

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, :

v. :

JENNIFER BRUNNER, :
Secretary of State of Ohio, :

Case No. 2:08CV913
JUDGE MARBLEY
MAGISTRATE JUDGE KING

Defendant.

:
:

STATE EX REL. SKAGGS, et al.

Relators-Plaintiffs,

vs.

Case No. 2:08-cv-1077

JENNIFER BRUNNER
Secretary of State of Ohio

JUDGE Frost

And

FRANKLIN COUNTY BOARD OF ELECTIONS,

Respondent-Defendants.

MOTION TO CONSOLIDATE

Pursuant to Fed. R. Civ. P. 42(a), Defendant Secretary of State Jennifer Brunner moves for consolidation of *State ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077 removed to this Court on November 14, 2008, with *Ohio Republican Party v. Brunner*, No. 2:08-cv-931 and *Northeast Ohio Coalition For The Homeless v. Brunner*, No. C2-06-896, which were previously consolidated on November 6, 2008. Consolidation is appropriate because these cases present identical legal issues, and necessary in order to avoid the risk of inconsistent legal rulings in the short time remaining for the counting of ballots in the 2008 general election. A memorandum in support is attached.

Respectfully submitted,

NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianesse

Richard N. Coglianese (0066830) Trial Attorney
Damian W. Sikora (0075224)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
rcoglianese@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax
Attorneys for Defendant
Ohio Secretary of State Jennifer Brunner

MEMORANDUM IN SUPPORT

I. The Two Cases Present Identical Legal Issues.

Consolidation is appropriate “when actions involving a common question of law or fact are pending before the court.” Fed. R. of Civ. P. 42(a). In addition to ordering consolidation, the court “may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

The Complaint in *Skaggs* concerns the manner in which the Franklin County Board of Elections implements Secretary of State Directives 2008-101 and 2008-103, governing the processing and county of provisional ballots. On October 24 and 27, this Court issued orders specifically adopting Directive 2008-101 and restating the language of Directive 2008-103, in the consolidated cases of *Ohio Republican Party v. Brunner*, No. 2:08-cv-931, and *Northeast Ohio Coalition For The Homeless v. Brunner*, No. C2-06-896, (“NEOCH/ORP”).

The Plaintiffs in *Skaggs* allege that an attorney in the Secretary of State’s office sent an email informing the Franklin County Board of Elections to count provisional ballots if the board could verify a voter’s signature although the voter may have failed to print his or her name on the provisional ballot envelope. There is no specific requirement in Ohio law requiring an individual voter to print his or her name on their provisional ballot envelope. Rather than using the provisional ballot envelope prescribed by the Secretary of State, however, the Franklin County Board of Elections created its own envelope-form for use in the 2008 general election. The Franklin County envelope-form states that a voter is required to print his or her own name on the form. Had the board used the Secretary’s prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign. Because Franklin County

chose to develop its own form, however, it also chose to mandate that the individual voter fill out his own name in addition to signing the form.

The *Skaggs* Plaintiffs seek to disqualify what may be hundreds or more provisional ballots because the voters did not print their name on the envelope, even though Ohio law does not require voters to do so. The manner in which provisional ballots are counted is already subject to orders from this Court in *NEOCH/ORP*, however. On October 27, 2008, Judge Sargus issued an order adopting Directive 2008-101 and stating that “an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot.” See Order (Oct. 27, 2008), *NEOCH v. Brunner*, No. C2-06-896, attached as Ex. A.

The subject matter and allegations brought by the Plaintiffs in *Skaggs* are based in the identical issues of law and fact as those in *NEOCH/ORP*. Under these circumstances, consolidation is certainly appropriate under Rule 42(a). Trying the cases together would avoid the unnecessary expenditure of judicial resources and eliminate the risk of inconsistent rulings regarding the counting of ballots. Furthermore, there is little to no risk of prejudice to Plaintiffs if these cases are consolidated. In contrast, 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 Complaint on the ninth day after the election and only two days before the official canvass begins, leaving inadequate time for the orderly adjudication of new claims regarding the counting and tabulation of votes. Specifically, the boards of elections may begin their official

canvass by Saturday November 15, 2008, and *must* do so by Wednesday, November 19, 2008, at the latest. This Court, by way of its handling of *NEOCH/ORP* is already intimately familiar with Directive 2008-101 and the manner in which provisional ballots are cast and counted. Given the time-sensitive and fact-specific inquiry of the *Skaggs* Plaintiffs' 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. This situation 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 *State ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077, with *Northeast Ohio Coalition For The Homeless v. Brunner*, No. C2-06-896, and *Ohio Republican Party v. Brunner*, No. 2:08-cv-913.

Respectfully submitted,

NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianese
Richard N. Coglianese (0066830) Trial Attorney
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Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
rcoglianese@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax
Attorneys for Defendant
Ohio Secretary of State Jennifer Brunner

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 14th day of November, 2008.

/s Richard N. Coglianesse