UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER, et al.	:	**CASE NO. 1:10-cv-820**
Plaintiffs	:	**Judge Susan J. Dlott**
vs.	:	
HAMILTON COUNTY BOARD OF ELECTIONS, et al.	:	**DEFENDANTS HAMILTON COUNTY BOARD OF ELECTIONS AND BOARD MEMBERS TRIANTIFILOU, BURKE, GERHARDT, AND FAUX REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Defendants	:	

Defendants Hamilton County Board of Elections and Board Members Alex Triantifilou, Charles Gerhardt, Timothy Burke and Caleb Faux (the "Board") submit this reply brief in support of their Motion for Summary Judgment ("MSJ").

I. THE BOARD IS IMMUNE TO PLAINTIFFS' CLAIMS

Hunter argues that the Board and its members are not immune to Plaintiffs' claims under the 11th Amendment because the Board is not an arm of the state, the Board and its members have waived any immunity claim and the Plaintiffs have requested prospective injunctive relief. Plaintiff Hunter also argues that her due process claims should not be dismissed. Each of those points is without merit and will be addressed seriatim.

A. The Board is an "Arm of the State"

Plaintiff Hunter recognizes that 11th Amendment immunity applies to government entities that are "arms of the state" (Hunter's Memorandum in Opposition to Board's

MSJ at p. 2 (hereinafter "Hunter Br.")), but argues without any authority that Ohio county boards of election are a political subdivision of a county and not a state entity (*id*.). As such, Hunter posits that the Board is not immune from suit under the 11th Amendment.

Hunter's attempt to distinguish the authority cited by the Board at pages 6 and 7 of her brief is unavailing. Indeed, the decision in *Tronsen v. Lucas County Bd. of Elections*, 2007 WL 978101 (N.D. Ohio 2007) is directly on point, and the fact that it was a "pro se suit" is irrelevant because the court actually raised the 11th Amendment issue *sua sponte*. Hunter also fails to cite the Ohio Supreme Court's recent decision in *State ex. rel. Dreamer v. Mason*, 950 N.E.2d 519 (2011). In *Mason*, the Court reaffirmed that under Ohio law "'all matters pertaining to the conduct of elections are state functions.'" (*Id*. at 523 (quoting *State ex rel. Columbus Blank Book Mfg. Co. v. Ayres*, 51 N.E.2d 636 (1943) (paragraph one of syllabus).) The *Mason* court also reaffirmed its holding that "'[m]embers of the boards of elections act under the direct control of and are answerable only to the Secretary of State in his capacity as the chief election officer of the state. They perform no county functions and are not county officers.'" (*Id*. at 523-24 (quoting *Ayres* at paragraph two of the syllabus).) Thus, *Mason* ruled that county boards of elections and their directors perform only state functions and are state, not county, officers.

This case goes to the heart of Hunter's main contention, which is that the State would not be liable for a money judgment against the Board. That argument is simply not relevant in the context of this case where there is no money judgment sought. The State will not be called upon to pay a money judgment given the nature of the case. The

key point that Hunter ignores is that the "arm of the state" question "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc.). Here, the Board's direct administration of an election, a state function under *Mason*, is at issue. And the carrying out of that function will rarely, if ever, give rise to a suit for money damages.

All of the other factors that Hunter cites similarly support the Board's argument here. Ohio law is not ambiguous on whether the Board and its members are referred to as state officers. When Hunter argues that state law has not clearly identified election board members as state officers (Hunter Br. at 5), she misinterprets what state law says and ignores the authority of the Ohio Supreme Court in *Mason*. Hunter claims that Ohio law defines boards of elections and their members as both county and state officials. The Ohio Revised Code, however, provides that county election boards and their members are representatives of the Ohio Secretary of State ("SOS"), appointed by the SOS, controlled by the SOS and subject to removal by the SOS. R.C. §§ 3501.05(A) (SOS appoints election board members); 3501.05(B) (SOS issues instructions to board members on how to conduct elections pursuant to R.C. § 3501.053); 3501.05(M) (SOS compels election officers including county election boards on the requirements of the election laws); 3501.06 (SOS appoints in each county a four member board of elections as the "Secretary's representatives"); 3501.07 (SOS appoints vacancies to the county boards of election); and 3501.16 (SOS may remove or suspend from office county election board members). Thus, the SOS controls county boards and their members, appoints board

members, may remove board members and fills board vacancies. All of those powers of the SOS support the finding that the Board and its members are "arms of the state."

Ohio law never states that county election boards and/or members are county officials. Hunter construes the requirement of R.C. § 3501.06 that county board of election members be "qualified electors of the county" to mean that such board members are "county officials." That is patently false. R.C. § 3501.01(N) defines a "qualified elector" as a "person having the qualifications provided by law to be entitled to vote." Every person registered to vote in a county is a "qualified elector" in the county. Being a "qualified elector" in a county does not make someone a "county official."

Hunter concedes that control of the SOS over county election boards weighs in favor of finding that they are "arms of the state." (Hunter Br. at 6.) Hunter tries to overcome this by saying that this case involves an order that the Board can follow without any involvement of the State. That is circular reasoning and assumes the point in contention. The Board and its members are representatives of the SOS. If the order involves the Board or its members, it involves the State. The SOS also had substantial involvement in this case, ordered the Board how to comply with this Court's orders and issued tie braking votes. (See e.g., Joint Exhibits 36, 37, 38, 40, 44 and 46.)

Hunter's argument on whether the Board and its members are "arms of the state" is also contradicted by her argument that the Board and its members are bound by the NEOCH consent decree and that NEOCH may enforce this decree directly against the Board. (Hunter Br. at 16-17.) The Board and its members were not a party to the NEOCH case (no Ohio county election board was). So why is the Board required to follow that decree? Hunter and NEOCH's point must be that the NEOCH consent decree

binds the Board and its members precisely because they are "arms of the state" and agents or representatives of the SOS.

B. The Board and its Members have not Waived their Right to Assert Eleventh Amendment Immunity

Plaintiff argues that the Board and its members have waived their sovereign immunity by participating in this litigation. But Plaintiff ignores key Sixth Circuit precedent allowing a party to raise the defense anytime, including on appeal for the first time and holding that the defense, in this Circuit, is essentially jurisdictional.

The Sixth Circuit recently reaffirmed its view that 11th Amendment immunity may be raised *sua sponte* even if it was not raised by the state:

> [t]he Sixth Circuit has largely followed the "jurisdictional bar" approach in *Edelman* by holding that a federal court "can raise the question of sovereign immunity *sua sponte* because it implicates important questions of federal-court jurisdiction and federal-state comity." *S & M Brands, Inc. v. Cooper,* 527 F.3d 500, 507 (6th Cir.2008) (citation omitted); *see also Nair v. Oakland County Cmty. Mental Health Auth.,* 443 F.3d 469, 474 (6th Cir.2006) ("Like subject-matter jurisdiction, a sovereign-immunity defense may be asserted for the first time on appeal, and it may (and should) be raised by federal courts on their own initiative." (citations omitted)); *Mixon v. Ohio,* 193 F.3d 389, 397 (6th Cir.1999) (stating that a federal court "may *sua sponte* raise the issue of lack of jurisdiction because of the applicability of the eleventh amendment" (citation and internal quotation marks omitted)). We are thus persuaded that we have the authority to raise the issue of sovereign immunity even though it has not been asserted by County Prosecutor Broughton's counsel, and that Cady's suit against Broughton in his official capacity should be barred by the Eleventh Amendment.

Cady v. Arenac County, 574 F.3d 334, 344-45 (6th Cir. 2009); *Tronsen v. Lucas County Bd. of Elections*, 2007 WL 978101 (N.D. Ohio Mar. 29, 2007) (raising 11th Amendment *sua sponte*). Thus, this Court should simply reject Plaintiff's waiver contention out of hand and adjudicate the issue.

But even if this Court were to entertain the waiver argument, it is clear that the Board has not waived its right to assert Eleventh Amendment immunity here.[1] First, the Board has never agreed that federal jurisdiction over this case is appropriate. The Board maintained from the beginning of this case that federal jurisdiction is lacking, that Plaintiffs have an adequate remedy under Ohio law, and this case belongs in state court. (DOC 9, Response in Opposition to Emergency Motion for a TRO and PI filed by the Board.) Compare e.g. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 620, 122 S. Ct. 1640, 1644 (2002) (state waived immunity when it voluntarily agreed to remove the case to federal court). Even though the Board's immunity claims were only recently ripe for consideration, as discussed below, the Board has always argued that this is a state election case governed by state election laws for which there is a proper and exclusive remedy in state court. Thus, this is simply not a case where the Board acceded to jurisdiction, tried to obtain a favorable merits ruling, and then later tried to raise immunity. *See infra*. Indeed, the instant motion marks the Board's first formal presentation of any merits arguments in this case.

For that reason and others, this case is distinguishable from *Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003). In *Ku,* the State not only moved for immunity after engaging in extensive discovery but after a trial on the merits, in a motion for stay pending appeal. *Id.* at 435. Here, of course, there was no decision on the merits when the Board filed this motion. The Board has not been waiting to see how the court would rule on merits before raising immunity.

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[1] In its answers, the Board preserved the right to assert all defenses that became available and asserted defenses that might generally go to whether a claim could be maintained under the U.S. Constitution. (See text *infra*. at 7.)

Moreover, although Plaintiffs assert that the Board "engaged in broad discovery and extensive pre-trial proceedings," that is simply false. (Hunter Br. at 9.) This case was on appeal and/or stayed for many months and did not get started again until May 2011. The discovery period in this case was very brief, involved only two depositions, and most matters "discovered" by the Plaintiff were through public records requests.[2] By contrast, in *In re Corporacion de Servicios Medico Hospitalarios de Fajardo*, 123 B.R. 4 (Bankr. D.P.R. 1991) (Hunter Br. at 7), the "extensive pretrial proceedings" lasted for five years.

Importantly, the brief pre-trial proceedings failed to illuminate the Board's sovereign immunity defense, which had been preserved in Defendant's answer--stating that Defendants would "assert and rely upon" all defenses, claims, and immunities" that "may become available or apparent during the course of discovery or trial." (DOC 56, Answer at 8; DOC 57, Answer to NEOCH at 8.) In formal and informal settings, the Board sought clarification as to Plaintiff's claims, which was not provided until Plaintiffs' pre-trial statement and trial brief were filed. It was only at this point that it was clear that Plaintiffs were only seeking retroactive relief and were not, for example, bringing a constitutional challenge to an Ohio state statute.[3] Thus, unlike the state's immunity argument in *Ku*, the Board's immunity defense only became ripe for review right before the Board filed its motion.

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[2] Since the November election, Plaintiffs made numerous public records requests pursuant to Ohio law. Plaintiffs received most of the discovery documents sought through the various public records requests.

[3] Indeed, the *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353 (3d Cir. 1997), which Plaintiff relies on (see Hunter Br. at 8) supports the Board on this point. In that case, the court rejected a waiver argument where the availability of the 11th Amendment immunity defense did not crystallize until later in the case. Even the Sixth Circuit in *Hunter* was confused regarding the nature of the due process claim. 635 F.3d at 243.

C. Plaintiffs seek only Retroactive Relief

The Board noted in its memorandum in support of its MSJ that where there is no claimed continuing violation of federal law or any threat of future violation, as is the case here, a declaratory judgment is inappropriate and granting such relief is prohibited by the 11th Amendment. In response, Plaintiffs claim that they have alleged an ongoing violation of federal law and that the only relevant inquiry "remains on the allegations only . . . ." (Hunter Brief at 10.) While it is true that a "court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective", *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 646 (2002), Hunter's complaint does not do that. Plaintiffs allege that the Board acted contrary to law on November 16, 2010 in its investigation, treatment and counting of provisional ballots, and as a result Plaintiffs seek a declaration to that effect and seek an order requiring the board to change the votes it took on the provisional ballots on November 16, 2010. That is retroactive relief only to remediate an alleged past constitutional violation.

Plaintiffs think that how they "characterize" their prayer for injunctive relief is dispositive. But that is not what the Supreme Court said in *Verizon* or what the Sixth Circuit said in *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474 (6th Cir. 2008). The question is whether the prayer for relief is "properly characterized" as prospective. Saying something is prospective does not make it so. It must in fact be prospective relief based upon a continuing violation of federal law. That is not true in this case.

The *League of Women Voters of Ohio* case is very different and illustrates why this case does not involve a continuing violation of federal law justifying injunctive relief that is properly characterized as prospective. The League of Women Voters of Ohio alleged in their suit that "Ohio's voting system" violated federal law for numerous reasons and that that system would violate their rights in "future elections" unless injunctive relief were granted to fix the entire state system. *Id*. at 466. In that case, as a result of the violations of federal law alleged, the plaintiff sought injunctive relief ordering the defendants "'[t]o promulgate, adopt, and enforce uniform standards' related to various aspects of Ohio's election system . . . ." *Id*. at 469-470. The requested injunction, which was sought against the Ohio Governor and Secretary of State, was specifically meant to address a continuing violation of law and to remedy that violation so that it would not occur again in future elections. In that sense, the case fit within the *Ex parte Young*, 209 U.S. 123 (1908) framework, which is designed to allow plaintiffs to challenge the ongoing enforcement of unconstitutional state statutes.

This case is completely different. Unlike the *League of Women Voters of Ohio* case, Plaintiffs here have explicitly disclaimed a challenge to "Ohio's voting system" or any state statutes. Instead, they allege that Defendants erred in how they voted on November 16, 2010 and seek equitable relief in effect requiring Defendants to change their past votes. This has nothing to do with a continuing violation of law or remedying such a continuing violation. Any action that might need to be taken in the future (i.e. the inclusion of the rejected ballots in a recount) is simply ministerial and follows from the Plaintiffs' attempt to reverse the alleged wrongful actions that the Board took in

November 2010 before the filing of the Complaint. Defendants are immune from suits for such a purpose under the 11th Amendment.

D. The Due Process Claims should be Dismissed

Hunter cannot support her original due process claims and cannot show why those claims should not be dismissed as set forth in the Board's motion for summary judgment. Consequently, Hunter has changed the nature of her due process claims in an attempt to salvage them. This should not be permitted at this late date after the trial. Hunter now claims that her due process claims are founded upon the allegation that the Defendants have a custom or practice of failing to "supervise poll workers with respect to their duty to process provisional voters in accordance with state law." (Hunter Br. at 12.) These claims are not in the complaint, are not supported by the law and are contrary to the facts. As a threshold matter, a federal court cannot enjoin a state actor to act, in Hunter's words, in accordance with state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

In any event, Hunter's new "due process" claims are futile and without merit because they have no legal or factual support. Initially, a plaintiff cannot maintain a failure to train or supervise case under Section 1983 without first establishing that some state actor committed a constitutional tort. *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989); *Harbin v. City of Detroit*, 2005 WL 2108326 at **7 (6th Cir. 2005). After all, it is liability for that constitutional tort that a plaintiff is attempting to attribute to the organization (without, of course, using respondeat superior, which is not recognized under Section 1983). Plaintiffs did not even name poll workers in their suit and failed to show that any errors by poll workers constituted constitutional torts. A claimed failure to

train "is constitutionally irrelevant if the plaintiff failed to demonstrate a resulting injury." *Harbin*, 2005 WL 2108326 at **6 (citing *City of Canton v. Harris*, 489 U.S. 378 (1989)).

Hunter asserts that the evidence in this case "includes testimonial evidence that poll worker error was tolerated for years even though it was clearly causing hundreds of ballots to be rejected at every election." (Hunter Brief at 13.) There is not any evidence that this is true. The evidence proved that poll workers at every election are instructed on Ohio law, on how to handle provisional voters, and on how to look up voter addresses and to use the tools related to that process. The undisputed evidence showed that poll workers were also taken through exercises to make sure they understood the training they were given, and this training was given every year to all presiding judges in each precinct and to every new poll worker. If poll workers demonstrated an inability to understand and follow the training during any election, they were not asked to return. The evidence also proved that the staff of the Board continuously modified its training and materials to improve poll worker performance. The bi-partisan staff of the Board has always been interested in following Ohio law and in having trained and competent poll workers. The fact that over 280,000 voters voted in the correct precincts on Election Day on November 2, 2010 is a testament to the quality of the training given to poll workers.

All Hunter can really claim is that some individual poll workers may have made an occasional error. This, however, is not the fault of the Board or its staff who indisputably and in writing instructed poll workers repeatedly on how to properly handle provisional voters. Human error, however, is unavoidable. This Court has already acknowledged that the Board and its staff engaged in no intentional wrong-doing or

errors. (Doc 39 January 12, 2011 Order.) That some poll worker may have looked up an address incorrectly could have occurred, but that is not attributable to the Board as there is no respondeat superior liability for such mistakes and none of this gives rise to a violation of the US Constitution.

II. PLAINTIFFS LACK STANDING

The Board posits that none of the Plaintiffs have standing to pursue the claims they have brought.

A. Hunter lacks Standing

Hunter's standing argument is based almost exclusively on the Supreme Court's decision in *Bush v. Gore*, which did not discuss standing. Importantly, Hunter does not deny that there was nothing preventing the voters in this case from asserting their own rights—some of them, in fact, testified in this case. Hunter also ignores the very different legal posture of *Bush v. Gore* from this case. That case was not brought in federal court; it was brought in state court (which is where this case should be). In fact, then-candidate Bush was the defendant in the state court proceeding, not the plaintiff.

Moreover, the fact that a candidate might have standing to bring a ballot access case does not give an unsuccessful candidate the right to assert the rights of voters who have no impediment to bringing their own suit.[4] The candidate in a ballot access case is asserting his or her own right to have their name on a ballot. Here the candidate's "injury" is completely derivative of the possible denial of the rights of voters.

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[4] See *Miller v. Lorain County Board of Elections*, 141 F.3d 252, 260 (6th Cir. 1998)(assuming without deciding that a candidate was entitled to bring a suit but noting that "whether an individual has a constitutionally protected interest in becoming a candidate for public office is not clear.")

B. NEOCH and ODP lack Standing

Hunter claims that NEOCH and ODP have standing in this case to enforce the NEOCH consent decree because they are parties to the consent decree and therefore may enforce the decree against the Board. (Hunter Brief at 16-17.) NEOCH and the ODP do not claim to represent the interests of Hamilton County voters who voted in the November 2, 2010 election. Likewise, NEOCH does not assert that any of its alleged members, which NEOCH has refused to identify, is a Hamilton County voter or is in any way injured by the alleged conduct of the Board. For that reason, NEOCH would have no traditional standing based upon such a claim, and this is why the Sixth Circuit found that NEOCH had no standing to challenge Ohio's absentee voter identification law. *NEOCH v. Blackwell*, 467 F.3d 999, 1010 and n.4 (6th Cir. 2006) (see also the concurring opinion of Judge McKeague at 1012 to 1013).[5] To avoid this standing problem, NEOCH and ODP assert that their sole interest in this case is to enforce the NEOCH consent decree as parties to that decree.

Hunter spends the remaining portion of her argument trying to defend the NEOCH consent decree against the obvious problem with that decree, which was raised by the Board in its Response to the Plaintiffs' Trial Brief and at trial, to the effect that the NEOCH consent decree is void and contrary to law because SOS Brunner and the State had no right to enter into a decree that changed Ohio law. The following is beyond dispute: all Ohio voters, including provisional voters, are obligated to vote in their correct precinct where they reside on election day and if they do not do so their vote will

[5] Hunter asserts that the Sixth Circuit has not "questioned" NEOCH's standing with regard to the consent decree. But Hunter also concedes that the Ohio Secretary of State (after a change of administration) decided not to pursue a second appeal on that issue in the Sixth Circuit. So the Sixth Circuit never had another chance to evaluate NEOCH's standing. In fact the only opinion regarding NEOCH's standing in the Sixth Circuit remains *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006).

not count regardless of poll worker error. R.C. §§ 3505.183(B)(4)(a)(ii) and (iii); *Painter v. Brunner,* 128 Ohio St.3d 17, 941 N.E.2d 782 (Ohio 2011). The Board and its staff followed this law and informed all provisional voters in writing, including on the provisional ballot envelopes, that they had to vote in the precinct where they resided or their vote would not count. The NEOCH consent decree on its face suspends and changes Ohio law because it inserts a poll worker error exception into Ohio law when such an exception is not the law of Ohio.

NEOCH and ODP rely upon the NEOCH consent decree to give them standing. To rely upon that decree, the decree must be valid and not void. The NEOCH consent, decree, however, is not valid and is void because it suspends Ohio law and was entered into by the Ohio Secretary of State and the Ohio Attorney General on behalf of the State of Ohio without any authority on their part to suspend or change Ohio law. The only entity that may suspend or change the operation of Ohio law is the General Assembly of Ohio. Ohio Const. Art. I, Section 18. Moreover, the Board itself is not a signatory to that agreement.

In an attempt to deal with this fatal problem, Hunter advances four arguments. First, Hunter claims the law of the case doctrine defeats the Board's argument. Generally, the law of the case doctrine only applies to issues that are contested and decided on appeal, and it is in any event an "amorphous concept." *Arizona v. California*, 460 U.S. 605, 618 (1983). Whether the NEOCH consent decree is void and invalid was not raised, contested, tried, litigated or decided by this Court prior to the Sixth Circuit's decision in *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), nor was it decided in *Hunter*. All *Hunter* stated was that because the Trial Court's

preliminary January 12, 2011 order requiring that NEOCH ballots be investigated was not contested, that part of the order was affirmed. *Id.* at 247. That is not a final decision on a contested issue, much less the matter now at issue, and therefore the law of the case doctrine should not apply to the validity of the NEOCH consent decree.

In addition, the Sixth Circuit decision in *Hunter* was dealing with an appeal from the Trial Court's preliminary injunction of November 22, 2010 and the order of January 12, 2011 granting in part and denying in part Plaintiffs' motion to enforce the preliminary injunction. Both orders were preliminary in nature and issued without a final hearing or a complete exposition of the law or the evidence. In such cases, the "law of the case doctrine" does not apply. "Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits, or that are avowedly preliminary or tentative, do not trigger law of the case consequences." *Wilcox D.O., P.C. Employees' Defined Benefit Trust v. United States*, 888 F.2d 1111, 1113 (6th Cir. 1989). 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. *Id*.

Even if the law of the case doctrine were to apply based upon the fact that the non-contested preliminary order of this Court to investigate NEOCH ballots was affirmed in *Hunter*, the Sixth Circuit will not apply the doctrine "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (citing *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). At trial, the Board set forth undisputed evidence that SOS Brunner and the Ohio Attorney

General had no authority to enter into the NEOCH consent decree; that the NEOCH consent decree changed Ohio law; and that the decree was void, invalid on its face and violated the Ohio Constitution. The evidence raised by the Board at trial is different from what was before this Court when the January 12, 2011 preliminary order was issued and when the Sixth Circuit affirmed part of that order. Next, to the extent that Hunter is saying that the Sixth Circuit has ruled definitively on the issue of the legality of the NEOCH consent decree, even though it has not, such an imagined ruling would be clearly erroneous and would work a manifest injustice. Accordingly, the law of the case doctrine does not preclude the challenge to NEOCH and ODP standing based upon the fact that the NEOCH consent decree is void and illegal.

Second, Hunter claims that the Board's challenge to the NEOCH consent decree is an improper collateral attack on that decree. (Hunter Brief at 18.) This is not true. Because the NEOCH consent decree is illegal and void, it may be challenged in this proceeding. It has long been the law that if a court is "without authority, its judgments and orders are regarded as nullites." *Elliot v. Piersol's Lessee*, 26 U.S. 328, 340 (1828). Judgments issued without authority "are not voidable, but simply void" and "all persons concerned in executing such judgments . . . are considered, in law, as trespassers." *Id. See also, World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere."); *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878). When a court lacks inherent power to enter a particular judgment, such a judgment can be attacked at any time, in any court, either directly or collaterally. E.g., *Long v. Shorebank Development Corp.*, 182 F.3d 548, 561 (7th Cir. 1999); *Blanchard v.*

Terry & Wright, Inc., 218 F. Supp. 910, 912 (W.D. Ky. 1963) ("If jurisdiction is absent, the judgment is void."); *Patton v. Diemer*, 518 N.E.2d 941 (Ohio 1988) (syllabus paragraph four) (Ohio courts have inherent authority to vacate void judgments); *State v. Blankenship*, 675 N.E.2d 1303, 1304 (Ohio App. 9 Dist. 1996) (a void judgment is one entered by a court without jurisdiction to enter such judgment). The cases are legion which stand for the proposition that void judgments are nullities and can be challenged at any time either collaterally or directly. E.g., *Chester v. Arkansas State Board of Chiropractic Examiners*, 435 S.W.2d 100, 103-04 (Ark. 1968); *Ramagli Realty Co. v. Craver*, 121 So.2d 648, 654 (Fla. 1960); *In re Estate of Steinfeld*, 630 N.E.2d 801, 806 (Ill. 1994); *Stidham v. Whelchel*, 698 N.E.2d 1152, 1154 (Ind. 1998); *In re Marriage of Welliver*, 869 P.2d 653, 656 (Kan. 1994); *In re Hatcher*, 505 N.W.2d 834, 840 (Mich. 1993); *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1956); *Marshall v. Marshall*, 482 N.W.2d 1, 4 (Neb. 1992); *Chavez v. County of Valencia*, 521 P.2d 1154, 1158 (N.M. 1974); *Carpenter v. Carpenter*, 93 S.E.2d 617, 623 (N.C. 1956); *Thomas & Howard Co. v. T.W. Graham and Co.*, 457 S.E.2d 340, 343 (S.C. 1995); *State v. Richie*, 20 S.W.3d 624, 630 (Tenn. 2000); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990); *Bresolin v. Morris*, 543 P.2d 325, 328 (Wash. 1975); *Neylan v. Vorwald*, 368 N.W.2d 648, 656 (Wis. 1985). Here the NEOCH consent decree was issued without proper jurisdiction or authority because the decree suspended and changed Ohio law based upon the consent of Ohio officials who had no authority to do so. The NEOCH court had no authority or power to accept the "consent decree" as its judgment.

A judgment is also void on its face if the trial court exceeded its jurisdiction by granting relief it had no power to grant. Jurisdiction cannot be conferred on a trial court

by "consent of the parties." E.g., *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972). Nor can a jurisdictional defect be waived by the parties. E.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guine*e, 456 U.S. 694, 702 (1982). Therefore, the fact that a judgment is entered by consent or stipulation does not insulate it from being void. Under Fed. R. Civ. P. 60(b)(4) (which provides for relief from any judgment that is void), it is a per se abuse of discretion for a lower court to uphold a void judgment, and void judgments may not be given any effect as they are nullities. *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998) (it is a per se abuse of discretion to uphold a void judgment); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) ("'[i]f the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)'" (quoting *United States, v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply*, 55 F.3d 1311, 1317 (7th Cir. 1995)); *Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994) (when a judgment is void, relief is not discretionary, it is mandatory); *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (judgment against defendant void when it was determined that action was in admiralty and should have been brought only against the US); *Compton v. Alton SS Co.*, 608 F.2d 96, 104 (4th Cir. 1979) (when a default judgment was awarded under an inapplicable statute, the judgment was void); *V.T.A. Inc . v. Airco, Inc.*, 597 F.2d 220, 224-25 and n.8 (10th Cir. 1979) ("If voidness is found, relief is not a discretionary matter; it is mandatory."); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (30 year old consent judgment void because court had no power to issue unconstitutional prior restraint).

The Board also was not a party to the NEOCH case and did not have the opportunity to litigate the legality of the consent decree. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). See also *762 Parklane Hosiery Co., v. Shore*, 439 U.S. 322, n.7 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-29 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). The rule that everyone should have their day in court is a "deep-rooted historic tradition". 18 A Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4449 at 346-47 (2002). Before the Board is held to be in violation of the NEOCH consent decree, it should have the opportunity to contest the application of the decree to the Board and in particular to show that the decree is illegal and void.

Third, Hunter claims that the NEOCH consent decree is not constitutionally defective and that NEOCH could enjoin the enforcement of an unconstitutional state law. (Hunter Brief at 18.) The Hunter consent decree provision requiring a poll worker error exception (1) for those provisional voters who use the last four digits of their Social Security number as identification, and then with regard to that group alone, (2) only for those who vote at multi-precinct locations, is not required by the US Constitution. There is no authority which provides that Ohio is prohibited, as it does, from requiring voters to vote in the precinct where they live and to never count votes cast on Election Day in the wrong precinct regardless of poll worker error. As explained in *Painter*: Ohio law does "not authorize an exception based on poll-worker error to the requirement that ballots be

cast in the proper precinct in order to be counted." 941 N.E.2d 782, 794 (Ohio 2011). Plaintiffs in this case are not challenging the constitutionality of that Ohio law. The constitutionality of Ohio's precinct based voting system was upheld in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). The NEOCH court was not compelled by the US Constitution to create a poll worker error exception. It just did it with the partisan acquiescence of the Ohio Secretary of State, the Ohio Attorney General, the Ohio Democratic Party and NEOCH. That was a change or suspension of Ohio law as to which those offices and entities could not consent, and the NEOCH court therefore had no authority to issue the NEOCH judgment insofar as it changed and/or suspended provisions of Ohio law.

Even if the NEOCH court and/or the parties in that case may have thought they had a better idea about how to re-write Ohio law by including a poll worker error exception under certain circumstances, it was not the province of that court, the parties or any court to rewrite Ohio law. "Courts may not rewrite the language of a statute in the guise of interpreting it in order to further what they deem to be a better policy than the one Congress wrote into the statute." *Norelus v. Denny's, Inc*., 628 F.3d 1270, 1300-01 (11th Cir. 2010) (citing *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them."). See also, *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996) ("We are bound by the language of the statue as it is written . . . even if the rule [petitioner] advocates might 'accor[d] with good policy . . . ."); *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Vainisi v.*

Commissioner., 599 F.3d 567, 572 (7th Cir. 2010) (appellate court may not rewrite statutes merely because the court thinks the statutes imperfectly express legislative intent or wise social policy); *Doe v. Dep't of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008) ("Our role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch."); *Albritton v. Cagle's, Inc*., 508 F.3d 1012, 1027 (11th Cir. 2007) ("We are not empowered to rewrite statutes."); *In re Sunterra Corp*., 361 F.3d 257, 269 (4th Cir. 2004) (modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress, not to courts); *In re Adams*, 302 B.R. 535, 545-46 (B.A.P. 6th Cir. 2003) ("courts simply do not have the power to resolve pure policy questions" which "is especially true when it comes to rewriting statutes with the intention of improving them"); *Wright v. Sec'y, Dep't of Corrs*., 278 F.3d 1245, 1255 (11th Cir. 2002) ("Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them.").)

Finally, Hunter argues that because Ohio was a party to the NEOCH case and represented by the Ohio Attorney General, the NEOCH consent decree is valid. That fact does not change the above analysis. The Ohio constitutional provision at issue is mandatory and exclusive. Only the state general assembly may suspend or change the law. For this reason, the NEOCH consent decree is illegal and void and NEOCH and the ODP have no standing to enforce it.

III. CONCLUSION

For the foregoing reasons, Defendants MSJ should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on August 19, 2011 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ James W. Harper
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