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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*, Plaintiffs, vs. JON HUSTED, in his official capacity as Secretary of State of Ohio, *et al.*, Defendants.	CASE NO. 2:06-cv-896 Judge Algenon Marbley Magistrate Judge Terrence P. Kemp

Plaintiffs' Reply Brief in Support of Emergency Motions for Clarification and for Modification of October 26, 2012 Order Regarding Scope of Section III(5)(b)(vii) of the Consent Decree

INTRODUCTION

Defendants seek to excuse Secretary of State Jon Husted's eleventh-hour nighttime Directive 2012-54 by arguing against the unambiguous language of the *NEOCH* Consent Decree and the Ohio law that it mirrors, and against what the Secretary previously represented to this Court. *See* 10/24/12 Trans. at 50:5-20 and 60:3-11; *see also* 11/7/12 Trans. (attached as Ex. 1). The Secretary's representation to this Court on October 24, 2012 was correct: Section III(5)(b)(vii) of the Consent Decree unambiguously protects provisional voters who use their Social Security numbers as identification ("SSN-4 voters") from disenfranchisement when a poll worker fails to complete the provisional-ballot-affirmation form, including the recording of voter-identification information in "Step 2" of that form. For the reasons the Sixth Circuit articulated in its combined October 11, 2012 decision in this case and *SEIU Local 1 v. Husted*, __ F.3d __, 2012 WL 4829033 at *19-20 (6th Cir. Oct. 11, 2012), allowing this Decree provision to protect only SSN-4 and not voters who used other

forms of ID will result in Ohio violating equal protection in the counting of provisional ballots in this election. Ohio must therefore be ordered to extend the Decree's protections to *all* voters to avoid any disparate-treatment, equal-protection problem. If Plaintiffs' interpretation of Section III(5)(b)(vii) of the Decree is correct (as this Court recognized in its October 26, 2012 Order), Ohio has made *no argument at all* as to why the remedy to the disparate treatment of voters should not be to extend the Decree's protections to all voters regardless of form of identification, the only remedy consistent with the Decree's purposes in preventing the disenfranchisement of Ohio voters that results from poll-worker error.

I. This Court Should Modify the Decree to Extend the Protection Against Poll-Worker Failure to Record Voter Identification in Section III(5)(b)(vii) to all Voters Regardless of Form of Identification, to Remedy Ohio's Current Unconstitutional Disparate Treatment of Voters

Plaintiffs ask the Court to modify the Decree to extend Section III(5)(b)(vii)'s protections to all provisional voters, not just those who use as identification the last four digits of their Social Security numbers. As explained in Plaintiffs' opening brief, there can be no dispute that Section III(5)(b)(vii) prohibits county boards of elections from rejecting provisional ballots with affirmation forms that are incomplete because a poll worker has failed to "record the type of identification provided" or "the [voter's] social security information." Ohio Rev. Code § 3505.181(B)(6); *see* Pls.' Mot. for Clarification & Modification at 5-6; *see also* October 26, 2012 Order at 19-20. To avoid any differential treatment of provisional voters in the counting of ballots in this election, this section's protections should be expanded to protect all provisional voters. Such modification is squarely within this Court's discretion, as the Sixth Circuit confirmed in recently remanding to this Court to address this very issue. *NEOCH v. Husted*, __ F.3d __, 2012 WL 4829033 at *19-20 (6th Cir. Oct. 11, 2012).

As the Sixth Circuit recognized, differential treatment of the SSN-4 voters protected by the Decree and all other Ohio provisional voters likely violates equal protection. *NEOCH*, 2012 WL

4829033 at *14, *19 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011)). Indeed, in affirming this Court's correct-location, wrong-precinct ballot preliminary injunction in *SEIU Local 1 v. Husted*, the Sixth Circuit explained that "differential treatment of provisional ballots depending on the form of identification used by the voters" violates equal protection. 2012 WL 4829033 at *14. As the Sixth Circuit explained, any preferential treatment of SSN-4 provisional ballots "likely violates the equal protection principle recognized in *Bush v. Gore*." *Id.* at *14 (quoting *Bush v. Gore*, 531 U.S. at 104-05: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

As the Sixth Circuit explained in remanding this case to this Court, while it had set aside the portion of the preliminary injunction in *SEIU Local 1* that prohibited disqualification of registered voters' ballots on the grounds that they were missing names or signatures, the Decree "continues to mandate that some deficient-affirmation ballots will be counted"—a "discrepancy [that] appears to create a *Bush v. Gore* problem." 2012 WL 4829033 at *19. But because this Court had not yet had an opportunity to rule on the proper remedy for any such problem in the context of a motion to modify the Decree, and because "decisions to modify consent decrees are generally left to the discretion of the trial court," the Sixth Circuit determined that "the proper course is to remand this case" to permit the District Court to modify the Decree to provide the appropriate remedy for any differential treatment of SSN-4 voters and other provisional voters. *Id.* at *19-20. The Sixth Circuit noted that Ohio "has the most to lose by a remand." *Id.* at 20.

This Court's October 26, 2012 opinion and order resolving the competing motions to modify the Decree recognized that any disparate treatment problem must be resolved by modifying the Decree. Op. and Ord. Oct. 31, 2012 at 19-20. The Court, however, held that, in contrast to Section III(5)(b)(vii) of the Decree, which protects against poll-worker error, Section III(5)(b)(vi)

protected only against the types of deficient affirmations the Sixth Circuit held to be *voter* rather than poll-worker error — namely, the failure of poll workers to check voters' names and signatures. *Id.* As to Plaintiffs' request to modify the Decree to extend the protections of Section III(5)(b)(vii), the Court noted that, "[c]ritically," these protections remain in the Decree and, further, were mirrored in Directive 2012-01, which applied to all voters. *Id.* at 20-21. Thus, at the time of the Court's October 26, 2012 order, there was no concern that Section III(5)(b)(vii) provided preferential treatment for SSN-4 voters — even though the Decree "continues to mandate that some deficient-affirmation ballots will be counted." *NEOCH*, 2012 WL 4829033 at *19.

Plaintiffs filed the present motion because of the disparate-treatment that arose on Friday night, November 2, 2012, when, after business hours, the Secretary of State issued Directive 2012-54. Directive 2012-54 expressly requires that boards reject provisional ballots on which the poll worker has failed to record the necessary identification information — ballots that are protected under Section III(5)(b)(vii) of the Decree. The Secretary's actions raise the exact equal-protection concerns the Sixth Circuit remanded to this Court to resolve in the context of a motion to modify this Decree. The decision to disqualify ballots of non-SSN-4 voters on the grounds that a poll worker has failed to "record the type of information provided," when subsection (vii) applies to protect SSN-4 voters in those circumstances, may be challenged as "valu[ing] one person's vote over that of another," thus violating the "equal protection principle recognized in *Bush v. Gore*." *NEOCH*, 2012 WL 4829033 at *14 (internal quotation marks omitted).

To avoid these equal-protection concerns, this Court should modify the Decree to extend subsection (vii) protection to *all* provisional voters. Extending this protection to all provisional voters is the only remedy that will serve the Decree's express purposes of protecting voters from arbitrary disenfranchisement caused by poll-worker error (*see* Dkt. 210 at I). *See Hunter*, 635 F.3d at 242-43 (concluding that proper remedy for state's disparate treatment of voters is to count all

similarly situated votes). This is also the only remedy that ensures that SSN-4 voters receive the protections for which the parties bargained, and for which the Plaintiffs gave up other important constitutional claims. The only other alternative—to remove subsection (vii)—will result in the arbitrary disenfranchisement of Ohio voters in this election and is directly contrary to the Decree's purposes and the public interest.

Whether or not the Constitution independently requires Ohio to count the ballots of voters whose affirmation forms are incomplete as a result of poll-worker error regardless of disparate treatment between groups of voters is an independent question from whether this Court should remedy the unconstitutional disparate treatment by modifying the Decree to protect all voters. As the Supreme Court has observed, parties are always free to settle their dispute in a consent decree "by undertaking to do more than the Constitution requires," and, indeed, "almost any affirmative decree beyond a directive to obey the Constitution necessarily does that." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). Here, as the Sixth Circuit pointed out in rejecting Ohio's attempts to vacate this Decree, Defendants *voluntarily* entered into a final and binding Decree that requires county boards to count the provisional ballots of SSN-4 voters that have deficient envelopes due to poll-worker error. 2012 WL 4829033 at *18-19. There are "serious finality concerns" associated with modifying a Decree to deprive voters, including Plaintiffs' members, of the benefit of the provisions to which Defendants agreed. *Id.* at *19. With the fundamental right to vote at stake, the appropriate remedy for any disparate-treatment problem is not to disenfranchise the voters whom the Decree protects, but to modify the Decree such that the provisions at issue apply equally to all identically situated voters.

Defendants have made no argument *at all*, nor could they, that the remedy should not be to extend subsection (vii)'s protections to all provisional voters. Instead, Defendants' sole argument is that subsection (vii) does not protect SSN-4 voters' ballots from disqualification when a poll worker

fails to record the voter's identification information. As shown below, that is not a fair reading of the Decree.

II. Defendants' Argument That Subsection (vii) Does Not Protect SSN-4 Voters From Poll Worker Failure to Record Identification Information Is Inconsistent with the Unambiguous Consent Decree Language, the Secretary's Representation to this Court October 24, 2012, and Ohio Law

A. This Court has authority to construe the Consent Decree it approved and entered

This Court has authority to construe the Consent Decree's protections, including those that subsection (vii) guarantees. A court's interpretation of a consent decree is akin to construction of a contract, and the Court may rely on familiar interpretative aids to resolve any ambiguities. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975). Thus, for example, the Court may look to evidence of the parties' understanding of the decree, the "circumstances surrounding the formation of the consent decree, any technical meaning words may have had to the parties," and state law, to the extent it assists in construing the decree's terms. *Id.* at 237-38.

Defendants' suggestion that Plaintiffs are seeking an order only to enforce state law is incorrect. Plaintiffs seek an order clarifying and construing the Consent Decree that this Court issued, something the Court plainly has authority to do. *See NEOCH*, 2012 WL 4829033 at *19 (remanding to this Court to resolve issues presented in motion to modify); *cf. Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-72 (6th Cir. 1998) ("It is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work."); *Brown v. Neeb*, 644 F.3d 551, 558 n.12 (6th Cir. 1981) ("Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.").

B. Under Principles Of Judicial Estoppel, The Court Should Hold The Secretary To His Representation That Subsection (Vii) Applies To Prohibit County Boards From Disqualifying Provisional Ballots That Are Missing Identification Information.

Plaintiffs have demonstrated that the Secretary should be required, by the equitable doctrine of judicial estoppel, to abide by statements made to this Court. To reiterate, the Secretary conceded Plaintiffs' interpretation of subsection (vii) when he confirmed that "the obligation to write down the identifying information is imposed upon the poll worker, not upon the voter." 10/24/12 Hrng. Tr. at 50:5-20. Now, after this Court relied on that representation in denying Plaintiffs' request to extend subsection (vii) to all voters, the Secretary takes the opposite position.

As explained in Plaintiffs' opening brief, the doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully asserted to a Court in a prior proceeding. Pls.' Mot. at 11; *see also Teledyne Indus., Inc. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1217 (6th Cir. 1990). Its purpose is to "preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Id.* at 1218.

These principles of judicial estoppel apply here. The Secretary argued to the Court that the poll-worker error Plaintiffs identified—errors in the completion of Step 2 of the ballot affirmation form—would fall under subsection (vii) and therefore ballots would not be rejected for this reason. The Court then relied on this, noting 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." Op. and Ord. Oct. 26, 2012.

Defendants' only response is to say that "this is not an appropriate circumstance to apply judicial estoppel," and to cite *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 385 (6th Cir. 1998), for the proposition that principles of judicial estoppel do not apply where a litigant's assertions are

"open to interpretation." Opp. at 17.

First of all, the Secretary's statements to this Court regarding the protections of subsection (vii) are not "open to interpretation." The Secretary confirmed that subsection (vii) would apply to the exact circumstance at issue here: when a poll worker fails to complete the identification information contained in Step 2 of the provisional ballot form.

Second, *Griffith* does not apply, as its holding is specific to Americans with Disabilities Act (ADA) cases, and applied the rule that "the doctrine of judicial estoppel does not operate to preclude ADA relief to an individual based on that individual's application for and/or receipt of social security disability benefits," in part because a disability application is a fill-in-the-blanks form that provides little room for explanation and thus might be open to interpretation. 135 F.3d at 381, *citing Blanton v. Inco Alloys Inter., Inc.*, 108 F.3d 104, 108-09 (6th Cir. 1997).[1]

There is simply no comparing an ADA plaintiff's statements on a fill-in-the-blank application and *the Secretary's intentional argument to this Court*, in opposition to Plaintiffs' motion, that under Ohio law, "the obligation to write down the identifying information is imposed upon the poll worker, not upon the voter," and that therefore ballots with incomplete identifying information would fall under the protections of subsection (vii). Because the position taken by the Secretary on October 24, 2012, and the position he now takes directly conflict, and because the Court relied upon the Secretary's assurances regarding the applicability of subsection (vii), this Court should find that the Secretary is judicially estopped from arguing that subsection (vii) does not apply to provisional-ballot forms that have incomplete identification information.

[1] *See also Griffith*, 135 F.3d at 382 (explaining that plaintiffs' disability application was "open to interpretation" because "portions of the SSA application and other forms require the applicant merely to check off boxes without comment, or require the applicant to fill in blanks with little room given for elaboration. In short, the employee may not have a fair opportunity to accurately explain the details of the employee's medical condition and his ability or inability to work for purposes of the ADA.)"

C. Subsection (vii) should be construed consistent with state law, which unambiguously places with "the election official," not the voter, the duty to record identification information and to note any information with which a voter should return.

This Court may look to Ohio law in construing the terms of the Decree. There can be no dispute that the plain and unambiguous language of Ohio Rev. Code §§ 3505.181(B)(6) & (7) and 3505.182 require the "election official" to *record* identification information. Defendants suggest that the statute requires voters to record their social security numbers, but §3505.181(B)(6) unambiguously states that the "election official shall record" the "social security number information."

The Secretary also argues that his intent in asking voters to record identification information was to ensure that poll workers did not make errors. But the question is what happens, under the Consent Decree, to a ballot if the information that state law provides that the poll workers is supposed to record is missing. The answer is that under Section III(5)(b)(vii), the ballot must be counted. Under this provision, the voter does not pay the price for the Secretary's decision to ignore the statute.

With his eleventh-hour directive requiring the rejection of ballots with incomplete identification information, the Secretary sought not only to shift to the voter what is plainly the election officials' statutory recording responsibility, but then impose what amounts to the ultimate penalty on that voter if the voter makes a mistake.[2]

[2] The "circumstances surrounding the formation of the consent decree" are, of course, also relevant to its interpretation. *ITT Continental Baking*, 420 U.S. at 238. Here, construing paragraph vii as Defendants would have the Court do, to permit the disqualification of provisional ballots with incomplete identification information, would present the very sort of equal-protection and due-process concerns the Decree was designed to address. Early reports from the November 6, 2012 election reflect poll workers' confusion regarding Step 2 and the recording of identification information. Some poll workers personally recorded the Step 2 information, *see* Decl. of Larry Davis at ¶ 7-8 (Nov. 8, 2012) (attached as Ex. 2), while others burdened the voter with this responsibility. *See, e.g.*, Decl. of Sarah Biehl at ¶ 4 (Nov. 8, 2012) (attached as Ex. 3); Decl. of Nate Moseley at ¶ 4 (Nov. 8, 2012) (attached as Ex. 4); Decl. of Jacquie Talbot at ¶ 3 (Nov. 8, 2012) (attached as Ex. 5). Still others adopted a combination approach, sometimes recording the information and

IV. Plaintiffs' Remedy is Narrow, Reasonable, and Not Untimely.

Plaintiffs proposed remedy is very straightforward: extend subsection (vii)'s protections to all provisional-ballot voters, regardless of the type of identification the voter proffered, to ensure that county elections boards do not disqualify provisional ballots on the grounds that they are missing identification information as a result of the poll worker's failure to record that information as required by Ohio law. Plaintiffs' remedy is narrowly tailored to cover *only* those situations in which the absence of recorded information was the poll worker's responsibility. Thus, it would not apply when there is evidence the voter failed to provide identification and was offered, but declined, the opportunity to complete a Form 10-T affirmation, or when there is evidence that the voter was instructed to bring additional information to the elections board within 10 days and failed to do so.

Defendants admit "incidentally" that, despite Ohio Rev. Code § 3505.181(B)(6), they have not ordered poll workers to record the statutorily required identification information. Defs.' Mem. Opp. at 17. This only underscores the need for the remedy Plaintiffs seek.

A. Defendants' Claim That The Requested Relief Would Not Apply To And Would Not Protect SSN-4 Voters Is Wrong

Defendants argue that the requested relief somehow would not apply to SSN-4 voters. But that is not accurate. If a voter performs the voter's duty to *provide* the SSN-4, but the election official then fails to "record" it as required by §3505.181(B)(6), this is just as much poll-worker error as if

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sometimes leaving it to the voters to figure out. *See*, *e.g.*, Decl. of Stephen Q. Giblin at ¶ 4 (Nov. 8, 2012) (attached as Ex. 6) (testifying that if the voter was using the last four digits of a social-security number, the voter would provide the number orally to the poll worker who would record it, but if the voter was using a driver's license number, the voter would record it); Decl. of Melissa Yasinow at ¶ 4 (Nov. 8, 2012) (attached as Ex. 7); Decl. of Margery Koosed at ¶ 4 (attached as Ex. 8). Poll-worker training on the question of recording identification information, too, was apparently all over the map. *Compare* Decl. of Sarah Biehl at ¶ 3 (testifying that poll-worker training instructed that *voters* were supposed to complete Step 2) *with* Decl. of Larry Davis at ¶ 6 (testifying that poll-worker training instructed that *poll workers* were supposed complete Step 2 and record the type of identification provided in accordance with Ohio law). Similarly situated provisional-ballot voters should not be treated differently, and the Consent Decree was intended by the parties to ensure that poll-worker error, including errors caused by varying training and poll-worker understandings of their duties, would not determine the fate of a voter's provisional ballot.

the election official had failed to record another type of identification—e.g., the driver's license number or to record another type of identification. Defendants' argument is really that it would be impossible to identify—based on a ballot-affirmation form with an incomplete "Step 2"—whether the voter was proffered a social security number or some other form of identification. But that the Secretary would be unable to distinguish SSN-4 voters with incomplete "Step 2"s from other voters' ballots that likewise have incomplete "Step 2's" because of poll-worker error, becomes an academic concern given the need to modify the consent decree to address any potential disparate-treatment concerns, as discussed in Section I, above.

B. Defendants' claim that a blank Step 2 "could mean" that the poll worker instructed the voter to return to the board is beside the point if the poll worker does not comply with the statutory responsibility to record that on the form.

Defendants argue that when "Step 2" is incomplete, it could be because the voter was instructed to return to the board. But there can be no dispute that poll workers are obliged to record whether a voter must return to the board with additional information. Ohio Rev. Code § 3505.181(B)(7) ("election official shall indicate, on the provisional ballot verification statement required under section 3505.182 of the Revised Code" that voter is "required to provide additional information" to the elections board "to determine the eligibility" of the voter); Ohio Rev. Code § 3505.182 (in contrast to Form 12-B, statutory form creates place for poll worker to record this information before poll worker's signature). Thus, to the extent evidence shows that the poll worker so instructed the voter, the poll worker would have performed his or her duties in those circumstances, and the voter would be protected by paragraph vii. Defendants' protest is unwarranted.

C. Defendants' own last-minute change in ballot counting rules applicable to this election necessitated Plaintiffs' emergency motion.

Until the Secretary issued Directive 2012-54, Plaintiffs had every reason to believe that subsection (vii) protected voters who cast provisional voters with incomplete identification

information in Step 2. Nonetheless, Plaintiffs sought to confirm their understanding and therefore sent a letter to the Secretary requesting that any directives implementing the Court's October 26, 2012 order excising paragraph vi be clear that voters would not be disenfranchised for deficiencies in what is recorded on Form 12-B, Step 2. The Secretary instead chose to issue an eleventh-hour Directive that completely reverses position, and Plaintiffs' emergency motion for relief, of which it gave advance notice to Defendants and the Court almost immediately after the 7 p.m. Directive, is not untimely or too late for meaningful relief.

While Defendants contend that Directive 2012-54 rewrote Directive 2012-01 "only to make the process clearer" and that "Step 2 in 2012-54 does not differ in process or outcome from Step 2 in Directive 2012-01," Dkt. 352 at 6, this is false. Unlike Directive 2012-54, Directive 2012-01 placed no burden on the voter to record the identification information, required poll workers to do so consistent with Ohio law—and did not require boards to reject ballots where poll workers had not done so. Contrary to Defendants' claims, the Secretary's eleventh-hour directive imposes new and substantial burdens on voters and differs in process and outcome from Directive 2012-01. It heightens the risk of voters being unduly disenfranchised due to poll-worker error.

As for Defendants' invocation of *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), there is no hard-and-fast "*Purcell*" rule that deprives Plaintiffs of remedies completely when those violating their federal constitutional rights do so *belatedly*. Rather, while *Purcell* advises caution regarding injunctions close to an election, it also cautions that a district court should carefully consider any arguments that qualified voters would be disenfranchised by the conduct at issue. *Id.* at 4.

Additionally, under Ohio law, provisional ballots cannot be counted until after members of county elections boards have determined the validity of all provisional ballots cast. Ohio Rev. Code 3505.183(D). Given that provisional voters have ten days to provide additional information to the board of elections to prove ballot validity, Ohio Rev. Code § 3505.183(B)(2), elections boards

cannot begin counting provisional ballots before November 17. There remains ample time for this Court to correct the Secretary's unnecessary Directive.

Dated: November 8, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 8, 2012, my office filed the foregoing document using the Court's online-filing system, which will send a copy of the foregoing to all counsel of record.

/s/ Subodh Chandra
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