Case No. 08-4585

IN THE UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

State of Ohio ex rel. Dana Skaggs, et al.,

Relators-Appellants,

v.

Jennifer L. Brunner
Secretary of the State of Ohio, et al.,

Respondents-Appellees.

On Appeal From the United States District Court
For the Southern District of Ohio, Eastern Division

BRIEF OF APPELLEES FRANKLIN COUNTY BOARD OF ELECTIONS

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JURISDICTIONAL STATEMENT

The matter before the District Court was a request for a writ of mandamus against the Ohio Secretary of State and the Franklin County Board of Elections ("FCBOE"). The Secretary of State removed the case pursuant to 28 U.S.C §1441(b). (R. 2.) Respondent FCBOE did not consent to removal and moved to remand. (R. 11.) Respondent Ohio Secretary of State filed a motion to realign the parties. (R. 15.) The District Court realigned the parties, denied the motion to remand, and assumed jurisdiction of this matter. (R. 20.)

Appellants-Plaintiffs bring this appeal from the District Court's order and final judgment filed November 20, 2008. (R. 41.) Appellants filed a notice of appeal on November 20, 2008. (R. 39.) Hence, this Court appears to have appellate jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

This appeal presents the following issues:

1. Whether the District Court's removal of this case was proper where the FCBOE did not consent to removal.

2. Whether the District Court erred realigning the FCBOE to be a plaintiff where the plaintiff-voters had sought a writ of mandamus to issue to the FCBOE.

3. Whether the District Court had original jurisdiction over the underlying proceedings.

STATEMENT OF THE FACTS AND CASE

On October 24, 2008, the Secretary of State issued Directive 2008-101, which promulgated the standards for counting provisional ballots in the 2008 General Election. This directive became an order of the Court in *NEOCH v. Brunner*, Case No. C2-06-896 (S.D. Ohio 2006) ("*NEOCH*").[1] Directive 2008-103 was subsequently promulgated to instruct that provisional ballots could not be rejected if the "may not be rejected for reasons that are attributable to poll worker error including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181."

The observers for the Democrat candidate for the 15th Congressional District began to complain that the dictates of Ohio law must be disgarded on the novel theory that all errors in provisional ballots must be because of poll worker error. (R. 5, Mot. Temp. Restraining Order, Attachment D). Several emails then

[1] This Court questioned the ability of the Northeast Ohio Coalition for the Homeless (NEOCH) to maintain standing when it vacated a Temporary Restraining Order issued by the District Court this same case in October 2006. See, *NEOCH v. Blackwell,* 467 F. 3d 999 (6th Cir. 2006). That case remained active because the NEOCH plaintiffs sought attorneys fees regarding a previously entered consent order. District Court granted standing to seek attorneys fees for the consent order, and the NEOCH plaintiffs filed a supplemental complaint challenging provisional votes prior to this election. No final appealable order has been entered in the *NEOCH* case in order to challenge standing the case, which the District Court bootstrapped the 2008 preelection order on provisional ballots as well as the ability to use that order as a vehicle to exercise jurisdiction in this case.

followed regarding the reinterpretation of Directive 2008-101, which concisely set forth the standard for counting provisional ballots. Those standards were:

> 1. Ballots Eligible to be Counted
>
> Where ALL of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:
>
> a) The individual named on the affirmation is properly registered to vote;
>
> b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
>
> c) The individual provided the following:
>
> (1) His or her name and signature as the person who cast the provisional ballot;
>
> (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
>
> (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;
> Or
>
> (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official.

(R. 5, Attachment C.) On November 13, 2008, an employee of the Secretary of State informed the FCBOE that it may count ballots that did not comply with the

dictates of Directive 2008-101. (R. 5, Email from Brian Shinn to FCBOE, Attachment B.)

On November 13, 2008, the FCBOE received, via hand delivery, the Petition for a Writ of Mandamus filed by Plaintiff/Relators. Because a temporary restraining order was requested, counsel for the FCBOE filed a notice of appearance that was served on counsel for the Relator and counsel for Respondent.

The next morning, counsel for Respondent Secretary Brunner requested consent to remove this matter to the District Court for the Southern District of Ohio. That request was denied because federal jurisdiction was not present. Secretary Brunner filed her notice of removal of this case, which was drawn to Judge Frost, (R. 7) and sought consolidation with the *NEOCH* case that was on Judge Marbley's docket (R. 6). Pursuant to S.D. Ohio Civ. R. 3.1(b) this matter was transferred to the District Court judge who had handed the *NEOCH* case that was initiated in 2006 and where standing was questionable. (R. 9.) A scheduling order was imposed requiring the parties to submit material by the afternoon of November 14, 2008.

The FCBOE filed a motion to remand. (R. 11.) The Relators also moved for remand. (R. 12.) Secretary Brunner subsequently moved to realign the parties (R. 15.), which was countered by the FCBOE's response in opposition to Secretary Brunner's realignment motion (R. 16).

Additionally, on November 14, 2008, the FCBOE met in special session to vote on issues related to provisional ballots. William Anthony, one of the Board members, made a motion to accept those provisional ballots that failed to contain the signature of the voter. That motion resulted in a tie vote. That matter would be decided by Secretary Brunner in accordance with R.C. §3501.11(X). At that meeting, no motion was made, and no vote taken, by the FCBOE consenting to removal.

The District Court held a hearing on November 15, 2008, regarding the notice of removal, the motions to remand and the motion to realign the parties. On November 17, 2008, the District Court issued an oral order realigning the parties, finding that the FCBOE's interests were adverse to Secretary Brunner's interests because FCBOE Deputy Director Matthew Damschroder was the affiant in the affidavit used in support of Relators' motion for temporary restraining order (R. 5, Ex. D.), and because statutory counsel for the FCBOE had a different interpretation from an attorney that was employed by Secretary Brunner (*See* R. 5, Ex. B). The Court further indicated that notwithstanding the ordered-realignment, the FCBOE's consent was not required, holding that it was a nominal party, and also that it had not been served with the petition by the Ohio Supreme Court despite a formal appearance entered by counsel for the FCBOE in the case. (R. 20.)

The District Court then proceeded to hold a hearing on Relators' motion for a temporary restraining order seeking the following relief:

A. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.183(B)(1)(a) and compelling her to advise the county Board of Elections that any provisional ballot must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted.

B. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.181 and compelling her to advise the county Boards of Election that any provisional voter must provide the identification verification information mandated by R.C. 3505.181 on the Provisional Ballot Application or, alternatively, complete the identification affirmation provided in R.C. 3505.18(A)(4), and if the voter fails to do so, her provisional ballot is not eligible to be counted.

C. Issue a writ of mandamus compelling Respondents to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a) and/or the voter fails to provide on the Application the identification verification information required by R.C. 3505.18 or, alternatively, fails to complete the identification affirmation provided in R.C. 3505.18(A)(4).

D. Issue a temporary restraining order or other interim ancillary injunctive relief enjoining and restraining the Board of Elections from opening and commingling any provisional ballots until this Court can adjudicate the Relators' request for a writ of mandamus.

E. Issue such further and other relief as the Court deems appropriate.

(R. 5.)

Relators withdrew their request for a temporary restraining order and the parties agreed that motions for summary judgment would be filed by November 18, 2008, at 5:00pm. The FCBOE timely filed a motion for partial summary judgment requesting that if the Court was still going to exercise jurisdiction, that the Secretary be ordered to instruct the FCBOE that any provisional ballot application that failed to contain the signature of the voter be deemed invalid, remain unopened and not counted.[2] On November 20, 2008, the District Court granted Secretary Brunner's motion for summary judgment, denied the Plaintiffs-Relators' motion for summary judgment, and denied the FCBOE's motion for partial summary judgment. (R. 41.)

Plaintiff-Relators now appeal the District Court's removal and granting of summary judgment in this case.

SUMMARY OF THE ARGUMENT

The District Court erred in removing this case from the Supreme Court of Ohio, where Secretary Brunner failed to obtain the consent of the FCBOE for removal. The District Court also erred in realigning the parties, where the primary

[2] Pursuant to Ohio Rev. Code § 3501.11(X), Secretary Brunner broke the tie vote of the FCBOE moments after the District Court rendered its opinion and entered judgment in favor of Secretary Brunner. Secretary Brunner's position regarding the provisional ballots is now the position of the FCBOE, requiring the FCBOE to not pursue an appeal of the District Court's denial of the FCBOE's motion for partial summary judgment. Nevertheless, the FCBOE, as a party sought to be enjoined, did not consent to removal and continues to oppose removal.

purpose of the lawsuit was to compel Secretary Brunner and the FCBOE to administer the counting of provisional ballots in a manner that complied with Ohio election laws. In addition, where it lacked original subject matter jurisdiction, the District Court erred in not granting the FCBOE's motion to remand the case to the Supreme Court of Ohio.

ARGUMENT

I. STANDARD OF REVIEW

A district court's denial of a motion for remand is reviewed under the *de novo* standard. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 465 (6th Cir. 2002) (citations omitted). Removal of a case by a district court is likewise reviewed under the *de novo* standard. *Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000) (citing *Michigan Affiliated Healthcare Sys., Inc. v. CC Systems Corp. of Michigan,* 139 F.3d 546, 549 (6th Cir. 1998)).

Additionally, the existence of federal subject matter jurisdiction is also reviewed under the *de novo* standard. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868 (6th Cir. 2000) (citing *Gafford v. General Elec. Co.,* 997 F.2d 150, 155 (6th Cir.1993)). The realignment of a party by a district court also reviewed *de novo*. *In re Hashim*, 379 B.R. 912 (9th Cir. 2007) (citing *Smith v. Salish Kootenai Coll.,* 434 F.3d 1127, 1133 (9th Cir. 2006)).

II. BECAUSE THE CO-DEFENDANT FRANLIN COUNTY BOARD OF ELECTIONS' OPPOSED REMOVAL, THE DISTRICT COURT ERRED IN REMOVING THIS CASE FROM THE SUPREME COURT OF OHIO.

Removal was improper where the co-defendant FCBOE opposed the removal sought by Secretary Brunner. While a defendant may remove a state action to federal court pursuant to 28 U.S.C. § 1441, there is a rule of unanimity that is established from 28 U.S.C. § 1446. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003). The rule of unanimity "demands that all defendants must join in a petition to remove a state case to federal court." *Id.* Thus, where defendants are "expressly divided in their desire to remove," the district court must remand. *Id.* at 517.

Moreover, "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c). Further, "frank opposition to removal by a codefendant who affirmatively seeks remand within the thirty-day period satisfies the prerequisite of a motion, and empowers the district court to enforce the unanimity requirement." *Loftis*, 342 F.3d at 517.

The FCBOE did not consent to removal of this case. After Secretary Brunner filed a notice to remove, the FCBOE affirmatively opposed removal by moving for remand. Pursuant to the rule of unanimity, the District Court was required to remand the case to the Supreme Court of Ohio.

Secretary Brunner argued, and the District Court held, that the consent of Defendant FCBOE was unnecessary for removal. (*See* R. 20, Nov. 17, 2008 Order, pp. 12-13.) The District Court held that two exceptions to the rule of unanimity applied to the FCBOE in this case: (1) that the non-joining defendant – the FCBOE – had not been served with service of process at the time the removal petition was filed; and (2) that the FCBOE was merely a nominal or formal party. *See*, *Klein v. Manor Healthcare Corp.*, 1994 WL 91786 *3 (6th Cir. 1994). However, these two exceptions do not apply because (1) counsel for the FCBOE entered their appeared in this case before the Supreme Court of Ohio and (2) the FCBOE is a real party in interest and is not merely a nominal or formal party.

A. The non-service exception does not apply because counsel for the FCBOE filed an appearance in this case before the Supreme Court of Ohio and demonstrated an intent to defend the lawsuit.

The District Court erred in holding that the non-service exception applied to the FCBOE. The non-service exception should not be employed to preclude the FCBOE from opposing removal. Service should not be an issue in this case because counsel for the FCBOE filed an appearance in this case before the Supreme Court of Ohio. (*See* R. 11, Def.'s Mot. Remand, Not. of Appearance, attached as Exhibit A.) The appearance of the FCBOE's counsel demonstrated an intent to defend the case at bar and precluded the application of the non-service

exception. *See, Oliver v. Baratta*, No. 3:08 CV 1734, 2008 WL 3414140 (N.D. Ohio, Aug. 8, 2008).

The *Oliver* court addressed a similar situation to the instant case. The plaintiff in *Oliver* had challenged that because one defendant, Martin, had not been successfully served with process, Martin could not be considered for purposes of removal. In support, the plaintiff had cited the general rule that "an unserved defendant is not considered for purposes of removal." *Oliver*, 2008 WL at *2 (internal citation omitted). The court rejected the plaintiff's argument and held that "by entering a general appearance through counsel at the July 25th hearing before this Court, Martin effectively waived service of process." *Id.* The court ultimately held that the appearance, as well as Martin's consent to removal, made removal timely. *Id.*

Similar to the *Oliver* case, the counsel's appearance in this case on behalf of the FCBOE served to waive any required service of process. The FCBOE therefore must have been considered for purposes of removal. Accordingly, because counsel for the FCBOE had appeared to defend the lawsuit, the non-service exception does not apply. Secretary Brunner was therefore required pursuant to the rule of unanimity to obtain the consent of the FCBOE in order to petition for removal.

B. Consent of the FCBOE was required because the FCBOE is a real party in interest and not merely a nominal or formal party.

The District Court erred in holding that the FCBOE was merely a nominal or formal party. "[A] formal or nominal party is one who, in a genuine legal sense, has no interest in the result of the suit, . . . , or no actual interest or control over the subject matter of the litigation." *Rose v. Giamatti*, 721 F.Supp. 906, 914-15 (S.D. Ohio 1989)(internal citations omitted). However, a defendant is not merely a nominal party if there is an arguable claim stated against it and it has "a demonstrated interest in the outcome of the case." *Local Union No. 172 v. P.J. Dick, Inc.*, 253 F.Supp.2d 1022, 1026-27 (S.D. Ohio 2003). A defendant is a real party in interest if it "by the substantive law, has the duty sought to be enforced or enjoined." *Rose*, 721 F.Supp. at 914 (citation omitted).

In adjudicating a case where a party had asserted that a defendant was a nominal party, the *Local Union* court held that because the defendant may have had an "enforceable duty to arbitrate" pursuant to a collective bargaining agreement. 253 F.Supp.2d at 1027. As such, the court held that the defendant was therefore not merely a nominal party, but "one which has a demonstrated interest in the case." *Id.*

The District Court erred in holding that the FCBOE has no actual interest in the result of this lawsuit. This case concerns the counting of provisional ballots pursuant to state law. The FCBOE is the public body statutorily charged with the

obligation of counting ballots. Section 3505.183 of the Ohio Revised Code requires that "[t]he ***board*** shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code." R.C. § 3505.183(B)(1) (emphasis added).

This section also mandates, in pertinent part, that "nothing in this section shall prevent a ***board of elections*** from examining provisional ballot affirmations and additional information under divisions (B)(1) and (2) of this section to determine the eligibility of provisional ballots . . . ." R.C. § 3505.183(E)(1) (emphasis added).

As this provision of the Ohio Revised Code indicates, the FCBOE is the statutorily-charged body that has the duty of examining provisional ballots – not the Secretary of State. The Secretary may issue lawful directives that provide direction regarding interpretation, and the Secretary may, pursuant to statutory authority, break a tie vote in a board of elections. That exercise of authority does not give the Secretary the ability to ultimately examine and count the provisional ballots at issue. That duty and authority is only enforceable by the FCBOE. If anything, Secretary Brunner would be the nominal party below, not the FCBOE.

The counting of the ballots by the FCBOE is the precise duty that the Appellant-voters seek to enjoin. The Appellant-voters sought, in their third prayer

for relief in the complaint, "a writ of mandamus compelling ***Respondents*** to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter on the provisional voter affirmation . . . ." (R. 3.) (emphasis added). Again, the FCBOE has the sole authority to accept or reject provisional ballot applications. As such, the FCBOE has an actual interest in the result of the lawsuit and has the precise duty sought to be enforced by the Appellant-voters. Accordingly, the FCBOE is a real party in interest and its consent was required for removal. The FCBOE's lack of consent was fatal to Secretary Brunner's attempt at removal. As such, the District Court therefore erred in removing the case from the Supreme Court of Ohio.

III. THE DISTRICT COURT ERRED IN REALIGNING THE FCBOE AS A PLAINTIFF WHERE THE PRIMARY DISPUTE WAS BETWEEN THE APPELLANT-VOTERS AND THE GOVERNMENT ENTITIES RESPONSIBLE FOR THE ADMINISTRATION OF OHIO ELECTION LAWS.

The District Court erred in granting Secretary Brunner's motion to realign the FCBOE from a defendant/respondent to a plaintiff/relator. In her motion, Secretary Brunner relied upon the holding in *United States Fidelity and Guaranty Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992). There, the Sixth Circuit adopted a test for realignment of parties based upon the Supreme Court's general

test set forth in *City of Indianapolis v. Indianapolis Gas Co.*, 314 U.S. 63, 62 S.Ct. 15 (1941).

The Supreme Court held in the diversity jurisdiction case of *Indianapolis Gas* that there must be "a collisions of interest" between the plaintiffs and the defendants in order to confer diversity jurisdiction. 314 U.S. at 69. The Court narrowed the inquiry to determine what is "the primary and controlling matter in dispute?" *Id.* at 72. The Court further held that "[t]he rest is window-dressing designed to satisfy the requirements of diversity jurisdiction." *Id.*

In interpreting the Supreme Court's articulation of the general principle for realignment, the Sixth Circuit adopted a "primary dispute" test to determine the proper alignment of the parties. *Thomas Solvent*, 955 F.2d at 1089. There, the Court held that "despite the fact that there may be actual and substantial ancillary or secondary issues to the primary issue, the parties should be aligned in accordance with the primary issue in an action. *Id.* Further, the Court held that the inquiry is limited to the "primary dispute", "even where there is more than one dispute." *Id.* at 1090.

In this case, the primary dispute is limited to the validity of certain provisional ballots. This dispute is primary as demonstrated by the precise relief sought by the Appellant-voters. They seek to enjoin the Secretary and the FCBOE regarding these provisional ballots. That is the primary dispute.

The District Court, however, realigned the FCBOE to a plaintiff/relator, holding that the FCBOE's interests were adverse to Secretary Brunner. In so holding, the Court noted that the adverse interest derived from the fact that Matthew Damschroder, Deputy Director of the FCBOE, was the affiant in the affidavit submitted by the Relators in an initial filing, and also from advice rendered from the FCBOE's counsel regarding provisional ballots. However, these facts are secondary to the primary dispute between the Appellant-voters and the government bodies responsible for the administration of Ohio election laws. Realignment was therefore improper. Accordingly, the District Court erred in realigning the FCBOE to a plaintiff.

IV. THE DISTRICT COURT ERRED IN NOT REMANDING THE CASE TO STATE COURT, AS THE CLAIMS OF THE APPELLANT-VOTERS ARE PROPERLY RESOLVED UNDER AN INTERPRETATION OF STATE LAW, AND ABSENT ORIGINAL SUBJECT MATTER JURISDICTION, FEDERAL JURISDICATION IS NOT INVOKED.

Where it lacked jurisdiction to adjudicate the case, the District Court erred in assuming jurisdiction and not granting the FCBOE's motion to remand. Defendants may remove to a federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Relevant to this case, a district court has original jurisdiction if the case involves a federal question, where the case arises under the Constitution or laws of the United States. 28 U.S.C. § 1331.

In the context of federal question jurisdiction, "[t]he 'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542 (1987) (citing *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 9-12, 103 S.Ct. 2841, 2846-48 (1983)). Thus, the district court reviews only the complaint, and "[i]f the complaint relies only on state law, the district court generally lacks subject matter jurisdiction and the action is not removable." *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 552 (6th Cir. 2005) (internal citations omitted). Morevover, "a state law claim cannot be 'recharacterized' as a federal claim for the purpose of removal." *Loftis*, 342 F.3d at 515.

In this case, the District Court erred in removing the case and assuming jurisdiction over the proceedings. The complaint only alleged state law claims that required an interpretation of state law. The District Court erred in characterizing the complaint as stating a federal equal protection claim.

A. The claims of the Appellant-voters are only resolved upon an interpretation of state law.

This case turns solely upon the interpretation of state law and federal jurisdiction is not invoked. This case arises as an original action in mandamus under Article IV, Section 2 of the Constitution of the State of Ohio and Chapter 2731 of the Ohio Revised Code. The statutes at issue, and upon which this case

turns, are in the Ohio Revised Code. This case does not arise under federal law; it arises and turns upon the interpretation of state law. As such, federal jurisdiction is absent.

In a supplemental memorandum in support of removal, Secretary Brunner argued that this Court has jurisdiction over Relators' claims under the All Writs Act. *See generally,* 28 U.S.C. § 1651(a). It should be noted that the party seeking to remove has the burden of establishing that federal subject matter jurisdiction exists. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S.Ct. 780 (1936). "[T]he All Writs Act does not confer federal subject matter jurisdiction and, therefore, it cannot confer the original jurisdiction required to support removal pursuant to [28 U.S.C.] § 1441." *Neick v. City of Beavercreek*, 255 F.Supp.2d 773, 778 (S.D. Ohio 2003) (citing *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366 (2002)). *See also*, *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476, 118 S.Ct. 921 (1998) (holding that a prior federal court order does not "transform the plaintiff's state-law claims into federal claims").

The *Neick* court held that based upon the Supreme Court's holding in *Syngenta Crop* – "that the federal district court's retention of jurisdiction over the primary case, *i.e.,* the case in which the consent order was issued, did not confer removal jurisdiction over [a] case before it" – the defendants were precluded from

basing removal of the plaintiffs' action on the All Writs Act. *Neick*, 255 F.Supp.2d at 778 (internal citations omitted).

Based upon established authority, the District Court was not empowered under the All Writs Act to use the consent order in the *NEOCH* case as the basis of jurisdiction sufficient for removal. Nevertheless, the District Court assumed jurisdiction over the case, relying upon the holding in *EBI-Detroit, Inc. v. City of Detroit*, 279 Fed. Appx. 340 (6th Cir. 2008), as the basis for original jurisdiction over the instant action.

The Sixth Circuit held in *EBI-Detroit* that removal was proper where federal jurisdiction was invoked by allegations in the complaint that stated a claim for breach of contract by the City of Detroit, and also a claim that Detroit Mayor Kilpatrick had acted in violation of the federal order that appointed Mayor Kilpatrick Special Administrator of the Detroit Water and Sewer Department ("DWSD"). 279 Fed. Appx. at 346.

The federal court order that created the appointment arose from a lawsuit ("EPA case") where the United States sued the DWSD over not complying with the Clean Water Act. *Id.* at 342; see also, *United States v. City of Detroit*, 476 F.Supp. 512 (E.D. Mich. 1979). The parties in the EPA case entered into a consent decree that created a schedule for DWSD's compliance with the requirements of the Clean Water Act. *EBI-Detroit*, 279 Fed. Appx. at 342. The district court with

jurisdiction over the consent decree would subsequently appoint the mayor of Detroit as "Special Administrator" of the DWSD in order to ensure compliance with the consent decree. *Id.* at 342-43.

In deciding whether federal jurisdiction was invoked in *EBI-Detroit*, the Sixth Circuit held that "a claim 'arises under' federal law when federal law provides a right to relief." *Id.* at 345-46. As applied to EBI, the Court held that "[f]ederal law provides EBI's right to relief here because EBI's complaint alleges that Kilpatrick violated the federal court order appointing him Special Administrator of the DWSD." *Id.* at 346. The Court therefore held federal jurisdiction was invoked and that removal was proper. *Id.*

In applying the holding in *EBI-Detroit* to the instant case, the District Court held that "[a]s in *EBI-Detroit*, where, as here, the plaintiffs' complaint alleged that the defendant had violated a federal court order, removal is proper." (R. 20, p. 8.) But while relying on the holding in *EBI-Detroit*, the District Court distinguished the instant case from the Sixth Circuit's holding in *City of Warren v. City of Detroit*, 495 F.3d 282 (6th Cir. 2007).

In *Warren*, the City of Warren filed a lawsuit in state court against the City of Detroit. In its complaint, Warren alleged a breach of contract claim as well as a violation of Michigan law regarding water rates. Detroit removed the case to the district court, which asserted that the case was properly removed under 28 U.S.C. §

1441(b) where Warren had sought relief that had "an adverse effect upon or was inconsistent with the federal consent decree." *Warren*, 495 F.3d at 285. The consent decree identified in *Warren* was the same order at issue in *EBI-Detroit*.

The Sixth Circuit reversed the district court's denial of Warren's motion to remand. It held that a "substantial, disputed question of federal law" was not a required element of Warren's breach of contract and state law claim. 495 F.3d at 287. The Court recognized further that neither claim raised a question of federal law "because the consent judgments entered in the EPA case lack the power to supersede Warren's contractual rights or the Michigan statute." *Id.* (citing *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992)). While the Court acknowledged a district court's authority to enforce the consent judgment at issue, the Court made the distinction that "the source of the court's authority to require the parties to act is the parties' acquiescence, not rules of law." *Warren*, 495 F.3d at 287.

The *Warren* court ultimately held that Warren's rights under state law remained enforceable because Warren was not a party to the consent judgments. *Id.* Therefore, because Warren's complaint did not assert a claim created under federal law, the Court held that the district court erred in not remanding the case to state court. *Id.* at 289.

In contrasting this case with *Warren*, the District Court held that the instant case raised a "substantial disputed question of federal law on the face of Plaintiffs' Complaint. Undoubtedly, the resolution of the allegations in the Complaint necessarily require the deciding court to interpret this Court's federal orders in the *NEOCH* Case." (Rec. Entry 20, p. 9.) To the contrary, the claims asserted in this case do not require interpretation of the consent order in the NEOCH case. They require an interpretation of Ohio law.

Further, this case is more similar to *Warren* than *EBI-Detroit*. Like *Warren*, the plaintiff voters in this case were not seeking to enforce a federal court order or otherwise establish a violation of federal law – they were seeking to enforce Ohio election laws. Also, the plaintiff voters in this case were not parties to the consent order entered into by the plaintiff organizations and Secretary Brunner in the *NEOCH* case; thus, just as the plaintiff in *Warren*, the plaintiff voters are not bound by the order.

Moreover, as in *Warren*, there is no substantial, disputed question of federal law that is a required element of the plaintiff-voters' mandamus action. Rather, the plaintiff-voters were required to establish that the actions of Secretary Brunner and the FCBOE were not consistent with Ohio law.

In contrast to the plaintiff in *EBI-Detroit*, the plaintiff voters are not seeking to prove that Secretary Brunner and the FCBOE violated federal law. In *EBI-*

Detroit, the Court held that because EBI had alleged in its complaint that Detroit Mayor Kilpatrick had violated federal law, "EBI's 'right to relief' against Kilpatrick turns on whether Kilpatrick exceeded the authority granted to him by the federal court order." 279 Fed. Appx. at 346. But in the instant case, the plaintiff voters' right to relief turns on whether the actions of Secretary Brunner and the FCBOE would violate Ohio election law, not the federal consent order. In EBI-Detroit, the governing law was the federal consent order in the EPA case; but in the case at bar, the governing law is Ohio law. As such, this case is distinguishable from *EBI-Detroit*, and comports more with *Warren*.

Because the federal consent order in the NEOCH case does not provide original jurisdiction, the District Court was without jurisdiction in this case. Absent jurisdiction, the District Court was required remand this case to the Supreme Court of Ohio.

B. The complaint did not state a cause of action under the Equal Protection Clause.

The District Court also erred in holding that the complaint specifies an equal protection claim sufficient to confer original jurisdiction. First, such a holding is contrary to the well-pleaded complaint rule. *See*, *Taylor*, 481 U.S. at 63. The complaint does not expressly state a cause of action under the Equal Protection Clause of the Fourteenth Amendment.

Additionally, the state law claims in the complaint cannot be characterized as an equal protection claim for the purposes of removal. While paragraphs four and five of the complaint allege a harm of the claimant's vote being diluted "as a result of the misdirected instructions of the Secretary of State to count provisional ballots," such allegations are more properly characterized as a demonstration of standing and not necessarily stating a claim of a denial of equal protection. One allegation, such as this, should not be converted into an equal protection claim. And the District Court's subsequent analysis beyond the complaint and comparison of the instant case with the *NEOCH* case was in error. The complaint states a claim that arises solely under state law and should not have been recast as a federal equal protection claim.

CONCLUSION

For the foregoing reasons, the FCBOE requests that the Court REMAND the case to the District Court and ORDER the District Court to remand the case to Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of to Fed. R. App. P. 32(A)(7)(B), such that it contains 5,626 words according to the word processing system. This brief was created and formatted using MS Word 2003.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon all counsel of record by means of the Court's electronic filing system this 21st day of November, 2008.

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