



Clauses of the Fourteenth Amendment. Specifically, Directive 2012-54 now, for the first time, *orders* all county boards of elections to *reject* any provisional ballot where *the voter* has not completed the section of the provisional ballot affirmation form (Form 12-B) recording the voter identification provided to the poll worker, despite the fact that this responsibility is expressly “task[ed]” to the poll worker – not the voter. *NEOCH v. Husted*, \_\_F.3d \_\_, 2012 WL 4829033 at \*16 (6th Cir. Oct. 11, 2012). This Directive is a 180-degree turn from the previous Directive governing the counting of provisional ballots (No. 2012-01), that, as this Court relied upon in its October 26, 2012 opinion and order, did *not* require these ballots’ rejection. 10/26/12 Order at 19-20. And it is also a 180-degree turnaround from the Secretary’s representation to this Court. 10/24/12 Tr. at 50:5-20. As the Sixth Circuit and this Court have recognized, and as the Secretary argued to this Court on October 24, 2012, the duty to record a voter’s identification information lies with the *poll worker*, not the voter. *NEOCH v. Husted*, \_\_F.3d \_\_, 2012 WL 4829033 at \*16 (6th Cir. Oct. 11, 2012); 10/26/12 Order at 19-20; 10/24/12 Trans. at 50:5-20. To provide that a voter – not the poll worker – has the responsibility for recording identification information on a complicated form (in direct contravention of the applicable statute) and then to disqualify the ballot if the voter does so incorrectly, as the Secretary has now done, violates the parties’ understanding of the Consent Decree, Ohio law, and the Constitution. Plaintiffs have no choice, given the late hour of the Secretary’s change of position – directly contrary to his representations to this Court just days before – but to immediately move for emergency relief applicable to the provisional ballots cast in this election.

Prior to the issuance of Directive 2012-54, Plaintiffs in *NEOCH v. Husted* moved on an emergency basis for clarification of this Court’s October 26, 2012 Order and to confirm that Section III(5)(b)(vii) of the *NEOCH* Consent Decree protects against the disqualification of

provisional ballots cast by SSN-4 voters that have incomplete or incorrectly completed voter identification information. *NEOCH* Dkt. 346 (filed Nov. 1, 2012). As explained in that motion, the *NEOCH* Plaintiffs were concerned that the Secretary would order county boards of elections to reject these ballots, despite the Secretary's representation to the Court that Section III(5)(b)(vii) of the Decree prohibited such rejection. Plaintiffs' concern was prompted by the Secretary's adoption for this election of a Provisional Ballot Affirmation Form (Form 12-B) that wrongly purports to place on the voter, not the poll worker, the burden of recording the identification information. *Id.* at 8-9. Prior to filing the motion for clarification, the *NEOCH* Plaintiffs asked the Secretary to confirm that these ballots, consistent with his representations to this Court, would be counted, but never received any response to that request. *Id.* at 6-7; *NEOCH* Dkt. 346-1 ¶¶3-4.

Instead, confirming Plaintiffs' fears, the Secretary has now – on the eve of the election – ordered county boards of elections to reject and not count *any* provisional ballot where the voter has incorrectly filled out or failed to fill out the section regarding identification proffered to the poll worker, even though this is information that *poll workers*, not voters, are statutorily required to complete. Tellingly, the Secretary issued Directive 2012-54 only after this Court removed the Consent Decree's provision prohibiting disqualification of ballots based on a voter's failure to complete the provisional ballot form when that failure is attributable to poll-worker error, and only after the Secretary's counsel assured this Court that any concerns regarding incomplete identification information would implicate poll-worker responsibilities and thus would not fall under Section III(5)(b)(vii) of the Decree. The Secretary should be judicially estopped from changing course now.

Directive 2012-54 conflicts with Section III(5)(b)(vii) of the Decree, which – properly construed – does not permit the disqualification of ballots on the basis that the identification information the poll worker is statutorily obligated to record is incomplete. The Directive also conflicts with the Sixth Circuit’s and this Court’s rulings that voters should not be disenfranchised as a result of a poll worker’s failure to perform his or her duties.

This Court’s October 26, 2012 decision on remand from the Sixth Circuit, which rejected the *NEOCH* Plaintiffs’ request for statewide relief with respect to incomplete ballot affirmations and instead granted Ohio’s motion to modify the consent decree to eliminate the voter-error provision, rested on the Court’s conclusion that, *at that time*, no ballots would be rejected because of poll-worker rather than voter error in completing affirmations. Relying on the Secretary’s representations, this Court stated that “critically,” the ballots that were incomplete because a *poll worker* failed to complete requisite information, such as those at issue here, would not be rejected under Consent Decree Section III(5)(b)(vii) and Directive 2012-01. 10/26/12 Order at 19. That is no longer true given the Secretary’s eleventh-hour new Directive.

In light of these factual developments, the *NEOCH* Plaintiffs respectfully move on an emergency basis for clarification of the Court’s October 26, 2012 Order, that under Section III(5)(b)(vii), provisional ballots may not be disqualified because the ballot form information regarding the identification proffered by the voter is incomplete, unless the board of elections first has determined that the voter failed to provide poll workers with the last four digits of his or her Social Security number or proffer other identification acceptable under Ohio law, and that the voter declined to complete a Form 10-T affirmation, and to modify the Consent Decree in *NEOCH v. Husted* to extend these protections to all provisional voters. The *SEIU Local 1* Plaintiffs move for a preliminary injunction for the same relief, enjoining Directive 2012-54 to

the extent it requires that provisional ballots be disqualified on the basis that the ballot form's information regarding the identification proffered by a voter is incomplete or incorrectly completed, and the board of elections has not determined that the voter failed to proffer acceptable identification or the last four digits of the voter's Social Security number, and declined to complete Form 10-T.

County boards of elections will begin counting provisional ballots cast on Election Day, November 6, 2012, at public meetings held between November 17 and 21, 2012, and their staff may begin reviewing ballots for eligibility as soon as Wednesday, November 7, 2012. *See* Directive 2012-54 at 2 (attached as Ex. A to Chisholm Decl.). Accordingly, Plaintiffs also respectfully request the Court set a briefing schedule on this motion that parallels that set on the *NEOCH* Plaintiffs' November 1, 2012 motion, with Defendants' response due on November 6, 2012, and a reply due on November 8, 2012. A supporting memorandum of law accompanies these motions.

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Respectfully submitted,

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## MEMORANDUM OF LAW

### INTRODUCTION

Plaintiffs seek emergency clarification of this Court's October 26, 2012 Order issued in the related cases of *NEOCH v. Husted* and *SEIU Local 1 v. Husted*, and emergency relief in light of the Secretary of State's issuance of Directive 2012-54 at 6:00 p.m. on the Friday before election day. Chisholm Decl., Ex. A.

Secretary Husted issued Directive 2012-54 ostensibly to implement this Court's and the Sixth Circuit's recent orders regarding the November 2012 election. *Id.*, Ex. A at 1. Directive 2012-54, however, makes an extraordinary and unconstitutional change to Ohio's established rules for counting provisional ballots not required by, and indeed directly contrary to, those court orders. According to Directive 2012-54, county boards of elections are now required to *reject* provisional ballots that have incomplete information regarding identification proffered by voters – despite the fact that under the relevant statute the duty to record this information rests squarely and unambiguously with *poll workers*, and *not* voters. *Id.*, Ex. A at 3. Before Friday evening, the counting of provisional ballots was governed by Directive 2012-01, which did not allow for the disqualification of provisional ballots for this reason. *Id.*, Ex. B; *see also* 10/26/12 Order at 19-20. The Secretary's eve-of-election instructions to reject these otherwise valid votes cast by lawfully registered voters should not be permitted.

This eleventh-hour change disenfranchising Ohio voters is contrary to the representations of the Secretary's counsel to this Court, inconsistent with the decisions of this Court and the Sixth Circuit, and violates the Constitution. 10/24/12 Trans. at 50:5-20; 10/26/12 Order at 19-20; *NEOCH v. Husted*, \_\_\_ F.3d \_\_\_, 2012 WL 4829033 at \*16 (6th Cir. Oct. 11, 2012).

There can be absolutely no dispute that *poll workers*, and not voters, are responsible for recording on provisional ballot forms information about identification proffered by voters. O.R.C. §3505.181(B)(6); *id.* §3505.182. The Sixth Circuit acknowledged the duty of “election officials to ‘record the type of identification provided, [or] the social security number information.’” *NEOCH*, 2012 WL 4829033 at \*16 (quoting O.R.C. §3505.181(B)(6)). The Secretary in support of eliminating a different sub-section of the Decree, expressly assured this Court that recording identification information was a *poll worker’s* duty, and therefore that ballots with incomplete identification information would be protected from disqualification under Section III(5)(b)(vii) of the *NEOCH* Consent Decree. 10/24/12 Trans. at 50:5-20.

This Court, in its October 26, 2012 Order in these related cases, relied on this representation, and the fact that both the Decree and Directive 2012-01 protected provisional ballots against disqualification in the event they were incomplete as a result of a poll worker’s failure to fill out required information. 10/26/12 Order at 19-20. That these protections would remain in place was “critical[]” to the Court’s decision to deny the *NEOCH* Plaintiffs’ request to extend the protections of Section III(5)(b)(vii) to all voters, and to grant the Secretary’s motion to remove Section III(5)(b)(vi) from the Decree, a section the Secretary contended was limited to instances of *voter* mistakes in printing or signing the ballot form. *Id.*; 10/24/12 Trans. at 50:5-20. This factual predicate for the Court’s decision is, however, no longer true: incomplete ballot affirmations that result from *poll-worker* not voter error will result in the rejection of votes under Directive 2012-54.

As set forth in *NEOCH* Plaintiffs’ Motion for Clarification filed November 1, 2012, Plaintiffs requested confirmation from the Secretary that, consistent with representations of his counsel and this Court’s order, he would instruct county boards of elections to count otherwise

valid provisional ballots if they had incomplete identification information on the form. NEOCH Dkt. 346 at 6-7; NEOCH Dkt. 346-1 ¶¶3-4 & Ex. 1. Plaintiffs explained that such confirmation was necessary because the Secretary's Provisional Ballot Affirmation Form (Form 12-B) differed from the statutory form, and improperly purported to place on the voter the burden of recording identification information. NEOCH Dkt. 346-1, Ex. 1. The Secretary, however, refused to provide any confirmation in response to Plaintiffs' request. *Id.* ¶¶3-4. Instead, he responded by *reversing his position* regarding the counting of these ballots and – in a Directive he claimed was necessary only to implement this Court's orders – instructed county boards to disqualify ballots that are deficient *only because they lack information the poll workers are required to complete*. Chisholm Decl., Ex. A at 3.

In light of these factual developments, the *NEOCH* Plaintiffs move this Court to clarify its October 26, 2012 Order that, under Section III(5)(b)(vii), provisional votes may not be disqualified because the ballot form's information regarding the identification proffered by the voter is incomplete, and to modify the Consent Decree to extend Section III(5)(b)(vii)'s protections to all provisional voters. The Plaintiffs in *SEIU Local 1 v. Husted* respectfully move for a preliminary injunction providing the same relief.

## **BACKGROUND**

### **A. The Sixth Circuit's and this Court's Decisions Regarding Poll-Worker Error and Deficient Provisional Ballot Affirmations**

On October 11, 2012, the Sixth Circuit remanded to this Court the question of the constitutionality and proper scope of the Decree's protections for flawed provisional ballot affirmation forms. *NEOCH*, 2012 WL 4829033 at \*19-20. The Sixth Circuit noted that, in light of its decision to set aside this Court's August 27, 2012 ballot affirmation preliminary injunction, the continued protection for SSN-4 provisional voters against disqualification for failure to

complete ballot affirmations that resulted from poll-worker error was, under *Bush v. Gore*, 531 U.S. 98 (2000), likely unconstitutional disparate treatment between those voters protected by the Decree, and all other Ohio provisional voters. *Id.* Accordingly, the Sixth Circuit remanded to this Court to address and remedy this constitutional concern in the context of a motion to modify the Decree. *Id.* at \*20.

This Court's October 26, 2012 Order resolved the parties' competing motions for modification of the Consent Decree. 10/26/12 Order at 17-21. Defendants moved to excise Section III(5)(b)(vi) of the Decree, which provided that provisional ballots covered by the Decree could not be disqualified on the basis that "[t]he *voter* did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error." NEOCH Dkt. 342 & 210. Plaintiffs moved to extend the protections of Section III(5)(b)(vi) and (vii) to *all* provisional voters. NEOCH Dkt. 338 & 338-1. Paragraph (vii) guards against the disqualification of provisional ballots when "[t]he *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." NEOCH Dkt. 210.

In arguing the motions to the Court, Plaintiffs explained that they were concerned that the Secretary would disqualify provisional ballots on the ground that the voter did not record identification information, even though that was *poll-worker* duty. 10/24/12 Trans. at 42:22-43:5, 55:15-56:11. Defendants responded by representing to the Court that recording information regarding a voter's proffered identification is the poll worker's responsibility and therefore falls within the protection of 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 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.*

10/24/12 Trans. at 50:5-20 (emphasis added); *see also id.* at 60:3-11. As discussed below, the obligation of the poll worker to record this information to which Defendants' counsel referred at argument is set forth in Ohio Revised Code §§3505.181(B)(6)-(7) and 3505.182.

On October 26, 2012, the Court issued an Order granting Defendants' motion to remove Section III(5)(b)(vi) from the Decree, but leaving in place the protections of Section III(5)(b)(vii). 10/26/12 Order at 17-21. The Court denied Plaintiffs' motion to extend Section III(5)(b)(vii), finding there was no need to do so:

Critically, 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. *SEIU* Dkt. 28 at 17. 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.

*Id.* at 20-21 (internal citation omitted). If, based on the rules applicable to these provisional ballots at the time, there was no disparate treatment creating an equal protection violation, then there was no need to extend the protections of Section III(5)(b)(vii) to all voters.

**B. Ohio Law Requires Election Officials – and Not Voters – to Record the Type of Identification Provided By a Voter and to Indicate Whether a Voter Needs to Provide Any Additional Information to the Board of Elections**

Ohio Revised 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. O.R.C. §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.

**C. The Secretary's Redesigned Provisional Ballot Affirmation Form (Form 12-B) Improperly Purports to Shift the Duty to Verify and Record Information from the Poll Worker to the Voter**

In January 2012, the Secretary issued Directive 2012-01 regarding the counting of provisional ballots. Despite the fact that the Ohio Revised Code provides a statutory provisional ballot affirmation form, O.R.C. §3505.182, Directive 2012-01 included a redesigned provisional ballot affirmation form, "Form No. 12-B," that county boards of elections must use. *See* NEOCH Dkt. 346-1 (Chandra Decl., Ex. 2). The 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 Revised 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 that Form 10-T is an affirmation a voter who cannot provide identification may complete). *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, and as represented to this Court by the Secretary on October 24, 2012 (10/24/12 Tr. at 50:5-20), 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 record whether the voter needs to provide additional information to the county board. *Id.*

§§3505.181(B)(7), 3505.182. (Also missing from the Secretary’s Form 12-B is any statutorily required record of whether the voter needs to bring additional information to the board.)

**D. *NEOCH* Plaintiffs Seek Confirmation from Secretary of Section III(5)(b)(vii)’s Scope and, Receiving No Response, File Motion for Clarification**

Based on the representation of the Secretary to this Court on October 24, 2012, and this Court’s October 26, 2012 decision, and the clear statutory duty of poll workers to record voters’ Social Security number, driver’s license number, or other form of identification proffered, counsel for *NEOCH* Plaintiffs wrote to the Secretary and requested confirmation that the Secretary would, under Section III(5)(b)(vii) of the Decree and Directive 2012-01, ensure that county boards of elections not reject provisional ballots on the grounds that “Step 2” of the Provisional Ballot Affirmation Form is incomplete or incorrectly completed. *NEOCH* Dkt. 346-1 (Chandra Decl., Ex. 1). Plaintiffs’ counsel followed up with a voicemail message, which went unreturned. *Id.* ¶¶3-4.

When Plaintiffs received no response from the Secretary, on November 1, 2012, Plaintiffs filed an emergency motion for clarification of the scope of Section III(5)(b)(vii). Plaintiffs explained that clarification was needed before the county boards begin counting provisional ballots because, in analyzing the ballots for deficiencies, the boards may not realize that a failure to complete or incorrect completion of the identification information requested on the provisional ballot form falls within the protection of Section III(5)(b)(vii) of the Decree. NEOCH Dkt. 346.

**E. The Secretary’s Directive 2012-54, Issued on the Eve of the Election, Reverses the Approach Taken in Directive 2012-01 and Contradicts the Secretary’s October 24, 2012 Assurances to This Court**

Secretary Husted issued Directive 2012-54 around or shortly after 6 p.m. on Friday, November 2, 2012, asserting that the Directive was required by this Court and the Sixth Circuit’s orders. Chisholm Decl. ¶2 & Ex. A. Directive 2012-54 differs significantly from previous Directives that address the counting of ballots with incomplete identification information, despite the fact that neither this Court nor the Sixth Circuit required such changes.

Directive 2012-01, which governed the counting of provisional votes until this past Friday evening, provided only for disqualification of ballots that are missing printed names or signatures. It did not require disqualification of ballots with incomplete or incorrectly completed information regarding identification. *See* Chisholm Decl., Ex. B at 2. Thus, even though Form 12-B was issued together with Directive 2012-01, that Directive did not identify the failure to complete the identification information on the form as a basis for rejecting the ballot. *Id.*

In contrast, the new Directive 2012-54 expressly requires that boards “must **reject [a] provisional ballot**” “[i]f the voter did not provide identification on the provisional ballot affirmation, did not complete SOS Form 10-T, and did not return to the Board within the ten

days after the election to remedy the missing item.” Chisholm Decl., Ex. A at p. 3 (“Step 2”) (emphasis in original). Nowhere does the Directive acknowledge that it is the poll worker’s responsibility to record the identification provided.

## ARGUMENT

### **I. The *NEOCH* Consent Decree Should Be Modified to Extend the Protections of Section III(5)(b)(vii) to All Provisional Voters**

#### **A. The Court Should Clarify that Under Section III(5)(b)(vii) of the Consent Decree Provisional Ballots May Not Be Disqualified Because the Ballot Form Information Regarding the Identification Proffered By the Voter Is Incomplete**

On remand from the Sixth Circuit, Plaintiffs urged the Court to remedy any equal protection violation by extending the protections of Section III(5)(b)(vi) and (vii) to all provisional voters. *NEOCH* Dkt. 338 & 338-1. Defendants, by contrast, asked the Court to remove Section III(5)(b)(vi), *but not Section III(5)(b)(vii)*, from the Decree. *NEOCH* Dkt. 342.

In resolving these competing motions to modify the Consent Decree, this Court relied on the protections for voters provided by Section III(5)(b)(vii), and by then-governing Directive 2012-01, which the Court understood would ensure that provisional ballot envelopes that are incomplete as the result of poll workers’ failure to record voter identification information would not be rejected on that ground. 10/26/12 Order at 19-20. This Court also relied on the Secretary’s assurances regarding the scope of paragraph (vii). *See supra* at 4-5 (quoting 10/24/12 Trans. at 50:5-20).

In granting the Secretary’s motion to remove paragraph (vi) from Section III(5)(b), the Court found that there would be few circumstances in which a missing name or signature would be the result of poll-worker error. 10/26/12 Order at 19; *see also NEOCH*, 2012 WL 4829033 at \*16 (“Ohio law does not task poll-workers with quality control of ballot affirmations.”). In

contrast, “Ohio law *does* . . . task poll-workers” with recording the identification proffered by the voter. *Id.* (emphasis added); *see also id.* (quoting O.R.C. §3505.181(B)(6)); O.R.C. §3505.182. As the Secretary represented to this Court: “the obligation to write down the identifying information is imposed upon the poll worker.” 10/24/12 Tr. at 50:5-20. Thus, there can be no dispute that Ohio election officials are responsible for recording the identification information proffered by provisional voters.

The equitable doctrine of judicial estoppel also weighs in favor of requiring the Secretary to abide by the assurances he provided to this Court. “[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also Warda v. C.I.R.*, 15 F.3d 533, 538 (6th Cir. 1994). Here, the doctrine of judicial estoppel applies to bar any argument by the Secretary that Section III(5)(b)(vii) does not protect provisional ballot affirmations with incomplete identification information. Such an argument is directly contrary to the Secretary’s previous representation to the Court, a representation on which the Court relied, and unfairly would disenfranchise voters and deprive them of the protections negotiated by the parties to the Decree.

Yet, in direct contrast to the Secretary’s representations to this Court, the language of the Consent Decree, and Directive 2012-01, Directive 2012-54 now requires county boards of elections to reject provisional ballots where poll workers have failed in this duty to record voter identification information. Thus, this Court should clarify that Section III(5)(b)(vii) prohibits the

Secretary from disqualifying provisional ballots on the basis that they have incomplete information in “Step 2” of the form regarding the voter’s proffered identification.

**B. This Court Should Revise the October 26, 2012 Order in Light of the Secretary’s Eleventh-Hour Directive 2012-54 and Modify the Decree to Extend the Protection Against Poll-Worker Failure to Record Information to All Provisional Voters**

The Court’s October 26, 2012 Order, in concluding that Section III(5)(b)(vii)’s protections did not need to be extended to all provisional voters, relied on its understanding that the section’s protections against poll-worker error were mirrored in then-governing Directive 2012-01, which “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.” 10/26/12 Order at 20-21 (internal citation omitted).

As Plaintiffs’ November 1, 2012 motion explained, at the time the motion was filed (before the Secretary issued Directive 2012-54 in the evening on Friday, November 2, 2012), there was no concern with the potential disparate treatment of voters covered by the Decree and all other Ohio provisional voters, because Directive 2012-01 did *not* require the disqualification of provisional ballots with incomplete identification information. NEOCH Dkt. 346 at 9. The factual predicate for this Court’s decision not to extend Section III(5)(b)(vii)’s protections to all voters, however, no longer exists. Because the Secretary rescinded Directive 2012-01, replacing it with Directive 2012-54, the protections of Section III(b)(5)(vii) of the Decree now extend only to SSN-4 voters.

Thus, the Secretary – by issuing Directive 2012-54 on the eve of the election – has created the exact equal protection problem against which the Sixth Circuit warned, and that the Sixth Circuit remanded to this Court to resolve. The Sixth Circuit explained that the differential treatment of similarly situated provisional ballots “appears to create” an equal protection

violation. *NEOCH*, 2012 WL 4829033 at \*19; *see also id.* at \*14; *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Bush v. Gore*, 531 U.S. at 104-05. The Sixth Circuit remanded to the District Court to address, on a motion to modify the Decree, the equal protection problem presented by differential treatment of ballot affirmation flaws, and noted that decisions regarding modification of consent decrees are generally left to district court discretion. 2012 WL 4829033 at \*20.

Because Section III(5)(b)(vii) of the Decree is properly construed as protecting from disqualification provisional ballots that have incomplete identification information, and Directive 2012-54 now, for the first time, requires disqualification of those ballots not otherwise protected by the Decree, this Directive results in unconstitutional disparate treatment of similarly situated ballots. Plaintiffs therefore ask the Court, pursuant to Federal Rule of Civil Procedure 60 and its inherent equitable authority, as recognized by the Sixth Circuit in remanding to this Court (2012 WL 4829033 at \*20), to modify the Decree to prohibit the rejection of provisional ballots cast by *any* voter as a result of incomplete or improperly completed identification information on the ballot affirmation form, unless a county board of elections first determines that the voter failed to proffer acceptable identification or provide the last four digits of his or her Social Security number to a poll worker, and declined to complete a Form 10-T. Such modification is necessary to both remedy the equal protection problem that Directive 2012-54 causes and preserve the Decree’s current protections for SSN-4 voters. It also avoids the constitutional violations that would occur if the Secretary were permitted to disenfranchise voters for purported deficiencies in recording information the poll workers, not the voters, are required to record.

The alternative solution to resolving the disparate treatment problem – eliminating Section III(5)(b)(vii) – would deprive the *NEOCH* Plaintiffs of the protections they obtained in return for not pursuing their constitutional claims. As the Sixth Circuit held in *NEOCH*, there are significant public interests served by holding the State to the bargain it struck to resolve the case. 2012 WL 4829033 at \*19.

**II. The Court Should Issue a Preliminary Injunction in *SEIU Local 1 v. Husted* Enjoining the Rejection of Provisional Ballots with Incomplete Identification Information on the Ballot Forms**

For the same reasons that this Court should modify the Consent Decree to protect all provisional voters from having their votes disqualified on the basis that the identification information on the ballot is incomplete or incorrectly completed, the Court should preliminarily enjoin Defendants from implementing Directive 2012-54 to disqualify these ballots.

*SEIU Local 1* Plaintiffs easily satisfy the four factors for a preliminary injunction. *See NEOCH*, 2012 WL 4829033 at \*8. There can be no dispute that Plaintiffs' members, as well as other Ohio voters, are likely to be irreparably harmed by Directive 2012-54's requirement that provisional ballots with incomplete information regarding identification proffered by the voter be disqualified and not counted. *See id.* at \*15. That harm alone weighs very heavily in favor of an injunction. Neither the State nor any other party is injured by counting these otherwise valid ballots of lawfully registered voters. Significantly, the State cannot claim that it would be harmed by an injunction that places the duty to record the voters' identification information on the poll worker, not the voter, given that Ohio law already squarely places that duty on the poll worker, and given that until Friday, November 2, 2012 at 6 p.m., that is what the Consent Decree and the Secretary's Directives provided.

Finally, Plaintiffs are likely to succeed on the merits and, at a minimum, have presented “questions going to the merits so serious [and] substantial . . . to make them a fair ground for litigation” and warranting preliminary injunctive relief. *Id.* at \*8 (internal quotation marks omitted). Consistent with the Sixth Circuit’s decisions in *NEOCH*, 2012 WL 4829033, and *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 243-44 (6th Cir.2011), the disqualification of ballots on the grounds that a poll worker has failed to perform his duties to record information imposes a substantial burden on the right to vote. Not only does Ohio law unambiguously require election officials, and not voters, to record the information about proffered identification and to inform voters if additional information must be presented to the board of elections, O.R.C. §§3505.181(B)(6)-(7) & 3505.182, but there is a good reason this responsibility lies with trained election officials and not the voters. For example, it is absurd to expect that a voter – without any poll-worker instruction – will be able to “complete Form 10-T,” as the Secretary’s Provisional Ballot Affirmation Form requires. *See* Chisholm Decl., Ex. A. Nor will an average voter be able to navigate the form’s complicated instructions as to when an address on a photo identification needs to be current and when it does not. *Id.* Under the Constitution, the provisional ballot form may not be converted to a literacy or logic test. *Cf. Crawford*, 553 U.S. at 188 (plurality) (noting “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications”); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congress’ power to prohibit literacy tests).

Balanced against this substantial burden, there is no evidence of any legitimate state interest actually furthered by disqualifying ballots with incomplete information in “Step 2” of the ballot form. Nor could there be, given that Ohio law expressly places the responsibility for recording and verifying identification with election officials (and until November 2, 2012 the

Secretary did not require rejecting these ballots). Therefore, under *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), *Crawford v. Marion County Bd. of Elections*, 553 U.S. 181, 190-91 (2008) (plurality), *NEOCH*, 2012 WL 4829033 \*9-13, and *Obama for America v. Husted*, \_\_\_ F.3d. \_\_\_, 2012 WL 4753397 \*4-7 (6th Cir. Oct. 5, 2012), disqualifying these votes violates equal protection.

Finally, the Secretary's eleventh-hour attempt to change the rules applicable to these ballots is contrary to every argument made by Ohio and the Secretary to the Sixth Circuit in seeking an emergency stay of this Court's October 24, 2012 injunction protecting voters who cast wrong-location provisional ballots from poll-worker error. Defendants represented that a litany of harms would be caused by any change to the rules for poll workers and the county boards. Chisholm Decl., Ex. C at 3, 8-9. Secretary Husted's action comes even closer to the election, mere days in advance. Every argument made by the Secretary to the Sixth Circuit as to why the October 26, 2012 injunction should be stayed weighs heavily in favor of enjoining this Directive, insofar as it is a last-minute change in the rules for counting provisional ballots, and one that will require the disenfranchisement of lawfully registered voters.

### **CONCLUSION**

For the foregoing reasons, the *NEOCH* Plaintiffs respectfully request that in *NEOCH v. Husted* the Court clarify its October 26, 2012 opinion and order and extend the protections of Section III(5)(b)(vii) of the Consent Decree to all provisional voters such that no provisional ballot may be rejected on the grounds that the identification information provided on the Provisional Ballot Affirmation Form is incomplete or incorrectly completed, unless a county board of elections first determines that the voter failed to provide poll workers with the last four digits of his or her Social Security number or show other acceptable identification, and verifies

that the voter declined to complete a Form 10-T affirmation. The *SEIU Local 1* Plaintiffs respectfully request that the Court preliminarily enjoin Defendants from implementing Directive 2012-54 to the extent it requires the disqualification of ballots with incomplete or incorrectly completed identification information on the Provisional Ballot Affirmation Form, and further preliminarily enjoin Defendants from rejecting any provisional ballot on the grounds that the identification information provided on the Provisional Ballot Affirmation Form is incomplete or incorrectly completed, unless a county board of elections first determines that the voter failed to provide poll workers with the last four digits of his or her Social Security number or show other acceptable identification, and verifies that the voter declined to complete a Form 10-T affirmation.

Dated: November 4, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 4, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this case.

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