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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*,	:	**Case No. 2:06-CV-896**
Plaintiffs,	:	
v.	:	**JUDGE ALGENON L. MARBLEY**
JON HUSTED, in his official capacity as Secretary of the State of Ohio,	:	**Magistrate Judge Terence Kemp**
Defendant.	:	
and	:	
STATE OF OHIO	:	
Intervenor-Defendant	:	

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on Plaintiffs' Motion to Extend and Modify Consent Decree ("Motion") (Doc. 362). Given the imminent elections in the state of Ohio, the Court ordered expedited briefing on the Motion. (Doc. 368). Defendants' oppose the Motion. (Doc. 371). On July 12, 2013, the Court held a hearing on the Motion. The Motion has now been fully briefed and is ripe for review. For the reasons stated herein, Plaintiffs' Motion to Extend and Modify Consent Decree is **GRANTED IN PART**.

II. BACKGROUND

A. Background to the Motion

The background facts of this litigation have been discussed by this Court numerous times in orders both in this case, and the related case, *Service Employees' International Union, Local*

1, et. al. v. Husted, et. al., Case No. 2:12-cv-562 (the "*SEIU* case"). Thus, for the purposes of this Opinion & Order, a brief recapitulation of the litigation to date will suffice. At this stage, Plaintiffs include, *inter alia*, two coalitions advocating for the rights of the homeless and indigent, Northeast Ohio Coalition for the Homeless ("NEOCH") and Columbus Coalition for the Homeless, and the Ohio Democratic Party as an Intervenor-Plaintiff. Plaintiffs originally filed this action as a challenge to Ohio's voter identification[1] laws in 2006, against then-Ohio Secretary of State, Kenneth Blackwell. The State of Ohio entered as an Intervenor-Defendant. In the years since this case was filed the Court has dismissed a number of claims. Litigation was still ongoing, however, in 2010 when parties agreed to the entry of the Consent Decree (Doc. 210), which is the subject of the Motion *sub judice*. By 2010, then-Secretary of State Jennifer Brunner had replaced former Secretary Blackwell as a Defendant.

On April 19, 2010, the Court approved the Consent Decree. In stipulating to the Consent Decree, the parties agreed that it did not "constitute an adjudication or finding on the merits" of Plaintiffs' claims in the case, nor was it to "be construed as an admission by the Defendants of any wrongdoing or violation of any applicable federal or state law or regulation." (*Consent Decree*, Doc 210 at 2.) The parties then stated:

> In resolution of this action, the parties hereby AGREE to, and the Court expressly APPROVES, ENTERS and ORDERS, the following:
>
> I. PURPOSES OF THIS DECREE
>
> 1. The purposes of this Decree are to ensure that:
>
> > a. The fundamental right to vote is fully protected for registered and qualified voters who lack the identification required by the Ohio Voter ID Laws, including indigent and homeless voters – such as the Individual Plaintiffs and certain members of the Coalitions – who do not have a current address and cannot readily purchase a State of Ohio ID Card;

[1] Identification is also referred to by the abbreviation "ID" in this opinion, and throughout the record of this case.

> b. These voters are not required to purchase identification as a condition to exercising their fundamental right to vote and have their vote be counted;
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> c. The legal votes cast by these voters will be counted even if they are cast by provisional ballot on Election Day;
>
> d. These voters will not be deprived of their fundamental right to vote because of differing interpretations and applications of the Provisional Ballot Laws by Ohio's 88 Boards of Elections;
>
> e. These voters will not be deprived of their fundamental right to vote because of failures by poll workers to follow Ohio law. For purposes of this Decree poll worker error will not be presumed, but must be demonstrated through evidence; and
>
> f. All legal votes that are cast by indigent and homeless voters on Election Day will be counted.

(*Id.*) The remainder of the Consent Decree consists of provisions designed to bring about the purposes listed in Section I. The key provision, in Section III, ordered the Secretary of State to instruct Ohio's 88 boards of election to "count the provisional ballot cast by a voter using only the last four digits of his or her social security number" (an "SSN-4 voter") subject to a number of other conditions. (*Id.* at III) In Section V, the Consent Decree states that it "shall remain in effect until June 30, 2013." (*Id.* at V.) It also states that "[a]ny of the parties may file a motion with the Court to modify, extend or terminate this Decree for good cause shown." (*Id.*) At issue here is not an individual provision, but whether the Consent Decree as a whole should remain in force.

The Consent Decree remained in effect during the 2010 midterm election and the 2012 presidential election, surviving Defendants' motion to terminate it in 2012. In 2012, Secretary of State Jon Husted formally replaced former Secretary Brunner as a Defendant. In the months prior to June 30, 2013, the parties engaged in settlement discussions that they hoped would bring about final resolution of the issues in this case. As the date approached without an agreement,

however, Plaintiffs decided to move to extend the Consent Decree, filing the Motion on June 10, 2013. Initially, the Motion also requested certain substantive modifications to the Consent Decree to bring it into accordance with the decisions of the Sixth Circuit in this case and the *SEIU* case. Once the *SEIU* Plaintiffs reached a settlement with Defendants in the *SEIU* case, however, the request to modify the Consent Decree was moot. The sole issue now before this Court is whether to grant Plaintiffs' request to extend the Consent Decree beyond June 30, 2013. While this Motion has been pending before the Court, the Court ordered two temporary extensions to ensure the Consent Decree remained in place until the Court issued this decision on the Motion. (Docs. 368 & 381.) The Motion, having been fully briefed, is now ripe for decision.

B. Findings of Fact

In the Sixth Circuit, "modification of a consent decree requires a complete hearing and findings of fact." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) (internal quotations omitted). Over the seven years since this litigation began, the Court has received voluminous evidence from the parties and held numerous hearings. A hearing on the Motion was held on July 12, 2013. Upon review of the entire record and the transcript of the July 12, 2013 hearing, the Court finds as follows.

Currently, Ohio's election laws do not contain any provision which explicitly allows a vote, or provisional ballot, to be cast by a SSN-4 voter who does not have an accepted ID, but has and provides the last four digits of her SSN. This appears to be an oversight by lawmakers because, subject to certain other requirements,[2] voters of the following descriptions may cast provisional ballots: (1) voters who have, but are unable to provide, ID and do provide their SSN-4; (2) voters unable to provide ID and have, but are unable to provide, their SSN-4; (3) voters

[2] Other requirements for these voters include returning to the board of election within ten days to show identification or provide more information, and executing a written affirmation.

who have, but decline to provide, ID and have, but decline to provide, their SSN-4; and (4) voters who do not have ID and do not have a SSN-4. O.R.C. §§ 3505.18, 3505.181. The Court notes that it is not clear how an election official distinguishes between a voter who has, but cannot provide ID, and a voter who does not have ID. Nevertheless, the law is susceptible to an interpretation that would permit the former voter to cast a provisional ballot with her SSN-4, but not permit the latter voter to cast a provisional ballot.

The Court also finds, according to the unrefuted affidavit of NEOCH organizer Brian Davis, that of the Cleveland-area's approximately 23,000 homeless people, between 20% and 30% lack any form of identification. (*Affidavit of Brian Davis*, Doc. 378-1 at ¶6.) As of June 24, 2013, the Social Security Administration requires people seeking a replacement social-security card or a social-security printout to provide either a state ID, driver's license, passport, employee card, student ID card, health-insurance card, or U.S. military ID card. (*Id.* at ¶12.) To obtain a state ID in Ohio, however, one must present multiple proofs of identification, one of which is often a social-security card or printout. (*Id.* at ¶8.) The result of this, in some cases, is that one cannot acquire an ID without having an ID. This, of course, assumes that one can even afford to pay the fees to obtain an ID. Although Davis only has personal knowledge of circumstances in the Cleveland-area, requirements to obtain a state ID or social-security card are uniform across the state of Ohio. Therefore, having no evidence to the contrary, the Court finds that the obstacles to obtaining ID in Cleveland are representative of the obstacles affecting homeless Ohioans across the state.

Prior to entry of the Consent Decree, and the subsequent directives instructing boards of election to comply with the Consent Decree, Ohio counties implemented voting regulations in a dizzying variety of ways that often failed to conform to state law. Plaintiffs deposed

representatives of ten (out of 88) county boards of election to determine how they treated particular classes of ballots. (Doc. 135, Atts. 1-10.) The answers to these depositions show that, prior to the entry of the Consent Decree, treatment of provisional ballots varied wildly. If, for example, a voter provided a valid SSN-4 and did not return to present an ID within ten days, her provisional ballot was counted in Butler, Clermont, and Franklin counties, *not* counted in Clark and Hamilton counties, and possibly counted (subject to a determination by the board of elections) in Coshocton County. The representative of the board of elections for Belmont County was unsure whether such ballots would be counted. (Doc. 132-1 at 4.) In addition, nowhere in O.R.C. §§ 3505.18, 3505.181 is there a requirement that a SSN-4 voter provide her date of birth. Yet, prior to the Consent Decree, if a voter provided a valid SSN-4 but did not provide her date of birth, boards of election in Clermont, Coshocton, Greene did not count the ballot, boards of election in Belmont, Butler, Franklin, Hamilton, and Logan counties may or may not have counted the ballot (subject to various other factors), and the boards of election in Clark and Cuyahoga counties did count the ballot. (*Id.* at 2.) As these disparities demonstrate, the word arbitrary is insufficient to describe the treatment of SSN-4 ballots prior to the entry of the Consent Decree, despite the fact that such ballots were authorized by state law. According to statistics provided on the website for the Ohio Secretary of State, in 2008, prior to the Consent Decree, Ohio rejected 1,990 provisional ballots for failure to provide identification.[3] In the 2012 election, which was conducted under the Consent Decree, Ohio rejected only 363 provisional ballots for failure to provide identification.[4] The Court recognizes that not all provisional ballots are cast by eligible SSN-4 voters and that not all ballots rejected for failure to provide

[3] All voting statistics in this Opinion & Order available at Ohio Secretary of State's website, http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain.aspx.

[4] While these numbers do not constitute a large percentage of the more than ten million votes cast by Ohioans in the 2008 and 2012 elections (combined), the denial of the right to vote is irreparable harm. *See, e.g., Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

identification are cast by eligible SSN-4 voters. Available statistics do not allow for a more finely tuned inquiry, however, because the Secretary of State does not disaggregate SSN-4 provisional ballots. The Court also notes that, while Defendants argue that Plaintiffs have not produced one actual SSN-4 voter to testify that her ballot was rejected because of the issues discussed herein, it is unclear how anyone would ever know that her ballot was subsequently rejected, or for what reason it was rejected. For all intents and purposes, once an SSN-4 voter casts her provisional ballot and departs the polling place, she assumes her ballot was properly cast and will be counted, unless a poll-worker informs her that she falls into a category that would require her to return to provide further information.

III. LEGAL STANDARD FOR MODIFICATION OF CONSENT DECREE

A. Good Cause or Rule 60(b)

A critical threshold issue is under what legal standard this Court considers a plaintiff's motion to modify a consent decree. Generally, "[s]ince consent decrees and orders share many of the attributes of ordinary contracts, 'they should be construed basically as contracts.'" *Lorain NAACP v. Lorain Bd. Of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975).). Therefore, "the 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'" *Id.* (quoting *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984)). Despite the contractual nature of a consent decree, however, this Court "is not merely an instrument of a consent decree" and the decree "is nonetheless subject to Rule 60(b) [of the Federal Rules of Civil Procedure] because it is 'a judicial decree that is subject to the rules generally applicable to other judgments and decrees.'" *NEOCH v. Husted*, 696 F.3d 580, 601-2 (6th Cir. 2012) (internal quotations omitted).

The cases seem to present a conflict as to the appropriate standard. If this Court looks only "within the four corners" of the Consent Decree, it is explicitly stated that "[a]ny of the parties may file a motion with the Court to modify, extend or terminate this Decree for good cause shown." (*Consent Decree*, Doc. 210 at 6.) While Defendants argue strenuously at certain junctures that this Court must not look beyond the Consent Decree, they also strenuously dispute that "good cause shown" is the standard for modification, despite the unambiguous language of the Consent Decree. Defendants invite the Court to consider the broader context of the litigation in determining the relevant standard. The Court accepts Defendants' invitation and takes note of the affidavit of former Secretary of State Brunner. (Doc. 373-1.) Former Secretary Brunner was Ohio's Secretary of State, and the Defendant in this litigation, at the time the Consent Decree was agreed upon and entered into in 2010. She declares that, in negotiating the Consent Decree, the parties stipulated "that any party could move for extension or termination of the Decree 'for good cause.'" (*Id.* at 1.) She adds that her "understanding and intention was that 'good cause' warranting extension would include situations where, in the absence of the Decree, there would be regression and voters would be just as vulnerable to disenfranchisement as they had been before the Decree." (*Id.*) Brunner's declaration demonstrates that Defendants knowingly bargained for inclusion of the "good cause" standard for extension or termination. To preserve the agreement of the parties, then, this Court should apply the good cause standard, as Plaintiffs request. Yet, despite the unambiguous language of the Consent Decree and the parties' declared intentions, the Court is bound by the Sixth Circuit's previous decision in this case, which held that "[e]ven when consent decrees explicitly provide instructions for their own modification, Rule 60(b) governs." *NEOCH*, 696 F.3d at 602. The panel went on to hold, with regard to this

Consent Decree, "that the 'good cause shown' language . . . reaffirms Rule 60(b)'s applicability, rather than circumventing it." *Id.*

B. Rule 60(b) "*Rufo*" Standard to Modify Consent Decree

While the Sixth Circuit requires this Court to apply the standard of Rule 60(b), the Court still must determine what exactly that standard is in this instance. At the hearing, Defendants proposed that the Rule 60(b) standard properly applied to a motion to modify a consent decree is found in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). In *Rufo*, the Court held that "a party seeking modification of a consent decree bears the burden of establishing that [1] a significant change in circumstances warrants revision of the decree. [2] If the moving party meets this standard the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383.

Federal courts have universally understood that holding to establish "the two-part *Rufo* standard." Nevertheless, Plaintiffs ask this Court to consider what they refer to as the "third prong" of *Rufo*, the "public interest" prong. *Vanguards of Cleveland*, 23 F.3d at 1019. The Court presumes that by the "third prong," Plaintiffs refer to the *Rufo* majority's further elaboration of the first part of the standard:

> A party seeking modification of a consent decree may meets its initial burden by showing either a significant change either in factual or in law [*sic*]. Modification of a consent decree may be warranted when changed factual modifications make compliance with the decree substantially more onerous . . . Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification *would be detrimental to the public interest.*

Rufo, 502 U.S. at 384 (internal citations omitted) (emphasis added). While Plaintiffs treat "public interest" as a separate third prong, examination of *Rufo* shows that detriment to public interest is merely one conceivable example of a "significant change in factual conditions" which

could satisfy the first-part of the *Rufo* standard. The *Rufo* Court, perhaps optimistically, treated a situation in which enforcing a decree was not in the public interest as a "significant change," based on the assumption that a consent decree that was not in the public interest would not have been entered in the first instance. Hence, under *Rufo*, one type of significant factual change that warrants modification of a consent decree would be that enforcing a consent decree as written is no longer in the public interest. As an example of such a circumstance, the *Rufo* Court cited *Duran v. Elrod*, 760 F.2d 756, 759-61 (7th Cir. 1985), a Seventh Circuit case which held that modification of a consent decree was necessary because, if enforced in its original form, the decree would have forced the state to release accused violent felons prior to trial. In that decision, Judge Posner explained that:

> When an equity decree affects other people besides the parties to it, the judge must take account of the interest of those people – the public interest – in his decision whether to grant or deny equitable relief. This is true whether the judge is being asked to approve a decree, or interpret a decree, or, it seems evident, modify a decree. Therefore, in deciding whether [to grant the proposed modification], the judge had to consider not only the burden of the modification on the plaintiffs, and the benefits of the modification to the county government, *but also the benefits and burdens to the public.*

Id. at 759 (internal citations omitted) (emphasis added). Although *Duran* was decided prior to *Rufo*, the Supreme Court's approving citation suggests that impact on the public interest is among the changed circumstances which may make modification of a consent decree proper under *Rufo*.

Although Defendants agree that *Rufo* is the appropriate standard, they contend that the Sixth Circuit's *Lorain NAACP* decision stands for the proposition that a court cannot modify a consent decree where the defendant does not agree to the modification and no constitutional violation has been adjudicated. While *Lorain NAACP* does cast doubt on whether it is advisable for a court to modify a consent decree against the wishes of a defendant in the absence of an

adjudicated constitutional violation, it does not prohibit a modification in such circumstances. Nor does *Lorain NAACP* cite any case which purports to establish a blanket prohibition on modification in such circumstances. In *Lorain NAACP*, the Sixth Circuit cited the Third Circuit for the observation that "in the usual case[,] a court may not impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights reflected in the consent decree and that modification is essential to remedy the violation." *Lorain NAACP*, 979 F.2d at 1151 (quoting *Fox v. Department of Housing & Urban Dev.*, 680 F.2d 315, 323 (3d Cir. 1982)). While that may be the usual case, it is not the rule. In *Vanguards of Cleveland*, the Sixth Circuit upheld the district court's modification of a consent decree despite the fact that no constitutional violation had been adjudicated. 23 F.3d at 1021.

Furthermore, in *United States v. State of Michigan*, the Sixth Circuit upheld a modification which, in essence, ordered the state of Michigan to increase the mental health bedspace capacity of its prison system despite the fact that defendants opposed the modification and "the district court made no finding that any alleged noncompliance by defendants constituted a constitutional violation." 62 F.3d 1418 at *13 (6th Cir. 1995) (unpublished). That case, which discusses *Lorain NAACP* at length, clarifies that the Sixth Circuit has not imposed a blanket prohibition on modifying a consent decree over the objections of defendant absent an adjudicated constitutional violation. As the panel explained:

> [T]he Supreme Court has rejected the notion that a court may enforce a consent decree only to the point of ordering relief to which the parties would have been entitled to after a trial on the merits. [citation omitted] Further, "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo*, 502 U.S. at 391. This is so because "state and local officers in charge of institutional litigation may agree to do more than that which it minimally required by the Constitution to settle a case and avoid further litigation." *Id.* at 392.

Id. at *14. Although the state officers who made the bargain and sought to avoid further litigation here oversaw voting rights litigation, rather than institutional litigation, that difference does not undermine the principle articulated in *U.S. v. Michigan*. When state officials enter a consent decree to settle a case prior to an adjudication of the merits and, thus, benefit from avoiding costly and time-consuming litigation, it is manifestly unfair to allow them to defeat a proposed modification which preserves the essence of the bargain and furthers the purposes of the decree on the basis that there was no decision on the merits of a plaintiff's claims.

Even if this Court were to ignore the lessons of *United States v. State of Michigan* -- which it does not -- *Lorain NAACP* is distinguishable from the case *sub judice* in two significant ways. First, the district court in *Lorain NAACP* modified the consent decree to impose new substantive obligations on a defendant. In the original *Lorain NAACP* consent decree, the state of Ohio was ordered to contribute $1 million to assist in the desegregation of Lorain public schools. When desegregation proved more costly than anticipated, the court modified the decree to order Ohio to contribute $9 million. The Sixth Circuit held that, by increasing the amount the state had agreed to contribute by a factor of nine, the modification "stands contrary to, and effectively eviscerates, the terms of the State's consent from which the district court derived its authority to enter the consent judgment." *Lorain NAACP*, 979 F.2d at 1153. In the case *sub judice*, by contrast, an extension of the Consent Decree would not burden the state with any additional duties. Furthermore, the record contains no evidence to suggest that the extension would impose any additional costs on the state. An extension of the Consent Decree would only require the State continue to instruct boards of election to count the provisional ballots cast by SSN-4 voters -- something Defendant's counsel represented the State will continue to do, regardless of whether the Consent Decree remains in force.

The second way in which *Lorain NAACP* differs from the case *sub judice* concerns the extent to which the modification serves and/or undermines the purposes of the Consent Decree. In denying the *Lorain NAACP* modification, the Sixth Circuit noted that "[n]othing in this opinion vitiates either the goals of the desegregation consent decree or the integrity of the Lorain Board of Education's commitment to achieve them." *Id.* Thus, with or without the extra $8 million from the State, Lorain's Board of Education still had to achieve desegregation. The ultimate purpose of the consent decree, therefore, remained unaffected. Accordingly, by denying the modification, the Sixth Circuit merely shifted the costs to be borne by the defendants in order to preserve the bargain upon which the State based its consent. Here, to deny the proposed modification would vitiate entirely the purposes of the Consent Decree. The modification Plaintiffs now seek is not a simple matter of who pays the bill, as there is no bill to be paid. If the Consent Decree is not extended, its purpose -- guaranteeing the voting rights of the homeless and indigent who identify themselves using the final four digits of their social security numbers - will fail.

Defendants ask the Court not to give significant consideration to the purposes of the Consent Decree, citing the Supreme Court for the proposition that "[t]he decree itself cannot be said to have a purpose; rather, the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). While that is the applicable law with respect to the specific decree and particular facts of *Armour*, the Sixth Circuit holds that in considering modifications, generally, "the district court properly focuse[s] on the goal of the consent decree." *Vanguards of Cleveland*, 23 F.3d at 1020. Similarly, in the converse situation, where a party asks a district court to dissolve a decree, the

Sixth Circuit has "emphasized that the probing of the underlying goal of a consent decree is necessary before the decree [can] be dissolved." *Id.* at 1019. In *Lorain NAACP*, the panel's observation that "[n]othing in this opinion vitiates [] the goal[] of the desegregation consent decree" was crucial to the ultimate holding. *Lorain NAACP*, 979 F.2d at 1153. These cases demonstrate that courts are more favorable to proposed modifications that further purposes of a decree than modifications that vitiate those purposes. Furthermore, the Consent Decree here differs from a standard consent decree in that the parties explicitly *agreed* to and memorialized the purposes of the Consent Decree in Section I. Those purposes, which Defendants endorsed, are worth quoting once again:

> 1. The purposes of this Decree are to ensure that:
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> a. The fundamental right to vote is fully protected for registered and qualified voters who lack the identification required by the Ohio Voter ID Laws, including indigent and homeless voters – such as the Individual Plaintiffs and certain members of the Coalitions – who do not have a current address and cannot readily purchase a State of Ohio ID Card;
>
> b. These voters are not required to purchase identification as a condition to exercising their fundamental right to vote and have their vote be counted;
>
> c. The legal votes cast by these voters will be counted even if they are cast by provisional ballot on Election Day;
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> d. These voters will not be deprived of their fundamental right to vote because of differing interpretations and applications of the Provisional Ballot Laws by Ohio's 88 Boards of Elections;
>
> e. These voters will not be deprived of their fundamental right to vote because of failures by poll workers to follow Ohio law. For purposes of this Decree poll worker error will not be presumed, but must be demonstrated through evidence; and
>
> f. All legal votes that are cast by indigent and homeless voters on Election Day will be counted.

Thus, far from having opposing purposes in entering the Decree, the parties codified a statement of intent which would be difficult for anyone who upholds the U.S. Constitution to oppose. At the hearing on the Motion, in an unfortunate choice of words, Defendants' counsel dismissed the purposes or goals of the Consent Decree as "flowery language." The Court finds nothing "flowery" about the Consent Decree's instruction that "[a]ll legal votes that are cast by indigent and homeless voters on Election Day will be counted." The Court will not do Defendants the disservice of presuming that they would oppose such a result, or, that they would prefer that registered voters who cast valid provisional ballots under Ohio law not have their votes counted because county boards of election misinterpret Ohio laws. In any case, the purposes and goals of this decree are manifestly in the public interest. Thus, even if parties now dispute the means by which those purposes should be achieved, this Court properly considers the goals previously agreed to by the parties in deciding whether modification is appropriate.

In light of the above, the Court determines that the proper standard of review for a motion to extend a consent decree is the two-part standard established in *Rufo*: "[1] [A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. [2] If the moving party meets this standard the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383. In this context, a significant change in circumstances can include: "[1] when changed factual modifications make compliance with the decree substantially more onerous . . . [2] when a decree proves to be unworkable because of unforeseen obstacles . . . or [3] when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384. Moreover, in applying this standard to the facts of the case, "the district

court properly focuse[s] on the goal of the consent decree." *Vanguards of Cleveland*, 23 F.3d at 1020.

IV. LAW & ANALYSIS

A. *Rufo* Step 1: Significant Changed Circumstances

Defendants argue that Plaintiffs have failed to demonstrate significant changed circumstances because "the circumstances have not changed at all from the inception of the Consent Decree to its agreed termination." *Defendants' Response in Opposition*, Doc. 371 at 9. When parties state, as they did here, that a consent decree is designed to achieve a particular result and it fails to obtain that result, that unforeseen failure can be a significant changed circumstances. In *Vanguards of Cleveland*, the Sixth Circuit held "that the lower than expected pass rates by minorities on the 1984 and 1985 promotional examinations and the resulting slower than expected promotion rate for minorities" were "a significant change in factual circumstances" that "caused the consent decree to become 'unworkable' as well as 'detrimental to the public interest.'" *Vanguards of Cleveland*, 23 F.3d at 1019. In *Vanguards of Cleveland*, the consent decree had failed to bring about "the 23 percent [of supervisor positions being held by minorities] goal." *Id.* at 1020. As a result of the failure of the decree to achieve the intended result during the time it was in effect, the Sixth Circuit upheld the district court's extension of the decree because "a significant change in circumstances which warrants revision of the consent decree [was] present in [that] case." *Id.*

Defendants distinguish *Vanguards of Cleveland* on the basis that both the plaintiffs and defendants in that case agreed to the proposed modification, which was challenged by the union, a third-party. That distinction has no bearing, however, on the proposition that the failure of decree to achieve the intended goal can itself constitute a significant change of circumstances.

As the Third Circuit succinctly stated, modification of a consent decree is justified when "'time and experience have demonstrated' that 'the decree has failed to accomplish th[e] result' that it was 'specifically designed to achieve.'" *Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267, 283 (3d Cir. 2001) (quoting *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968)). Furthermore, in *Rufo* the Supreme Court held that, to justify a modification, a change in facts need be only "unforeseen," not "unforeseeable." *Rufo*, 502 U.S. at 385. As the *Rufo* Court observed, "Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree." *Id.*

The Court finds that here the Consent Decree has, thus far, failed to achieve the purposes for which both parties agreed it was designed when they entered it, namely, to ensure valid ballots cast by SSN-4 voters are counted. The evidence adduced by Plaintiffs demonstrates that each county dealt with such votes as it saw fit in the 2008 election, prior to the entry of the Consent Decree, despite the fact that Ohio law mandated the counting of those ballots. In 2012, with the Consent Decree in effect, the number of ballots rejected because of a failure to provide identification (a group which includes SSN-4 voters) decreased significantly. This Court hopes that Ohio's boards of election would continue to implement Ohio's voting laws with the same uniformity that they have since the entry of the Consent Decree. Aside from the Consent Decree, however, there is nothing to prevent boards of election from returning to those haphazard and, in some cases, illegal practices, which previously resulted in the invalidation of validly cast ballots from registered voters.

Although Defendants argue that Plaintiffs' characterization of O.R.C. §§ 3505.18, 3505.181 is not the most straight-forward reading of those provisions, Plaintiffs are correct that, read literally, those sections are susceptible to the interpretation that boards of election need not

count a ballot cast by a SSN-4 voter who does not have an accepted ID, but has and provides the last four digits of her SSN. Defendants assure the Court that those votes will continue to be counted, per the instructions of the Secretary of State. A citizen's right to vote, however, cannot be at the mercy of the shifting legal interpretations of a single state officer, no matter how well intentioned he or she is. The Secretary of State changes frequently and while the current Secretary may continue to instruct boards of election to count the ballots of SSN-4 voters, there is no guarantee his successor will follow suit. The Court also observes that, on more than one occasion, Secretary Husted has attempted to make eleventh hour changes to Ohio's voting system. *See, e.g., SEIU Local 1 v. Husted*, 2012 WL 5497757 (S.D. Ohio Nov. 13, 2012); *Obama for America v. Husted*, 888 F.Supp.2d 897 (S.D. Ohio Aug. 31, 2012).

Plaintiffs also draw the Court's attention to the affidavit of former Secretary Brunner, the Defendant when the Consent Decree was entered, who states that she "anticipated that, prior to the Decree's expiration, its objectives of broad enfranchisement and consistency in providing equal and fair access would become institutionalized in Ohio statutory provisions applicable all Ohio voters [*sic*], including homeless and indigent voters." *Brunner Affidavit*, Doc. 373-1 at 1.[5] In 2010, the parties did not foresee that three years later Ohio laws would still contain a loophole that could result in valid provisional ballots being rejected. The Court does not find that the Consent Decree required, or purported to require, Ohio to pass new voting legislation. Such a requirement would have been an impermissible infringement upon Ohio's rights as a state. The Court also does not find that the failure of the proposed 2010 voting legislation alone --

[5] Defendants contend this Court should consider only what is within the four corners of the Consent Decree and not look to former Secretary Brunner's affidavit. Since the purposes of the Consent Decree as stated by Secretary Brunner are essentially the same as stated by the Consent Decree, the Court reaches the same conclusion as to the Consent Decree's purposes from either source.

legislation which would have solved the SSN-4 voter problems -- is a significant changed circumstance which justifies modification of the Consent Decree.

The Court does find, however, that Defendants entered the Consent Decree with the same purpose as Plaintiffs, to ensure the counting of ballots cast by SSN-4 voters, among whom are a large number of homeless and indigent voters. When they entered the Consent Decree, the parties did not foresee that at the time of its termination, the enfranchisement of those voters would not be ensured. At the current time, if the Consent Decree is allowed to expire, there is nothing except Defendants' assurances to secure the rights of SSN-4 voters and prevent a return to the 2008 state of affairs, in which many counties failed to count valid SSN-4 ballots. Thus, in the time allotted, the Consent Decree has not achieved the stated purposes which the parties expected it to achieve. Hence, Plaintiffs satisfy the first part of the *Rufo* standard, having successfully demonstrated significant changed circumstances. It is appropriate to modify the Consent Decree in order to extend its life and, thus, effectuate its purposes.

B. *Rufo* Step 2: Suitably Tailored Modification

The second part of *Rufo* requires the Court to determine whether the modification Plaintiffs seek "is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383. Plaintiffs have asked the Court to extend the Consent Decree indefinitely. An indefinite extension would, essentially, convert a temporary consent decree into a permanent injunction without a full adjudication of the merits. Such a result is not supported by the law, nor was it contemplated by Defendants when they entered the Consent Decree. Defendants agreed to be bound by the Consent Decree with the understanding that they were not permanently bound, and would be free of the Consent Decree when its purposes were achieved. To bind Defendants by the Consent Decree permanently would fundamentally alter the bargain reached by the parties.

Since an indefinite extension is not suitably tailored, the Court must consider the appropriate length of the extension in this case. In *Vanguards of Cleveland*, the Sixth Circuit held that a modification which extended the consent decree "for a relatively short period of time, approximately two years" was suitably tailored. 23 F.3d at 1020. Two years, in *Vanguards of Cleveland*, covered two annual promotion examinations, each of which would move the Defendants toward their goal of having 23% of supervisor positions held by minorities. Mirroring this logic, Plaintiffs have asked, alternatively, that the Consent Decree be extended for two presidential election cycles, until the end of 2020. The Court notes that though that proposal has the benefit of tracking, in some ways, the Sixth Circuit's decision in *Vanguards of Cleveland*, it would result in an extension of more than seven years. In light of the fact that Defendants initially agreed to a period of three years for the Consent Decree, a seven-year extension is excessive and not in keeping with the original bargain. Instead, the Court finds that an extension until December 31, 2016, roughly three and one-half years, is suitably tailored to address the failures of Defendants to ensure the counting of valid SSN-4 votes.

This extension will preserve the Consent Decree through the next presidential election. As the record evidence indicates, it is during the high turn-out Presidential elections that Ohio's voting system experiences the most stress. Indeed, the evidence of boards of election improperly dealing with SSN-4 ballots emerged out of the 2008 presidential election, in which voter turn-out reached 69.97%. In the 2012 presidential election, 5,632,423 of Ohio's 7,987,697 registered voters cast ballots, roughly 70.51%. Of those ballots cast in 2012, 208,084 were provisional ballots -- the type of ballot most SSN-4 voters must cast. By contrast, in the 2010 midterm election, only 3,956,045 of Ohio's 8,037,806 registered voters cast ballots, roughly 49.22%. Of the 2010 ballots, only 105,195 were provisional ballots, roughly half as many as in the 2012

presidential election. Given the additional burden placed on boards of election during presidential elections – and the accompanying increased risk of disenfranchisement of SSN-4 voters -- the Court finds it necessary to extend the Consent Decree through the 2016 election.

Of course, since none of the substantive terms of the Consent Decree change as a result of this Order, either party may move to extend, terminate, or modify the Consent Decree at any time. If, prior to the 2016 election, Defendants can devise an alternative method to ensure valid SSN-4 votes will be systematically counted, and can demonstrate its efficacy to this Court, they may be successful in moving to terminate. Similarly, if Plaintiffs prove further failures of Defendants to count valid SSN-4 ballots in subsequent elections, another extension of the Consent Decree may be appropriate. At this time, however, the Court hereby modifies the Consent Decree such that it remains in effect until December 31, 2016. All other substantive provisions of the Consent Decree remain unchanged.

V. CONCLUSION

For the reasons stated herein, Plaintiffs' Motion to Extend and Modify the Consent Decree is **GRANTED IN PART**. The Court **ORDERS** that the Consent Decree be modified to remain in effect until December 31, 2016. All other provisions of the Consent Decree remain unchanged.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

Dated: August 5, 2013