ballots. ODP is not representing its Democratic voters on an issue relating to a prospective violation of their rights or an alleged disenfranchisement of their future voting rights as to which ODP is seeking prospective relief. In *Sandusky*, standing of the ODP was found because it was seeking to protect the future voting rights of its members.

The *Sandusky* court noted that ODP had standing because it was pursuing “prospective

⁵ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Purnell v. City of Akron*, 925 F.2d 941 (6th Cir. 1991). These cases are further inapposite here because they dealt with whether the intervenors had Article III jurisdiction to appeal from an order of the district court without the plaintiff, and not whether the intervenors had standing to assert certain claims in the first instance.

injunctive relief.” (Id. at 573-74.) In this case, at best the ODP is seeking to represent individual claims of a few individual voters whose votes were not counted by the Board on November 16, 2010. That is not an injury to the Democratic Party or to Democratic voters in general. If the Board should have counted the voter’s ballots at issue in this case, that is a claim the individual voters may have a right to raise, but the ODP has no right to do so on behalf of them or Democratic voters in general.⁶

E. The State is a Necessary Party if a State Law is Being Challenged

NEOCH and ODP do not contest the point that they must bring in the State if they are challenging Ohio Election Law. NEOCH and ODP insist they are not challenging Ohio’s precinct rules and law on not counting votes cast in the wrong precinct regardless of poll worker error. This in turn proves that the NEOCH consent decree is void as it modified Ohio law on this point without federal warrant and contrary to the Ohio Constitution.

F. NEOCH and ODP are not Seeking Prospective Relief

NEOCH and ODP seek only remedial, retroactive relief for past actions of the Board and for which the Board is entitled to Eleventh Amendment immunity as explained in its Motion for Summary Judgment. (Doc.94.)

G. The Amended Complaint does not Conform to the Evidence

The only ballots at issue here (as wrong precinct NEOCH ballots are dealt with elsewhere and reviewed as part of the review of the 849 ballots) are alleged NEOCH ballots with affirmation issues. NEOCH and ODP claim that the Board merely

⁶ Since NEOCH and ODP have failed to identify any of its members that were allegedly injured by the Board’s actions, they have only shown a “conjectural” or “hypothetical” injury. A federal court’s Article III jurisdiction, however, can only be invoked when the plaintiff has suffered “some threatened or actual injury resulting from the putatively illegal action.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Metz v. Supreme Court of Ohio*, 46 F. App’x. 228, 232-233 (6th Cir 2002).

“discussed” this issue. To the contrary, the Board both “discussed” and voted on the ballots and found, in a three to one vote, that there was no poll worker error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on September 22, 2011 using the Court’s CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ James W. Harper
James W. Harper

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