

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

NORTHEAST OHIO COALITION :
FOR THE HOMELESS, *et al.*, :
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Plaintiffs, :
 :
v. :
 :
OHIO DEMOCRATIC PARTY, :
 :
Intervenor-Plaintiff, :
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 :
JENNIFER BRUNNER, in her official :
capacity as Secretary of State of Ohio, :
 :
Defendant. :
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NORTHEAST OHIO COALITION :
FOR THE HOMELESS, *et al.*, :
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Plaintiffs, :
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v. :
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THE STATE OF OHIO, :
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Intervenor-Defendant. :
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OHIO REPUBLICAN PARTY, *et al.*, :
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v. :
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JENNIFER BRUNNER, in her official :
capacity as Secretary of State of Ohio, :
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Defendant, :
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VETERANS FOR AMERICA, :
 :
Intervenor-Defendant. :

Case No. C2-06-896
JUDGE ALGENON L. MARBLEY
Magistrate Judge Terence P. Kemp

Case No. C2-08-913
JUDGE GEORGE C. SMITH
Magistrate Judge Terence P. Kemp

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on Defendant Secretary of State Jennifer Brunner's ("Defendant Brunner") Motion to Consolidate (no. 146); Intervenor Ohio Democratic Party's Motion to Consolidate (no. 150); and Plaintiffs Northeast Ohio Coalition for the Homeless' and Service Employees International Union, Local 1199's (collectively "Plaintiffs") Motion in Support of Secretary of State Jennifer Brunner's Motion to Consolidate (no. 151) (collectively "Motions to Consolidate"). In their Motions to Consolidate, the parties argue that *Ohio Republican Party v. Brunner* ("ORP case"), case no. 2:08-cv-913, should be consolidated with *The Northeast Ohio Coalition for the Homeless v. Brunner* ("NEOCH case"), case no. 2:06-cv-896, currently before this Court.¹ The moving parties contend that the cases should be consolidated because the actions present common questions of law and fact and that the ORP Case should be consolidated with the NEOCH case because NEOCH case was the first-filed of the two cases. The Ohio Republican Party, a plaintiff in the ORP case, opposes consolidation. Oral argument on the Motions to Consolidate was heard on November 4, 2008. For the reasons discussed below, the Motions to Consolidate are **GRANTED**.

II. BACKGROUND

There are two cases involved in this matter. The NEOCH case, which involves constitutional challenges to Ohio's Voter ID laws and Provisional Ballot Laws, was filed before this Court on October 24, 2006. The ORP case, which also involves constitutional challenges to

¹ Defendant Brunner's Motion to Consolidate (OPR no. 66) and Plaintiffs' Motion in Support of Consolidation (ORP no. 68) were simultaneously filed in the ORP case before Judge Smith. The Ohio Republican Party's Memorandum in Opposition to consolidation (ORP no. 69) was filed only in the ORP case, but its caption references both that case and the NEOCH case, currently before this Court.

Ohio's Voter ID and Provisional Ballot Laws as enforced through Directives issued by Defendant Brunner ("Directives"), was filed on September 26, 2008 before Judge Smith. Under the well-established practice in the Southern District of Ohio, cases are consolidated into the first-filed case. *Kohus v. Toys "R" Us, Inc.*, Nos. C-1-05-517, C-1-05-671, 2006 WL 1476209, at *2 (S.D. Ohio May 25, 2006) ("[I]t is common practice in the Southern District of Ohio to consolidate cases into the first-filed case"); *see, e.g., Harden v. Bush*, Nos. 3:06-cv-258, 3:08-cv-096, 2008 WL 4533664 (S.D. Ohio Sept. 30, 2008) (consolidating into first-filed case). None of the parties contests this principle. Therefore, as the *NEOCH* case was filed almost two years before the *ORP* case, the cases will be consolidated into the *NEOCH* case.

A. Status of the *ORP* Case

On November 4, 2008, Plaintiffs in the *ORP* case filed an Amended Complaint. (*ORP* Case no. 64). The Amended Complaint contained prayers for relief relating to four Directives issued by Secretary of State Brunner. First, Plaintiffs sought to enjoin Directive 2008-63; however, at the time the Amended Complaint was filed the Ohio Supreme Court had already upheld that Directive in *Ohio ex rel. Colvin v. Brunner*, – N.E.2d –, 2008 WL 4443962, at *13 (Ohio Sept. 29 2008)². Thus, Plaintiffs' challenge to Directive 2008-63 is no longer at issue.

Second, the Amended Complaint sought to enjoin Directive 2008-24; however, that issue is now moot because on October 16, 2008 the Ohio Supreme Court granted a writ of mandamus which prevented the enforcement of that Directive.³ *Ohio ex rel. Stokes v. Brunner*, Slip Opinion No. 2008-Ohio-5392, at ¶ 30 (Ohio Oct. 16, 2008). Moreover, the early voter period ended on

² Directive 2008-63 advised the Ohio Boards of Elections that there were several days before the 2008 election in which voters could simultaneously register to vote and complete an absentee ballot.

³ Directive 2008-24 related to whether observers were allowed to be present during the early voting period.

November 3, 2008, the day before the Amended Complaint was filed in the *ORP* case.

Third, the Amended Complaint sought to enjoin Directive 2008-101 and to require the secretary to “promulgate uniform standards for the determination of the eligibility of provisional ballots to be counted.” Directive 2008-101, however, relates to the provisional ballot issue that is central to the October 2008 preliminary injunction proceedings in the *NEOCH* case. In fact, Defendant Brunner issued Directive 2008-101 as a means to settle the *NEOCH* case Plaintiffs’ motion for preliminary injunction. (*See* Directive 2008-101, ¶ 1). Moreover, in an October 24, 2008 Order in the *NEOCH* case (no. 142), this Court adopted and annexed Directive 2008-101 as an Order of the Court. Therefore, the *ORP* case Plaintiffs’ challenges to Directive 2008-101 are inextricably related to the *NEOCH* case.

Fourth, the Amended Complaint sought to enjoin Directive 2008-105. Directive 2008-105 relates to the election night “Unofficial Canvass” of ballots. That Directive also deals with the manner in which ballots are counted including “double-bubble” votes, in which a voter both filled in the oval next to the candidate’s name and wrote in the name of the same candidate in the write-on candidate area..⁴

In sum, the *ORP* Case Plaintiffs’ challenges to Directives 2008-101 and 2008-105 are the remaining issues before Judge Smith in the *ORP* case.

⁴ Directive 2008-105 discusses vote counting procedures in the context of the “unofficial canvass,” which occurs on election night and excludes provisional ballots, which are counted beginning the day after the election. Nevertheless, Defendant Brunner explained during oral argument on the Motions to Consolidate that the ballot counting procedures in 2008-105 would be applied to the counting of provisional ballots. Specifically, Defendant Brunner stated: if someone were to cast a provisional ballot, and at the same time put—darken the oval next to a candidate’s name and in the write in line darken the oval and write in that candidate’s name, we’re still dealing with the question under [Directive 2008-105] should that ballot count in addition to [Directive 2008-101] should that ballot count. So that there is an overlap in the subject matter question of how are we counting ballots. (Mot. to Consolidate Hr’g Tr. 9).

III. LAW & ANALYSIS

Federal Rule of Civil Procedure 42(a) governs consolidation of cases. Under Rule 42 “if actions before the court involve a common question of law or fact the court, it may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Fed. R. Civ. P. 42(a). A trial court has broad discretion to consolidate cases under Rule 42(a). Fed. R. Civ. P. 42(a); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (whether to consolidate is within discretion of trial court); *see also Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. of California*, 877 F.2d 777, 777 (9th Cir. 1989) (holding that a district court has broad discretion to consolidate cases pending in the same district even when cases are pending before different judges). In ruling on a motion to consolidate a court must consider:

[W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Id. (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)).

Defendant Brunner, *NEOCH* case Plaintiffs and Intervenor Ohio Democratic Party (“Moving Parties”) all ask this Court to consolidate the *ORP* case with the *NEOCH* case. They assert that the cases overlap both factually, with regard to the counting of provisional ballots and the operation of Directive 2008-101, and legally, with regard to the assertions in both cases that lack of uniformity in counting provisional ballots violates member voters’ Equal Protection Clause Rights. Conversely, *ORP* case Plaintiffs claim that the two cases do not involve common issues of law or fact and that consolidation would be imprudent because the *ORP* case has been heavily litigated since its filing a little over one month ago.

To evaluate whether the *ORP* case, as it exists after the Amended Complaint, shares common issues of law and fact with the *NEOCH* case, the Court considered the prayers for relief within the *ORP* Amended Complaint. A review of the prayers for relief convinces the Court that there are a considerable number of common factual and legal questions in the two cases, particularly relating to provisional ballot issues.

There are eight prayers for relief in the Amended Complaint filed before Judge Smith. As discussed above, two have been mooted by Ohio Supreme Court rulings (prayers one and three). One of the remaining requests is a non-substantive request for attorney's fees and costs (prayer eight).

The remaining five prayers for relief request the following:

- **Prayer Two:** requests that provisional ballots be provided for voters who simultaneously register to vote and request a ballot. To the extent that this prayer relates to Directive 2008-63, regarding simultaneous registration and voting it is mooted by the *Colvin* case as discussed above. To the extent it relates to provisional balloting it implicates Directive 2008-101.
- **Prayer Four:** requests that Directive 2008-101 be rescinded or retracted.
- **Prayer Five:** requests that Directive 2008-105 be rescinded or retracted.
- **Prayer Six:** requests that the Secretary of State be required to promulgate uniform standards for the counting of regular and provisional ballots. Thus it implicates both Directive 2008-101 and 2008-105.
- **Prayer Seven:** requests that the Secretary of State be required to promulgate uniform standards for the determination of the eligibility of provisional ballots. Thus this prayer also implicates Directive 2008-101.

Thus, of the five remaining prayers for relief, four of them relate to Directive 2008-101 (prayers two, four, six, and seven). Only one relates solely to Directive 2008-105 (prayer five).

Therefore, there is substantial factual and legal overlap even within the prayers for relief such that consolidation would further the interests of judicial economy.

Next, The Court notes that *ORP* case Plaintiffs did not point to any prejudice that could arise from consolidation in their Memorandum in Opposition to Consolidation.⁵ At oral argument they did argue that consolidation of the cases might result in counsel for the *ORP* case Plaintiffs being conflicted out of the case because Mr. Todd, current counsel to the Ohio Republican Party in the *ORP* case, represented Defendant Brunner in the *NEOCH* case in 2006 and because Mr. Hadden, also counsel to the Ohio Republican Party, works for the same firm as Ms. Gentry, current counsel for the *NEOCH* Plaintiffs. While the potential loss of current counsel would result in some prejudice to the *ORP* Plaintiffs, this prejudice is mitigated by the fact that the *ORP* case has been pending for just over a month, a short span of time in the life of a civil case.

While the *ORP* Plaintiffs' motion for temporary restraining order was heavily litigated in that month, the issues involved in the TRO were related only to Plaintiffs' Help America Vote Act Claim ("HAVA"), the merits of which have been cast into grave doubt by the Supreme Court's ruling on the TRO. *Brunner v. Ohio Republican Party*, 77 U.S.L.W. 3238, 2008 WL 4601731 U.S., at *1 (2008) (holding Ohio Republican Party was not sufficiently likely to prevail on the question whether Congress authorized the District Court to enforce HAVA actions brought by a private litigant). Furthermore, the active prayers for relief in *ORP* Plaintiffs Amended Complaint relate to Directives 2008-101 and 2008-105, which were issued respectively on October 24, 2008 and October 31, 2008. Thus, counsel's familiarity with those Directives stretches back only a little over a week. Finally, counsel for Mr. Wolpert, the other *ORP* case Plaintiff, was involved in the *ORP* case during the TRO proceedings and will not be conflicted out due to the consolidation, further mitigating any prejudice. The Court, therefore,

⁵ The Court also notes that Defendant Brunner, who is the Defendant in both actions actively supports and advocates consolidation.

concludes that this alone is insufficient to bar consolidation of the cases given the amount of factual and legal overlap between the cases and the risk of inconsistent rulings on ballot counting issues absent consolidation.

During oral argument on the motions to consolidate, the parties agreed that the Directive 2008-101 issues should be consolidated given the centrality of that Directive to the *NEOCH* case Orders on Plaintiffs' preliminary injunction motion.⁶ Moreover, the Court agrees with Defendant Brunner's argument that without consolidation she faces a real risk of inconsistent adjudications regarding the validity of that Directive as the *ORP* case Plaintiffs seek to enjoin enforcement of that directive while this Court ordered compliance with the Directive in the *NEOCH* case. The Court believes Defendant Brunner should not be placed at risk of "hav[ing] to choose which court . . . she decide[s] to be found in contempt of." (Mot. to Consolidate Hr'g Tr. 8).

While the Court initially considered consolidating only the Directive 2008-101 issues and leaving the Directive 2008-105 issues with Judge Smith, the Court ultimately concludes that to do so would be improvident. During oral arguments, Defendant Brunner explained that Directive 2008-105 would be used to count provisional ballots. (Mot. to Consolidate Hr'g Tr. 9, 11). Counsel for *NEOCH* Plaintiffs argued that they would be litigating over whether there was uniformity in counting provisional ballots among the various Ohio Boards of Electors and thus would also be seeking and presenting evidence of lack of uniformity in the procedures for

⁶ Counsel for *ORP* Case Plaintiffs stated:
issues relating to the implementation of directive 2008-101, in all probability, belong in this court particularly since that directive was issued as part of a consent or settlement of the issues before the Court at that time . . . I believe the Court is correct and that should not be separated out into Judge Smith's courtroom.
(Mot. to Consolidate Hr'g Tr. 18).

counting votes under Directive 2008-105. (*Id.* 13-14). Thus, absent consolidation both this Court and Judge Smith would have to consider the same Equal Protection Clause issues relating to Directive 2008-105.

NEOCH Plaintiffs' counsel further argued that if the cases were not consolidated, the *NEOCH* Plaintiffs would have to intervene in the *ORP* case. (*Id.* 14-15). This would cause further redundancy between the two proceedings. Consequently, the Court finds that Directive 2008-105 issues and the allegations in the *ORP* case Amended Complaint are inextricably linked to the claims in the *NEOCH* Case and should be tried in one proceeding.

Also, looking at the allegations in the *ORP* Amended Complaint, the Court again finds considerable overlap in the legal issues between the cases. Both the Supplemental Complaint in the *NEOCH* case and the Amended Complaint in the *ORP* case contain allegations that lack of uniformity of the counting of provisional ballots violates voter's rights to equal protection of the law. (*ORP* Amend. Compl. ¶¶ 34, 35, 86; *NEOCH* Supl. Compl. ¶¶ 116-18). Similarly, both complaints allege vote dilution claims based on the lack of uniformity in the counting of and eligibility determinations regarding provisional ballots. (*ORP* Am. Compl. ¶¶ 34, 35, 92; *NEOCH* Supl. Compl. ¶¶ 119-121). The Court believes it is expeditious to consider these issues in one lawsuit. Finally, the Court believes that consolidation is necessary to avoid the risk of inconsistent rulings on the constitutional validity of the procedures used to count provisional ballots under the Ohio Election Laws and the Directives issued by Defendant Brunner.

