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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,	:	
Plaintiffs,	:	
v.	:	
JENNIFER BRUNNER, OHIO SECRETARY OF STATE,	:	
Defendant.	:	**Case No. C2-06-896**
	:	**JUDGE MARBLEY**
THE NORTHEAST OHIO COALITION FOR THE HOMELESS and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,	:	
Plaintiffs,	:	
v.	:	
THE STATE OF OHIO,	:	
Intervenor-Defendant.	:	
OHIO REPUBLICAN PARTY, et al.	:	
Plaintiffs,	:	
	:	**Case No. 2:08CV913**
v.	:	
	:	**JUDGE SMITH**
JENNIFER BRUNNER, Secretary of State of Ohio,	:	**MAGISTRATE JUDGE KING**
Defendant.	:	

MOTION TO CONSOLIDATE OF DEFENDANT SECRETARY OF STATE JENNIFER BRUNNER

Pursuant to Fed. R. Civ. P. 42(a), Defendant Secretary of State Jennifer Brunner moves for consolidation of Plaintiffs' Amended and Supplemental Complaint For Preliminary and Permanent Injunction, filed November 4, 2008 (Doc. 64), with *Northeast Ohio Coalition For The Homeless v. Brunner*, S.D. Ohio Case No. C2-06-896. Consolidation is justified because the two cases present identical legal issues and because of the urgent need to avoid inconsistent legal rulings in the short time remaining for the counting of ballots in the November 2008 general election. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. The Two Cases Present Identical Legal Issues.

Federal Rule of Civil Procedure 42(a) provides that the Court may order consolidation "when actions involving a common question of law or fact are pending before the court." In addition to ordering consolidation, the court "may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Plaintiffs' Amended Complaint specifically adds new allegations challenging the Secretary's instructions to the county boards of elections in Directives 2008-101 and 2008-105 regarding the counting of ballots. See Am. Compl., ¶¶ 34-40. The new claims in Plaintiffs' Amended Complaint are identical to the claims currently being adjudicated in *Northeast Ohio Coalition For The Homeless v. Brunner* ("*NEOHC*"). In fact, on October 27, 2008, Judge Sargus issued an order in *NEOHC* adopting the Secretary of State's Directive 2008-101 and stating that "an eligible voter casting a provisional ballot should not be disenfranchises because of poll worker error in processing a provisional ballot." See Order (Oct. 27, 2008), *NEOHC v. Brunner*, Case No. C2-06-896, attached as Ex. A. Thus, the subject matter and allegations contained in *NEOHC*, which deals with the casting and counting of provisional ballots, is identical to the issues in *Ohio Republican Party.* Since both cases address provisional ballots and the *NOEHC* case already issued an order concerning this issue, these cases should be consolidated.

Furthermore, the Plaintiffs' allegations regarding Directive 2008-105 also reach at the issue of tabulating votes. Therefore, as warranted under Fed. R. Civ. P. 42(a), the two cases should be consolidated to prevent the expenditure of costs and resources and to prevent inconsistent rulings regarding the counting of ballots. There is little to no risk to Plaintiffs if the

cases are consolidated. However, the separate adjudication of these two cases will likely result in great prejudice to the voting public from the inconsistent application of law.

II. Consolidation Is Justified By The Short Amount Of Time Remaining For The Counting of Ballots.

Furthermore, consolidation is justified here because of the short amount of time remaining for the counting of ballots cast in the general election. Plaintiffs have filed their Amended Complaint on Election Day, leaving inadequate time for the orderly adjudication of new claims regarding the counting and tabulation of votes. Specifically, the boards of elections must tabulate and submit the results for the unofficial canvass by noon on November 5, 2008. See Directive 2008-105; R.C. 3505.30. The Court, through *NEOHC* is already intimately familiar with Directive 2008-101 and the manner in which provisional ballots are cast and counted based upon the Court's prior rulings from 2006. Given the time-sensitive and fact-specific inquiry of Plaintiffs' new challenge, it is likely that different judges may apply different frameworks and arrive at inconsistent conclusions. Meanwhile, the lack of objective criteria creates uncertainty for the boards of elections, leaving the Secretary in a position once again to make decisions with no clear guidance from statute or case precedent and will almost certainly result in more litigation and challenges.

III. CONCLUSION

For the reasons stated above, Defendant Secretary of State Brunner moves for consolidation of Plaintiffs' new claims in their Amended Complaint with *Northeast Ohio Coalition For The Homeless v. Brunner*, S.D. Ohio Case No. C2-06-896 for adjudication before Judge Marbley.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic notification system on this 4th day of November, 2008.

/s Richard N. Coglianese