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

The Northeast Ohio Coalition for the Homeless, et al.,	:	
Plaintiffs,	:	**Case No. 2:06-cv 896**
v.	:	**Judge Algenon Marbley**
Jon Husted, et al.,	:	
Defendants.	:	

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, *et al*.	:	
	:	**CASE NO. 2:12-cv-00562**
Plaintiffs,	:	
v.	:	**Judge Algenon Marbley**
JON HUSTED, *et al.*	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTIONS FOR CLARIFICATION [*NEOCH* DOC. 346 AND 349 AND *SEIU* DOC. 97]

Defendants, the State of Ohio and Secretary of State Jon Husted, respectfully urge the Court to deny the motions for "emergency" relief filed on election eve by the Plaintiffs in these actions. Three weeks ago, the Sixth Circuit Court of Appeals held that Ohio's provisional ballot affirmation form has "rather simple instructions" and that Ohio law "does not task poll-workers with quality control of ballot affirmations." *NEOCH v. Husted*, 2012 U.S. App. LEXIS 21058, at 29 (6th Cir., Oct. 11, 2012).

Plaintiffs' new request is not about Directive 2012-54 or anything Secretary's counsel "represented" to the Court. This is about Plaintiffs trying to change the identification rules for casting a provisional ballot that have been in place since 2006 – when the NEOCH plaintiffs could have challenged them. Plaintiffs want to have different identification requirements for provisional voters than the identification requirements for absentee voters who provide their identification on both the absentee ballot request and returned identification envelope and the identification requirements for Election Day voters who are required to show identification to cast a regular ballot.

In truth, what Plaintiffs seek is not a clarification of the Court's orders, but an 11th hour *expansion* of them – an expansion of the *NEOCH* consent decree [*NEOCH* Doc. 210] and an expansion of the SEIU preliminary injunction. [*SEIU* Doc. ____]. In their attempt to seek an expansion of the rules, the *NEOCH* and *SEIU* Plaintiffs have confused statutory requirements related to provisional ballots. As a consequence, the Motions have no basis in law and should be denied.

Plaintiffs now want the Court to order the counting of defective provisional ballots even if the voter fails to fill out the portion of the affirmation regarding identification, and indeed even if the voter does not provide any identification at all. As a matter of law, the three motions should be denied because:

(1) With respect to the *NEOCH* consent decree, Ohio law expressly states that the *voter* must write down his or her social security number on the affirmation. Ohio law imposes no duty on poll workers to write down social security numbers on affirmation forms.

(2) The Court cannot expand the *SEIU* preliminary injunction because (a) Ohio law imposes no duty on poll workers to write down voter driver's licenses *anywhere*; and (b) the

Court lacks jurisdiction to expand the *SEIU* preliminary injunction because doing so would violate *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984).

The Motion should also be denied based on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) and the strong presumption against changing election procedures at the last minute, especially after the votes have been cast.

For all these reasons, Defendants submit these combined Memoranda of Law to urge the Court to deny the three last-minute motions.

MEMORANDUM OF LAW

I. Background

As the Court is aware, a provisional voter must complete an Affirmation as a condition for election officials to open and count the provisional ballot. R.C. 3505.182, R.C. 3505.183. The Provisional Ballot Affirmation currently in use is part of Form 12-B and was created and distributed to all boards of elections on January 4, 2012. [Declaration of Matt Damschroder].

The Provisional Ballot Affirmation currently in use is part of Form 12-B and was created and distributed to all boards of elections in January 2012 and has been used in three elections, including the current election.[1] The Secretary of State issued Directive 2012-01 on January 4, 2012 and attached a new provisional ballot envelope, Form 12-B. The prior version of 12-B, in effect from July 2008 until January 2012 is attached to Matt Damschroder's Declaration. (Damschroder Declaration). As noted in Directive 2012-01, "During the 2011 election year, a number of county boards of elections contacted this office with questions about how to process provisional ballots." In 2011, boards of elections asked the Secretary of State's Office many

[1] Voters have already cast provisional ballots starting 28 days before the election under Ohio Revised Code 3503.16 using Form 12-B as prescribed by the Ohio Secretary of State in January 2012.

questions about whether a provisional ballot was eligible to be counted based on poll workers' marks on the back of the provisional ballot envelope, the Verification Statement. (Damschroder Declaration). The Secretary's office consistently advised boards that the poll workers' marks on the back of the provisional ballot envelope should never be used against a voter in determining whether or not to count the ballot. (Damschroder Declaration)

For example, boards of elections asked what to do when the poll worker checked on the Verification statement "The provisional voter is required to provide addition information to the board of elections" but on the Affirmation on the front of the envelope, the voter checked "Ohio drivers license (provide #) _____ _" or any of the other forms of identification provided. In this instance, the provisional ballot would be eligible to be counted because the voter provided identification on the Affirmation. (Damschroder Declaration).

Additionally, during 2011 boards of elections asked many questions about whether the provisional ballot could be counted if the voter's address or birth date were missing or inconsistent, as both those items were included on the provisional ballot affirmation between the voter's printed name and signature. (Damschroder Declaration). Under Ohio law, neither an address[2] nor birth date are required for a provisional ballot to count. In order to eliminate the confusion, and after consulting with various voter advocacy groups, the Secretary redrafted the provisional ballot affirmation to only include the required information. (Damschroder Declaration).

Form 12-B provides what is required on the front and back of the provisional ballot envelope. The front of the provisional ballot envelope includes the "Provisional Ballot

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[2] An address is sometimes necessary when a voter is updating his or her address. However, that address information is provided as a part of a change of address form and is not necessary as a part of the Affirmation section. R.C. 3503.16.

Affirmation" that is completed by the voter and follows three simple steps. [*See NEOCH* Doc. 346-3]. In Step 1, the provisional voter must print her name. Under Step 2, the voter must write the actual information used as identification at the polls -- the voter's social security number (last four digits only) or driver's license number – or check a box indicating a different form of identification used. And Step 3 merely requires the provisional voter to sign the Affirmation. The bottom of the front of the provisional ballot envelope contains the "Precinct Election Official" portion where the precinct election official can write the precinct, location and sign and date it. However, as noted on that portion of the provisional ballot envelope, failure of the precinct election official to complete that section does not affect the eligibility of the ballot. The back of the provisional ballot envelope consists of a change of address/change of name form, which only needs to be filled out by those voters who are changing their address and/or name. (Form 12-B dated 1-12).

One goal in creating the new provisional ballot envelope was to simplify the provisional ballot affirmation so that it was clear to the voter what the voter was required to fill out in order for her ballot to be counted. (Damschroder Declaration) Another goal in creating the new provisional ballot envelope was to streamline the poll worker's portion of the envelope to reduce the chance that a provisional ballot would be rejected due to poll worker conduct. (Damschroder Declaration). The section at the bottom of the front of the provisional ballot envelope, "The Precinct Election Official Info" clearly states "Failure by the precinct election official to complete this section will not affect whether or not this provisional ballot is counted". *See*, Rule 12-B.

Form 12-B also helps boards of elections to uniformly apply the law and count ballots that had the required information. The Secretary hoped that issuing the form and direction in

January would provide boards of elections and precinct election officials sufficient time to get familiar with the form and an opportunity to use the form before the November presidential election. (Damschroder Declaration). Though the Secretary hoped that the direction provided in Directive 2012-01 in January 2012, including Form 12-B, would be the last direction the Secretary would have to provide on those issues before the November 2012 presidential election, because of the court cases it was not possible for the Secretary to issue comprehensive final instructions until that Friday. (Damschroder Declaration).

On Friday, November 2, 2012 after the Court's final resolution of the Consent Decree language, the Secretary issued Directive 2012-54 which included a mandatory six-step process for boards of elections to use when determining whether a provisional ballot is eligible to be counted.

Step 1 requires the boards of elections to determine, consistent with (*SEIU*, 12-3916, 4069, p. 21)] whether the provisional voter printed and signed the voters name on the provisional ballot affirmation portion of Form 12-B.

Step 2 in the directive requires the boards of elections to determine if identification was provided by the voter. Under Ohio law, if identification is not provided either at the time the voter casts the provisional ballot or ten days after the election, the provisional ballot cannot be opened or counted. O.R.C. 3505.183. Directive 2012-54 rewrote Step 2 only to make the process clearer. However, Step 2 in 2012-54 does not differ in process or outcome from Step 2 in Directive 2012-01. Directive 2012-01 which accompanied the new Form 12-B in January, 2012 included the Step 2 which required the board to determine whether the voter was required to provide additional information. In other words, whether the voter provided identification as required on the provisional ballot affirmation or whether the voter had to return within ten days

after the election to provide that information. If the voter did neither, then the provisional ballot is rejected. (Damschroder Declaration)

Step 3 of the Directive requires boards of elections to determine the voter's identity and Step 4, requires the boards of elections to determine whether the voter has been registered in Ohio for 30 days preceding the election.

Step 5 addresses whether the voter is voting in the correct precinct, and if not, as this Court has held and has been affirmed by the Sixth Circuit Court of Appeals, whether the voter cast the ballot in the correct polling place but wrong precinct due to poll worker error.

Finally, Step 6 addresses this Court's statement that "Critically, Section III(5)(b)(vii) remains in the Consent Decree to ensure no provisional ballot is disqualified when a poll worker fails to complete her designated portion of the envelope and the State does not dispute that." *SEIU* Dkt. 28 at 17. Step 6 requires the boards of elections to review provisional ballot affirmations that would be rejected under Steps 1 through 5 and determine whether that portion of the consent decree applies. Step 6 further affirms that "As noted on SOS Form 12-B, failure by the precinct election official to complete the "Precinct Election Official Info" section will not result in the provisional ballot being rejected."

We know from the Sixth Circuit's decision in *NEOCH* last month that the responsibility for filling out Steps 1 and 3 rests with the voter, and that it is constitutionally permissible for Ohio to reject provisional ballots that lack Step 1 and/or Step 3 information on the affirmation. Now, after the votes have been cast, the Court is asked to rule, contra *NEOCH*, that if Step 2 is left blank, the cause must be "poll worker error," and the defective provisional ballot should be counted. There is no legal authority for the relief Plaintiffs seek.

II. Legal Argument

A. The Present Issue Does Not Even Implicate The *NEOCH* Consent Decree.

Two of the three pending motions ask the Court to expand the *NEOCH* consent decree to count these defective provisional ballots. All the arguments (set forth above) for why such relief is available to the *SEIU* Plaintiffs apply with equal force in *NEOCH*. But there is also a threshold issue to consider: whether the consent decree in *NEOCH* even applies to the voters and ballots in question.

The answer is no, for two reasons. First, the *NEOCH* consent decree only applies to voters who use the last four digits of their social security numbers as identification at the polls. As election law expert Professor Ned Foley explains:

> The immediate difficulty is this: how is one supposed to know that a provisional voter used the last four digits of his or her SSN, and therefore is within the scope of the consent decree's protections—rather than another acceptable type of ID, and thus is outside the scope of the decree's protections—if both the SSN and DLN [driver's license number] spaces on the form are blank, and all the boxes corresponding to the other alternative types of ID are all unchecked? To count ballots when no type of ID has been indicated on the form would seem to go well beyond the decree's limited applicability. The key point here is that the provisional ballot form seemingly must show that the voter used the last four digits of his or her SSN to get the benefit of the decree, and yet the circumstance we are contemplating is that the form does not show this.

http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=10019. In other words, *NEOCH* voters are, by definition, not part of the class of voters now under consideration. So the only relief the Court could offer under the consent decree would be to expand the decree to all provisional voters, something the decree itself neither contemplates nor permits. Indeed, the NEOCH plaintiffs, as SSN-4 voters, do not even have standing to seek relief on behalf of non-SSN-4 voters.

Second, the fundamental assumption in Plaintiffs' Motions is mistaken: the Ohio Revised Code imposes *no* duty on poll workers to write down social security numbers *on the affirmation*. R.C. 3505.182 mandates that "[e]ach individual who casts a provisional ballot under section 3505.181 of the Revised Code *shall* execute a written affirmation." The Revised Code does not prescribe the exact form of the Affirmation, but instead provides a sample form with the instruction that the actual form "shall be substantially as follows." [*Id*]. The Revised Code's sample affirmation requires the *voter* to fill in four blanks: (1) printed name; (2) *social security number* (last four digits); (3) date of birth; and (4) signature. [*Id.*]. Form 12-B is entirely consistent with the Revised Code's recommended form.

Plaintiffs cite R.C. 3505.181 (B)(6) and (B)(7) as the alleged source of the poll worker's statutory duty to complete Step 2 of the Affirmation. Subsection (B)(7) applies to a small subset of provisional voters, basically those who have no form of identification whatsoever. Thus, by definition, it does not apply to *NEOCH* voters, who provide their SSN-4s as identification. [3] As for (B)(6), that provision does impose certain record keeping functions on poll workers, but does not instruct the poll workers to record any such information *on the ballot affirmation*.

B. Plaintiffs' Have Failed To Show Any Basis For Expanding The *SEIU* Preliminary Injunction.

The objections to an expansion of the *SEIU* preliminary injunction are numerous. Plaintiffs are again mistaken about what Ohio requires poll workers to do. Plaintiffs erroneously rely on one provision of Ohio law, as discussed below, to the exclusion of all others. To understand the Ohio's legal requirements several statutes must be examined and read in their totality.

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[3] (B)(7) also deals with voters who are challenged by an election official or pursuant to R.C. 3505.19, which is a rare occurrence and not raised in either the *NEOCH* or *SEIU* lawsuits.

First, Ohio Revised Code 3505.182 mandates that "[e]ach individual who casts a provisional ballot under section 3505.181 of the Revised Code *shall* execute a *written* affirmation." The Revised Code does not prescribe the exact form of the provisional ballot affirmation, but instead provides a sample form with the instruction that the actual form "shall be substantially as follows." [*Id*]. It is the *individual*, not the *election official*, who completes this affirmation in writing. As a part of the written affirmation that the individual must complete, R.C. 3505.182 includes a line for the voter to provide his social security number. The statute even distinguishes between what information is mandatory for the voter and what information is "completed at the voter's discretion". Further, R.C. 3503.182 does not contain a line for the precinct election official to provide the voter's social security number because it is the voter's responsibility, not the election official's, to provide it. Despite Plaintiffs' claim to the contrary, R.C. 3505.182 clearly provides that it is the voter's responsibility to complete the provisional affirmation in writing. Not only is it clear that the voter is tasked with supplying this information, it also makes perfect sense. The voter is best equipped to accurately write down the last four digits of her social security number or her driver's license number because it is the voter – not the election official – who has this knowledge.

Second, under Ohio law, the provisional ballot cannot be counted if the voter failed to provide identification or if the SSN-4 or driver's license number does not match the information on file with board of elections. Ohio Revised Code 3505.183(B)(4)(a) states: "the provisional envelope shall not be opened, and the ballot shall not be counted" if:

> (vii) The individual failed to provide a current and valid photo identification, a military identification, a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address, or the

> last four digits of the individual's social security number or to execute an affirmation under division (A) of section 3505.18 or division (B) of section 3505.181 of the Revised Code.
> (viii) The last four digits of the elector's social security number or the elector's driver's license number or state identification number are different from the last four digits of the elector's social security number or the elector's driver's license number or state identification number contained in the statewide voter registration database.

R.C. 3505.183(B)(4)(a). The Revised Code again makes clear that the individual is tasked with providing the identification information and the board is tasked with determining whether the social security number or driver's license (if other identification is not provided) on the affirmation matches the board's records. The fact that the board is required to check the accuracy of SSN-4 and Drivers License number information against its records illustrates once again why the legislature would choose to place the responsibility on the voter to provide this identification information: the voter is in the best position to accurately write this information to ensure that his ballot is not rejected for this reason.

In addition to the statutory support, the concept of the voter's responsibility to provide identification has been consistently incorporated as a part of the provisional ballot affirmation. Even the prior version of the provisional ballot affirmation, created by former Secretary Brunner and used both before and after she entered into the Consent Decree, provided a space under "Form of identification provided" for the voter to check the box and fill in the blank after "Last four digits of *my* social security number are: _____". (Form 12-B dated 07-08). The current version of the 12-B similarly follows this pattern by stating "Write the last four digits of your Social Security Number." (Form 12-B dated 1-12).

In granting the wrong-precinct, right polling location relief in SEIU (October 11th), the Sixth Circuit reasoned that one could not require the "voters to have greater knowledge of their

precinct, precinct ballot, and polling place than poll workers." (*SEIU*, 12-3916, 4069, p. 21). The court did not expect "such omniscience" on the part of the voter. [*Id*]. The same is true here, but instead the voter is the one with the superior knowledge. When it comes to the identification that the voter possesses, that knowledge is most accurately within the voter's knowledge, and the court should not expect such omniscience from the election official. The burden on the voter to write down the voter's driver's license number on the Affirmation, or check the box next to the other kind of identification provided is at least as miniscule as the burden of printing one's name. And the Revised Code does not impose an affirmative duty on the poll workers to write this information on the Affirmation.

To accept Plaintiffs contention would, in effect, relieve provisional voters of a responsibility that is required for those voting via absentee ballot and those voting via regular ballot on Election Day. Those voters who choose to vote via absentee ballot are required to provide identification twice. First, a voter must write her identification as a part of the absentee ballot application process. See Form 11-A and R.C. 3509.03. Second, when returning one's absent voter's ballot, the voter must write her identification on the identification envelope in order for his/her ballot to count. See Form 11-B and R.C. 3509.04. Voters who vote at their precinct on Election Day also are required to provide some form of identification. R.C. 3505.18(A).

Yet, Plaintiffs contend that, somehow, the election official is responsible for writing down the individual's identification information only when it comes to provisional ballots. Plaintiff's argue this even where there are categories of provisional ballots cast that, by their very definition, do not have identification. R.C. 3505.18, 3505.181. For instance, if a voter is not able to provide any of the acceptable forms of identification to be able to cast a regular ballot at his

precinct on Election Day, and the voter cannot provide his SSN-4, the voter is required to cast a provisional ballot. R.C. 3505.18(A)(3). Plaintiffs' requested relief would ignore the fact that some provisional ballots are cast for the very reason that individuals have arrived to the polling location without the identification needed to cast a ballot. Further, these voters would not be required to meet the similar identification responsibilities that are required of all other voters. Here the Sixth Circuit's *NEOCH* language is particularly apt:

> In our view, the difficulty in measuring the voter burden imposed by the ballot affirmation requirement stems from the fact that all of the identified deficiencies arise from voters' failure to follow the form's rather simple instructions: (1) print name, (2) provide identification, and (3) sign the affirmation appearing at the bottom. *See* SOS Form 12-B. Even the last step is optional, because Ohio law permits voters to cast a provisional ballot without signing the affirmation upon notifying a poll worker. O.R.C. § 3505.181(B)(6). [Opinion p. 29]. Contrary to the district court's suggestion, Ohio law does not task poll-workers with quality control of ballot affirmations.

If anything, the burden of checking a box is even less than the burden of writing one's name. Although not directly before the Sixth Circuit at the time, the logic of *NEOCH* strongly indicates that Step 2 is constitutional.

Not only is the burden minimal, but having the voter complete the identification portion will ensure that more votes will count. The chance of error is smaller if the voter writes the SSN-4 or DLN on the form than if the voter verbally communicates it to the poll worker. If the Court's goal is to protect the franchise, then certainly it serves that end to minimize the risks of human error intruding on the process.

Additionally, Plaintiffs have tried to prove that poll worker mistakes lead to wrong-location and wrong-precinct voting. But there is no evidence in the Record that poll-worker error causes voters to leave Step 2 blank. (Plaintiffs are reverting to the discredited argument

that it is poll-worker error to accept an incomplete provisional ballot envelope, an argument squarely rejected by the Court of Appeals in *NEOCH*).

And this leads to perhaps the most significant flaw in the various motions: as the Court knows, a voter who brings no identification to the polls is permitted to cast a provisional ballot, and has ten days to bring appropriate identification to the board of elections. And if the voter never appears with the required documents, that provisional ballot will look exactly like the ones Plaintiffs are talking about: Steps 1 and 3 filled out, Step 2 empty. So Plaintiffs are asking the Court to order the counting of ballots that are invalid because the voter in fact had no ID, which would be an open invitation to voter fraud in future elections.

Finally, Plaintiffs have failed to explain how this Court has any jurisdiction to enter the injunction they seek. As noted, *NEOCH* makes it impossible for Plaintiffs to contend that requiring voters to fill out Step 2 unconstitutionally burdens their First or Fourteenth Amendment rights. Lacking a federal constitutional claim, Plaintiffs can only argue that state election officials are (allegedly) not carrying out their statutory duties under Ohio law. But it is well-settled that federal courts are without jurisdiction to instruct state officials on the proper performance of their duties under state law, absent a federal constitutional violation. *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900 (1984); *State ex rel. Skaggs v. Brunner*, 549 F.3d 468, 471 (6th Cir. 2008).

For this reason alone, the Court should deny all the pending motions.

C. The Court Should Apply *Purcell* And Decline To Hear The Motions

The United States Supreme Court has cautioned that last minute injunctions changing election procedures are "strongly disfavored." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Only last week ago, the Sixth Circuit Court of Appeals, in rejecting an expansion of the *SEIU*

injunction (regarding wrong-location provisional ballots), reaffirmed the principle that "application of [the *Purcell*] principle is particularly appropriate when a party does not seek to clarify or expand the scope of relief after having an opportunity to do so, in the district court and on appeal, in the months before an election, and then asks for reconsideration of that relief days before an election." *SEIU Local 1 v. Husted*, Case No. 12-4264, 2012 U.S. App. LEXIS 22417, at * 10-11 (6th Cir., Oct. 31, 2012).

This is precisely what Plaintiffs have done. Plaintiffs have alternately claimed that they could not raise the issue with the Court before the October 24, 2012 Order was issued or before the November 2, 2012 Directive came out. Neither claim bears up under scrutiny.

The essence of these motions is Plaintiffs' objection to Form 12-B. The Secretary of State issued Form 12-B, as part of Directive 2012-01, back in January of this year, yet Plaintiffs said nothing for eleven months. In fact, Directive 2012-01 merely served to clarify and simplify prior practice.

The Secretary hoped that issuing the form and direction in January would provide boards of elections and precinct officials sufficient time to get familiar with the form and an opportunity to use the form before the November presidential election. (Damschroder Declaration). Though the Secretary hoped that the direction provided in Directive 2012-01 in January 2012, including Form 12-B, would be the last direction the Secretary would have to provide on those issues before the November 2012 presidential election, the Secretary could not issue comprehensive final instructions until last Friday due to developments in the litigation. (Damschroder Declaration).

Contrary to the claims in the Motions, Directive 2012-54, which the Secretary promulgated on November 2, 2012, does not differ in any material respect from Directive 2012-

01, issued on January 4, 2012. Both Directives clearly indicated that provisional ballots would be rejected if they lacked identification. Plaintiffs' contention that they could not raise these issues with the Court any earlier than they did is plainly false. It is especially hard to understand why the *SEIU* Plaintiffs had to wait until November 5, 2012, three days after the Directive issued, when the *NEOCH* Plaintiffs were able to file their motion a day before the Directive came out.

Plaintiffs could have addressed this in January of 2012 when the current Form 12-B issued or in the prior years when the requirements were the same. Moreover, the Court's October 24, 2012 Order similarly did not change the landscape in any relevant way. But even if it had, the *SEIU* Plaintiffs cannot explain why they waited nearly two weeks, until the very last minute before the election, to file their papers.

As a result of this inexcusable delay, the court will not consider the merits of these motions until after the regular ballots have all been cast and counted.

The delay in seeking relief has also foreclosed a host of possible remedies. Because voting is now over, the Court can no longer issue any order that will affect what happens at the polls. So the only option left to the Court, as a result of Plaintiffs' dilatory conduct, is a blanket order to count all "Step-2 deficient" provisional ballots, including those that must be rejected for lack of any identification.

The Court has no evidentiary record from which to conclude that *any* of those ballots, let alone *all* of them, were cast by otherwise-qualified electors. Nor does the Court have any legal basis for creating a presumption in favor of counting these defective ballots. Federal courts do not sit to order State authorities to comply with the federal courts' reading of State law. See *Pennhurst*, 465 U.S. at 106; *State ex rel. Skaggs v. Brunner*, 549 F.3d 468, 471 (6th Cir. 2008).

Finally, Plaintiffs make much of the alleged "admission" by undersigned counsel at oral argument that poll workers have an affirmative duty to "write down the [voter's] identifying information." [Tr., p. 50]. In fact, that statement is legally correct: poll workers have a duty under R.C. 3505.181 to write down the type of ID used (though not, for example, the actual driver's license number). But, as explained above, that obligation does not appear in the Code sections dealing with provisional ballot affirmation.

Contrary to the claims in all three motions, undersigned counsel did *not* "admit" that the poll workers must record the ID information on the provisional ballet affirmation. The first sentence in the transcript reads: "*Mr. Berzon suggested to you*, for example, that there might still be poll worker error because there is an obligation to record on the form the mode of identification used, and, if that's missing, that's a defect in the ballot." Mr. Epstein repeated the assertion; he did not adopt it. He then goes on to "admit" that "as they say, the obligation to write down the identifying information is imposed upon the poll worker, not upon the voter."

But certainly this is not an appropriate circumstance to apply judicial estoppel. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 385 (6th Cir. 1998) (rejecting judicial estoppel where litigant's assertions were "open to interpretation"). Incidentally, the Court should be aware that poll workers in recent elections (including this one) have not been ordered to record the information mandated by R.C. 3505.181. This fact of course has no bearing on the issues before the Court, since the defect in question is a blank Step 2.

III. Conclusion

Plaintiffs are not entitled to the relief they seek, nor is this a proper time to be seeking it, essentially after voting is over. For these reasons, Defendants respectfully ask the Court to deny the "emergency" motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 6th day of November, 2012. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Aaron D. Epstein
Aaron D. Epstein
Assistant Attorney General