UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	**Case No. 2:08 cv 1077**
Relators,	:	
	:	**Judge Frost**
vs.	:	
	:	**Magistrate Judge Kemp**
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE OF	:	
OHIO, et al.,	:	
	:	
Respondents.	:	

RELATORS DANA SKAGGS AND KYLE FANNIN'S MOTION FOR REMAND OF CASE TO THE OHIO SUPREME COURT

Pursuant to 28 U.S.C. § 1447, Relators Dana Skaggs and Kyle Fannin ("Relators") hereby move for remand of the above-captioned matter to the Ohio Supreme Court. For the reasons set forth in the attached memorandum in support, Respondent Ohio Secretary of State Jennifer Brunner's ("Secretary Brunner") removal was defective, and this Court lacks subject matter jurisdiction to consider the removed action.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

> "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant … Federal courts examine the well-pleaded allegations of the complaint for a federal question on its face, *and ignore potential defenses*, ... 'including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.' …. *Since a plaintiff is the master of his complaint, ... where a choice is made to assert only a state law claim, the general rule prohibits recharacterizing it as a federal claim.* …. Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. ...."
>
> [Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006) (emphasis added) (citations omitted).]

A federal defense is not a basis for removal jurisdiction. Rather, a relator's well-pleaded complaint provides the basis for determining a federal court's jurisdiction to consider a removed action. Where the well pleaded allegations reveal *only* state law claims, removal is inappropriate even if the relator asserts or claims to possess a defense premised on federal law and/or a federal case. A party cannot avoid this settled law by resorting to the All Writs Act, particularly where, as here, the parties to the present action are not in privity with those in the federal case upon which said party's federal law arguments are based.

Relators filed this original mandamus action in the Ohio Supreme Court, pursuant to Chapter 2731 of the Ohio Revised Code, to compel Secretary Brunner to correctly advise the Franklin County Board of Elections (the "Board") under the plain language of *the Ohio statute* that governs the Board's review and counting of provisional ballot applications and provisional ballots. Such relief is necessary after Secretary Brunner unilaterally acted to change Ohio's election rules after the ballots were cast. This question of Ohio statutory law is an appropriate issue for judicial relief, but such relief must come from the Ohio Supreme Court.

II. STATEMENT OF THE PROCEEDINGS

As Relators note in the opening paragraph of the Complaint, *"[n]o federal law claims are asserted,"* and, thus, Relators' Complaint has nothing to do with federal law. (Emphasis added.) Instead, Relators filed this Original action in mandamus, pursuant to Chapter 2731 of the Ohio Revised Code, seeking an order compelling: (1) Secretary Brunner to correct her erroneous instruction to the Board, based on an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and compelling her to advise the county Boards of Elections that any Provisional Ballot Application cast in the November 4, 2008 election must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted; (2) Secretary Brunner to correct her erroneous interpretation of Section 3505.181 of the Revised Code and compelling her to advise the county Boards of Elections that any provisional voter must provide the identification verification information mandated by R.C. 3505.181 on the Provisional Ballot Application or, alternatively, complete the identification affirmation provided in R.C. 3505.18(A)(4), and if the voter fails to do so, her provisional ballot is not eligible to be counted; and (3) compelling Secretary Brunner and the Board to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include

both the name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a) and/or the voter fails to provide on the Application the identification verification information required by R.C. 3505.18 or, alternatively, fails to complete the identification affirmation provided in R.C. 3505.18(A)(4).

Relators also seek temporary injunctive relief—pursuant to Rule 65 of the Ohio Rules of Civil Procedure, which applies in original proceedings before the Ohio Supreme Court under Supreme Court Practice Rule X—to protect the Court's jurisdiction to decide the merits of Relators' request for mandamus relief. Such request seeks to temporarily enjoin the opening of Provisional Ballot Applications until the Court rules on the merits of Relators' request for mandamus relief.[1]

III. STATEMENT OF FACTS.

A. Summary Of Allegations.

By way of brief background, Relators seek a Writ of Mandamus compelling Secretary Brunner to correct her office's post-election, erroneous instruction to the Board to count provisional ballots even where the provisional voter did not comply with the voter's obligations, under *the Ohio Revised Code*, in completing the Provisional Ballot Application. Such relief turns on the Court's interpretation of the plain language of Ohio Revised Code Section 3505.183(B)(1), which provides that both the "name and signature" of a provisional voter must be included in the written affirmation submitted by the elector "in order for the provisional ballot to be eligible to be counted." [Compl. ¶ 16.] The wording of Section 3505.183(B)(1)(a) could not clearer:

[1] This relief is necessary, as set forth in Relators' motion for temporary injunctive relief, because once the Provisional Ballot Application envelopes are opened, the ballots are removed and commingled with other provisional ballots. In other words, the opening of the provisional ballots would ring a bell that cannot be unrung.

> . . . the following information *shall be included* in the written affirmation [on the Provisional Ballot Application] *in order for the provisional ballot to be eligible to be counted*:
>
> (a) The individual's name and signature;
>
> * * *
>
> [Emphasis added.]

In a direct reversal of her office's pre-election direction to the Board, Secretary Brunner's office has recently—after the November 4, 2008 election—instructed the Board that it should not follow the plain language of Section 3505.183(B)(1) in reviewing and counting provisional ballots. Specifically, in a November 10, 2008 e-mail issued at the prompting of a Democratic campaign attorney, Brian Shinn, Assistant General Counsel for Secretary Brunner's office, instructed the Board to deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." [Compl. ¶ 21, Exh. D to Compl.]

Shinn went so far as to indicate that if a voter's signature is found anywhere on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." [Id.] Secretary of State Brunner concurred with Mr. Shinn's after-the-election change in interpretation of the provisions of R.C. 3505.183(B)(1)(a), and adopted it as her own, on Wednesday, November 12, 2008. [Id.]

It is this misdirection/instruction to the Board, pursuant to the plain language of Section 3505.181(B) of the Ohio Revised Code, that lies at the heart of Relators' request for Mandamus relief. Specifically, and consistent with recent Ohio Supreme Court authority in State ex rel. Colvin v. Brunner, 2008- Ohio –5041 (2008), and State ex rel. Stokes v. Brunner, 2008-Ohio-5097 (2008), Relators seek an order compelling Secretary Brunner to correct her misdirection, pursuant to an express Ohio statute, and to correct her erroneous statutory interpretation.

B. Secretary Brunner's Purported Bases For Removal.

Despite the clarity of Relators' Complaint, and the solely state-law allegations contained therein, Secretary Brunner nonetheless contends that removal is proper based on a vague contention that Relators' state-law allegations involve issues "ensconced" in federal case law by this Court that addressed "poll worker" error. [Brunner Notice, at 1-2.] In addition, Secretary Brunner contends that removal is proper, even though the Board has not joined in her Notice, because the Board (presumably like Secretary Brunner) has not yet received service of process from the Supreme Court—even though the Board entered a notice of appearance in the Supreme Court action on November 13, 2008. [See Notice of Appearance, Exh. A.]

In reality, Secretary Brunner's true assertion is that removal is proper because she intends to *respond to* Relators' solely state-law claims in light of certain consolidated cases before this court (the "Federal Action"); because the Board, even though it is the party ultimately responsible for reviewing and evaluating the Provisional Ballot Applications, is not a real party in this case; and because, even though neither Respondent has received official service of process from the Supreme Court, she was the first to seek removal. As set forth below, none of these asserted bases justify Secretary Brunner's removal of a state-law action.

IV. LAW & ARGUMENT

A. Secretary Brunner Has Established No Basis For Removal Under 28 U.S.C. § 1441.

1. No Exception To The "Rule Of Unanimity" For Effective Removal Applies Here.

As Secretary Brunner recognizes, a defendant's notice of removal is ineffective unless *all defendants have been properly joined in the notice*. See, e.g., Harper v. AutoAlliance Intern., Inc., 392 F.3d 195, 201 (6th Cir. 2004). It is undisputed that the Board has not joined in her notice of removal. Nonetheless, Secretary Brunner argues that the general rule does not apply because the Board is merely a "nominal" party to the case, and that the Board has otherwise not been served with process. She is wrong on both counts, and remand is appropriate because not all Respondents have joined in the notice of removal.[2]

a. The Board, Which Has A Demonstrated Interest In The Outcome Of This Case, Is Not Merely A "Nominal" Party.

As this Court has recognized, for purposes of the rule of unanimity, a party is not merely "nominal" where it has a "demonstrated interest in the outcome of the case." See Local Union No. 172 Int'l Ass'n of Bridge, Structural Ornamental and Reinforcing Ironworkers v. P.J. Dick Inc., 253 F. Supp. 2d 1022, 1027 (S.D. Ohio 2003) (Sargus, J.). There is little doubt that the Board, as the party ultimately responsible for reviewing and evaluating the Provisional Ballot Applications at issue, has a demonstrated interest in the outcome of this case. Indeed, the Board is absolutely necessary with respect to Relators' request for temporary injunctive relief, which, if granted, would impact the Board's ability to open the Provisional Ballot Application envelopes.

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[2] At the outset, we note that any doubts with respect to the effectiveness of removal should be resolved in favor of remand to state court. See Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 6th Cir. 1999) ("[S]tatutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction. Thus, in the interest of comity and federalism, federal jurisdiction should be exercised only when it is clearly established, and any ambiguity regarding the scope of § 1446(b) should be resolved in favor of remand to the state courts.") (citation omitted).

In short, both because of the integral role it plays in evaluating the Provisional Ballot Applications and because it is the direct subject of a request for temporary injunctive relief, the Board clearly has a "demonstrated interest in the outcome of this case." As a result, under this Court's precedent, the Board is not a merely "nominal" party, and its consent is *required* for effective removal.

b. The Board's Consent To Removal Is Additionally Required Because The Board Has Entered An Appearance In The Supreme Court Action.

As noted above, the Franklin County Prosecutor's office entered an appearance on behalf of the Board, in the Supreme Court action, on November 13, 2008. The Board's entry of appearance necessarily forecloses Secretary Brunner's argument that the Board's consent is unnecessary because it has not yet been served with official process.

Indeed, a party's entry of appearance as defendant in the action to be removed invokes the rule of unanimity—even absent actual service of process—and, thus, such party's consent is required for effective removal. See First Independence Bank v. Trendventures, L.L.C., 2008 WL 253045, *6 (E.D. Mich. 2008) ("Because *[one of multiple defendants] has appeared in this action with respect to First Independence Bank's Original Complaint, the non-service exception does not apply.")* (emphasis added). As another court expressly stated, "[t]he entry of appearance and the subsequent failure to petition for removal on the part of Lloyd's *would require that the cause be remanded even though the original service was not good.*" Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co., 220 F. Supp. 222, 227 (D. Mo. 1963).

The same is true here. Having entered an appearance in the Supreme Court action, the Board cannot now be excluded from the removal process. Rather, its consent is necessary for effective removal. In the absence of such consent, the case must be remanded.

2. Applied Here, The "Well Pleaded Complaint Rule" Deprives The Court Of Subject Matter Jurisdiction.

Separate and apart from these independently-fatal shortcomings, the Court additionally lacks subject matter jurisdiction to consider the removed action because, on its face, Relators' complaint asserts only *state law* mandamus claims that seek to compel a *state* official to instruct county boards of election consistent with the plain language of an *Ohio* statute. It is well settled that the nature of a party's claims, for purposes of removal jurisdiction, is to be determined from the face of the plaintiff's well-pleaded complaint. Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006). Thus, any federal issues that a defendant might raise cannot confer removal jurisdiction on a federal court:

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. … Federal courts examine the well-pleaded allegations of the complaint for a federal question on its face, *and ignore potential defenses*, *id.,* 'including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.' …. *Since a plaintiff is the master of his complaint, … where a choice is made to assert only a state law claim, the general rule prohibits recharacterizing it as a federal claim.* …. Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. ....
>
> [Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006) (emphasis added) (citations omitted).][3]

[3] The Sixth Circuit has held that absolute preemption provides a basis for removal *only* in four, specific statutory instances: Section 301 of the Labor Management Relations Act; Section 502(a)(1)(B) of ERISA; Section 85 and 86 of the National Bank Act; and Section 301(a) of the Copyright Act. Allied Erecting and Dismantling Co., Inc. v. Ohio Central R.R., Inc., 2006 WL 2933950, *4 (N.D. Ohio Oct. 12, 2006) (citing AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir. 2004)). None of these specific statutes are, obviously, at issue here.

See also Allied Erecting and Dismantling Co., Inc. v. Ohio Central R.R., Inc., 2006 WL 2933950, *4 (N.D. Ohio 2006) ("[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.").

Thus, where a plaintiff pleads only state law claims, the fact that a defendant raises federal law issues in response to the Complaint does not justify removal thereof. In a similar case, this Court's sister district remanded a state law election case in which the plaintiff sought mandamus and injunctive relief to compel the Detroit Election Commission to prevent a violation of state election laws. Taylor v. Currie, 386 F.Supp.2d 929, 930-31 (E.D. Mich. 2005). The complaint was expressly limited to state law claims, and raised no federal causes of action. Id. at 930. Nevertheless, the defendants removed to federal court citing the general removal statute (28 U.S.C. § 1441) and the civil rights removal statute (28 U.S.C. § 1443). Id. at 932. The court applied the well pleaded complaint rule and found no federal question. Id. at 933-34.

In so holding, the Taylor court gave weight to the fact that the plaintiff expressly limited the scope of the complaint to state law claims:

> Indeed, the complaint seeks to assert only rights arising under state statutes against state officials in relation to a state election. It is hard to imagine a more quintessentially state case.

Id. at 934. Thus, the district court remanded to state court. Id. at 938.

Again, the same is true here. Relators' Complaint expressly states that no issues of federal law are asserted. Rather, the Complaint is expressly limited to a state law claim for mandamus relief, seeking enforcement of Secretary Brunner's duties, under Ohio statutes, to enforce the plain language thereof. No attempt by Secretary Brunner to inject a federal law issue

into this case can change the fundamental state-law allegations in Relators' well-pleaded complaint. For this additional reason, the Court lacks subject matter jurisdiction to consider the removed action, and the case should be remanded to the Ohio Supreme Court.

B. The All Writs Act Provides No Basis For Removal.

1. In The Absence Of This Court Having Original Jurisdiction Over The Instant Action, The All Writs Act Provides No Basis For Removal.

> *Petitioners may not, by resorting to the All Writs Act, avoid complying with the statutory requirements for removal. ...*
>
> * * *
>
> *Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement.*
>
> [Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 32, 34 (2002).]

Secretary Brunner urges the Court to find that the All Writs Act, 28 U.S.C. § 1651(a), authorizes this Court to allow removal in combination with its supposed supplemental, or "ancillary" jurisdiction[4] over the removed action. Not so. Secretary Brunner's argument is based on a quote snippet from the United States Supreme Court's decision in Syngenta, wherein the Court was explaining the petitioners' contention as to why removal should be allowed. [See Supplemental Memorandum in Support of Removal, filed by the Ohio Attorney General.] What Secretary Brunner fails to mention, however, was the rest of the case. The Supreme Court actually held the opposite of the position Secretary Brunner advances: it held that the All Writs Act provides no authority for removal where the court lacks original jurisdiction over the

[4] Supplemental and ancillary jurisdiction are the same thing, in that "ancillary jurisdiction" was a common-law basis of federal jurisdiction over state law counterclaims that was codified as "supplemental jurisdiction" in 28 U.S.C. § 1367. See Peacock v. Thomas, 516 U.S. 349, 354 n. 5 (1996).

removed case. As explained in Section A, *supra*, the Court lacks original jurisdiction over the Relators' claims.

Syngenta involved various plaintiffs asserting torts claims against the same defendants in state court and in federal court; the federal action was filed first. See 537 U.S. at 30. The federal action was settled, and after the state court held that the settlement did not preclude certain claims from proceeding in the state action, the defendants responded by removing the state action to federal court. [Id.] The defendants (petitioners) argued to the Supreme Court that the All Writs Act supported removal of the state-court action because *if* the state-court claims been brought in the federal action, the district court *could have* asserted ancillary jurisdiction over the claims. See 537 U.S. at 33. The Supreme Court rejected this argument:

> [Petitioners] fail to explain how the [federal court's] retention of jurisdiction over the [federal court] settlement authorized *removal* of the [state-court] action. Removal is governed by statute, and invocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with statutory requirements."
>
> [Syngenta, 537 U.S. 28, 34.]

In short, since supplemental jurisdiction was the only alleged "grounds" for removal and the removal statute, 28 U.S.C. § 1441, requires original jurisdiction, the All Writs Act did not somehow authorize what the removal statute does not allow.

> Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement.
>
> [537 U.S. at 34.]

In short, the All Writs Act provides no basis for this Court to assert jurisdiction over the removed action.

2. The Anti-Injunction Act Provides Separate, Independent Grounds For Remand Of The Removed Action.

In any event, the All Writs Act does not even apply. The All Writs Act must be analyzed together with the Anti-Injunction Act to determine the propriety of a federal court's issuance of an order enjoining state court litigation. See In re Inter-Op Hip Prosthesis Prod. Liability Litig., 174 F. Supp. 2d 648, 652 (6th Cir. 2001). This provides separate, independent grounds for remand.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
>
> [22 U.S.C. § 2283.]

Thus, the Anti-Injunction Act prohibits federal courts from enjoining state proceedings – either directly, by enjoining a state court, or indirectly, by enjoining the parties from proceeding with litigation in the state courts. See Atlantic Coast Line R.R. v. Bhd. of Locomotive Engineers, 398 U.S. 281, 286 (1970). The purpose of the Anti-Injunction Act is, of course, to promote comity between the federal and state court systems. "In adopting the Act, Congress sought to avoid 'the inevitable friction between the state and federal courts that ensues from the injunction of state court proceedings by a federal court.'" Hatch v. Avis Rent-A-Car Sys., Inc., 152 F.3d 540, 541 (6th Cir. 1998) (quoting Vendo Co. v. Lektro Vend Corp., 433 U.S. 623, 630 (1977)).

The exceptions contained in the Act are exclusive, and federal courts cannot create additional exceptions. "Suffice it to say that the Act is an absolute prohibition of any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically

defined exceptions to the act." Vendo Co., 433 U.S. at 630. Furthermore, *"[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting state courts to proceed in an orderly fashion to finally determine the controversy*." Atlantic Coast Line R.R., 398 U.S. at 297 (emphasis added).

The All Writs Act provides authority for federal courts to issue injunctions of state court proceedings, but only under three limited exceptions, which are narrowly construed. See, e.g., In re Inter-Op Hip Prosthesis Product Liability Litig., 174 F. Supp. 2d 648, 652 (N.D. Ohio 2001). We examine the three exceptions in turn:

a. Exception No. 1, An "Act Of Congress" – Does Not Apply.

The first exception Applies when the injunction is "expressly authorized by Act of Congress." 28 U.S.C. § 2283. The test is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 237 (1972). This applies, for example, to statutes such as:

- The Interpleader Act 28 U.S.C. §2361. See, e.g., Holcomb v. Aetna Life Ins. Co., 288 F.2d 75 (10th Cir. 1955) (federal courts in an interpleader action expressly authorized to issue injunctions "against instituting or proceeding in any proceedings in any State or United States court.").

- The Bankruptcy Code, specifically 11 U.S.C. §362. See, e.g. In re U.S.H. Corp. of New York, 280 B.R 330 (Bankr. S.D.N.Y. 2002) (injunction was authorized under the "expressly authorized" exception to the Anti-Injunction Act, as expressly authorized by Congress under statute granting bankruptcy court equitable power to do whatever necessary to aid its jurisdiction.).

The "expressly authorized" exception is not available here.

b. Exception No. 2, "Aid Of Jurisdiction" – Does Not Apply.

The Second Exception, injunction "necessary in aid of [a court's] jurisdiction, essentially applies where the federal court first acquires jurisdiction over a case involving the disposition of real property. See, e.g., Piper v. Portnoff Law Associates, 262 F. Supp. 2d 520 (E.D. Pa. 2003)

(in homeowner's claim under Fair Debt Collection Practices Act, court enjoined sheriff's sale of real property, holding that sale presented a sufficient threat to the federal action because the plaintiff may lose her home in the state proceeding, even though the federal court may conclude that the fees and costs assessed against her property were unlawful). The United States Supreme Court has refused to expand the "in aid of jurisdiction" exception to *in personam* actions. Atlantic Coast Line R.R. v. Bhd. of Locomotive Engineers, 398 U.S. 281 (1970).

c. Exception No. 3, "Relitigation Exception" – Does Not Apply.

The third exception, the so-called "relitigation exception," provides that an injunction may issue "to protect or effectuate [the court's] judgments." 22 U.S.C. § 2283. This exception provides that when a federal court decides an issue, it can prevent that same issue from being relitigated in state court where principles of preclusion should bind the state court. See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988) ("[t]he relitigation exception] is founded in the well-recognized concepts of res judicata and collateral estoppel.").

"The essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court." Huguley v. Gen. Motors Corp., 999 F.2d 142, 146 (6th Cir. 1993) (citing Chick Kam Choo, at 148)). Critical here is that the relitigation exception *does not apply* when the earlier federal court ruling was based on federal court procedures and not on the merits. Moreover:

> While the relitigation exception is "founded" upon the concept of res judicata, the exception applies only as necessary to protect or effectuate a federal court judgment, and thus is not the equivalent of res judicata. Under the doctrine of res judicata, an issue which was or *should have been litigated* in the prior action cannot be raised in a subsequent action. In contrast, "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from

> litigation in state proceedings *actually have been decided by the federal court*. Because the relitigation exception does not encompass the full parameters of res judicata, a federal court cannot enjoin the bringing in state court of claims that could have been raised in a prior federal action but were not in fact litigated there.
>
> [Hatcher v. Avis Rent-a-Car Sys., Inc., 152 F.3d 540, 543 (6th Cir. 1998) (emphasis in original).]

In order to determine if the relitigation exception applies, the Fifth Circuit, for example, uses a four-part test. "First, the parties in a later action must be identical to (or at least in privity with) the parties in a prior action. Second, the judgment in the prior action must have been rendered by a court of competent jurisdiction. Third, the prior action must have concluded with a final judgment on the merits. Fourth, the same claim or cause of action must be involved in both suits." Vines v. Univ. of La., 398 F.3d 700, 704 -05 (5th Cir. 2005).

Here, the Relators are obviously not "identical" to the parties in the federal action, nor are they in privity. For purposes of invoking the relitigation exception, consent orders simply do not have the same effect on third parties as fully litigated judgments, *even where* those third parties seek to challenge the propriety of the consent order itself. See, e.g., Dunn v. Carey, 808 F.2d 555, 559 (7th Cir. 1986) (holding that individuals who were not parties to the consent decree may challenge authority of state to enter into decree). Here, of course, the Relators are not even attempting to reopen the issues settled by the consent order; Relators have brought their own claims based on separate conduct of Secretary Brunner.

Clearly, the relitigation exception does not apply:

- The parties are not the same.
- Relators' claims were not "in fact litigated" in the federal action.

- Relators' claims "could not have been raised" in the federal action, as the circumstances giving rise to the claims had not even happened yet.

V. CONCLUSION

For the reasons set forth herein, Relators' Motion to Remand should be granted and the case remanded to the Ohio Supreme Court.

Respectfully submitted,

/s/ John W. Zeiger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record by means of the Court's CM/ECF system on this 14th day of November, 2008.

/s/ John W. Zeiger
John W. Zeiger (0010707)

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