

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

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.* :
 :
 Plaintiffs, : Case No. 2:16-cv-00303
 :
 v. : JUDGE GEORGE C. SMITH
 :
 SECRETARY OF STATE, JON HUSTED : Magistrate Judge Deavers
 :
 Defendant. :

THE SECRETARY OF STATE’S RESPONSE IN OPPOSITION TO PLAINTIFFS’
NOTICE OF RELATED CASE

Defendant Ohio Secretary of State Jon Husted opposes Plaintiffs’ Notice of Related Case (Doc. 2). Contrary to Plaintiffs’ assertion, the claims alleged in this case are not related to the claims in *Northeast Ohio Coalition for the Homeless, et al. v. Husted, et al.*, Case No. 2:06-CV-00896 (S.D. Ohio) (“*NEOCH*”) or *Judicial Watch Inc. et al. v. Husted*, Case No. 2:12-cv-00792 (S.D. Ohio) (“*Judicial Watch*”). The present action is distinct and unrelated to those cases, and Plaintiffs’ notion of “relatedness” is unworkable and unsupportable. A memorandum in support is attached.

Respectfully submitted,

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s/ Steven T. Voigt

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MEMORANDUM IN RESPONSE

I. INTRODUCTION AND BACKGROUND

Plaintiffs' Notice of Related Case is an exercise in forum shopping and should be denied. The claims in this litigation involve Ohio's current voter list maintenance procedures tested against the National Voter Registration Act of 1993 ("NVRA"). They are distinct and different from the claims in *NEOCH* and *Judicial Watch*. This is a straightforward legal disagreement over the application of the NVRA and it will require little fact development.

In this litigation, Plaintiffs allege that "Ohio's past and continuing use of the Supplemental Process" to maintain the accuracy of its voter rolls "has violated and continues to violate Section 8" of the NVRA. Compl., Doc. No. 1 at ¶ 48. They further argue that the "confirmation notice" (SOS Form 10-S) sent to confirm a voter's address and registration is "legally deficient" under Section 8 of the NVRA. *Id.* at ¶ 52. They ask that the Court declare the list-maintenance process in violation of the NVRA, restore persons to the voter rolls who were removed pursuant to the Supplemental Process, and adopt a new confirmation notice form, among other claims. *Id.* at "Prayer for Relief."

Plaintiffs' first choice of a forum is the *NEOCH* forum. But that litigation, at least at the trial level, is nearly done. The *NEOCH* litigation began about ten years ago and recently ended with a two-week federal trial. The parties in *NEOCH* are now completing post-trial briefing (initial post-trial briefs are due on April 21, 2016 and reply briefs are due on April 28, 2016). Plaintiffs apparently want a second *NEOCH* trial, despite the pending district court decision.

Not only is *NEOCH* nearly finished, *NEOCH* bears no similarity to this matter. In the *NEOCH* plaintiffs' initial 2006 complaint, the *NEOCH* plaintiffs primarily complained about the requirement for Ohio voters to provide one of various types of identification to vote on Election Day. *See generally NEOCH*, Compl., Doc. No. 2. In 2015, the *NEOCH* plaintiffs filed a second

supplemental complaint. *NEOCH*, 2nd Supp. Compl., Doc. No. 453. That complaint challenged two Ohio statutes that, among other things, set the rules for fields of identification on absentee identification envelopes and provisional ballot affirmations. Neither of those statutes are issues in this litigation. Nor are requirements for identification on Election Day.

Plaintiffs' second forum choice is the *Judicial Watch* forum. That litigation began almost four years ago, settled more than two years ago, and was dismissed with prejudice. *Judicial Watch*, Doc. Nos. 1, 24. In *Judicial Watch*, plaintiffs Judicial Watch, Inc. and True the Vote sued to compel the Secretary "to fulfill the State's obligation to make reasonable efforts to remove the names of ineligible voters from Ohio's voter registration rolls." *Judicial Watch*, Compl., Doc. No. 1, at ¶ 39. On January 13, 2014, the plaintiffs voluntarily dismissed the case pursuant to F.R.C.P. 41(a)(1)(A)(ii). *Judicial Watch*, Notice of Voluntary Dismissal, Doc. No. 24. The case ended before the Court issued a decision. The parties held one initial pretrial conference on November 27, 2012, before the Magistrate Judge and there was no hearing.

Plaintiffs urge a broad and unsupportable notion of "relatedness" to pick-and-choose their forum. But giving a plaintiff the choice of a forum is not the purpose of Rule 3.1(b). That Rule exists "to provide for the orderly division of the business of the Court." Fed. R. Civ. P. 3.1(c). The issue in this litigation is whether the current laws of the Ohio comply with the NVRA. Neither *NEOCH* nor *Judicial Watch* involved the same issue. This Court is fully capable of adjudicating the issues in this litigation and there is no possibility for "conflicting orders of this Court." Fed. R. Civ. P. 3.1(b)(4).

This action should remain pending as it was properly assigned to this Court.

II. ARGUMENT

A. This Lawsuit is not Related to *NEOCH*.

There is no “relatedness” to *NEOCH*. Plaintiffs’ claims do not arise from the same event as in *NEOCH*, do not call for a determination of the same or substantially identical question of law or fact, will not result in the duplication of efforts, and will not result in conflicting orders of the Court. *See* Ohio S.D. Civ. R. 3.1(b).

This lawsuit is a challenge to the unchanged voter list-maintenance procedures that have been in place since the beginning of the NVRA and are currently in place under the Secretary’s directives.

In contrast, voter list-maintenance was never an issue or even mentioned in *NEOCH*. There, the initial complaint and first supplemental complaint involved voter identification requirements on Election Day compared with identification requirements for provisional and absentee ballots. *See generally* *NEOCH*, Compl., Doc. No. 2. In their second supplemental complaint, the plaintiffs changed their case theory to complain about the fields of identification on absentee identification envelopes and provisional ballot affirmations. *NEOCH*, 2nd Supp. Compl., Doc. No. 453.

In this matter, Plaintiffs make no mention of absentee ballots or forms of identification. They also do not complain about the fields of identification on provisional ballots or the manner in which provisional ballots are processed. Moreover, in this matter, Plaintiffs focus on list maintenance “in the summer of 2015,” Compl. at ¶ 37-46, which was about nine years after the *NEOCH* litigation began.

Notably, this is not the first attempt by a plaintiff to relate a case to *NEOCH*. Last year, long *before* the *NEOCH* trial, the plaintiffs in *The Ohio Democratic Party v. Husted*, Case No. 2:15-CV-1802 (“*ODP*”) (Watson, J.) sought to shift that case to the *NEOCH* forum. Judge

Watson (*ODP*) and Judge Marbley (*NEOCH*) determined that *ODP* and *NEOCH* were related but that the cases should remain with the Judges to whom they were originally assigned. *ODP*, Doc No. 16. In *ODP*, the plaintiffs argued that they were challenging “many of the *same new restrictions on absentee and provisional voting* . . . that the Plaintiffs in *NEOCH* seek to challenge.” *ODP*, Doc No. 7, p. 2 (emphasis added). The purported “link” here — that this case and *NEOCH* involved “homeless voters” (Doc. No. 2 p. 5) — is far weaker.

Even under a generous reading of Plaintiffs’ claims, this litigation is not even remotely similar to any of the issues in *NEOCH*.

B. This Litigation is not Related to *Judicial Watch*.

This litigation is also not related to *Judicial Watch*. While that case at least references voter list-maintenance, *Judicial Watch* did not progress far enough such that any duplication of effort would result. See Ohio S.D. Civ. R. 3.1(b). In fact, the Judge in *Judicial Watch* never issued any substantive ruling, let alone one that would conflict with the orders of this Court. In addition, the dismissal of *Judicial Watch* in January 2014 means that, similar to *NEOCH*, the litigation in *Judicial Watch* could not possibly have arisen from the removal of persons from the voter rolls in the summer of 2015. Compl. at ¶ 37-46.

There are other substantive differences with this litigation and *Judicial Watch*. Plaintiffs here were not part of that case. The *Judicial Watch* plaintiffs argued that Ohio’s voter list maintenance procedures needed to be improved because in several counties, the number of registered voters purportedly exceeded the total possible number of eligible voters. In January 2014, the *Judicial Watch* plaintiffs’ dismissed their complaint with prejudice. *Judicial Watch*, Doc No. 24. In the settlement agreement ending the litigation, Ohio agreed to join nationwide programs such as the State and Territorial Exchange of Vital Events and the Interstate Voter Registration Cross-Check Program. At best, only one of the sub-parts of the Settlement

Agreement (Provision 2(i)) has any connection to this case. Provision 2(i) describes one aspect of Ohio's voter list maintenance program. *See* Defendant's Ex. A (the original Settlement Agreement); Defendant's Ex. B (Amended Settlement Agreement). Regardless, the Settlement Agreement is straightforward and any Court is capable of reading and applying the terms of the Settlement Agreement, to the extent the terms of the Settlement even are an issue in this litigation. The Settlement Agreement did not include any provisions for the *Judicial Watch* Court to retain jurisdiction over any future issues.

In sum, *Judicial Watch* — a completed litigation that is over two years finished — is not a related case. There is *not* a single pending claim before *any* judge in this District relating to the present action.

C. This Branch is Fully Capable of Hearing this Matter.

The Secretary does not dispute that the Judge in *NEOCH* is well-acquainted with issues related to homeless voters and that the Judge in *Judicial Watch* is well-versed in settlement agreements. The Secretary does not dispute that both Judges are also well-acquainted with Ohio's voting laws.

But the other Judges in this District are likewise fully capable of handling election law cases and cases that may touch on the homeless or settlement agreements. *See Fair Elections Ohio, et al., v. Husted, et al.*, Case No. 2:12-cv-763, 2013 WL 3147951 (S.D. Ohio June 19, 2013) (Smith, J.); *Hindel, et al., v. Husted*, Case No. 2:15-cv-03061 (S.D. Ohio) (Smith, J.), *Ohio Democratic Party, et al., v. Husted, et al.*, Case No. 2:15-CV-1802 (S.D. Ohio) (Watson, J.), *Ohio State Conference of the National Association for the Advancement of Colored People, et al., v. Husted, et al.*, Case No. 2:14-cv-00404 (S.D. Ohio) (Economus, J.); *Fair Elections Ohio, et al., v. Husted*, 47 F.Supp.3d 607 (S.D. Ohio) (Dlott, J. and Spiegel, J.), *vacated and*

remanded, 770 F.3d 456 (6th Cir. 2014); *Mooneyhan v. Husted*, Case No. 3:12-cv-379, 2012 WL 5834232 (S.D. Ohio Nov. 16, 2012) (Rice, J.).

Under Plaintiffs' theory, "relatedness" loses any practical meaning. Cases simply cannot be assigned by topic such that one Judge handles all First Amendment cases, one Judge handles all Title VII cases, one Judge handles all patent cases, one Judge handles all cases that might involve the homeless, and one Judge handles all election cases. Standards exist for relating cases, and for good reason. Plaintiffs have failed to meet those standards here and the case should remain as assigned.

III. CONCLUSION

For the foregoing reasons, Defendant Ohio Secretary of State Jon Husted respectfully opposes Plaintiffs' Notice of Related Case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on April 8, 2016, and served upon all parties of record via the court's electronic filing system.

/s/ Steven T. Voigt

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