Ohio's Voter-Identification Law

Northeast Ohio Coalition for the Homeless v. Brunner (Gregory L. Frost and Algenon L. Marbley, S.D. Ohio 2:06-cv-896)

On October 24, 2006, public interest organizations brought a federal constitutional challenge to Ohio's new voter-identification laws.[1] With the complaint, the plaintiffs filed a motion for a temporary restraining order.[2] The court assigned the case to Judge Gregory L. Frost, who held a teleconference with the parties that same day.[3]

Following customary practice when a plaintiff filed a motion for a temporary restraining order with a complaint, the clerk's office walked the complaint and motion to the assigned judge's chambers.[4] The plaintiff was asked to remain present in the courthouse for a possibly immediate conference.[5]

At the first conference, Judge Frost set a hearing on the temporary restraining order motion for the next day.[6] When the parties gathered for the hearing, they informed Judge Frost that the case was related to one before Judge Algenon L. Marbley.[7]

On the case's third day, it was reassigned to Judge Marbley.[8] The earlier case arose from an August 31, 2006, complaint that in the 2004 general election Ohio's voting machines were distributed in an unequal and discrimina-

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1. Complaint, NEOCH v. Brunner, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 2; NEOCH v. Husted, 696 F.3d 580, 584 (6th Cir. 20120); NEOCH v. Husted, 837 F.3d 612, ___ (6th Cir. 2016) (p.5 of opinion filed at 6th Cir. No. 16-3603, D.E. 64); NEOCH v. Secretary of State of Ohio, 695 F.3d 563, 566; NEOCH v. Blackwell, 467 F.3d 999, 1004 (6th Cir. 2006); NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 (S.D. Ohio 2009); *see* Kevin Mayhood, *Groups Sue to Block Voter ID Rules*, Columbus Dispatch, Oct. 25, 2006, at 3D; Mark Rollenhagen, *Suit Calls Ohio's Voter ID Law a Mess, Asks Court to Void It*, Cleveland Plain Dealer, Oct. 25, 2006, at B1; Julie Carr Smyth, *Groups Sue Over Voter ID Measure*, Cincinnati Post, Oct. 25, 2006, at A3.

2. Temporary Restraining Order Motion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 3.

3. Docket Sheet, *Id.* (Oct. 24, 2006); Interview with Hon. Gregory L. Frost, June 1, 2012.

Tim Reagan interviewed Judge Frost for this report by telephone on June 1, 2012.

4. Interview with Hon. Gregory L. Frost, June 1, 2012.

Judges try to be available in the courthouse on election days in case they are called upon to preside over emergency election cases. *Id.*

5. *Id.*

6. Notice of Hearing, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 24, 2006), D.E. 7.

7. Interview with Hon. Gregory L. Frost, June 1, 2012.

Tim Reagan interviewed Judge Marbley for this report by telephone on July 11, 2012.

8. Transfer Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006), D.E. 16; *see* Transcript at 4–5, *id.* Oct. 27, 2006, filed Oct. 30, 2006), D.E. 27 [hereinafter Oct. 27, 2006, Transcript] (noting that transfer does not necessarily imply consolidation); *see also* Mark Rollenhagen, *Federal Hearing on Challenge to Voter ID Rule Is Today*, Cleveland Plain Dealer, Oct. 26, 2006, at B3.

tory manner to the disadvantage of urban and African-American voters.[9] As part of the relief sought in that case, the plaintiffs asked Judge Marbley to order Ohio's secretary of state to order each county to preserve 2004 ballots, but, on September 11, Judge Marbley issued an order directly to the counties that they do so.[10] In 2012, Judge Marbley determined that the action was barred by the Eleventh Amendment.[11]

On the day he was assigned the second case, Judge Marbley convened a hearing at 3:00 p.m.[12] Scheduling for the second case was greatly facilitated by the overlap of attorneys working the two cases.[13] The attorneys' considerable familiarity with the applicable areas of law were a great asset in moving the cases forward.[14]

At 5:10 p.m., the court recessed for 45 minutes, and then Judge Marbley issued a temporary restraining order against the new voter-identification laws, finding a likelihood that the plaintiffs could prove some unconstitutionality, and ordered an evidentiary hearing on the morning of Wednesday, November 1.[15]

The State of Ohio sought to intervene on October 27 so that it could appeal the temporary restraining order.[16] Judge Marbley denied the motion, reasoning that the state's interests were adequately represented by the defendant secretary of state.[17]

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9. Complaint, King Lincoln Bronzeville Neighborhood Ass'n v. Blackwell, No. 2:06-cv-745 (S.D. Ohio Aug. 31, 2006), D.E. 1; King Lincoln Bronzeville Neighborhood Ass'n v. Blackwell, 448 F. Supp. 2d 876, 877 (S.D. Ohio 2006).

10. *King Lincoln Bronzeville Neighborhood Ass'n*, 448 F. Supp. 2d at 879–80.

11. Opinion, *King Lincoln Bronzeville Neighborhood Ass'n*, No. 2:06-cv-745 (S.D. Ohio Aug. 31, 2006), D.E. 122, *available at* 2012 WL 395030.

12. Transcript, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006, filed Oct. 27, 2006), D.E. 30 [hereinafter Oct. 26, 2006, Transcript].

13. Interview with Hon. Algenon L. Marbley, July 11, 2012.

14. *Id.*

15. Temporary Restraining Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2006, D.E. 17; Oct. 26, 2006, Transcript, *supra* note 12, at 86–103; NEOCH v. Blackwell, 467 F.3d 999, 1002, 1004 (6th Cir. 2006); NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 n.1 (S.D. Ohio 2009); *see* Matt Leingang, *Judge Suspends ID Law on Absentee Ballots*, Cincinnati Post, Oct. 27, 2006, at A4; Kevin Mayhood, Mark Niquette & Alan Johnson, *Judge Suspends Voter-ID Directive*, Columbus Dispatch, Oct. 27, 2006, at 1A (reporting a reprieve from having absentee votes disqualified because the voters provided the wrong numbers from the drivers' licenses as identification—the number above the photo identifying where the license was obtained instead of the driver's identification number).

16. Intervention Motion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 27, 2006, D.E. 22; *NEOCH*, 467 F.3d at 1004; *see* Oct. 27, 2006, Transcript, *supra* note 8, at 10 (observing "a situation in which two state agencies or two state officials disagree on litigation strategy"); *see also* Matt Leingang, *Disagreement Over Challenge to Voter ID Law*, Cincinnati Post, Oct. 28, 2006, at A4.

17. Oct. 27, 2006, Transcript, *supra* note 8, at 45; *NEOCH*, 467 F.3d at 1004–05; *see* Alan Johnson, Mark Niquette & Joe Hallett, *Voter-ID Rules Remain in Limbo*, Columbus Dispatch, Oct. 28, 2006, at 1A (reporting that Ohio's attorney general sought to intervene on behalf of the state because the secretary of state decided not to appeal).

On October 31, the court of appeals, with one judge dissenting, stayed the temporary restraining order: "There is . . . a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote."[18] The court also determined that the state had a right to intervene.[19]

On the following day, six days before the election, Judge Marbley entered a consent order specifying how voters would have to prove their identities in Ohio for the 2006 election.[20] For the 2008 election, Judge Marbley also issued orders based on the parties' negotiations.[21] In 2009, Judge Marbley awarded the plaintiffs $431,374.05 in attorney fees and costs.[22]

Judge Marbley entered a consent decree in 2010.[23] The consent decree approved a revision to the earlier award of fees and costs, increasing it to $504,414.11.[24] On November 30, Judge Marbley awarded an additional $18,943.13 in fees and costs.[25] On July 9, 2012, Judge Marbley ruled that Ohio's new executive administration was not entitled to relief from the decree.[26] The court of appeals affirmed Judge Marbley's decision on October 11.[27]

On June 22, 2012, five labor organizations filed a federal complaint challenging some of Ohio's laws respecting provisional ballots, especially seeking a declaration that provisional ballots cast in the wrong precinct should be

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18. *NEOCH*, 467 F.3d at 1012; *NEOCH*, 652 F. Supp. 2d at 876 n.1; *see* Mark Rollenhagen, *Voter ID Rules Change a Third Time in Four Days*, Cleveland Plain Dealer, Oct. 30, 2006, at A1.

19. *NEOCH*, 467 F.3d at 1008–09.

20. Consent Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 1, 2006), D.E. 51; NEOCH v. Secretary of State of Ohio, 695 F.3d 563, 566; *NEOCH*, 652 F. Supp. 2d at 876; *see* Mark Rollenhagen, *Absentee Voter ID Rules Are Suspended*, Cleveland Plain Dealer, Nov. 2, 2006, at A1 ("All absentee ballots will be counted regardless of whether voters supplied identification when they were case."); Julie Carr Smyth, *Court Settlement Clarifies Voter ID Law*, Cincinnati Post, Nov. 2, 2006, at A2; Robert Vitale, *Voter ID Ruling Sets Off a Flurry*, Columbus Dispatch, Nov. 3, 2006, at 1A.

21. Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 27, 2008), D.E. 143; Order, *id.* (Oct. 24, 2008), D.E. 142; *NEOCH*, 695 F.3d at 566; *NEOCH*, 652 F. Supp. 2d at 876; *see* Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 821 (S.D. Ohio 2008).

22 *NEOCH*, 652 F. Supp. 2d at 875; NEOCH v. Husted, 837 F.3d 612, ___ (6th Cir. 2016) (pp.5–6 of opinion filed at 6th Cir. No. 16-3603, D.E. 64).

23. Consent Decree, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 19, 2010), D.E. 210; NEOCH v. Husted, 831 F.3d 686, 693; *NEOCH*, 695 F.3d at 696–98; Service Employees Int'l Union v. Husted, 887 F. Supp. 2d 761, 767 (S.D. Ohio 2012); *see* Transcript, *id.* (Apr. 19, 2010, filed June 24, 2010), D.E. 217; *see also* Ohio ex rel. Painter v. Brunner, 128 Ohio St. 3d 17, 20–21, 941 N.E.2d 782, 788–89 (2011).

24. Consent Decree, *supra* note 23, at 6; Fees and Costs Order at 4, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 30, 2010), D.E. 234, *available at* 2010 WL 4939946; *NEOCH*, 695 F.3d at 567.

25. Fees and Costs Order, *supra* note 24, *aff'd*, 695 F.3d 563.

26. Opinion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Apr. 19, 2012), D.E. 307, *available at* 2012 WL 2711393; NEOCH v. Husted, 696 F.3d 580, 585 (6th Cir. 2012); *Service Employees Int'l Union*, 887 F. Supp. 2d at 767; *NEOCH*, 831 F.3d at 694.

27. *NEOCH*, 696 F.3d at 600–04.

counted if they were cast in the wrong precinct because of poll-worker error.[28] The court determined that this case was related to Judge Marbley's pending action, and so it was assigned to him as well.[29]

On August 27, Judge Marbley determined that provisional ballots cast in the wrong precinct because of poll-worker error must be counted.[30] In its October 11 affirmance, the court of appeals clarified that the voter must cast a provisional ballot at a correct location.[31] On October 26, Judge Marbley found that the evidence supported an expansion of his injunction to protect provisional ballots cast in both the wrong location and the wrong precinct because of poll-worker error.[32] Five days later, the court of appeals issued an emergency stay of the expanded injunction both because "last-minute injunctions changing election procedures are strongly disfavored"[33] and because, "Though voters must rely heavily on poll workers to direct them to the proper precinct in a multi-precinct voting place, they are not as dependent on poll workers to identify their correct polling place."[34] On September 30, 2013, the court of appeals dismissed this appeal as moot because the 2012 election was well over.[35]

On the Friday night before the 2012 general election, Ohio's secretary of state issued a directive that election boards reject provisional ballots with in-

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28. Complaint, Service Employees Int'l Union v. Husted, No. 2:12-cv-562 (S.D. Ohio June 22, 2012), D.E. 1; *NEOCH*, 831 F.3d at 694; *NEOCH*, 696 F.3d at 585 n.1; *Service Employees Int'l Union*, 887 F. Supp. 2d at 772; *see* Second Amended Complaint, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio July 24, 2012), D.E. 63; First Amended Complaint, *id.* (July 13, 2012), D.E. 32; *see* Robert Barnes, *In Ohio, a Fight Over Votes Not Counted*, Wash. Post, Aug. 6, 2012, at A1.

29. Order, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio June 26, 2012), D.E. 16; *NEOCH*, 831 F.3d at 694–95; *Service Employees Int'l Union*, 887 F. Supp. 2d at 766 n.1.

The court of appeals affirmed Judge Marbley's denial of a motion to intervene filed by voters five weeks after the complaint was filed. Order, Service Employees Int'l Union v. Husted, No. 12-4079 (6th Cir. Feb. 20, 2013), *available at* 2013 WL 628527; *see Service Employees Int'l Union*, 887 F. Supp. 2d at 771–72; *see also NEOCH*, 696 F.3d at 589 n.4.

30. *Service Employees Int'l Union*, 887 F. Supp. 2d at 798; *NEOCH*, 696 F.3d at 585 & n.2; *NEOCH*, 831 F.3d at 695–97; *see* Robert Barnes, *Ohio Must Count Some Improperly Cast Ballots, Judge Rules*, Wash. Post, Aug. 28, 2012, at A5.

31. *NEOCH*, 696 F.3d at 589–90; *see id.* at 583 (noting that to resolve the appeal quickly the court of appeals received expedited briefing and heard oral arguments by telephone on October 1); Order, *Service Employees Int'l Union*, No. 2:12-cv-562 (S.D. Ohio July 9, 2013), D.E. 112, *available at* 2013 WL 3456756; *NEOCH*, 831 F.3d at 695; *see* Robert Barnes, *Ohio Told Poll Workers' Errors Shouldn't Invalidate Votes*, Wash. Post, Oct. 12, 2012, at A6; Daniel P. Tokaji, Election Law in a Nutshell 168–69, 190, 195 (2013).

32. Opinion, NEOCH v. Brunner, No. 2:06-cv-896 (S.D. Ohio Oct. 26, 2012), D.E. 344, *available at* 2012 WL 5334080; Order, *id.* (Oct. 26, 2012), D.E. 345; Transcript at 60–61, *id.* (Oct. 24, 2012, filed Oct. 26, 2012), D.E. 89; *NEOCH*, 831 F.3d at 699; *see Polling Location Ruling Expanded*, Cincinnati Enquirer, Oct. 26, 2012, at C1.

33. Service Employees Int'l Union v. Husted, 698 F.3d 341, 345 (6th Cir. 2012).

34. *Id.* at 344; *see NEOCH*, 831 F.3d at 699; *see also Court: Voters Must Find Right Poll*, Cincinnati Enquirer, Nov. 1, 2012, at C1; Darrel Rowland, *No "Wrong Church, Wrong Pew" Voting*, Columbus Dispatch, Nov. 1, 2012, at 3B.

35. Service Employees Int'l Union v. Husted, 531 F. App'x 755 (6th Cir. 2013); *NEOCH*, 831 F.3d at 699.

complete identification information.[36] This violated the consent decree with respect to omissions resulting from poll-worker error for provisional voters who provided Social Security numbers as identification.[37] On November 13, four days before counting of provisional ballots was to begin, Judge Marbley enjoined the violation of the consent decree and, as a matter of equal protection, ordered that provisional ballots for all voters be counted if incomplete identification information resulted from poll-worker error.[38] The court of appeals stayed the injunction pending appeal.[39] On February 6, 2014, the court of appeals remanded the case to Judge Marbley for vacation of his November 13, 2012, opinion, pursuant to an agreement of the parties approved by Judge Marbley.[40]

On February 17, 2015, Judge Marbley awarded the plaintiffs $2,227,179.90 in fees and costs.[41] The court of appeals largely affirmed the award on August 1, 2016, but remanded the fee requests for a reduction of hourly rates for the most highly paid attorneys—attorneys at a San Francisco law firm—and abrogation of the circuit's fees-for-fees cap that the court of appeals determined in this case to be inconsistent with a 1990 Supreme Court case, *Commissioner, INS v. Jean*.[42] On October 12, 2016, Judge Marbley approved an agreed fee-and-costs award of $2,618,140.78 to cover litigation up to a 2015 supplemental complaint.[43]

A supplemental complaint was filed on August 10, 2015.[44] Following 12 days of bench trial concluding on March 31, 2016, Judge Marbley declared on June 7 that some provisions of Ohio's 2014-enacted voting laws were in violation of the constitutional and Voting Rights Act rights of homeless and African-American voters: rigid requirements for filling out voting forms, a proscription on poll-worker assistance, and a tight time frame for curing errors.[45] On September 13, 2016, the court of appeals affirmed the ruling on rigid re-

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36. Opinion at 4, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Nov. 13, 2012), D.E. 357, *available at* 2012 WL 5497757.

37. *Id.* at 7–10.

38. *Id.* at 10–16; *see* Joe Guillen, *Judge Denounces Change to Ballot Rules*, Cleveland Plain Dealer, Nov. 14, 2012, at A1.

39. Opinion, NEOCH v. Husted, No. 12-4354 (6th Cir. Nov. 16, 2012); *see* Alan Johnson, *Appeals Court Backs Husted on Provisionals*, Columbus Dispatch, Nov. 17, 2012, at 2B.

40. Order, *NEOCH*, No. 12-4354 (6th Cir. Feb. 6, 2014); Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Feb. 7, 2014), D.E. 405 (vacating the November 13, 2012, opinion); Order, *id.* (Jan. 31, 2014), D.E. 401 (agreeing to vacate the opinion); *see* Order, *NEOCH*, No. 12-4354 (6th Cir. Mar. 6, 2014) (dismissing the appeal as settled).

41. Opinion, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Feb. 17, 2015), D.E. 444; *NEOCH*, 831 F.3d at 702.

42. *NEOCH*, 831 F.3d at 692, 719–25; *see* Commissioner INS v. Jean, 496 U.S. 154 (1990).

43. Order, *NEOCH*, No. 2:06-cv-896 (S.D. Ohio Oct. 12, 2016), D.E. 795.

44. Second Supplemental Complaint, *id.* (Aug. 10, 2015), D.E. 453; NEOCH v. Husted, 837 F.3d 612, ___ (6th Cir. 2016) (pp.6, 11–12 of opinion filed at 6th Cir. No. 16-3603, D.E. 64).

45. Opinion, *id.* (June 7, 2016), D.E. 691, 2016 WL 3166251; *NEOCH*, 837 F.3d at ___ (pp.2, 6–8 of opinion filed at 6th Cir. No. 16-3603, D.E. 64); *see* Robert Higgs, *Judge Rules Ohio Voting Laws Unconstitutional*, Cleveland Plain Dealer, une 8, 2016, at A1; Darrel Rowland, *2nd Judge Halts GOP Changes in Ohio Law*, Columbus Dispatch, June 8, 2016, at 1A.

quirements but, by a vote of two to one, reversed the rulings on poll-worker assistance and curing errors.[46] The dissenting senior judge voted to rehear the appeal, and six active judges, a minority, voted to rehear the appeal en banc.[47]

46. *NEOCH*, 837 F.3d 612 (6th Cir.), *stay denied*, 580 U.S. ___, 137 S. Ct. 14 (2016); *id.* at ___ (pp. 31–68 of filed opinion) (Circuit Judge Damon J. Keith, concurring in part and dissenting in part: "I am deeply saddened and distraught by the court's deliberate decision to reverse the progress of history.").

47. NEOCH v. Husted, ___ F.3d ___, 2016 WL ___ (6th Cir. 2016) (opinion filed at 6th Cir. 16-3603, D.E. 79, 80).