

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

<p>THE NORTHEAST OHIO COALITION FOR THE HOMELESS, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>JON HUSTED, in his official capacity as Secretary of State of Ohio, <i>et al.</i>,</p> <p>Defendants.</p>	<p>CASE NO. 2:06-cv-896</p> <p>JUDGE ALGENON MARBLEY</p>
<p>Plaintiffs' Emergency Motion for Clarification of October 26, 2012 Order Regarding Scope of Section III(5)(b)(vii) of the Consent Decree</p>	

Plaintiffs respectfully move on an emergency basis for the Court to clarify its October 24, 2012 Order and October 26, 2012 Opinion and Order excising Section III(5)(b)(vi) of the Consent Decree relating to certain “deficient affirmation” provisional ballots. Specifically, Plaintiffs request the Court clarify that incomplete or improperly completed provisional-ballot forms that are deficient because certain form-of-identification information that *poll workers* are *statutorily* required to provide is missing or incorrect remain protected by Section III(5)(b)(vii) of the Decree, which protects voters against *poll workers’* abdication of their responsibility to complete or properly complete the provisional-ballot form.

This immediate clarification is important because “Step 2” of the Provisional Ballot Affirmation Form designed by the Secretary (Form 12-B), which is currently being used throughout Ohio, purports to require the *voter*, not the poll worker, to write down the type of identification proffered by the voter—even though that obligation unambiguously rests squarely with the poll worker under the Ohio governing statutes. *See* Ohio Rev. Code §§ 3505.181(B)(6) & (7) and

3505.182. Plaintiffs sought to confirm their understanding that provisional ballots with incomplete or incorrectly completed identification information are protected under Section III(5)(b)(vii) of the Decree with counsel for the Secretary of State. *See* Chandra Decl., Ex. 1. At the time of the filing of this motion, however, even after leaving a follow-up message, Plaintiffs had not received the requested confirmation. Chandra Decl. ¶ 4. Accordingly, to avoid any confusion in the county boards' counting of provisional ballots under the Decree, Plaintiffs respectfully request that this Court issue a clarifying order confirming that any incomplete or incorrect completion of Step 2 of the Provisional Ballot Affirmation Form is poll-worker error that continues to be covered by the protections of Section III(5)(b)(vii) of the Decree.

Plaintiffs also respectfully request the Court set a briefing schedule that enables this issue to be fully resolved, and any resulting instruction or directive communicated to the county boards of elections, before the boards begin the process counting provisional ballots cast on Election Day, November 6, 2012, at public meetings held between November 17 and 21, 2012.

**Memorandum of Law in Support of Plaintiffs' Emergency Motion for Clarification of
October 26, 2012 Opinion and Order Regarding Scope of Section III(5)(b)(vii) of the
Consent Decree**

INTRODUCTION

Plaintiffs respectfully request this Court clarify its October 24, 2012 Order and October 26, 2012 Opinion and Order to confirm the scope of Section III(5)(b)(vii) of the Consent Decree and, specifically, to confirm that a provisional-ballot form that has incomplete or improperly completed information regarding the type of identification proffered by a voter should be counted pursuant to this section of the decree because, as acknowledged by Defendants' counsel at oral argument and clearly established in Ohio law, it is the poll worker's obligation—not the voter's—to record such

information. This clarification is necessary to ensure that the Secretary and the boards of elections have clear and uniform direction regarding the counting of provisional ballots in the upcoming election.

BACKGROUND

I. This Court's Order regarding the Decree's protections for deficient provisional-ballot affirmations.

In this Court's October 26, 2012 Opinion and Order, the Court explained that the Decree, in Section III(5)(b), included two provisions regarding incomplete provisional-ballot affirmations.

They are as follows:

- vi. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error;
- vii. The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional ballot affirmation form, except for reasons permitted by the governing statute.

The Court ordered that Section III(5)(b)(vi) be removed from the Decree. It noted, however, that “[c]ritically, 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. . . . Directive 2012-01, which Secretary Husted issued on January 4, 2012, expressly instructed county boards of election that provisional ballots are not to be rejected if the poll worker fails to fill out his or her portion of the provisional ballot envelope.” Oct. 26, 2012 Op. and Order, Slip. Op. at 20-21 (internal citation omitted).

The instant motion seeks clarification of the scope of Section III(5)(b)(vii) of the Decree as it relates to ballot affirmation forms that have incomplete or incorrectly completed information regarding the type of identification proffered by the voter to poll workers.

II. Ohio law requires election officials—and not voters—to record the type of identification a voter provides and to indicate whether the voter needs to provide any additional information to the board of elections.

Ohio Rev. Code § 3505.181(B)(6) provides that, once a voter casting a provisional ballot proffers identification, “the appropriate *local election official shall record* the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot” (Emphasis added.) Section 3505.181(B)(7) further provides that when a voter casts a provisional ballot, “the *election official shall indicate*, on the provisional ballot verification statement . . . , that the individual is required to provide additional information to the board of elections” (Emphasis added.)

The Ohio Revised Code also sets forth a provisional-ballot-affirmation form to be printed on provisional ballot envelopes, which includes a “Verification Statement” to be completed and signed by the poll worker. Ohio Rev. Code § 3505.182. This Verification Statement confirms that it is the *poll worker*—not the voter—who is required to record the type of identification (if any) a voter proffers. *See id.* (Verification Statement listing nine different categories of identification provided by voter, with instructions that “*election official must check* the following true statement concerning identification provided by the provisional voter, if any”) (emphasis added). It further confirms that it is the poll worker’s duty, not the voter’s, to specify what additional identification or information, if any, the voter is required to provide to the elections board within the ensuing ten days. *See id.* (Verification Statement providing: “If applicable, *the election official must check* the following true statement concerning additional information needed to determine the eligibility of the provisional voter.”) (emphasis added).

By imposing such affirmative-verification duties on election officials, Ohio law ensures that any questions regarding a voter’s identification are resolved on the spot or, consistent with due

process, the voter is informed that he or she needs to provide additional information to the board of elections. This protects the integrity of the voting process, and provides a reasonable opportunity to resolve deficiencies.

III. The Secretary's redesigned provisional-ballot-affirmation form (Form 12-B) purports to impose on voters the poll worker's duty to verify the type of identification proffered.

Despite the fact that the Ohio Revised Code provides a statutory provisional-ballot-affirmation form, Ohio Rev. Code § 3505.182, the Secretary redesigned and prescribed as mandatory "Form No. 12-B," entitled "Provisional Ballot Affirmation" (Chandra Decl., Ex. 2.) This form is divided into two sections: one that the voter is requested to complete (labeled "MANDATORY INFORMATION REQUIRED FOR YOUR BALLOT TO COUNT"), and one for the election official to complete. *Id.*

The section for the voter to complete is broken into 3 steps. "Step 1" requires the provisional voter to print his or her full name. *Id.* And "Step 3" asks the voter to sign the sworn statement that he or she is eligible to vote in the election. *Id.* Both of these steps are consistent with information provisional voters are required to provide under Ohio Rev. Code §§ 3505.181(B)(2) and 3505.182.

"Step 2" covers all forms of identification a voter may proffer to a poll worker. It requires the voter to provide the last four digits of his or her social-security number; to write his or her full eight-digit Ohio driver's license number; or to "show . . . your precinct election official one of the forms of identification listed below" and to check a box indicating which one was shown, or to "complete Form 10-T" (with no explanation of what Form 10-T is). *Id.* It then identifies various types of potential documentary identification. Step 2 of the Secretary's Form states that if a provisional voter fails either to show one of the listed forms of identification or to complete Form 10-T, "the board of elections will conclude that you did NOT show ID to your precinct election

official and you must show ID at the board of elections during the 10 days after the election for your vote to be eligible to be counted.” *Id.*

The poll worker’s portion of Form 12-B contains no place for the poll worker to record information regarding identification proffered by the voter; only Step 2 of the voter’s section of the form provides space to record this information. Ohio law, however, does not require voters to record any of this information in order to have their ballot counted. Instead, as discussed above, it is the poll worker’s duty to record the type of identification proffered or to record the last four digits of the voter’s Social Security (O.R.C. §§3505.181(B)(6), 3505.182), and to inform voter if he or she needs to provide additional information to the county board. *Id.* §§ 3505.181(B)(7), 3505.182.¹

IV. Plaintiffs sought confirmation from the Secretary of State regarding the counting of provisional ballots with incomplete or incorrectly completed identification information in “Step 2” of the provisional-ballot-affirmation form (Form 12-B)

At the October 24 hearing, counsel for Defendants correctly represented to the Court that recording information regarding a voter’s proffered identification is the poll worker’s responsibility and falls within Section III(5)(b)(vii) of the Decree:

Mr. Epstein: [Plaintiffs’ counsel] suggested to you, for example, that there might still be poll worker error because there is an obligation to record on the form the mode of identification used, and, if that’s missing, that’s a defect in the ballot. **But that scenario is not covered by the provision we’re talking about because, as they say, the obligation to write down the identifying information is imposed upon the poll worker, not upon the voter. In Section 7 it says that we won’t invalidate ballots based upon the poll worker’s failure to write something down. So we’re not talking about that scenario.** That scenario, in fact, doesn’t even deal with an

¹ By failing to provide a space for the poll worker to record that he or she has indeed checked the identification provided and informed the voter whether he or she needs to provide additional information to the county board, Form 12-B effectively eliminates the paper trail that would allow for an assessment of whether the poll workers fulfilled *their* statutory obligation to record the identification information. For example, if a voter has not written the last four digits of his or her Social Security number on the form, but has furnished another form of identification to the poll worker, Form 12-B provides no way for a poll worker to record that such identification was furnished, although the *statute* requires the *poll worker* to do so.

affirmation that is deficient because it is lacking a printed name or a signature, which is all that [Consent Decree Section III(5)(b)(vi)] is talking about.²

The poll worker's obligation to record this information to which Defendants' counsel referred at argument is of course that set forth in Ohio Rev. Code §§ 3505.181(B)(6) & (7) and 3505.182.

Based on the representation of counsel and the clear statutory duty of poll workers to record voters' Social Security number, driver's license number, or other form of identification proffered, Plaintiffs' counsel wrote to the Secretary's attorneys and requested confirmation that the Secretary would, under Section III(5)(b)(vii) of the Decree and Directive 12-01, instruct county boards of elections that provisional ballots may *not* be rejected on the grounds that "Step 2" of the Provisional Ballot Affirmation Form is incomplete or incorrectly completed. Chandra Decl., Ex. A. Plaintiffs asked the Secretary's counsel to respond by noon on October 29, 2012.

As of the time of the filing of this motion, Plaintiffs' counsel had not received a response from the Secretary of State. Chandra Decl. ¶¶ 3-4.

ARGUMENT

Plaintiffs seek clarification of this Court's October 26, 2012 Order and Opinion and the scope of the Consent Decree's remaining protection against disqualification of provisional ballots when a poll worker does not complete or properly complete the provisional-ballot-affirmation form. Specifically, Plaintiffs request that the Court clarify that, consistent with Ohio law and the representation of Defendants' counsel, Section III(5)(b)(vii) of the Decree prevents the disqualification of a provisional ballot on the basis that information regarding the type of identification proffered by a voter in Step 2 of Form 12-B is incomplete or incorrectly completed, because it is the poll worker's, not the voter's, duty to record such information.

² Oct. 24 Hrng. Tr. at 50:5-50:20 (emphasis added); *see also id.* at 60:3-11.

Based on Ohio Rev. Code §§ 3505.181(B)(6)-(7) and 3505.182, and Defendants' acknowledgement that "the obligation to write down the identifying information is imposed upon the poll worker" and that Section III(5)(b)(vii) should apply when a "poll worker fails to write something down," it is clear the Decree must be construed to prevent the disqualification of votes cast in provisional-ballot forms with incomplete or incorrectly completed sections regarding the identification proffered—regardless of the fact that the Secretary has designed a form that purports erroneously to place that obligation on the voter.

Nothing in the Sixth Circuit's decision in *NEOCH v. Husted*, ___ F.3d ___, 2012 WL 4829033 (6th Cir. Oct. 11, 2012), is counter to the clarification Plaintiffs request. The Sixth Circuit held that a voter's failure to print his or her name or to sign his or her ballot form—i.e., completion of Steps 1 and 3 of the uniform Provisional Ballot Affirmation Form—did not constitute poll-worker error because "Ohio law does not task poll-workers with quality control of ballot affirmations." *Id.* at *16. By contrast, the court explained, election officials *are* required to "record the type of identification provided, the social-security-number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot." *Id.* (quoting Ohio Rev. Code § 3505.181(B)(6)). Thus, as the Secretary's counsel acknowledged, when an election official fails to record this information that they are statutorily mandated to record, ballots that consequently are incomplete or incorrectly completed fall within Decree Section III(5)(b)(vii)'s protections.

Clarification is necessary in advance of county boards' counting of provisional ballots cast in the upcoming election because county boards that are analyzing provisional ballots for deficiencies

may not realize that a failure to complete or incorrect completion of “Step 2” falls within the protection of Section III(5)(b)(vii) of the Decree, unless the Secretary so instructs them.³

In the District Court’s October 26, 2012 Opinion and Order, the Court explained that, like Section III(5)(b)(vii) of the Decree, the Secretary’s Directive 12-01 also guards against rejection of provisional ballots when a poll worker fails to complete or incorrectly completes the ballot-affirmation form. Oct. 26, 2012 Op. & Order at 20-21. Indeed, Directive 12-01, which applies to all provisional voters, not just Social-Security-number voters, currently provides only for disqualification of ballots that are missing printed names or signatures, and not for disqualification of ballots with incomplete or incorrectly completed information regarding identification. Thus, there should be no concern with any potential disparate treatment of consent decree and non-consent decree voters, as Directive 2012-01 is consistent with the requested clarified scope of Section III(5)(b)(vii) of the Decree.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court clarify that Section III(5)(b)(vii) of the Consent Decree requires the Secretary and the county boards of elections to count otherwise valid votes cast by lawfully registered voters in provisional-ballot envelopes where “Step 2” of the Secretary’s Form 12-B is incomplete or incorrectly completed and, further, order the Secretary to provide instructions on such clarification to the county boards of elections before the time boards must begin counting provisional ballots cast in the November 6, 2012 election.

³ Before the Court’s October 26, 2012 Order, voters voting provisionally on Election Day using the last four digits of their social-security numbers were protected both by Section III(5)(b)(vi) and Section III(5)(b)(vii) against having their votes discarded based on deficiencies in their ballot affirmation forms. Thus, that Form 12-B erroneously purports to shift the burden to record identification information to the voter posed less of a concern. With Section III(5)(b)(vi) no longer in place, however, clarification of the scope of Section III(5)(b)(vii) in light of Form 12-B is necessary.

Dated: November 1, 2012

Respectfully submitted,

/s/ Subodh Chandra

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CERTIFICATE OF SERVICE

I certify that on November 1, 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

One of the Attorneys for Plaintiffs NEOCH and SEIU