

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SERVICE EMPLOYEES INTERNATIONAL .	.	
UNION LOCAL 1, et al., .	.	
	.	
PLAINTIFFS, .	.	CASE NO. 2:12-CV-562
	.	
VS. .	.	COLUMBUS, OHIO
	.	NOVEMBER 7, 2012
JON HUSTED, et al., .	.	11:00 A.M.
	.	
DEFENDANTS. .	.	
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TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	CAROLINE GENTRY, ESQ.
	STEPHEN P. BERZON, ESQ.
	DANIELLE E. LEONARD, ESQ.
	BARBARA J. CHISHOLM, ESQ.
	DONALD JOSEPH MCTIGUE, ESQ.
	SUBODH CHANDRA, ESQ.
	DONITA JUDGE, ESQ.
	MICHAEL HUNTER, ESQ.

FOR THE DEFENDANTS:	AARON D. EPSTEIN, ESQ.
	RICHARD N. COGLIANESE, ESQ.
	ERIN BUTCHER-LYDEN, ESQ.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE NORTHEAST OHIO COALITION	.	
FOR THE HOMELESS, et al.,	.	
	.	
PLAINTIFFS,	.	CASE NO. 2:06-CV-896
	.	
VS.	.	COLUMBUS, OHIO
	.	NOVEMBER 7, 2012
JON HUSTED, in his official	.	11:00 A.M.
capacity as Secretary of	.	
State of Ohio,	.	
	.	
DEFENDANT,	.	
	.	
and	.	
	.	
STATE OF OHIO,	.	
	.	
INTERVENOR-DEFENDANT.	.	
.	

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WEDNESDAY MORNING SESSION
NOVEMBER 7, 2012

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THE COURT: Good morning.

Ms. Clark, would you please call the case.

THE DEPUTY CLERK: 06-CV-896 and 12-CV-562, the Northeast Ohio Coalition for the Homeless, et al., versus Jon Husted in his official capacity of Secretary of the State of Ohio and State of Ohio; and Service Employees International Union Local 1, et al., versus Jon Husted, et al.

THE COURT: Would counsel please identify themselves for the record beginning with counsel for the plaintiffs.

MR. CHANDRA: Good morning, Your Honor. Subodh Chandra for Plaintiffs Northeast Ohio Coalition for the Homeless, SEIU Local 1199 and the individuals therein.

MS. CHISHOLM: Good morning, Your Honor. Barbara Chisholm. I'm representing Plaintiff SEIU Local 1199 in the NEOCH matter, and the Union plaintiffs in the SEIU Local 1 matter.

MR. BERZON: Good morning, Your Honor. Steven Berzon representing the same parties as Ms. Chisholm.

MS. LEONARD: Danielle Leonard representing the same parties as Mr. Berzon and Ms. Chisholm.

MS. GENTRY: Good morning, Your Honor. Caroline

1 Gentry representing the same parties as Mr. Chandra.

2 MS. JUDGE: Good morning, Your Honor. Donita Judge
3 representing SEIU and the Ohio Organizing Collaborative.

4 MR. MCTIGUE: Don McTigue representing the Ohio
5 Democratic party, plaintiff in the NEOCH case.

6 MR. HUNTER: Good morning, Your Honor. Michael
7 Hunter. I represent Plaintiff District 1199 in the NEOCH
8 case and all of the plaintiffs in the SEIU Local 1 case.

9 MR. CHANDRA: Your Honor, if I may, for those of us
10 representing Local 1199 and the Northeast Ohio Coalition
11 for the Homeless, I left out one organization, I believe,
12 which is the Columbus Homeless Coalition.

13 THE COURT: Counsel for the defense.

14 MR. EPSTEIN: Aaron Epstein, Assistant Attorney
15 General on behalf of Secretary of State Jon Husted in both
16 cases.

17 MS. BUTCHER-LYDEN: Erin Butcher-Lyden, Assistant
18 Attorney General for Secretary of State in both cases.

19 MR. COGLIANESE: Good morning, Your Honor. Rich
20 Coglianesse for the State of Ohio.

21 THE COURT: We're here today on a couple of
22 emergency motions, or at least the NEOCH plaintiff's
23 emergency motion for clarification and for modification of
24 the consent decree, and SEIU Local 1 plaintiff's motion for
25 preliminary injunction.

1 Who will be arguing for the plaintiffs?

2 MS. CHISHOLM: Your Honor, I will be arguing for the
3 plaintiffs in both the NEOCH case and SEIU Local 1.
4 However, Mr. Chandra will also be arguing on behalf of
5 NEOCH, so we would like to split the 30 minutes that the
6 Court has provided to our side.

7 THE COURT: Do you wish to hold any time in reserve?

8 MS. CHISHOLM: We do. I think we would hold seven
9 minutes in reserve for rebuttal.

10 THE COURT: Will it be you, Ms. Chisholm, or will it
11 be you, Mr. Chandra, who goes first? I'm assuming that you
12 discussed --

13 MS. CHISHOLM: I will, Your Honor.

14 THE COURT: Please proceed.

15 So are you arguing eight minutes, or are you arguing
16 12 minutes, and then saving three and a half minutes --
17 well, that would be -- this math is really too difficult
18 for me.

19 MS. CHISHOLM: It is difficult. I think I will
20 argue 15 minutes.

21 THE COURT: And Mr. Chandra will have eight minutes.
22 Is that right?

23 MR. CHANDRA: It sounds correct, but I'm as
24 mathematically challenged as Your Honor.

25 THE COURT: I hope not. Please proceed,

1 Ms. Chisholm.

2 MS. CHISHOLM: After representing to this Court that
3 poll workers are obligated to record identification
4 proffered by a voter and, therefore, any scenario involving
5 missing identification information on a provisional ballot
6 affirmation form would continue to fall under the
7 protections of the consent decree in the NEOCH case, namely
8 Section III(v)(B)(6), Ohio is now taking the position that
9 those ballots should not be counted under the consent
10 decree.

11 Further, as Your Honor is aware, on Friday evening,
12 the secretary changed this directive governing the counting
13 of provisional ballots to require county boards to reject
14 these same ballots.

15 THE COURT: As a threshold matter, Ms. Chisholm, why
16 do I have jurisdiction, because the argument that you raise
17 in your papers essentially is that this is a question of
18 state law, because the secretary has -- your argument goes,
19 the secretary has violated the statute, 3505.181(B)(6) in
20 its directive. So it's really a question of state law,
21 isn't it?

22 MS. CHISHOLM: No, I don't think so, Your Honor. I
23 should have said first, I want to take the consent decree
24 issue first and the clarification, modification of the
25 consent decree first. I think that's a much more

1 straightforward issue, and I think the Court can actually
2 rule on those grounds. The consent decree has two
3 paragraphs in it. There's paragraph six which Your Honor
4 excised, and paragraph seven which deals with when the poll
5 worker fails to complete or incorrectly completes the
6 provisional affirmation form.

7 What we're asking your court to do is to construe
8 paragraph 7 to cover the issue here. Your Honor has
9 jurisdiction to construe the consent decree that this Court
10 issued. You look at state law in deciding how this consent
11 decree should be construed. You also look at the
12 representations of counsel. Counsel, on October 24th,
13 stood here and said, Your Honor, it's okay to excise
14 paragraph 6 because the poll worker error that occurs when
15 you don't fill in the identification comes under paragraph
16 7. That protection will remain.

17 Your Honor in your October 26th order said we're not
18 dealing with paragraph 7, because NEOCH plaintiffs actually
19 had a motion to expand and to modify the consent decree
20 under paragraph 7. Your Honor found that wasn't necessary
21 because there was no disparate treatment, right?

22 And the reason there was no disparate treatment
23 between NEOCH voters and non-NEOCH voters was because there
24 was a directive in place at the time --

25 THE COURT: Excuse me. I need just a copy of the

1 consent decree. I brought everything but the consent
2 decree with me.

3 Please continue, I apologize, Ms. Chisholm.

4 Do you want Mrs. Evans to read back where you were?
5 I interrupted you in midstream.

6 MS. CHISHOLM: That's fine.

7 I do think what we can do is look at the consent
8 decree.

9 THE COURT: Why don't you put it on the --

10 MS. CHISHOLM: You're going to technically challenge
11 me here.

12 THE COURT: You wouldn't be challenged if you knew
13 where to find it.

14 MS. CHISHOLM: I don't know about that.

15 So paragraph 6 is the one that Your Honor excised,
16 which dealt with when the voter did not complete, or
17 properly complete, the provisional ballot application.

18 Paragraph 7 deals with -- I guess we actually need
19 the second -- when the poll worker did not complete or
20 properly complete and/or sign the provisional ballot
21 application line, and/or the provisional ballot affirmation
22 form. So paragraph 7 applies when the poll worker did not
23 complete the provisional affirmation form.

24 Defendants have conceded that Section 3505.181(B)(6)
25 of the Ohio Revised Code requires the poll worker to record

1 the type of identification provided and the Social Security
2 information provided by a voter. They also, in arguing for
3 excising paragraph 6 of the consent decree, argued in
4 response to Mr. Berzon who said there's still a concern
5 about poll worker error here because we have this confusing
6 ballot affirmation form that has step two that requires the
7 voter to fill out the information that the poll worker is
8 supposed to fill out.

9 Secretary's counsel said don't worry about that,
10 that circumstance falls under paragraph 7. I think that's
11 a reasonable reading of paragraph 7. That's a reason that
12 comports with the law, with the Ohio law. So therefore
13 it's a reasonable construction of paragraph 7, which is
14 really what this Court needs to decide.

15 THE COURT: The secretary, in its papers, said that
16 he was revising the directive, or he issued directive
17 2012-54 to eliminate confusion, to provide clarity.

18 Isn't that within the ambit of his responsibilities,
19 to clarify issues that may be the source of some confusion
20 for either the voter or for the poll worker? As the chief
21 election officer, isn't that his prerogative?

22 MS. CHISHOLM: I think it's certainly an honorable
23 motive. There are two issues here. One is what is the
24 construction. First and foremost, before you get to the
25 directive and the new directive, this Court needs to decide

1 what is the proper construction of paragraph 7 of the
2 consent decree. And once you decide that paragraph 7 does
3 apply to these circumstances, then you need to deal with
4 the disparate treatment problem, and that's where we get
5 into this -- paragraph 7 needs to be expanded to everyone.

6 The question as to the new directive which is what
7 now says for everyone if you don't fill out step two, we
8 are going to disenfranchise you, I think the intent
9 certainly is honorable. The fact of the matter is it would
10 have been fine to continue to have the poll worker fill out
11 this information.

12 The secretary's affidavit that he provided says we
13 wanted to eliminate poll worker error and, therefore, we
14 had been telling counties that if the poll worker fills
15 this out and makes a mistake, you disregard that. We
16 agree. That is exactly what the secretary should be
17 instructing the counties. That doesn't mean that the
18 secretary should stop asking for that information
19 certainly, when that's information that the secretary has
20 conceded the poll worker is required to record under the
21 law.

22 THE COURT: Well, the fact that he no longer
23 requires the poll worker to complete the form, but the
24 voter, doesn't mean that he's not seeking to ascertain the
25 same information. He's, in fact, seeking the same

1 information. He's just shifting the burden. Isn't that
2 right?

3 MS. CHISHOLM: He is shifting the burden, Your
4 Honor.

5 THE COURT: Is there any point of law which
6 prohibits him from shifting the burden?

7 MS. CHISHOLM: Your Honor, we think -- yes, we think
8 that the statute certainly requires this. We think the
9 consent decree needs to be construed in accordance with
10 Ohio law. You can look to Ohio law in construing your
11 federal consent decree.

12 THE COURT: Let me ask you this. If his shifting
13 the burden to the voter does not violate constitutional
14 principles, doesn't unduly burden the right to vote, can he
15 still do it, even if it may be incongruous with state law?

16 MS. CHISHOLM: He could if the consent decree did
17 not exist. So plaintiffs believe that this matter should
18 be decided on the grounds of the consent decree, and then
19 on the grounds on which the Sixth Circuit --

20 THE COURT: So your motion, then, is just a motion
21 to enforce the consent decree?

22 MS. CHISHOLM: It is to clarify and enforce the
23 consent decree, and then on the remand issue --

24 THE COURT: Are there any constitutional issues --
25 are there any constitutional rights to be vindicated by

1 having the secretary rescind 2012-54?

2 MS. CHISHOLM: Absolutely, Your Honor.

3 THE COURT: Which ones are they?

4 MS. CHISHOLM: Well, the Sixth Circuit in the NEOCH
5 decision made clear that a voter should not be
6 disenfranchised as a result of poll worker error. We know
7 that to be true. We know that it's poll worker error. We
8 also know that the Sixth Circuit, in talking about the
9 ballot affirmation issue, said this is not contrasted,
10 signing your name and printing your name with -- and they
11 quoted 181(B)(6), the poll worker's duty to record this
12 information.

13 So the Sixth Circuit was looking at Ohio law to
14 determine on whom has Ohio placed the duty to provide this
15 information. It would be burdensome to disenfranchise
16 people for failing to do what they are supposed to --
17 what's supposed to be done by the poll workers under Ohio
18 law.

19 THE COURT: Did the secretary's actions violate
20 *Burdick*?

21 MS. CHISHOLM: Yes, Your Honor. There's no
22 legitimate interest here that is served by switching this
23 over to --

24 THE COURT: Isn't the interest of having clear
25 instructions a valid interest? That's not a burden, is it?

1 MS. CHISHOLM: It is, Your Honor.

2 THE COURT: The secretary said, "I did this to
3 clarify." And if the chief elections officer can't bring
4 clarity to a process, than who can? How can that be
5 said -- if you believe the secretary, how can that be said
6 to constitute a burden, Ms. Chisholm?

7 MS. CHISHOLM: It can be said to constitute a burden
8 because what the secretary has done is to shift this burden
9 over to the voter while totally rescinding what the poll
10 worker was supposed to be doing. If the secretary really
11 wanted to clarify this, they could have clarified the form
12 for the voter to fill out and continued to have the poll
13 worker record the information as the poll worker is
14 required to do under Ohio law.

15 THE COURT: Isn't this a logical extension of the
16 Sixth Circuit's opinion in which it said the form is
17 essentially a simple form, the voter should fill it out,
18 fill it out correctly?

19 MS. CHISHOLM: The Sixth Circuit said that the voter
20 should fill out the name and the signature and should
21 provide the identification. The Sixth Circuit then
22 quoted --

23 THE COURT: Let me ask you this. So, when I said
24 it's a logical extension, what the secretary's asking to do
25 is for the voter, then, to check which type of

1 identification she provided. Right?

2 MS. CHISHOLM: Right.

3 THE COURT: Okay. So, if you've got to fill out
4 your name and maybe the Social Security number, or whatever
5 else you have to fill out on that form --

6 MS. CHISHOLM: Your name and your signature.

7 THE COURT: -- your name and your signature, and the
8 voter is providing the poll worker with a type of
9 identification, whether it's Social Security number,
10 military, or government ID or driver's license, wouldn't it
11 be a logical extension given the Sixth Circuit's rationale
12 to say, since I, the voter, am providing you, the poll
13 worker, with my type of identification, why can't I, the
14 voter, simply check off what type of identification I'm
15 providing to the poll worker?

16 MS. CHISHOLM: There are a couple of issues here. I
17 think one is if you look at the actual form, it's a lot
18 more complicated than that.

19 THE COURT: It is indeed.

20 MS. JUDGE: This is a significant burden. As Your
21 Honor knows in the consent decree that was issued here,
22 that directive that's attached, it's a very complicated
23 question as to what's a current ID and what's not.

24 I see I'm getting close to my time.

25 THE COURT: Keep going. I'm the timekeeper.

1 Actually, Ms. Clark is but I'll let you run over.

2 MS. CHISHOLM: Therefore, it is a burden to
3 disenfranchise someone for failure to fill that out when
4 that information could also be recorded in accordance with
5 Ohio law --

6 THE COURT: Doesn't *Burdick* establish a balancing
7 test? So it looks at the interest that is sought to be
8 achieved vis-à-vis the burden. Right?

9 MS. CHISHOLM: Yes, Your Honor.

10 THE COURT: And so my -- I agree with you that it is
11 a burden, but in weighing the competing interests,
12 clarification of the process compared to having the voter
13 check off the box with which identification form I'm
14 providing, why is that not within the secretary's rights
15 and responsibilities to do?

16 MS. CHISHOLM: A quick answer to that, and then I
17 want to turn back to the consent decree.

18 THE COURT: We have time.

19 MS. CHISHOLM: There is no legitimate state interest
20 here that requires that burden, that would justify that
21 burden, because Ohio -- one, Ohio can't say that there's an
22 interest in not having the poll worker record the
23 information that their statute says they have to record;
24 nor, can Ohio say that somehow they're not able to tell
25 counties not to reject ballots on the basis that the poll

1 worker makes a mistake since that's what Ohio has been
2 doing up until Friday.

3 So, even if there is some motivation here to make it
4 more clear, it's actually not furthering any legitimate
5 state interest.

6 But what I do want to say is Your Honor does not
7 have to reach this question. When we were here last on
8 October 24th, Mr. Berzon argued on the consent decree.
9 Consent decrees can go beyond what's constitutionally
10 necessary. I can tell you that the SEIU plaintiffs are
11 willing to withdraw their motion for preliminary injunction
12 and allow the NEOCH case to proceed on the consent decree.
13 We think that is the best argument here, that the clear
14 conceded interpretation of paragraph 7 is that it applies
15 to these voters who, for whatever reason, failed to record
16 the information, the poll worker has no way complied with
17 their statutory duty. That comes under section seven here.

18 There are principles of judicial estoppel at play
19 here. Your Honor, in excising paragraph 6, relied on
20 representations by the secretary that the poll worker error
21 that we were describing in that argument was not under
22 paragraph 6. It was under paragraph 7. You can't deny
23 it's poll worker error because clearly, undisputedly there
24 is a duty to record this information, and the poll worker's
25 not recording it.

1 THE COURT: Thank you, Ms. Chisholm.

2 Mr. Chandra.

3 MR. CHANDRA: Good morning, Your Honor, and may it
4 please the Court. And thank you also for scheduling things
5 on such a rapid fire schedule in this matter. We really
6 appreciate it.

7 On behalf of NEOCH, I'd like to reinforce some of
8 the arguments that were made by Ms. Chisholm but also
9 provide a slightly different emphasize and a bigger picture
10 on how we got to this situation. It's very important from
11 our client's perspective.

12 As Your Honor knows, six years ago, NEOCH filed this
13 litigation to try to vindicate the rights of the poorest of
14 the poor, those who lack paid forms of identification which
15 were the only forms of identification that the state of
16 Ohio had written into the statute that people could vote
17 on. So driver's license, costs money; state issued ID,
18 costs money; bank statement in your name, you've got to
19 have money; utility statement, you've got to have property.

20 So ultimately that was the underlying constitutional
21 claim that was so deeply held by the NEOCH plaintiffs.

22 Ultimately, it resulted in the interim consent decrees for
23 the purposes of the 2006 election that Your Honor was so
24 heavily involved in mediating, and then that eventually led
25 to similar resolution in the 2010 NEOCH consent decree.

1 The road to get to those consent decrees, as Your
2 Honor knows in part from being involved in the 2006
3 matters, was very difficult and very challenging. And one
4 of the things that Mr. Coglianese, on behalf of the state
5 and the secretary of state, repeatedly emphasized was that
6 the consent decree had to be faithful to Ohio law. We
7 heard that over and over again. There was even insistence
8 on incorporating actual language echoing Ohio law in the
9 consent decree.

10 That led to the situation where you had subpart
11 clauses six and seven in the consent decree. And that led
12 to the situation where, on October 24th in this courtroom,
13 when Mr. Berzon was expressing on behalf of the NEOCH
14 plaintiffs this concern that if the carefully negotiated
15 provision of the consent decree that insured that defects
16 in ballot affirmation forms would not be a basis under
17 which human beings would be disenfranchised, when that
18 concern was expressed, the secretary of state's counsel got
19 up and assured this Court, assured plaintiffs, assured the
20 world that's not going to happen, that's not a worry
21 because consistent with the Sixth Circuit's opinion, just
22 write your name, sign your name, and the recording of the
23 identification is the poll worker's responsibility.

24 Now, this judicial estoppel principle is extremely
25 important because Your Honor wrote into the opinion that

1 you were relying upon that representation. Your Honor said
2 critically -- and I'm quoting from the Court. Your Honor
3 said that critically the poll worker's role -- Your Honor
4 reflected that it was critical that the poll worker's role
5 was recording the identification, and that is in the
6 opinion.

7 So, for the NEOCH plaintiffs now to be put in a
8 position -- this may not have been the intention by the
9 secretary, but certainly the effect is that of a
10 bait-and-switch. On October 24th, don't worry, your vote
11 is still going to be counted because it's the poll worker's
12 job to record identification. That was a true statement of
13 Ohio law as reflected in subparts B6 and B7. That's what
14 it says. It's not, as the secretary has represented,
15 subject to interpretation. It says that the election
16 official will do it.

17 One issue that NEOCH doesn't want to get lost in
18 this discussion is not just that it is the election
19 official's duty to record what ID was used, but it is the
20 elections official -- also it is their duty under B7. And
21 if you look at the 182 statute, the provisional ballot
22 affirmation form, there also it is reflected that the
23 election official is supposed to record what, if any,
24 additional information the voter is supposed to come back
25 with. That reflects due process in the conversation and

1 the engagement between the election official and the voter,
2 that the voter is being informed about what more they need
3 to do to insure that they do not lose their right of
4 franchise, something that this Court has emphasized
5 repeatedly in this litigation is paramount. The judicial
6 estoppel principle is important because everyone relied on
7 this.

8 I would point to a couple of other things in
9 connection with the emergency motion that was filed last
10 Thursday. We believed, based on the Court's decision,
11 based upon Mr. Epstein's representation, that it was
12 understood among the parties that voters would not be
13 disenfranchised based on a defect on section two of that
14 form. But knowing that the secretary of state needed to
15 issue a directive to implement this Court's orders, we
16 wanted to make sure. So we sent a letter to the secretary
17 of state through Mr. Epstein on Wednesday morning,
18 October 31st, saying we just want to make sure as you're
19 writing up those directives that you're being clear that
20 elections boards are not to disenfranchise people based on
21 a defect.

22 We didn't receive the courtesy of a response. We
23 asked for a response by noon the following day. My
24 declaration establishes I made a follow-up call that
25 afternoon out of concern. And finally we felt we had no

1 choice but to file the emergency motion.

2 NEOCH's worst fears were realized when, in fact, at
3 the eleventh hour on the eve of the election, Friday night
4 after the close of business, they issue the directive
5 essentially directing elections officials all over the
6 state to disenfranchise people based on a defect in the
7 form.

8 So going back to the question you asked
9 Ms. Chisholm, which is, is there a constitutional problem
10 here. What I would say is this. First of all, Your Honor
11 has a consent decree that is a federal order and we're
12 asking for clarification of that order. And that all
13 relates to the underlying constitutional concerns. But
14 second, there is a fundamental due process concern
15 associated with the bait-and-switch. There is a
16 fundamental judicial estoppel concern that is presumably
17 constitutionally founded, that what we hear from the
18 secretary of state is, oh, my goodness, we can't change the
19 rules at the last minute, we can't change the rules of the
20 game. We have to have orderly procedure.

21 Well, this is a problem of the secretary's own
22 making. And the issue of provisional ballot affirmation
23 Form 12-B was never an issue. So this laches argument just
24 goes away. It was never an issue until Friday night when
25 they issued the directive because the Court's order, the --

1 Mr. Epstein's interpretation, as expressed to the Court,
2 and the previous language that had been in the consent
3 decree in subpart 6 that got excised, all of those things,
4 up until October 26th on the excision, and then last
5 Friday, November 1st, that night, until that moment, this
6 was never an issue in this litigation because the consent
7 decree ensured that voters wouldn't be disenfranchised on
8 this basis.

9 So that is NEOCH's underlying concern, is what we
10 see is a chipping away, an eroding away of this right.

11 Your Honor is absolutely right. It may be that
12 ultimately a court looking at this says, step two isn't so
13 burdensome although this is a little complicated. But the
14 issue is not -- because it might wind up being a wise
15 policy judgment by the State of Ohio and general assembly
16 to say we're going to ask the voter to record that unless
17 they need assistance or you have to accommodate people's
18 disabilities or illiteracy, that sort of thing. That might
19 be a wise policy judgment.

20 But the policy judgment is already made by the
21 expressed language of the statute which is not subject to
22 interpretation. The policy judgment was already made when
23 the State of Ohio represented to this Court, and this Court
24 relied upon that, and the parties relied upon that. So to
25 change that rule in the middle of the game, that's the

1 underlying concern. The bait-and-switch is the underlying
2 constitutional concern. And that is why we're asking not
3 for a modification of the consent decree, but simply a
4 clarification that the Court meant what it said.

5 The underlying concern is that by shifting the
6 burden at the last moment to the voter and insisting that
7 voters be disenfranchised on that basis, it increases the
8 statistical likelihood that an error on that form -- that
9 the secretary and the boards will throw up their hands and
10 say, see, it's not our fault, when in fact the statute
11 places the responsibility on them. And to do that at the
12 last minute is inappropriate.

13 THE COURT: Thank you, Mr. Chandra.

14 MR. CHANDRA: Thank you.

15 THE COURT: Mr. Epstein.

16 Mr. Epstein, would you agree that voting is the
17 linchpin of our democracy?

18 MR. EPSTEIN: Yes, Your Honor.

19 THE COURT: I do too. What concerned me about the
20 2012-54 directive is that it was filed on a Friday night at
21 7 p.m. The first thought that came to mind was democracy
22 dies in the dark. So, when you do things like that that
23 seeks to avoid transparency, it appears, then that gives me
24 great pause but even greater concern.

25 So, if anyone I'm going to give additional time to,

1 it's going to be you, Mr. Epstein, because you have a lot
2 of explaining to do. Please proceed. I want you to begin
3 by telling me how 2012-54 does not fly in the face of
4 3505.181. That's first.

5 Then I want you to tell me secondly how what the
6 secretary did can be reconciled with what you said on page
7 47 of the transcript. I'm going to read it to you because
8 I know you are prepared to answer this. You had to have
9 thought about this because either you have been put in an
10 untenable situation as an advocate, or the right hand
11 doesn't know what the left hand is doing in the secretary
12 of state's office. You say, and I quote, "Mr. Berzon
13 suggested to you, for example, that there might still be
14 poll worker error because there is an obligation to record
15 on the form the mode of identification used. And if that's
16 missing, that's a defect in the ballot. But that scenario
17 is not covered by the provision we're talking about because
18 as they say, the obligation to write down the identifying
19 information is imposed upon the poll worker, not the voter.
20 And in Section 7, it says that we won't invalidate ballots
21 based upon the poll worker's failure to write something
22 down, so we're not talking about that scenario. That
23 scenario, in fact, doesn't even deal with an affirmation
24 that is deficient because it is lacking a printed name or
25 signature, which is all that five is talking about."

1 Please proceed.

2 MR. EPSTEIN: I think there is a single answer to
3 both of your questions. And the answer in short is Revised
4 Code 3505.182. The poll workers, the elections officials
5 have responsibilities to record certain information, and
6 under 3505.182, the voters also have certain obligations.

7 THE COURT: Right.

8 MR. EPSTEIN: The model form -- and for purposes
9 right now, let me speak just to the NEOCH portion in the
10 consent decree and then we'll broaden the focus.

11 THE COURT: All right.

12 MR. EPSTEIN: The model form that the revised code
13 contemplates clearly says that the provision of the
14 affirmation that the -- I'm sorry, the provision of the
15 form, the affirmation portion that the voter fills out,
16 includes writing down the four digit Social Security
17 number.

18 There's a second provision in 3505.181 which seems
19 to contemplate elections officials also recording that
20 information, but that's not in the context of the
21 affirmation form. It doesn't say where or how they're
22 supposed to record it; it simply says they're supposed to
23 do it.

24 Past practice has been --

25 THE COURT: You're losing me now, because when I

1 read 181, the clause says the appropriate elections
2 official shall record the type of identification provided.
3 That's unambiguous. It's a command. So I'll tell you
4 what, put up 182 on the ELMO so that we can all look at it,
5 because maybe I've overlooked something.

6 Mr. Coglianesi will have it, and if he doesn't have
7 it, I have no doubt he could write it verbatim from memory,
8 he's dealt with it so much.

9 MR. EPSTEIN: It's a little difficult because the
10 book doesn't curve the way a paper would.

11 THE COURT: We could always take a one minute break
12 and make a copy.

13 MR. EPSTEIN: I think we have it now.

14 MR. CHANDRA: Which one were you asking for?

15 THE COURT: 182.

16 MR. EPSTEIN: This is what I was referring to. This
17 is the model form 3505.182. It says, provisional ballot
18 affirmation and the blanks it provides is, one, I, and it
19 leaves a blank for the person's name, signature of the
20 voter at the bottom, voter's date of birth, last four
21 digits.

22 THE COURT: Right.

23 MR. EPSTEIN: The --

24 THE COURT: And I want you to note that in that
25 introductory paragraph, it says each individual who casts a

1 provisional ballot under Section 3505.181 of the Revised
2 Code shall execute a written affirmation.

3 So 182 feeds off of 181. 181 is like a predicate
4 statute. 181 defines the rights, and that still does not
5 absolve poll workers from the command, the legislative
6 command, in 181 that the appropriate local election
7 official shall record the type of identification provided.

8 There's nothing in this form that absolves the poll
9 worker of that responsibility. I'm still looking for that,
10 Mr. Epstein.

11 MR. EPSTEIN: Your Honor, there is a difference
12 between the type of identification and the substantive
13 information. So, for example, what they're really talking
14 about is all these checkmark categories, the type of. If
15 they record that you used a driver's license, that's not
16 the same thing, that the poll worker has to write down the
17 driver's license number.

18 THE COURT: So let's take that example. So what the
19 poll worker is tasked to do under 181 in that example is to
20 check off the box that said he used a driver's license.
21 Right?

22 MR. EPSTEIN: Yes. And Your Honor, that's why I
23 wanted to make sure --

24 THE COURT: But then 2012-54 says that the poll
25 worker doesn't have to do that. Isn't that correct?

1 MR. EPSTEIN: Yes. But let's be clear. Again,
2 we're talking about the NEOCH consent decree which would
3 not apply to voters who fall under B and C. Because if
4 they used --

5 THE COURT: That's cross-pollination, Mr. Epstein.
6 That's cross-pollination. What we're talking about is in
7 its pristine form, the poll worker has to record the type
8 of information provided. The poll worker -- that's what
9 181 says. Let's walk through that. Is that right?

10 MR. EPSTEIN: Respectfully, Your Honor, I don't
11 agree with your interpretation.

12 THE COURT: Look, I'm not talking about
13 interpretation. I'm talking about reading it. Look at 181
14 and tell me whether 181 says the appropriate local
15 elections official shall record the type of information
16 provided. Doesn't it say that?

17 MR. EPSTEIN: It does say that.

18 THE COURT: And has the legislature enacted any
19 legislation that has transcended or rescinded this?

20 MR. EPSTEIN: No.

21 THE COURT: Okay. Now, this is still the law of the
22 State of Ohio, isn't it?

23 MR. EPSTEIN: It is, Your Honor.

24 THE COURT: Section 182, in its preamble, says that
25 each individual who casts a provisional ballot under

1 3505.181 shall execute a written affirmation. So 182
2 relates back to 181, doesn't it?

3 MR. EPSTEIN: Yes.

4 THE COURT: Now, tell me where it is that the
5 election official no longer has the burden of recording the
6 type of identification provided. That's what I want to
7 know right now. Tell me where it says that that person is
8 absolved of that responsibility except in directive
9 2012-54.

10 MR. EPSTEIN: I'm not contending that the elections
11 official is absolved of that responsibility. I'm
12 contending that both parties have a responsibility.

13 THE COURT: Show me the statute which says that the
14 voter has the responsibility -- shall record the type of
15 identification provided. Show it to me.

16 MR. EPSTEIN: I believe that that --

17 THE COURT: I'm going to give you a chance to make
18 your belief. But right now I'm asking you questions to
19 give you an opportunity to persuade me, because my
20 questions really are just opportunities to persuade. They
21 may seem a bit animated at times because that's simply
22 because I'm really trying to get to the root of this, and I
23 don't want to see democracy die in the darkness on my
24 watch, especially with voting. You know I have a special
25 place for voting.

1 So I want you to tell me what statute says that the
2 voter has the burden, or put in the mandatory, shall record
3 the type of information that he or she has provided.

4 MR. EPSTEIN: In general there is no such statute.

5 THE COURT: In particular, then, is there such a
6 statute?

7 MR. EPSTEIN: I think 182 imposes that
8 responsibility.

9 THE COURT: Show me the language.

10 MR. EPSTEIN: I cannot find the word "shall" for
11 you. I believe it's contemplated in the way they designed
12 the form where they said this is the information for the
13 affirmation, and then the voter can provide at his or her
14 discretion this other information.

15 THE COURT: Mr. Epstein, I have said on the record
16 that Mr. Coglianesi is probably one of the best election
17 lawyers who's been in my courtroom; maybe one of the best
18 lawyers, period. I believe the same thing of you because
19 of the nature of the work that you've done. Do you
20 honestly believe what you just told me?

21 MR. EPSTEIN: I do, Your Honor.

22 THE COURT: If you honestly believe that, show it to
23 me, because you were -- in another context, and in this
24 case, you have argued that it's literally not there. You
25 have argued that the absence of the language means the

1 absence of the law. Now you're telling me to look at this
2 and find an obligation, a burden, if you will, within the
3 penumbras of this statute.

4 Show it to me. All I'm asking is to see it. If I
5 can see it, I can believe it. But if you can't show it to
6 me, then make your penumbras argument. We're going to be
7 transparent, and you're going to tell me -- if you expect
8 to prevail, somebody is going to answer my question because
9 no one is answering it from your side as to where it is.
10 So tell me if it's in the penumbras because you can't point
11 to the language. So show me where it is. Show me where
12 it's meant. Show me the legislative history. Show me the
13 facts that the secretary used to make the decision to
14 change this directive at seven o'clock on a Friday night on
15 the eve of an election. I want to see it, and I want to
16 see it now. Show it to me.

17 MR. EPSTEIN: Your Honor, I have no legislative
18 history to present to the Court.

19 THE COURT: Continue with your argument.

20 MR. EPSTEIN: Within the confines of the consent
21 decree, Your Honor, even accepting every argument from the
22 plaintiffs is true, that this is a responsibility that the
23 revised code imposes on the poll worker, there's no way at
24 this point in time for the Court to determine which
25 ballots, which provisional envelopes were cast by NEOCH

1 voters and which ones were cast by people using other forms
2 of identification, or indeed people who presented no
3 identification whatsoever. The only remedy this Court can
4 order is to count all ballots where this information is
5 missing. I think that would be an unwarranted expansion of
6 the consent decree and would signal that Ohio doesn't even
7 enforce its voter identification laws anymore.

8 So the problem that they have is they can't shoehorn
9 all of these ballots into the consent decree, and they
10 can't tell the Court which ones should be counted and which
11 ones should not.

12 With respect to SEIU, the Court has already
13 identified the larger problem, which is simply that there's
14 no constitutional interest to be vindicated here. Even if
15 this is a violation of state law, the analysis that the
16 Sixth Circuit has set out in the NEOCH case would tell us
17 that the burden imposed upon the voters is minimal. I take
18 great issue with the statement from the plaintiffs that
19 there's no state interest here. I think there is an
20 interest in having the form this way, in terms of fraud
21 prevention, because you are having the voter attest to
22 information. There's an interest in terms of avoiding the
23 stakes, because if I ask you to write down your driver's
24 license or your Social Security number, there's less of a
25 chance of an error than if you tell it to me verbally and I

1 write down what I heard. So I think the state --

2 THE COURT: Mr. Epstein, you and I are in total
3 agreement on that. That's the correct reading of 182: I
4 write it down. But that still doesn't answer my underlying
5 question.

6 The only reason that -- I just think that you
7 recognize that you're in an untenable position because I
8 don't see any type of legal sophistry that you can employ
9 that will ingraft upon 182 that the voter has the burden of
10 recording the type of information provided.

11 Now, maybe you're arguing there is a conflict in the
12 statute, but 182 is basically just almost an enabler of
13 181. 182 is just a form. 181 sets forth the duties and
14 responsibilities. Would you agree with the fact that 181
15 sets forth duties and responsibilities?

16 MR. EPSTEIN: Yes.

17 THE COURT: Now, before you get to the second
18 question that I asked about your comments on page 47, I
19 want to get back to another question. What fact finding
20 did the secretary do to arrive at the conclusion that there
21 was confusion that required him to enact 2012-54?

22 MR. EPSTEIN: I believe some of the answer to that
23 question is spelled out in the declaration of
24 Mr. Damschroder that we submitted to the Court which
25 explains the process that led to the creation of this form

1 and the issuance of 2012-01, the directive from January.

2 THE COURT: It seems to say, beginning with
3 paragraph 3 that beginning -- during the 2011 election
4 year, some of the boards of election had questions about
5 how to proceed with provisional ballots, and that was the
6 driver. Is that a fair characterization, Mr. Epstein?

7 MR. EPSTEIN: It is.

8 THE COURT: Now, if that is the case, then what led
9 you to make the statement that you made in -- on page 47
10 that the obligation to write down the identifying
11 information is imposed upon the poll worker, not the voter?
12 Those seem to be inconsistent.

13 MR. EPSTEIN: The answer to that question is partly
14 contained in paragraph 11 of Mr. Damschroder's declaration.
15 I understand that the Court does not agree with my argument
16 that, in fact, there are two obligations.

17 THE COURT: Did you say paragraph 11 or paragraph
18 12?

19 MR. EPSTEIN: Paragraph 11.

20 THE COURT: Let me read paragraph 11 to you so you
21 can contemplate it as I am contemplating it.

22 Form 12-B also eliminated most of the items in the
23 verification statement to eliminate the chance that the
24 poll worker's actions or inactions could ever keep a
25 provisional ballot from being counted. The section at the

1 bottom, the Precinct Election Official Info, clearly
2 states, quote, failure by the precinct election official to
3 complete this section will not affect whether or not this
4 provisional ballot is counted, quotes closed.

5 MR. EPSTEIN: That's correct.

6 THE COURT: Now, tell me how this shifts the burden
7 from -- well, what you're representing to the Court is that
8 the burden would remain upon the poll worker to write down
9 the identifying information. Tell me how this changes
10 that.

11 MR. EPSTEIN: That's what I want to do. If I can
12 elaborate. The form that we're talking about -- and I
13 don't know if the Court has it in front, but essentially
14 the top half is the affirmation that the voter fills out;
15 the bottom half is the information that the poll worker
16 fills out, what I think is technically referred to as the
17 verification.

18 The verification that's currently in use asked the
19 poll worker to put in minimal information, basically
20 identifying the poll worker's name and the location. The
21 form that was in use before this was much more expansive
22 and actually implemented the things you're talking about
23 from 3505.181. So there was a much longer form for the
24 poll worker to fill out that incorporated all this
25 information. When I responded to Mr. Berzon's questions,

1 it's that section I had in mind.

2 It's always been the practice, at least under this
3 secretary of state -- I can't speak to prior
4 administrations, but it's been the practice of this
5 secretary of state that errors by the poll worker in
6 filling out the verification form would not be counted
7 against the voter. That is what I was indicating. I
8 didn't mean to mislead the Court.

9 THE COURT: I don't believe that you meant to
10 mislead the Court. What I believe is that you were telling
11 the truth here because this is what the statute requires.
12 And nobody has questioned that. I mean, it's as clear as
13 day to me. Not once would I question your integrity,
14 Mr. Epstein, but it's hard for me to see you standing up
15 here telling me that what the statute says is not what it
16 says because you said what the law is on page 47, and then
17 the secretary did what is contrary to what the legislature
18 has instructed what the law is. At least that's what
19 appears to me.

20 I'm trying to get you to tell me what happened
21 between this date when you said the obligation to write
22 down the identifying information is imposed upon the poll
23 worker, not the voter, which is also what Section 3505.181
24 says and last Friday night. You have talked and I still
25 don't get it.

1 I know that I approached this with an open mind
2 because I wanted to believe that there would not be -- I
3 had no reason to believe, rather, that there would not be
4 attempts at voter suppression. But I still don't have a
5 satisfactory explanation. As a matter of law and as an
6 officer of this court, I still want to know what happened
7 between the date of this statement - I don't remember what
8 day it was - and Friday night that changed the law.

9 That's why I was going to give you a chance to tell
10 me maybe the secretary did some fact finding and he was
11 compelled to change the law, or maybe there was an
12 emergency session of the legislature that changed this, or
13 maybe there was some rule-making authority that the
14 secretary has that would empower him to change what appears
15 to be the law and to do it in the form of a directive and
16 file it at seven o'clock in the evening.

17 There are any number of ways that you can explain
18 it, but you pick a way, but just explain it. But don't
19 tell me that this is not -- don't tell me that I'm reading
20 this incorrectly because I know that I read it correctly
21 because I've read this a gazillion times to try to
22 understand what happened between your representation to the
23 Court in making the appropriate statement of the law and
24 the change in the law. Something usually precipitates a
25 change in the law. So tell me where I missed it.

1 MR. EPSTEIN: Your Honor, I have no knowledge or
2 information of the types of examples that you're talking
3 about. I cannot tell you what the considerations were that
4 led to the issuance of the directive. All that I can tell
5 you, as an officer of the court, is that when I read the
6 directive I did not perceive it to be changing the law.

7 THE COURT: You didn't write this directive, did
8 you?

9 MR. EPSTEIN: Your Honor, I did not write it. I did
10 not --

11 THE COURT: Who wrote it?

12 MR. EPSTEIN: I do not know the answer to that.

13 THE COURT: Would you confer with your counsel and
14 find out who wrote it, because I may want that person to
15 come and explain it to me.

16 MR. EPSTEIN: I'm sorry, Your Honor. My co-counsel
17 doesn't know that information either.

18 THE COURT: It's noon. We're going to take a
19 15-minutes recess. I want you to call and find out who
20 wrote it.

21 (Recess taken from 12:02 to 12:20.)

22 THE COURT: Please proceed, Mr. Epstein.

23 MR. EPSTEIN: Thank you, Your Honor.

24 I've had an opportunity to speak with my client, and
25 what I've been told is that the drafting of the directives,

1 and this directive in particular, is a collaborative
2 process. It begins in the legal section under the
3 supervision of Elizabeth Schuster, who is the chief
4 elections counsel. When their work is done, it then goes
5 to the elections staff under the director of elections,
6 Mr. Damschroder. And his staff then works on it before it
7 is -- the final product, or close to final, is sent to the
8 assistant secretary of state and then on to the secretary
9 himself.

10 THE COURT: Well, I suppose that I could always have
11 Mr. Damschroder, since he provided the declaration, his
12 affidavit. He would probably have the most knowledge of
13 what led to it, to the enactment of 2012-54, and that would
14 give me better insight as to the clarity that was needed to
15 enact this and to the timing of this enactment. But that
16 may not be necessary depending on the conclusion of your
17 argument. I still have a retort, a written retort, that's
18 coming tomorrow that I can factor into my decision. And I
19 would imagine, because you are an excellent lawyer,
20 Mr. Epstein -- by the way, just to confirm, you weren't in
21 this chain?

22 MR. EPSTEIN: That's correct.

23 THE COURT: They just sent you down here to argue it
24 but they didn't ask you to help create it.

25 At the time that you made the statement that you

1 made on October the 24th to me about the obligation to
2 write down the identifying information is imposed upon the
3 poll worker, not upon the voter, you didn't know that
4 2012-54 was being drafted?

5 MR. EPSTEIN: I was aware the directives were under
6 way, but I didn't know the content of them.

7 THE COURT: So you didn't know that directive was
8 going to change what you said?

9 MR. EPSTEIN: That's correct.

10 THE COURT: Do you have anything further to add,
11 Mr. Epstein?

12 MR. EPSTEIN: Your Honor, I would simply return to
13 the point that I had made briefly before, which is that I
14 think the Court correctly identified the fact that this is
15 ultimately an issue about whether the secretary's properly
16 applying -- complying with his obligations under state law.
17 And except for the limited neighborhood of the consent
18 decree that would be beyond the purview of the Court.

19 THE COURT: Let's take that for a minute. Now,
20 under the Sixth Circuit's ruling in NEOCH, the Court made
21 it clear that the due process clause protects against
22 extraordinary voting restrictions that render the voting
23 system fundamentally unfair, kind of like an extension of
24 *Burdick* and all that.

25 If you have a circumstance where the secretary has

1 enacted a directive that is in contradistinction of state
2 law and that imposes voting restrictions -- because what
3 happens is, now, if a provisional ballot is not checked as
4 to -- it's not poll worker error, it's voter error, and
5 then the ballot doesn't have to be counted, and that makes
6 it fundamentally unfair because the poll worker has been
7 directed to violate state law and, in doing so, it
8 nullifies that vote. Because if the poll worker follows
9 state law, the poll worker himself or herself would check
10 off the box, and, as you correctly point out, under 182,
11 the voter would have to fill out certain things. But 182
12 never says that the poll worker does not have to check the
13 box. That's what 181 says. There's nothing in 182 that
14 says it. And then we always -- I can always come back to
15 your correct interpretation of state law when you yourself
16 said that it was not the voter's burden.

17 It only became the voter's burden after the
18 secretary declared it was the voter's burden and sent you
19 in here to defend it. You haven't been able to show me any
20 law that would justify that, nor have you shown me any
21 facts that would require him to change it. One other thing
22 I wanted to ask you before I continue with my question
23 about the constitutionality of this. Is there any state
24 law or administrative legislation that empowers the
25 secretary to change statutes under his rule-making

1 capabilities and authority?

2 MR. EPSTEIN: No, Your Honor. The secretary's
3 authority is to implement, interpret, and fill the gaps.

4 THE COURT: Okay. Now, the other issue that I see
5 is a possible equal protection issue, Mr. Epstein, because
6 you have now -- with 54 you have created a system where
7 provisional ballots are being treated differently under
8 your scenario than they would have been treated had state
9 law been followed.

10 So even provisional voters can be conceivably
11 treated differently, that is, the SSN four provisional
12 ballot voters are being treated differently, possibly, than
13 other provisional ballot voters because it appears that
14 some are now going to be subject to 54 and others are not.

15 MR. EPSTEIN: I want to make sure I understand the
16 question, Your Honor. Is it taking us back to what happens
17 if you find in favor of the NEOCH plaintiffs, and that's
18 the nature of the equal protection problem? Because if
19 it's a concern about simply administration, I don't see the
20 equal protection problem because, as far as we know, none
21 of the poll workers are doing this. So everybody is being
22 treated the same in that respect.

23 THE COURT: If some poll workers are abiding by the
24 state statute and checking off the box, and other poll
25 workers are abiding by the directive and saying that, well,

1 if the box is -- I'm not going to check off the box, and if
2 the voter doesn't check off the box, I'm not counting this
3 ballot, aren't those provisional voters being treated
4 differently?

5 MR. EPSTEIN: Yes, but not to the level of an equal
6 protection violation.

7 THE COURT: Why not? Because you have two sets of
8 provisional voters who are being treated differently, it
9 seems.

10 MR. EPSTEIN: Theoretically, that's true. And I
11 would add parenthetically we have no evidence in the record
12 to suggest that's actually happening. But I think that for
13 all of this constitutional analysis, the focus shouldn't be
14 on the extent to which the secretary does or does not
15 comply with state law, because you can have an equal
16 protection violation when he is complying with the law if
17 the law is unconstitutional. It always comes back to the
18 question of what is the state interest, what is the burden
19 on the voters, and so forth.

20 What's troubling to me, as I try to see the burden
21 on the voter, is that irrespective of who is responsible
22 for filling out the step two information, the voter has to
23 sign at the bottom of the form attesting that the
24 information is true. So the voter has the last chance to
25 review the form, catch the omission, and fill it in or say

1 something, and essentially not sign an affirmation that is
2 untrue or incomplete.

3 So I think from an equal protection perspective,
4 yes, it may be a poll worker in some hypothetical instance
5 making the checkmark, but the opportunity still exists for
6 the voter to put in that checkmark. And that's what
7 distinguishes it, for example, from the Court's ruling with
8 respect to the right church, wrong pew where the poll
9 worker is the only one in the position to catch a mistake
10 and cure it.

11 The burden here on the voter is so small, to review
12 before signing it, fill it in if it's missing some
13 information. I don't think that different handling by the
14 poll worker would rise to an equal protection problem.

15 THE COURT: Thank you, Mr. Epstein.

16 MR. EPSTEIN: Thank you, Your Honor.

17 THE COURT: Ms. Chisholm, you have five minutes.

18 MS. CHISHOLM: Thank you, Your Honor. Mr. Chandra
19 would like to use one minute.

20 First and foremost, I want to be very clear because
21 I realize I was not before. The SEIU plaintiffs are going
22 to withdraw their motion for preliminary injunction because
23 we believe it's not necessary. On the modification
24 request, the motion for clarification and modification, we
25 think it's a very straightforward analysis.

1 There is a two-step analysis. One is whether
2 paragraph 7 applies here to protect the NEOCH voters. It
3 clearly does.

4 THE COURT: So are you asking now, then, to expand
5 the consent decree to cover all voters?

6 MS. CHISHOLM: Yes, Your Honor.

7 THE COURT: What's the legal basis for that? What's
8 the constitutional basis?

9 MS. CHISHOLM: The constitutional basis is Bush
10 versus Gore. The Sixth Circuit remanded to this Court the
11 issue in the reverse scenario where it vacated the
12 preliminary injunction and said -- on the ballot
13 deficiency, but said the consent decree continues to
14 protect against those deficiencies, therefore, there is an
15 equal protection violation that they were remanding to the
16 district court's discretion to resolve on a motion to
17 modify.

18 This is the exact same scenario where we have -- and
19 we didn't have this issue until Friday night. But we have
20 the consent decree, paragraph 7 covering these ballots,
21 because it says you can't disqualify when a poll worker
22 fails to do their duty. As we've discussed, the poll
23 workers fail to do their duty when those boxes aren't
24 checked.

25 If you look at the Directive 12-54, that provision

1 of the consent decree is incorporated into the directive,
2 so that's still the law - it has to be - for the SSN four
3 voters. But the directive now says, unlike the previous
4 one, that you have to treat all the SSN four voters
5 differently. You have to disqualify their ballots if
6 you're the county boards of elections. That's your
7 disparate treatment. That's the Bush versus Gore problem.

8 So Your Honor has two choices. You could, as you
9 did with paragraph 6, remove it from the consent decree.
10 The problem with that is it's unfair. You're removing the
11 benefit of the bargain that the NEOCH plaintiffs obtained
12 in getting paragraph 7 in the NEOCH consent decree. You
13 are disenfranchising more people, and, at the end of the
14 day, all we would be doing is saying that the poll worker
15 has to comply with state law. So it's really not a burden.

16 The one thing I wanted to point out is there was
17 colloquy between you and Mr. Epstein about 181(B)(6), and
18 Your Honor was pointing to the words that the local
19 election official shall record the type of identification
20 provided. That goes on to say also "and the Social
21 Security number information." So to the extent there's any
22 argument about who has to record the Social Security
23 information, 181(B)(6) is crystal clear.

24 So because of that, and because of Mr. Epstein's
25 statements to this Court previously about paragraph 7 would

1 be what applies here, not paragraph 6 of the consent
2 decree, it's clear that paragraph 7 protects the NEOCH
3 voters. The only remaining question for the Court is what
4 do you do about the Bush versus Gore problem. That's why
5 we, as the NEOCH plaintiffs, are moving for modification of
6 the decree. The Sixth Circuit said that's the proper
7 vehicle to remedy a Bush versus Gore problem, the same sort
8 of problem that they pointed out.

9 THE COURT: Thank you, Ms. Chisholm.

10 Mr. Chandra.

11 MR. CHANDRA: Thank you, Your Honor. Continuing on
12 behalf of NEOCH on the Bush v. Gore issue, the only
13 reasonable remedy to address that concern is to expand the
14 consent decree to include all voters. Because since the
15 consent decree, as the Court has reflected in its colloquy,
16 is requiring that the poll worker has that responsibility,
17 the only reasonable remedy is to make sure that rule
18 generally applies to everyone, and that no one is
19 disenfranchised as a result of the confusion that the Court
20 has discussed.

21 A couple of other points that I wanted to make, I
22 alluded to this earlier in my argument, but I just don't
23 want it to get lost because we keep talking about the duty
24 to record the ID. The other issue before the Court, the
25 other problem with Form 12-B and then the directive which

1 disenfranchises people for problems in it is that vaporized
2 from Form 12-B, which is mandatory, is the duty to record
3 what, if any, information the voter needs to bring back.
4 It's just gone from there.

5 So, as a result, one is left with the situation -- a
6 due process problem here because we have no way of knowing
7 whether or not people were supposed to come back. Contrast
8 this, by the way, with the absentee voter situation where
9 there's communications to the absentee voter. Although the
10 secretary of state has cut out e-mail communication and
11 telephone communication for inexplicable reasons, there's
12 still mail communication to those absentee voters. There's
13 no opportunity noted to remedy any problems to the
14 provisional ballot voter since that's been vaporized from
15 the form.

16 So NEOCH would respectfully request that the Court
17 provide the narrow remedy that's requested. It's been
18 mischaracterized by the secretary as somehow eliminating
19 the ID requirement. That's simply not true.

20 What we're requesting is that there be affirmative
21 evidence -- if a form is blank, that there be affirmative
22 evidence outside of the fact that it's blank, that people
23 did not provide it, that they refused to provide it. And
24 the secretary and the boards of elections are perfectly
25 capable of conducting individualized assessments and

1 investigations so that no individual voter in this state is
2 improperly disenfranchised.

3 Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Chandra.

5 I appreciate the arguments that you have all made,
6 and the patience. I know that some of my questions might
7 have been probing at times. But to your credit, you
8 answered them as best you could, all three of you. I will
9 look forward with bated breath to the next round of
10 pleadings that I am to receive from the plaintiff tomorrow.

11 Then my hope is to make a decision within the next
12 couple of days, certainly not later than Monday I should
13 have a written decision filed.

14 Aside from the reply briefs that are to be filed by
15 the plaintiff, or by the plaintiffs, further briefing will
16 not be necessary. I believe that I have a full
17 understanding of the issues. My questions, to the extent
18 that they could be answered, have been answered. I believe
19 that once the record is complete with the reply briefs, I
20 will have all that I need to make an informed decision. So
21 thank you very much. Safe travels to all of you.

22 (Proceedings adjourned at 12:39 p.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans
Shawna J. Evans, RMR
Official Federal Court Reporter