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

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| THE NORTHEAST OHIO COALITION FOR THE HOMELESS AND<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,<br><br>Plaintiffs,<br>v.<br><br>JENNIFER BRUNNER, OHIO SECRETARY OF STATE<br><br>Defendant. | : | Case No. C2-06-896<br>JUDGE MARBLEY |

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| THE NORTHEAST OHIO COALITION FOR THE HOMELESS and<br><br>SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,<br><br>Plaintiffs,<br>v.<br><br>THE STATE OF OHIO,<br><br>Intervenor-Defendant. | : | |

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| OHIO REPUBLICAN PARTY, et al.<br><br>Plaintiffs,<br><br>v.<br><br>JENNIFER BRUNNER, Secretary of State of Ohio,<br><br>Defendant. | : | Case No. 2:08CV913 |

**MEMORANDUM IN RESPONSE TO DEFENDANTS MOTION TO CONSOLIDATE**

This is not a case that should be consolidated. The present case was filed well over a month ago and is well developed. This case has resulted in the issuance of two Temporary Restraining Orders, two appeals to the Sixth Circuit, including en banc review, as well as an appeal to the Supreme Court of the United States. In light of the tremendous judicial resources that have already been expended, it would be imprudent to consolidate this matter with an unrelated case.

Although a federal district court has broad discretion in determining whether a motion for consolidation is proper under Federal Rule Of Civil Procedure 42, *see, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990), such discretion is not unbounded, and the court should only order a consolidation when the movant demonstrates the requisition commonality of facts, law or both. *In Re Repetition Stress Imaging Litigation*, 11 F.3d 368 (2d Cir. 1993). Here, Secretary of State has neither demonstrated a common issue of fact or law sufficient to meet the standards of Federal Rule Of Civil Procedure 42. One specific factor that is frequently considered is whether consolidation is necessary to avoid inconsistent results. *International Paving System, Inc. v. Van Tulso*, 806 F. Supp. 17 (E.D.N.Y. 1992). In this situation, it is highly unlikely that there will be inconsistent results for 2 reasons: (i) virtually all of the current substitution claims in the *NEOCH* case were adjudicated in the Court's order of October 24 and October 27, 2008; and (ii) the remaining claims in the *NEOCH* case deal with the general election of 2006.

Defendant claims that consolidation is warranted because the two cases present "identical legal issues." Such a statement is obviously false, even upon even a cursory review of the pleadings of the two cases. The Motion to Consolidate should be denied because of the

existence of a multitude of issues that this Court has begun to address and because Plaintiffs' new arguments do not concern the same issues present in *NEOCH*.

First, it is noteworthy that in her Motion to Consolidate, Defendant only discusses Plaintiffs' new claim, apparently wishing to gloss over the fact that Plaintiff has no less than five other pending federal claims. Defendant's omission is obviously intentional, as these earlier claims have nothing to do with the claims addressed in *NEOCH* and offer no basis upon which to consolidate. Further, any peripheral overlap with *NEOCH* does not warrant consolidation of this matter with a case filed in 2006.

However, even if this Court were to adopt Defendant's myopic view by focusing on the new arguments raised, consolidation would still be unwarranted. The new concerns raised by Plaintiff address issues separate and distinct from the ones discussed in *NEOCH*. Defendant, as support for her assertion the issues in *NEOCH* are "identical" to the concerns raised by Plaintiffs here, cites the Court in *NEOCH* as stating "any eligible voter casting a provisional ballot should not be disenfranchises [sic] because of poll worker error in processing a provisional ballot." Such an statement however, is perplexing, given that Plaintiffs have not raised any issue even resembling the above assertion. Instead, Plaintiffs have expressed concern over Directive 2008-101's lack of uniform procedures governing the counting of provisional ballots. The mere fact that Plaintiffs' Amended Complaint discusses a particular aspect of Directive 2008-101 does not serve as some sort of talisman, warranting instant and unfettered consolidation with all cases previously discussing the same Directive.

Defendant's argument as to Directive 2008-105 is also insufficient. Her argument reads, *in toto*, "[f]urthermore, the Plaintiffs' allegations regarding Directive 2008-105 also reach at the

issue of tabulating votes." If this assertion were correct, then any voting case filed now or in the future that named the Secretary of State as Defendant could be consolidated with *NEOCH*.

For these reasons, Plaintiffs respectfully request that Defendant's Motion to Consolidate be DENIED.

Respectfully submitted,

/s/ William M. Todd
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum in Response to Defendants Motion to Consolidate was served via the Court's electronic filing system on this 4th day of November, 2008.

/s/ William M. Todd
William M. Todd, Trial Attorney (0023061)