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II. INTRODUCTION

Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) respectfully urge this Court to deny Defendants Hamilton County Board of Elections and Board Members Triantafilou, Burke, Gerhardt, and Faux (collectively “the Board”)’s Motion to Dismiss Intervenor-Plaintiffs’ Amended Complaint. (Doc. 191). This Court has subject matter jurisdiction to order the Board to comply with the *NEOCH* Consent Decree and to review the Equal Protection and Due Process claims at issue in the Amended Complaint. Furthermore, NEOCH and ODP have standing to enforce the *NEOCH* Consent Decree which, despite the Board’s improper characterization otherwise, is a valid final judgment entered by District Judge Marbley. NEOCH and ODP seek prospective relief because the Board is required to comply with the *NEOCH* Consent Decree before amending the certification in the November 2010 election that is at issue in this case.

Additionally, NEOCH and ODP have not failed to join a necessary party because NEOCH and ODP do not assert a facial constitutional challenge to Ohio law under Rule 5.1 of the Federal Rules of Civil Procedure. Even if Rule 5.1 did apply, the Ohio Attorney General already knows about this lawsuit and the State of Ohio could have intervened if it wanted to do so pursuant to Rule 5.1(c), and the failure to provide notice does not waive NEOCH and ODP’s constitutional claims. Fed. R. Civ. P. 5.1(d).

Finally, the Amended Complaint conforms to the evidence at the evidentiary hearing, which showed that the Board failed to comply with the *NEOCH* Consent Decree and Secretary of State Directives 2010-48, 2010-73, 2010-74 and 2010-79, by failing to identify numerous *NEOCH* provisional ballots and by failing to contact poll workers to investigate for poll worker error. For all of the reasons set forth herein, the Board’s Motion to Dismiss must be denied.

III. THIS COURT HAS SUBJECT MATTER JURISDICTION; THE *NEOCH* CONSENT DECREE IS VALID AND BOTH *NEOCH* AND *ODP* HAVE STANDING HERE TO ENFORCE IT

The Board asserts in its Motion to Dismiss that this Court lacks subject matter jurisdiction because: (1) *NEOCH* and *ODP* allegedly lack standing to pursue the claims asserted; and (2) the *NEOCH* Consent Decree is “void and a nullity which may not be enforced by this Court.” (Doc. 191 at 1). However, this Court has subject matter jurisdiction to order the Board to comply with the *NEOCH* Consent Decree and to review the Equal Protection and Due Process claims at issue in the Amended Complaint. In response to the Board’s arguments, *NEOCH* and *ODP* assert that: (1) it is the law of the case that the *NEOCH* Consent Decree applies and must be followed; (2) the Board’s collateral attack on the validity of the *NEOCH* Consent Decree may not be raised in this Court; (3) the doctrines of laches and equitable estoppel bar the Board’s attack on the *NEOCH* Consent Decree; (4) the *NEOCH* Consent Decree is valid because the interests of the Ohio General Assembly were represented by the Attorney General in the *NEOCH* case and it was within the authority of the Attorney General and the State of Ohio to enter the Decree; and (5) *NEOCH* and *ODP* have standing to assert the claims in their amended complaint.

A. The Law Of This Case Is That The *NEOCH* Consent Decree Applies And Must Be Followed.

In anticipation of *NEOCH*’s arguments in this memorandum contra, the Board argues that the law-of-the-case doctrine does not prevent them from challenging the validity of the *NEOCH* Consent Decree for the first time on remand. The Board’s arguments betray a fundamental misunderstanding of the doctrine and its application in remand hearings.

The law-of-the-case doctrine “renders a determination by the court of appeals binding upon the district court in subsequent stages of the same litigation.” *Keith v. Bobby*, 618 F.3d

594, 599 (6th Cir. 2010) (citing *U.S. v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006)). “A complementary theory, the mandate rule, requires lower courts to adhere to the commands of a superior court.” *Mitchell v. Rees*, 261 F.App’x 825, 828 (6th Cir. 2008) (quoting *U.S. v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994)). Thus, “the district court [is generally barred] from reconsidering those issues that the court of appeals has already explicitly or impliedly resolved.” *Keith*, 618 F.3d at 599 (citations omitted). The purpose of the doctrine is to “1) to prevent the continued litigation of settled issues; and 2) to assure compliance by inferior courts with the decisions of superior courts.” *Arctic Express, Inc. v. Del Monte Fresh Produce NA, Inc.*, No. 2:09-CV-00403, 2010 WL 1009777, *2 (S.D. Ohio Mar. 15, 2010) (citing *U.S. v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990)).

Here, the Sixth Circuit has already resolved the validity of the *NEOCH* Consent Decree and affirmed this Court’s order that the *NEOCH* ballots be investigated and counted. On January 12, 2011, this Court ordered the Board of Elections “to investigate all ballots subject to the *NEOCH* Consent Decree for poll worker error and count those ballots as required by that Consent Decree.” (Doc. 39 p. 1.) The Board appealed the Court’s order on January 16, 2011. (Doc. 48.) The Board did not, however, appeal the portion of this Court’s order compelling the Board to comply with the *NEOCH* Consent Decree. Because “all parties agree[d] that the consent decree remains and should be followed[.]” the Sixth Circuit “**AFFIRM**[ED] the district court’s January 12, 2011 order that the Board ‘investigate all ballots subject to the *NEOCH* Consent Decree for poll worker error and count those ballots as required by that Consent Decree.’” *Hunter v. Hamilton County Bd. of Elecs.*, 635 F.3d 219, 247 (6th Cir. 2011). And on April 8, 2011, the Sixth Circuit issued its mandate “[p]ursuant to the [Sixth Circuit]’s disposition that was filed on 1/27/2011[.]” See *Hunter v. Hamilton Cty. Bd. of Elecs.*, Case Nos. 11-3060,

11-3059, and 10-4481 (6th Cir. Apr. 8, 2011). Thus, the Board's obligation to comply with the *NEOCH* Consent Decree is settled.

Nonetheless, the Board raises three arguments as to why they believe the law-of-the-case doctrine does not apply. First, the Board argues that the doctrine does not apply because the validity of the *NEOCH* Consent Decree was not "contested and decided on appeal[.]" (Doc. 191 p. 4.) The Board acknowledges that it did not raise this issue in this Court before the remand or "in the interlocutory appeals taken in the case on this Court's preliminary injunction." (*Id.*) However, the Board says it was not required to raise this issue before. (*Id.*) Instead, the Board asserts that it was permitted to remain silent on this issue for eight months, let this Court and the Sixth Circuit issue rulings that assumed and accepted the validity of the *NEOCH* Consent Decree, then contest the validity of that decree for the first time on the eve of trial (*see* Doc. 112 p. 12). The Board further suggests that the doctrine does not apply because the Sixth Circuit's opinion affirming this Court's preliminary injunction order did not actually address the validity of the *NEOCH* Consent Decree (because, again, the Board did not contest that issue in the Sixth Circuit). (*See* Doc. 191 p. 4.)

The Sixth Circuit has not adopted the Board's suggested "procrastination" exception to the law-of-the-case doctrine. The only case that the Board cites in support of these arguments, *Arizona v. California*, 460 U.S. 605, 618 (1983), does not say that the law-of-the-case doctrine applies only to "contested" issues. Nor does Sixth Circuit precedent say that a litigant may avoid the effect of the law-of-the-case doctrine by conceding an issue on appeal and then raising it for the first time on remand. To the contrary, "[t]he law-of-the-case doctrine bars challenges to a decision made at a previous stage of litigation which could have been challenged in a prior appeal, but were not." *JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 532 (6th

Cir. 2008) (*quoting U.S. v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997)). By failing to raise the validity of the *NEOCH* Consent Decree on appeal, the Board waived its right to raise that issue on remand. *Id.* As the Sixth Circuit has held,

A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter, for “[i]t would be absurd that a party who has chosen not to argue a point on a first appeal would stand better as regards the law of the case than one who had argued and lost.”

Adesida, 129 F.3d at 850 (*quoting Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981)).

Moreover, the Sixth Circuit on appeal was not required to rule directly upon the validity of the *NEOCH* Consent Decree for the law-of-the-case doctrine to apply. The doctrine also applies to “any issues that were decided at an earlier stage of the litigation . . . implicitly or by necessary inference from the disposition.” *Burrell v. Henderson*, 483 F. Supp.2d 595, 598 (S.D. Ohio 2007) (*citing McKenzie v. BellSouth Telecomm. Inc.*, 219 F.3d 508, 513 n.3 (6th Cir. 2000)). By affirming this Court’s order that the Board must investigate and count the *NEOCH* ballots, the Sixth Circuit implicitly and by necessary inference affirmed the validity of the Consent Decree. The law-of-the-case doctrine, accordingly, prevents the Board from attacking the validity of the Consent Decree for the first time on remand.

The Board’s second argument is that the law-of-the-case doctrine does not apply because this Court’s preliminary injunction orders were only “preliminary in nature.” (*See* Doc. 191 p. 4.) Citing *Wilcox D.O., P.C. Employees’ Defined Benefit Trust v. United States*, 888 F.2d 111, 1113 (6th Cir. 1989), the Board argues that “[a] court’s determination of substantive issues in deciding a motion for preliminary injunction do not constitute the ‘law of the case’ for purposes of a decision on the merits of the case.” (*See id.* at p. 5.) However, *NEOCH* is not arguing that this Court’s conclusions at the preliminary injunction stage constitute the law of the case. It is the *Sixth Circuit’s* opinion, which accepted that “the [*NEOCH*] consent decree . . . should be

followed” and affirmed this Court’s order that the Board follow the *NEOCH* consent decree (*Hunter*, 635 F.3d at 247), that establishes the law of the case here.

Other courts have acknowledged the difference between preliminary rulings, which do not establish the law of the case, and appellate opinions affirming or denying those preliminary rulings, which do establish the law of the case. In *Michigan State AFL-CIO, International Union v. Miller*, 6 F. Supp.2d 634 (E.D. Mich. 1998), for example, the United States District Court for the Eastern District of Michigan considered challenges to four portions of Michigan’s Campaign Finance Act. The plaintiffs sought preliminary injunctive relief, which the court granted in part and denied in part. *See id.* at 636. One of the defendants appealed the grant of preliminary injunctive relief as to one section of the Act. The Sixth Circuit reversed the district court’s grant of injunctive relief, finding that the court “had applied the incorrect level of constitutional scrutiny and that plaintiffs have no likelihood of success.” *Id.* (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)). The Sixth Circuit further ruled that the section of the Act in question was “a content-neutral law that satisfies the requirements of intermediate scrutiny.” *Id.* (quoting *Miller*, 103 F.3d at 1253). On remand, the plaintiffs argued that they were entitled to further discovery and argument with regard to the constitutionality of the provision in question. The district court disagreed, holding that “when a legal issue has been determined after an interlocutory appeal, the reviewing court’s decision is the law of the case.” *Id.* at 637. The court distinguished *Wilcox* on the grounds that, unlike in *Wilcox*, “the prior decision relied upon is not from a magistrate judge’s recommendation, but a decision by the Sixth Circuit[.]” *Id.* at 638.

For the same reason, *Wilcox* does not apply here. Although this Court’s prior orders on Plaintiffs’ preliminary injunction motions may not have established the law of the case at the

trial stage of this litigation, the Sixth Circuit's opinion affirming this Court's order *did* establish the law of the case with regard to the validity of the *NEOCH* consent decree. *See, e.g., Connection Dist. Co. v. Reno*, 46 F. App'x 837 (6th Cir. 2002) (affirming that when the Sixth Circuit issued an earlier holding affirming the district court's denial of a preliminary injunction, which included a ruling on the level of scrutiny to be applied to a challenged statute, the Sixth Circuit's prior holding on that issue "constituted the law of the case").

Lastly, the Board asserts that the law-of-the-case doctrine does not apply because the Board presented evidence on remand that was not previously presented to this Court or the Sixth Circuit. (*See* Doc. 191 p. 5.) As a general matter, it is true that "[t]he law of the case doctrine" does not "preclude[] reconsideration of a previously decided issue" in the "exceptional circumstance[] . . . where substantially different evidence is raised on subsequent trial[.]" *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (*quoting Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). On its face, however, this exception does not apply here. Before the remand, the Board did not raise evidence relating to the validity of the *NEOCH* Consent Decree in this Court or the Sixth Circuit. For that matter, the Board did not properly introduce any evidence on this issue at the hearing, either. The Board simply handed the Court a stack of documents and asked the Court to take judicial notice of them. (*See* Tr. 12-3 – 9.) Regardless, these documents were not "substantially different" evidence than the Board previously introduced – they were the first and only "evidence" that the Board has submitted on this issue.

Applying the "substantially different evidence" exception in cases like this one, where a party raises a new argument for the first time on remand, would conflict with the law-of-the-case doctrine's waiver rule, which holds that a party who fails to appeal an issue waives the right to

relitigate that issue in a subsequent remand. See *JGR, Inc.*, 550 F.3d at 532 (6th Cir. 2008), *supra*; *Adesida*, 129 F.3d at 850, *supra*. It also would make no sense to allow a party to concede an issue on appeal, only to use its silence on appeal as a *justification* for raising the issue for the first time on remand. Again, the purpose of the law-of-the-case doctrine is to “promote[] the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166 (1988) (*quoting* 1B J. Moore, J. Lucas, & T. Currier, *Moore’s Federal Practice* ¶ 0.404[1], p. 118 (1984)). Allowing a party to raise entirely new arguments on remand so long as the party also introduces at least one piece of evidence to support those arguments would obliterate the waiver rule and completely undermine the purpose of the law-of-the-case doctrine. Accordingly, the “substantially different evidence” exception must be interpreted to apply only in situations where the party previously raised the argument at issue and is providing new and different evidence in support of that argument on remand.

Here, while it received a copy of the *NEOCH* Consent Decree from the Secretary of State several months before the election here in dispute, the Board did not contest the validity of the *NEOCH* Consent Decree until after the Sixth Circuit remand. Indeed, the Board actively conceded the validity and enforceability of the *NEOCH* Consent Decree, to both this Court and the Sixth Circuit, for eight months. None of the exceptions and exclusions to the law-of-the-case doctrine allows the Board to change its mind on this central issue for the first time on remand. Because the Board conceded the validity of the *NEOCH* Consent Decree before both this Court and the Sixth Circuit, the Board must be held to have waived any arguments about the validity of the *NEOCH* Consent Decree. In the interests of judicial efficiency and finality, the law-of-the-case doctrine must bar the Board’s new arguments on remand.

B. The Board's Argument That The *NEOCH* Consent Decree Is Void Is An Improper Collateral Attack.

As the intervening plaintiffs stated at the evidentiary hearing and in their Response to the Board's Motion for Summary Judgment, the Board's argument, raised again in its Motion to Dismiss, that the *NEOCH* Consent Decree is unconstitutional and void, is an improper collateral attack on the *NEOCH* Consent Decree. (TR (Cooperrider)12-6, 9); (Doc. 172 at 18).

The Board cites *Martin v. Wilks*, 490 U.S. 755 (1989), in its Motion to Dismiss for the proposition that “[c]onsent decrees may also be collaterally attached [sic] when they are the ‘product of corruption, duress, fraud, collusion, or mistake. . .’” and to argue that the “impermissible collateral attack” rule in consent decree cases involving discrimination claims was rejected by the U.S. Supreme Court in that case. (Doc. 191 at 8-9). The Board fails to note that the Civil Rights Act of 1991 superseded the Supreme Court's decision in *Martin v. Wilks* in relevant part.

In *Martin*, white firefighters challenged employment promotion decisions that were guided by consent decrees that included goals for hiring and promoting blacks as firefighters. The Civil Rights Act of 1991 sets forth that an employment practice that implements and is within the scope of a consent decree that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws, such as the case in *Martin*, may not be challenged after its entry by a person whose interests were adequately represented by another party at the time the decree was entered or by a person who had notice of the proposed order and an opportunity to object. 42 U.S.C. § 2000e-2(n)(1)(B). The Sixth Circuit has expressly stated that the Supreme Court's decision in *Martin* applies only to cases arising prior to the passage of the Civil Rights Act of 1991. *Rafferty v. City of Youngstown*, 54 F.3d 278, 284 n. 3 (6th Cir. 1995).

Even assuming, *arguendo*, that *Martin* did apply here, the Board would not be permitted to collaterally attack the Consent Decree in this court because the Board was adequately represented by the Ohio Secretary of State in the *NEOCH* case. *Martin*, 490 U.S. at 762 n. 2. In *Rafferty*, the Sixth Circuit addressed claims raised by white police officer plaintiffs who were not parties to a case resulting in a consent decree. 54 F.3d at 284. The plaintiffs' bargaining representative, the FOP, was a party to the case resulting in the consent decree. Although the FOP did not assert each of the plaintiffs' specific claims, the Sixth Circuit held that, because the plaintiffs' bargaining representative became an intervening party in the litigation resulting in the consent decree (because of its interest in protecting the rights of the white majority police officers), this constituted "adequate representation" within the meaning of *Martin*. *Id.* The white police officer plaintiffs were therefore bound by the principles of res judicata, and thus lacked standing to collaterally attack the consent decree. *Id.*

The Hamilton County Board of Elections, appointed by the Ohio Secretary of State to serve as the secretary's representatives pursuant to O.R.C. § 3501.06, were adequately represented and are bound by the Consent Decree entered by the Ohio Secretary of State in the *NEOCH* case. *Tennessee Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001) (intervenor appellants, who were not parties to the litigation when a consent decree was entered, were, by virtue of their contractual obligations to the state, and as agents of the state, bound by the revised consent decree); *see Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) (recognizing an exception to the general rule when, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party).

Due process does not require the Board to have been a party in the *NEOCH* case before being bound by it, as the Board might allege. In *Tennessee Ass'n of Health Maint. Orgs.*,

appellants, relying on the Supreme Court's decision in *Hansberry*, as the Board does in its Motion to Dismiss (Doc. 191 at 10), argued that since they were not parties to the consent decree, they could not be bound by it under the Due Process Clause of the Fourteenth Amendment. *Tennessee Ass'n of Health Maint. Orgs.*, 262 F.3d at 564. The Sixth Circuit disagreed. *Id.* The Sixth Circuit reasoned, citing *Hansberry's* exception for adequate representation, that because they were agents of the state, and consistent with Fed.R.Civ.P. 65(d) setting forth whom shall be bound by injunctive orders, the appellants were bound by the revised consent decree, and the entry of the consent decree against them was consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* at 565.

Applying the Sixth Circuit's reasoning here, requiring the Board to comply with the *NEOCH* Consent Decree is not only consistent with the fact that the Board was adequately represented by the Ohio Secretary of State in the litigation pursuant to *Hansberry*, but also consistent with Federal Rule of Civil Procedure 65(d) providing that persons receiving actual notice of an injunction order, who are in active concert or participation with parties in the case that granted the injunction order, are bound by the injunction order. *Id.* at 565. The Board received actual notice of the Consent Decree in Spring 2010 by Secretary of State Directive 2010-48, (Doc. 180-2). (TR (Cooperrider/Poland)7-255). As representatives to the Ohio Secretary of State pursuant to O.R.C. § 3501.06, the Board and its members are in active concert or participation with the Ohio Secretary of State, a signatory party to the decree, and are therefore bound by it pursuant to this rule, and, as previously briefed, the Board is also bound by the *NEOCH* Consent Decree pursuant to the directives issued by the Secretary of State. "This is derived from the common law doctrine that a decree of injunction not only binds the parties but also those identified with them in 'privity' with them, represented by them or subject to their

control.” *Tennessee Ass’n of Health Maint. Orgs.*, 262 F.3d at 565, quoting *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14 (1945). Hence, the Board is bound to comply with the *NEOCH* Consent Decree.

1. Judge Marbley Had (And Still Has) Subject Matter Jurisdiction To Issue The *NEOCH* Consent Decree, And the Consent Decree Is Not the Product Of Corruption, Duress, Fraud, Collusion, Or Mistake.

Judge Marbley’s court unquestionably had (and continues to have) subject matter jurisdiction over the *NEOCH* case, in which NEOCH challenged the constitutionality of Ohio’s Voter ID laws. The constitutional challenge to Ohio’s Voter ID laws provides federal question jurisdiction and the defendants – the Ohio Secretary of State and the State of Ohio – are undeniably subject to personal jurisdiction that meets the requirements of due process. The Ohio Secretary of State adequately represents the Ohio County Boards of Elections and has authority to bind the Ohio County Boards of Elections to comply with the *NEOCH* Consent Decree pursuant to its role as the chief election officer and its authority to issue binding directives, and indeed has done so through Directives 2010-48, 2010-73, 2010-74, 2010-79, 2011-04, and 2011-05. Accordingly, all of the cases cited by the Board in its Motion to Dismiss in which courts found judgments to be void due to lack of subject matter jurisdiction (or more specifically found that due process had not been met) are inapposite. *See e.g., Elliot v. Piersol’s Lessee*, 26 U.S. 328 (1828) (cited for proposition that judgment from court lacking jurisdiction is void); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (concerning judgment rendered where due process requirements for personal jurisdiction were not met); *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878) (same). Surely, there is no question that the defendants in the *NEOCH* case, the Ohio Secretary of State and intervening-defendant State of Ohio, had sufficient minimum contacts with the forum necessary for due process as addressed in these cases.

Additionally, there was no evidence adduced at the evidentiary hearing, and there is no evidence to support an argument that the *NEOCH* Consent Decree was the product of corruption, duress, fraud, collusion or mistake. To the extent that the Board seeks to argue that the Consent Decree was the product of a corrupt partisan endeavor, as they allude in their briefs, Secretary of State Husted's Directive 2011-05 to the Hamilton County Board of Elections completely undermines this argument. Secretary Husted's Directive 2011-05 specifically reminds the Hamilton County Board of Elections that it must comply with the *NEOCH* Consent Decree and former Secretary of State Brunner's Directives 2010-74 and 2010-79. *See* Husted Directive 2011-05: "Directive 2011-04 and the Mandatory Recount for Hamilton County Juvenile Court Judge" dated January 12, 2011 ("In addition, during the recount, the board should examine those provisional ballots that are subject to the consent decree in *Northeast Ohio Coalition for the Homeless*, in accordance with the requirements of Directives 2010-74 and 2010-79") (JX 42).

2. None of the Board's Cited Cases Support Its Argument That The Board's Collateral Attack On The Consent Decree Is Permissible.

None of the cases cited by the Board for its argument that the Board's collateral attack is permissible support that conclusion. For example, in *Blanchard v. Terry & Wright, Inc.*, 218 F.Supp. 910, 912 (W.D. KY 1963), the court *overruled* the defendants' motion to dismiss for want of jurisdiction, and explained "[f]or this Court to nullify the efforts and expense of the plaintiffs and defendants which culminated in the judgment based upon the verdict of the jury in this action would be substituting form for substance." Additionally, in *State v. Blankenship*, 675 N.E.2d 1303, 1304 (Ohio Ct. App. 1996), the Court of Appeals held that a trial court's failure to issue a discovery order, although in error, did not defeat the court's jurisdiction to grant a new trial, and thus the court's judgment was not void, and the state was precluded from challenging the judgment collaterally, by a motion to strike, instead of by direct appeal.

The Board also argues that it is a *per se* abuse of discretion to uphold a void judgment, citing *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998). *Carter* states: “[a] judgment is not void simply because it is erroneous, but only where the rendering court lacked subject matter jurisdiction or acted in a manner inconsistent with due process of law.” As previously set forth, the Southern District of Ohio had (and continues to have) appropriate subject matter jurisdiction over the *NEOCH* case, and jurisdiction over the defendants in that case is fully consistent with due process of law. Judge Marbley appropriately retained jurisdiction and stated in the *NEOCH* Consent Decree that the Decree “shall remain in effect until June 30, 2013.” (PX 2008 p. 6); *East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 464-65 (6th Cir. 2011) (recognizing that courts are required to retain jurisdiction over consent decrees during the term of their existence).¹

Additionally, the Board argues that jurisdiction cannot be conferred on a trial court by consent of the parties or by stipulation, citing *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). *NEOCH* does not and has not ever contended that jurisdictional requirements were met in the underlying *NEOCH* case by consent or stipulation of the parties. Simply put, there is no jurisdictional defect in the underlying *NEOCH* case.

¹ Although the Board attempts to argue that one of the cases cited by Intervenor-Plaintiffs – the Sixth Circuit’s decision in *Black & White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972) – was overturned by *Martin v. Wilks* by referring to it loosely as a “consent decree case[] involving discrimination claims,” it was not. *Black & White Children* was an action seeking an injunction restraining a school district from transporting children pursuant to a consent decree entered in a desegregation case. The Sixth Circuit’s holding in *Black & White Children*, prohibiting a collateral attack by a party complaining of difficulty carrying out a consent decree, and directing such party to raise such issues in the principal case, is not affected by the holding in *Martin v. Wilks* or the Civil Rights Act of 1991, which apply to challenges to employment practices that implement a consent decree that resolves a claim of employment discrimination. The same is true for another case cited by Intervenor-Plaintiffs, the Sixth Circuit’s decision regarding a collateral attack on a school desegregation decree in *Kelley v. Metropolitan County Board of Education of Nashville, Tennessee*, 463 F.2d 732 (6th Cir. 1972) (“The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.”). The other case law addressed in this memorandum, however, prevents the Court from having to address this issue.

3. The Board's Collateral Attack On The *NEOCH* Consent Decree Should Also Be Denied Pursuant To The Doctrines Of Laches And Equitable Estoppel.

The Sixth Circuit recently reviewed an argument raised by the City of Loveland on appeal from the Southern District of Ohio, in which the City argued that the district court had erred in granting a motion for judgment on the pleadings, thereby barring the City's argument that it was not a party to the consent decree it challenged and was not bound by it. *U.S. v. City of Loveland, Ohio*, 621 F.3d 465, 473 (6th Cir. 2010). The Sixth Circuit affirmed Judge Spiegel's opinion, ruling that the doctrines of laches and equitable estoppel barred the City's collateral attack on the consent decree. *Id.* Because the City had constructive notice (despite having argued it lacked notice), of the proposed consent decree, and because the City waited five years to bring its challenge once the City decided it did not want to be bound by the agreement (after having benefitted from it), the City prejudiced the county board of commissioners by its delay. *Id.* at 473-74.

In the Sixth Circuit, laches is "a negligent and unintentional failure to protect one's rights." *Id.* at 473, quoting *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir.1991). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Id.* quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001). Equitable estoppel requires a showing that there was: "(1) [a] misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3)[a] detriment to the party asserting estoppel." *Id.* quoting *Premo v. United States*, 599 F.3d 540, 547 (6th Cir.2010).

The Hamilton County Board of Elections had actual notice that it must comply with the *NEOCH* Consent Decree in the Spring of 2010 pursuant to Ohio Secretary of State Directive 2010-48, issued on April 27, 2010. (Doc. 180-2); (TR (Cooperrider/Poland)7-255). The Board accepted that it must comply with the Decree, and did not object that the *NEOCH* Consent Decree is void either by seeking to intervene in the *NEOCH* case, or by requesting that the Ohio Secretary of State address the issue in the *NEOCH* case. The Board accepted the applicability of the *NEOCH* Consent Decree, as its own actions demonstrate.² Even the Sixth Circuit was clearly under the impression that the Board accepted the decree. *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (6th Cir. 2011) (“[A]ll parties agree that the consent decree remains and should be followed... the parties do not contest [the *NEOCH* Consent Decree]”). It was not until the eve of trial here in the *Hunter* case that the Board raised its eleventh-hour challenges to the validity of the *NEOCH* Consent Decree.

NEOCH and ODP have been prejudiced by expending significant resources seeking to enforce the *NEOCH* Consent Decree, only to be forced (at this late stage) to defend its validity. *NEOCH* and ODP relied on the Board’s apparent acceptance of the *NEOCH* Consent Decree and expended resources in this case to enforce that decree, which the Board only now seeks to argue does not apply to it, much like the City of Loveland did. 621 F.3d at 473. If the Board had been diligent in asserting this defense, the Board would have raised the issue: (1) as a defense in an Answer to Intervening-Plaintiff’s original Complaint, which was filed almost a year ago; (2) on

² See “Wrong Precinct Provisionals Rejected Ballots Sorted by *NEOCH*” (DX 1015) (identifying seven provisional ballots as right location-wrong precinct ballots and explained by Board Staff member Sherry Poland at the evidentiary hearing as the proper way to locate the *NEOCH* provisional ballots identified by Board staff (TR (Poland Direct) 5-113-114); “Timeline of Events Surrounding *Hunter v. BOE* Litigation” (DX 1001 p. 3) (discussing Board Staff’s original interpretation of the *NEOCH* Consent Decree, as clarified by the Secretary of State); *id.* at 7 (noting that on January 28th, 2011, the Sixth Circuit “Affirm[ed] order to investigate pursuant to *NEOCH* Consent Decree.”); *id.* at 8 (“Staff prepares *NEOCH* spreadsheet listing P#, reason for rejection and precinct voted-in for discovery purposes.).

appeal to the Sixth Circuit, when this Court's Order requiring the Board to comply with the *NEOCH* Consent Decree was at issue; (3) with the Ohio Secretary of State to ensure that it was addressed in the *NEOCH* case, which remains pending before Judge Marbley; or (4) by seeking to intervene in the *NEOCH* case if/when the Board decided its interests were not being adequately represented.³ If the Board had done any of these things, it would have prevented prejudice against NEOCH and ODP. It did not. Accordingly, in the alternative to rejecting the Board's argument that the *NEOCH* Consent Decree is void as an improper collateral attack that must be raised in Judge Marbley's court, NEOCH and ODP respectfully ask the Court to bar this argument pursuant to the equitable doctrines of laches and estoppel.

In sum, the Board's argument that the *NEOCH* Consent Decree is void is an improper collateral attack that must be rejected. The host of cases cited by the Board in its Motion to Dismiss are inapposite. Jurisdiction is undoubtedly proper in the *NEOCH* case before Judge Marbley and the fact that the Hamilton County Board of Elections was not a party to the *NEOCH* Consent Decree, but can be ordered to comply with it by this Court, does not violate due process. The doctrines of laches and equitable estoppel further support the conclusion that this collateral attack must be denied.

C. The Board's Arguments That The Ohio General Assembly Was Not Involved In The *NEOCH* Case Or Was Required To Approve The *NEOCH* Consent Decree In Its Journals And Resolutions Are Inaccurate.

The Board argues in its Motion to Dismiss that “[i]f the Ohio General Assembly did not act on entering the *NEOCH* case and/or accept the *NEOCH* consent decree, and it did not, it was not a proper party and did not adopt the changes to Ohio law set forth in the consent decree.”

³ Federal Rule of Civil Procedure 24(a) sets forth that a party has the right to intervene when the party claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, *unless existing parties adequately represent that interest.*

Doc. 191 at 11. The Board cites to the Journals and Resolutions of the 127th and the 128th General Assembly of Ohio as evidence that the Ohio General Assembly did not consent to the *NEOCH* Consent Decree or authorize anyone to do so in its behalf. *Id.* This argument fails for many reasons, particularly because (1) the Ohio General Assembly and the State of Ohio are the same party or “entity”; and (2) whether the Ohio General Assembly set forth anything in its Journals and Resolutions when the State of Ohio, on behalf of the General Assembly, entered the *NEOCH* Consent Decree, is beside the point, and was not required, as evidenced by recent Ohio House Bill 194.

1. The Ohio General Assembly And The State of Ohio Are The Same “Party” or “Entity” And The Ohio Attorney General Entered The *NEOCH* Consent Decree on Behalf Of The General Assembly

The Board argues “In order to rely on the consent decree as a basis for its standing, NEOCH must establish that the decree was entered into on behalf of the State of Ohio by a person with the legal capacity to bind the State.” (Doc. 112 at 12). Ohio’s Declaratory Judgment Act, O.R.C. § 2721.12, specifies that the Attorney General is who “shall be heard” in a lawsuit if any Ohio statute is alleged to be unconstitutional. Thus, as a matter of state law, the General Assembly’s interests were adequately represented by the Attorney General in the *NEOCH* case challenging the constitutionality of Ohio’s Voter ID laws, which resulted in the *NEOCH* Consent Decree. As previously briefed and also set forth herein, the State of Ohio, represented by the Ohio Attorney General, separately intervened in the *NEOCH* case to represent the Ohio General Assembly’s interest in defending the statutes enacted by the General Assembly.

The Board’s repeated assertions that Ohio’s General Assembly was not involved in the *NEOCH* case and did not agree to Judge Marbley’s entry of the *NEOCH* Consent Decree misrepresent the procedural record in the *NEOCH* case. Furthermore, the Board’s new argument

in its Motion to Dismiss that the Ohio General Assembly “entity” did not move to intervene and that this “entity” was not made a party, is inconsequential. (Doc. 191 at 11).

In the *NEOCH* case which ultimately resulted in entry of the *NEOCH* Consent Decree, NEOCH filed its Complaint against Ohio’s Secretary of State on October 24, 2006, naming (as the single defendant) then-Secretary of State J. Kenneth Blackwell, in his official capacity. (S.D. Ohio Case No. 06-896, Doc. 2.) The following day, Assistant Attorneys General Richard Coglianesi and Damian Sikora submitted a response in opposition to NEOCH’s request for a temporary restraining order on behalf of their client, the Secretary of State. (*Id.* at Doc. 9.) Just three days later, the State of Ohio, represented by *different* Assistant Attorneys General (Sharon Jennings and Holly Hunt) filed a Motion to Intervene in the *NEOCH* case. (*Id.* at Doc. 22.) In that Motion to Intervene, these Assistant Attorneys General highlighted the reasons why the General Assembly’s distinct interests and participation in the *NEOCH* case were crucial and warranted intervention, saying:

- “This Court should grant this motion to intervene as the State of Ohio has interests that differ from those of the Secretary of State, *given the different roles of the Secretary and the General Assembly regarding the Voter ID Law*. The State of Ohio has an interest in *defending the constitutionality of the statutes enacted by the General Assembly*, while the Secretary’s primary interest is in administering these statutes and all others that apply to elections in Ohio.” (S.D. Ohio Case No. 06-896, Doc. 22, at p. 2) (emphasis added).
- “Plaintiffs allege that the statutes are unconstitutional; the State of Ohio will present argument regarding why the statutes are constitutional, and is in a better position to make those arguments than the Secretary of State, because *the evidence is within the control of the General Assembly and the General Assembly is better situated to address any questions regarding statutory interpretation and legislative intent that may arise*.” (*Id.* at p. 5) (emphasis added).
- “Indeed, the intervention of the State of Ohio should be favored, because of the opportunity for the Court to hear *the unique viewpoint of the General Assembly* regarding the enactment of this statute.” (*Id.* at p. 6) (emphasis added).

Although District Judge Marbley orally denied the State of Ohio's Motion to Intervene on the same day it was filed (S.D. Ohio Case No. 06-896, Doc. 25), the State successfully appealed that decision to the Sixth Circuit, which granted the State's request to intervene just four days later, on October 31, 2006. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006). In its Opinion, the Sixth Circuit made it crystal clear that the State of Ohio sought (and should receive) intervention in the *NEOCH* case to ensure the participation of its client, the General Assembly, in litigation regarding the constitutionality of its statutes, saying:

- “The State of Ohio moves to intervene to represent the interests of the people of Ohio *and the General Assembly* in defending the constitutionality of the statute.” *Id.*, 467 F.3d at 1002 (emphasis added).
- “In this case, the Secretary's primary interest is in ensuring the smooth administration of the election, while the State *and General Assembly* have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced.” *Id.* at 1008 (emphasis added).

From that day forward, the Secretary of State and the Ohio General Assembly were parties to the *NEOCH* case. Richard Coglianesse, the same Assistant Attorney General who successfully represented the distinct interests of the General Assembly before the Sixth Circuit in seeking (and obtaining) intervention in the *NEOCH* case, negotiated and agreed to the Consent Decree that *NEOCH* and ODP intervened here in *Hunter* to enforce. As such, the Board's repeated refrain attempting to negate the General Assembly's participation in the *NEOCH* case and its agreement to the terms of the *NEOCH* Consent Decree should be summarily rejected.

2. Whether The Ohio General Assembly Set Forth Anything In Its Journals and Resolutions When the State of Ohio Entered the *NEOCH* Consent Decree Is Beside The Point, And Recent H.B. 194 Confirms This.

The Board's reliance on the absence of any journal entries or resolutions by the General Assembly is beside the point. The General Assembly was represented by the Ohio Attorney General in the *NEOCH* case, and presumably authorized its counsel to enter into the Decree.

Communications between the General Assembly and its lawyers are privileged. If the Board wants to challenge the validity of the Decree, it needs to do so, as previously stated, in the case pending before Judge Marbley, not in this Court. Judge Marbley can engage in whatever fact-finding is necessary, including asking counsel for the State of the Ohio whom they represent, and determine the effect on the Consent Decree. This Court cannot engage in such fact-finding because those counsel are not present.

Moreover, recent developments in election law undermine the Board's position. Ohio House Bill 194, signed by Governor Kasich on July 1, 2011, enacts O.R.C. § 3501.50 (effective September 30, 2011), which specifically sets forth requirements for notifying the Ohio General Assembly of any legal action challenging provisions governing the election process (such as the underlying *NEOCH* case), and gives the General Assembly the right to intervene. This section also gives the General Assembly the right to be notified of any proposed consent decree, and to object to such consent decree before it is agreed to by the court:

3501.50 [Effective 9/30/2011] Actions challenging provisions governing election process. Any action brought challenging the constitutionality, legality, or enforcement of any provision of the Ohio Constitution that governs the election process or any provision of Title XXXV of the Revised Code shall be deemed to have been brought against the state, and all of the following shall apply:

- (A) The general assembly shall be notified of the filing of the action;
- (B) The general assembly has the right to intervene in the action;
- (C) The general assembly shall be notified of any proposed consent decree before the consent decree is agreed to by the court;
- (D) The general assembly has the right to intervene in the action to object to any proposed consent decree.

O.R.C. § 3501.50 (effective Sept. 30, 2011). When the parties in the *NEOCH* case entered the Consent Decree, there was no provision of Ohio state law, or analog to O.R.C. § 3501.50, setting forth any procedure for entering consent decrees in cases challenging election laws. *See*

generally, the Ohio Revised Code. Notably, neither this statute as enacted by H.B. 194, nor any other provision of H.B. 194 or Ohio law *prohibits consent decrees*.

In the *NEOCH* case that resulted in the *NEOCH* Consent Decree, the State of Ohio was a party, and even though H.B. 194 had not yet been enacted, the State of Ohio intervened *specifically on behalf of the Ohio General Assembly* so that the General Assembly's distinct interests were advocated in that litigation. As such, the Ohio General Assembly – a party in the case listed as “The State of Ohio” – and the Ohio Secretary of State defended the constitutionality of the Ohio Voter ID statutes challenged by NEOCH and other plaintiffs in that litigation. Recognizing that Ohio's Voter ID laws could give rise to additional constitutional claims, these parties entered a narrowly tailored consent decree. As Table J to the Plaintiffs' List of Ballots to Be Counted (Doc. 182-1) shows, there are only 26⁴ rejected provisional ballots that Intervenor-Plaintiffs are aware of that are subject to the *NEOCH* Consent Decree, reflecting the narrowness of the Decree. This narrow consent decree not only worked to avoid additional constitutional challenges to the Voter ID laws, it also addressed a problem created by the Ohio General Assembly when it created mandatory poll worker duties, but then failed to address the consequences of poll worker error—a problem that the General Assembly has since attempted to address through legislation in the prior referenced House Bill 194.⁵ The *NEOCH* Consent Decree anticipated potential changes in Ohio statutory law and automatically incorporates these changes, as stated in the express terms of the Consent Decree and as evidenced by a recent filing

⁴ Notably, the 26 *NEOCH* provisional ballots, which the Board is adamant must not be counted as subject to a void consent decree, is a group of provisional ballots that is *smaller* than the 31 ballots cast at the Board that the Board itself chose to count. The Board characterizes its decision to count the 31 ballots cast at the Board as “merely a mistaken application of state law.” (Doc. 188 at 36). But the state law that the Board wishes to characterize as merely having “mistaken” is the very same state law that it argues the *NEOCH* Consent Decree violates – that is, the state law precluding wrong-precinct ballots from being counted. The ballots subject to the *NEOCH* Consent Decree could be remade and counted, just as the 31 ballots cast at the Board were.

⁵ NEOCH and ODP do not express agreement with the new statutes enacted by H.B. 194, but only note this to show that the General Assembly was aware of the problem and addressed it.

made by Secretary of State Husted in the *NEOCH* case on August 1, 2011, notifying the Court of changes in Ohio law related to the Decree. PX 2008 at 6; *See* Case No. 06-cv-896 (S.D. Ohio) (Marbley J.) Doc. 240.

Boards of Elections, as representatives of the Ohio Secretary of State, are bound by the explicit terms of the *NEOCH* Consent Decree. PX 2008 p. 3; O.R.C. § 3501.06. The Board members and staff received copies of the Consent Decree with Directive 2010-48 (issued April 27, 2010), and again before the November 2010 election with Directives 2010-73 and 2010-74. The Board members and staff accepted that they were bound by the *NEOCH* Consent Decree (as evidenced by the actions they took, and as explained by the staff and board members at the evidentiary hearing), but have now, at this late stage, decided to change course and argue that the *NEOCH* Consent Decree is “void” and cannot apply to them. Because (1) the General Assembly was represented as a party in the *NEOCH* case as the State of Ohio; and (2) it is beside the point whether the Ohio General Assembly set forth anything in its Journals and Resolutions when the State of Ohio, on behalf of the General Assembly, entered the *NEOCH* Consent Decree, the Board’s arguments in its Motion to Dismiss must be summarily rejected.

3. The Board’s Newfound Reliance On *Brooks v. State Board of Elections From The Southern District Of Georgia To Question The Ohio Attorney General’s Authority To Enter The NEOCH Consent Decree Is Utterly Misplaced.*

At the September 7, 2011 omnibus hearing in this matter, the Board distributed to the Court and the parties copies of a decision from the Southern District of Georgia, *Brooks v. State Board of Elections*, 848 F.Supp. 1548 (S.D. Ga. 1994), in support of its position that the Ohio Attorney General lacked authority to enter into the *NEOCH* Consent Decree. While not previously cited by the Board, it is easy to see how *Brooks* may have caught the Board’s attention. *Brooks* is the only federal case cited in *American Jurisprudence* for the proposition

that, “[u]nder certain circumstances *** it has been held that the attorney general has no right or power to compromise or direct dismissal of the litigation.” 7 Am. Jr. 2d *Attorney General* §30 (2008) (citing *Brooks*). A brief examination of *Brooks* – which concerned a proposed consent decree that would have completely re-written Georgia’s constitution and statutes relating to the election of every state-court judge – demonstrates how the Board is truly grasping at straws in order to question the Ohio Attorney General’s authority to enter the far more narrowly tailored *NEOCH* Consent Decree. Both procedurally and substantively, *Brooks* simply does not compare and in no way undermines the validity of the *NEOCH* Consent Decree.

Procedurally, *Brooks* was a decision by a U.S. District Judge declining to enter a consent decree that had been proposed *by the parties before him* to resolve the litigation *pending before him*. *Brooks*, 848 F.Supp. at 1551. As such, it is not on par with the Board’s attempt to collaterally attack a decree entered by another District Judge in another case to which the Board was not a party. Moreover, the consent decree at issue in *Brooks* was meant to settle a class action, and was therefore subject to judicial review under the factors set forth in Rule 23(e) of the Federal Rules of Civil Procedure, which Judge Marbley did not apply in his review of the *NEOCH* Consent Decree. And in *Brooks*, multiple intervening parties in the litigation objected to the proposed consent decree. The district court received “hundreds if not thousands” of written objections from voters who were both members and non-members of the plaintiff class. *Brooks*, 848 F.Supp. at 1556. In contrast, no party objected to Judge Marbley’s entry of the *NEOCH* Consent Decree.

Substantively, the proposed consent decree at issue in *Brooks* was aimed at remedying the potential for discrimination against minority voters under the Voting Rights Act of 1965 and increasing the number of African-American state-court judges in Georgia. The proposed decree

would have effected sweeping changes regarding the manner in which *all* state-court judges would be appointed (instead of elected) and retained, and would have created an entirely new category of state-court judgeships that could only be filled by African-American candidates. *Brooks*, 848 F.Supp. at 1551. In contrast to the narrowly tailored *NEOCH* Consent Decree, the consent decree rejected by the district court in *Brooks* would have changed literally the entire structure of the state's system for filling judgeships. The U.S. Attorney General who "precleared" the plan embodied in the consent decree at issue in *Brooks* expressed concern that the plan itself actually violated U.S. Supreme Court precedent, leading the district court to wonder why the Attorney General ever "precleared" it. *Id.* at 1552, n.2.

The district court in *Brooks* noted that the proposed decree would "violate the Georgia constitution's requirement that judges be elected, impermissibly alter the structure of power currently embodied in the 1983 Georgia Constitution regarding the election of judges, and violate several fundamental Georgia statutes. *Id.* at 1564. The decree in *Brooks* would have "remove[d] the right of the electorate to choose directly via contested elections who will represent them in a particular judicial post." *Id.* at 1567. The *NEOCH* Consent Decree, in contrast, instead of wresting the right to vote away from all citizens in the state, 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. Given the sweeping nature of the consent decree at issue in *Brooks*, it is perhaps not surprising that *Brooks* has never been cited by the Sixth Circuit, and cited only three times by district courts within this Circuit (and never in support of vacating a consent decree). *See United States v. Euclid City School Board*, 632 F.Supp.2d 740, 747 (N.D. Ohio 2009) (citing *Brooks* for the proposition that courts should confirm that parties have indeed stipulated to all elements

before establishing liability); *Associated General Contractors of America v. City of Columbus*, 936 F.Supp. 1363, 1440 (S.D. Ohio. 1996) (citing *Brooks* as an example of a court considering the constitutionality of minority quotas in official positions), *vacated as moot*, 172 F.3d 411 (6th Cir. 1999); *Mallory v. Ohio*, 38 F.Supp.2d 525, 576 (S.D. Ohio 1997) (citing *Brooks* for the proposition that in fashioning a remedy in a Voting Rights Act case, the court should not “alter the structure of the State of Ohio’s judicial branch of government.”) For these reasons, the Board’s recent resort to the *Brooks* case in support of its eleventh-hour challenge to the validity of the *NEOCH* Consent Decree must fail.

D. NEOCH And ODP Have Standing To Assert The Claims In Their Amended Complaint.

The Board also argues that NEOCH and ODP lack standing. (*See* Doc. 191 at pp. 1-2.) As intervenors in this action, NEOCH and ODP are not required to demonstrate Article III standing. The Sixth Circuit has recognized that “[a]n intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing.” *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008) (*quoting* *Assoc. Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994)); *see also* *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (holding, “a party seeking to intervene need not possess the standing necessary to initiate a lawsuit”). Thus, if the Court concludes that Plaintiff Tracie Hunter has standing to bring her claims in this matter, which she does, then the Board’s arguments about NEOCH and ODP’s standing are irrelevant.

Even if a traditional standing analysis were required here, NEOCH and ODP would meet its requirements. Intervenor-Plaintiffs NEOCH and ODP have standing if they have “(1) suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury has to be

fairly traceable to the challenged action of the defendant, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *NEOCH v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006) (internal quotations and citation omitted). All of NEOCH and ODP’s claims meet this standard.

First, NEOCH and ODP’s roles as signatories to the *NEOCH* Consent Decree give them standing to sue to enforce that Decree. As NEOCH and ODP have continuously maintained, NEOCH and ODP intervened in Plaintiff Hunter’s action seeking an order to require the Defendants to comply with the terms of the Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 06-cv-896 (S.D. Ohio) (Marbley, J.). (Doc. 8-1 at ¶ 2; Doc. 172 p. 16; Doc. 180 at ¶2). It is undisputed that both NEOCH and ODP are parties to that Decree. (PX 2008 p. 1; Doc. 8-1 at ¶¶ 5-6.) As signatories to the Consent Decree, both NEOCH and ODP have a legally protected interest in enforcing the terms of the *NEOCH* Consent Decree. The injury arose when the Board violated the requirements of Equal Protection and Due Process in its implementation of the Decree. That injury is fairly traceable to the Board’s action, and it is likely to be redressed by a favorable decision. Thus, as the Southern District of Ohio recently noted, parties to consent decrees “unquestionably” have standing to enforce them. *Ragland v. City of Chillicothe*, No. 2:10-cv-879, 2011 WL 1044013, *2 (S.D. Ohio March 16, 2011). *See also Doe v. Briley*, 511 F. Supp.2d 904, 909 (M.D. Tenn. 2007) (holding that the plaintiff had Article III standing to enforce a consent decree because he was a party to the decree). As such, the Board’s claim that NEOCH and ODP failed to allege that they represent any Hamilton County voters who voted in the election at issue here is beside the point.

Second, ODP has standing to bring claims on behalf of Democratic voters in the November 2010 general election in Hamilton County, Ohio. In *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004), the Sixth Circuit held that political parties have standing to bring suit on behalf of their members to protect their rights to vote. See *NEOCH v. Brunner*, No. C2-06-896, 2008 WL 4449514, at *7 (S.D. Ohio Sept. 30, 2008) (interpreting *Sandusky Co. Democratic Party* as holding “that political party . . . plaintiffs had standing to challenge election procedures in the name of their members, even though they could not identify in advance which members would be denied the right to vote by election worker error on voting day.”).

At trial, Plaintiffs introduced evidence demonstrating that several hundred voters in Hamilton County were deprived of their right to vote in the November 2010 general election due to poll worker error, in violation of the *NEOCH* Consent Decree and the Due Process and Equal Protection clauses of the United States Constitution.⁶ Each of these voters would have had standing to bring suit under a traditional standing analysis: (1) they suffered a concrete and particularized injury in fact (the loss of their vote); (2) that injury is fairly traceable to the challenged actions of the Defendants (their failure to investigate for poll worker error, as required by the *NEOCH* Consent Decree and the Constitution); and (3) that injury will be redressed by a favorable decision (requiring the Board to investigate and count provisional ballots miscast due to poll worker error). See *Sandusky Co.*, 387 F.3d at 573 (setting out the three-part test for Article III standing). The Chair of the Hamilton County Democratic Party opined that the majority of the provisional ballots at issue in this case were cast in predominantly

⁶ For a discussion of the Intervenor’s Equal Protection and Due Process Clause claims, see Doc. 185 pp. 11-18 and Doc. 92 pp. 18-26.

Democratic precincts. (*See* Tr. 1-194.) Accordingly, the Ohio Democratic Party has organizational standing to assert the rights of its members in Hamilton County.

The Board inappropriately relies on the Sixth Circuit's Opinion five years ago in *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) to question NEOCH's standing in *this* case. In that Opinion, issued in an expedited appeal from a temporary restraining order only days before the November 2006 election, the record before the Sixth Circuit consisted only of NEOCH's unverified complaint against the Secretary of State. As such, no factual record had yet been developed with respect to NEOCH's standing. On remand, NEOCH developed that factual record, and District Judge Marbley later issued a detailed Opinion and Order denying, in relevant part, the State's motion to dismiss NEOCH's case for lack of standing. *See* Opinion and Order, *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06-cv-00896 (Marbley, J., Sept. 30, 2008). Judge Marbley concluded that NEOCH "demonstrated all three requirements for organizational standing with respect to Counts Three, Four, Eight, Nine, Ten, Twelve, and Thirteen of their Complaint." *Id.* at p. 15. In Counts Twelve and Thirteen of its Complaint in the *NEOCH* case, which were among the claims that Judge Marbley determined NEOCH had adequate organizational standing to pursue, NEOCH asserted Due Process and Equal Protection challenges to the provisional ballot language in House Bill 3, alleging that the provisional ballot provisions were unconstitutionally vague and would lead to the unequal treatment of similarly situated provisional voters by Ohio's Boards of Election. *See* Complaint, *NEOCH v. Brunner*, *supra*, Doc. 2. In the same Opinion and Order, Judge Marbley declared that NEOCH was a "prevailing party" entitled to an award of attorneys' fees. *Id.* at pp. 18-19.

Although the State sought reconsideration of Judge Marbley's September 30, 2008 Opinion and Order, the State did not challenge that portion of Judge Marbley's Order relating to

NEOCH's standing. *See* Motion for Reconsideration, *NEOCH v. Brunner*, No. 2:06-cv-00896, Doc. 191. And although the State later appealed Judge Marbley's orders to the Sixth Circuit, that appeal was dismissed for lack of prosecution when Judge Marbley entered the consent decree that NEOCH intervened in *this* case to enforce. *See id.* at Docs. 210 and 211.

Accordingly, Judge Marbley's determination that NEOCH possessed the requisite Article III standing to pursue its case (including its Due Process and Equal Protection claims) against the Secretary of State – the case which ultimately led to entry of the *NEOCH* Consent Decree at issue here – has not been questioned by the Sixth Circuit. Again, however, this argument by the Board is beside the point, because the *NEOCH* Consent Decree is valid, NEOCH and ODP are undisputed parties to the *NEOCH* Consent Decree, and parties to consent decrees “unquestionably” have standing to enforce them. *Ragland*, 2011 WL 1044013, *2.

IV. THE STATE OF OHIO IS NOT A NECESSARY PARTY

Additionally, NEOCH and ODP have not failed to join a necessary party because NEOCH and ODP do not assert a facial constitutional challenge to Ohio law under Rule 5.1 of the Federal Rules of Civil Procedure. Even if Rule 5.1 did apply, the Ohio Attorney General already knows about this lawsuit and could have intervened if it wanted to do so pursuant to Rule 5.1(c), and the failure to provide notice does not waive NEOCH and ODP's constitutional claim. Fed. R. Civ. P. 5.1(d).

V. NEOCH AND ODP STATE CLAIMS FOR PROSPECTIVE RELIEF

NEOCH and ODP seek prospective relief because the Board is required to comply with the *NEOCH* Consent Decree for the November 2010 election and resolve the constitutional claims *before amending the certification in the election at issue in this case*. The *prospective* relief sought would require the Board to (1) complete any additional investigation into poll

worker error that may be ordered by the Court; (2) vote to accept or reject the *NEOCH* provisional ballots at issue in this case; (3) conduct the recount for the juvenile court judge race; and (4) amend the certification for the juvenile court judge race. Each of these components to the relief sought by NEOCH and ODP is prospective.

VI. THE AMENDED COMPLAINT CONFORMS TO THE EVIDENCE

Finally, the Amended Complaint conforms to the evidence at the evidentiary hearing, which showed that the Board failed to comply with the *NEOCH* Consent Decree and Secretary of State Directives 2010-48, 2010-73, 2010-74 and 2010-79, by failing to identify numerous *NEOCH* provisional ballots and by failing to contact poll workers to investigate for poll worker error. NEOCH and ODP incorporate by reference herein Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law which address the Board's failure to comply with the *NEOCH* Consent Decree. (Doc. 189 at 30-41; 73-91). That name/signature problem provisional ballots were *discussed* by the Board does not resolve the issue that the Board failed to comply with the *NEOCH* Consent Decree and Secretary of State Directives by voting to reject 26 *NEOCH* provisional ballots before investigating for poll worker error on any of the name/signature problem *NEOCH* ballots, and by failing to comply with Directive 2010-74 directing the Board to contact poll workers to investigate for poll worker error.

VII. CONCLUSION

For all of the reasons stated herein, the Board's Motion to Dismiss NEOCH and ODP's Amended Complaint must be denied.

Respectfully submitted,

s/ Caroline H. Gentry

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Sara M. Cooperrider

ATTORNEY FOR INTERVENOR-PLAINTIFF