

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION COUNTY CIRCUIT COURT
CAUSE NO: 49C01 08 10 PL 049131

RAYMOND J. SCHOETTLE,)
ERICA PUGH, and the)
MARION COUNTY REPUBLICAN PARTY,)

Plaintiffs,)

v.)

MARION COUNTY ELECTION BOARD,)

Defendant.)

FILED

194 OCT 29 2008

Elizabeth J. White
CLERK OF THE MARION CIRCUIT COURT

VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER
PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

I. INTRODUCTION

1. The Plaintiffs bring this action to protect the integrity of the absentee balloting process in Marion County. The Marion County Election Board has adopted a policy and practice of ignoring Indiana's provisional balloting process for challenged absentee ballots. Instead of following the statutorily mandated provisional balloting process for these challenged ballots and permitting appropriate verification, the Marion County Election Board has chosen instead to preclude provisional challenges and immediately run challenged absentee ballots through the machines thus forever precluding appropriate verification of challenged absentee ballots and creating a substantial likelihood that fraudulent ballots will be counted.

2. In particular, the Plaintiffs seek a declaratory judgment that the Marion County Election Board must comply with the provisions of I.C. § 3-11-10-20 and I.C. § 3-11-10-21 and use the provisional balloting process set forth in I.C. § 3-11.7 when handling challenged absentee ballots.

3. The Plaintiffs further seek a temporary restraining order and preliminary and permanent injunctive relief requiring the Marion County Election Board to comply with the provisions of I.C. § 3-11-10-20 and I.C. § 3-11-10-21 and use the provisional balloting process set forth in I.C. § 3-11.7 when handling challenged absentee ballots.

4. As the November 4, 2008 election is only 6 days from the date of the filing of this action, the time to address the issues alleged herein is very short. Consequently, the legal issues presented in this action require an expedited hearing and immediate resolution by this Court to ensure that challenged absentee ballots in Marion County are handled in a manner consistent with Indiana law.

PARTIES

5. The Plaintiff, Raymond J. Schoettle, is a registered voter and resident of Marion County who plans on voting in the November 4, 2008 general election.

6. The Plaintiff, Erica Pugh, is a candidate for the office of Surveyor in Marion County as well as a registered voter and resident of Marion County who plans on voting in the November 4, 2008 general election.

7. The Plaintiff, Marion County Republican Party is an Indiana county wide political party organization organized pursuant to the Rules of the Indiana Republican party, entity organized with its principal place of business located at 120 East Vermont Street, Indianapolis, Indiana, 46204.

8. The Defendant Marion County Election Board ("Election Board"), conducts and administers elections in Marion County pursuant to I.C. §3-6-5-14. The Election Board has three members, including the Circuit Court Clerk, who is an *ex officio* member of the board, and two persons, one from each of the major political parties, who the Circuit Court Clerk appoints. I.C.

§3-6-5-2. 20. The Election Board in turn appoints a precinct election board for each precinct which determines “all questions of challenge and all other matters coming before the precinct election board.” I.C. § 3-6-6-1. The Election Board also has the authority to determine whether any provisional ballots cast by voters whose eligibility to vote has been challenged will be counted or rejected. Ind. Code § 3-11.7-5-1.5.

II. JURISDICTION AND VENUE

9. This Court has jurisdiction under I.C. § 33-28-1-2.

10. Venue is proper in this Court because Plaintiffs and Defendant reside in or are based in Marion County.

III. FACTUAL ALLEGATIONS

11. When an Indiana voter wishes to vote by absentee ballot, the voter—unless exempted by disability—must complete an application for an absentee ballot. IND. CODE § 3-11-4-2(a). The application is a form prescribed by the Indiana Election Commission, known as an ABS-1. A true and accurate copy of a blank ABS-1 is attached hereto and incorporated herein by reference as Exhibit “A.”

12. After applying for and receiving an absentee ballot, a Marion County voter will then cast the voter’s votes on the paper absentee ballot by using a pencil to fill in an oval next to the name of each candidate the voter chooses in the races on the ballot. The voter then seals the ballot in an envelope and returns it to the Election Board. “A voter permitted to transmit the voter’s absentee ballot by fax or electronic mail . . . is not required to comply with” the envelope requirements, but otherwise follows the same procedure. IND. CODE § 3-11-10-1(b).

13. After the Election Board reviews each absentee ballot pursuant to the requirements of IND. CODE 3-11-10, the Board arranges for the absentee ballots to be

“delivered to the precinct election boards at their respective polls on election day.” IND. CODE § 3-11-10-12.

14. In Marion County, voters who vote early at the City-County Building or the two remote early voting locations complete paper ballots identical to those completed by voters who cast absentee ballots and in-person ballots, as described in Rhetorical Paragraphs 12, *supra*, and 16, *infra*.

15. Early voting is a type of absentee voting. *See Exhibit “A.”*

16. Throughout the day on Election Day, during lulls in activity, the precinct election boards will cast the absentee ballots on the main voting machine employed by the Election Board, a machine known as the ES&S Model 100. Unlike many Indiana counties, Marion County does not employ a “central count” of absentee ballots upon the close of the polls.

17. The ES&S Model 100 is an optical scanning device and electronic vote counter mounted atop a sealed storage bin. Votes are cast when a paper ballot, whether by an in-person, absentee, or early voter, is fed into the device. The device scans the pencil-marked ovals, records the votes in each of the various races on the ballot, and allows the ballot to fall into the sealed storage bin. Once a paper ballot is scanned, its votes recorded, and dropped into the bin, it becomes fungible, regardless of whether it is an absentee ballot, an early ballot, or an in-person ballot. It is impossible to discern any one voter’s ballot from another, absent tampering.

18. Indiana allows challenges, on various bases, to voter eligibility. Challenges to in-person voters are governed by IND. CODE §§ 3-11-8-20 through 3-11-8-27.5. The thrust of these statutes is to require that a challenge to be made either by a designated challenger or a member of the precinct board, and that the challenge be made by affidavit. IND. CODE § 3-11-8-21. The challenged voter then has the opportunity to reply by counter-affidavit and, upon

completion of that counter-affidavit, is entitled to cast a provisional ballot. IND. CODE § 3-11-8-23.5. The procedures governing the resolution of a challenged voter's eligibility and the actual counting of provisional ballots ruled to have been cast by eligible voters are contained in IND. CODE 3-11.7.

19. A challenge to an absentee voter's eligibility is also to be determined by the provisions of IND. CODE 3-11.7. IND. CODE § 3-11-10-21.

20. Provisional ballots, whether in-person or absentee, are to be kept separate from other ballots and returned to the Clerk of the Courts after the close of the polls for eligibility determination and, for those found eligible, voting. IND. CODE §§ 3-11.7-2-3 and 4.

21. The Indiana Secretary of State and the Indiana Election Division have provided written guidelines for precinct election boards to follow on Election Day through the official document known as the "2008 Indiana Election Day Handbook." At page 30 of the Handbook, discussing challenges to absentee ballots, the Handbook states:

It is also possible to challenge an absentee ballot in the same manner that a voter can be challenged in person (See Form PRE-4). A challenged absentee ballot will be processed as a provisional ballot. The absentee ballot secrecy envelope must be marked as a provisional ballot. The challenged absentee ballot will be kept separate from the other absentee ballots processed by the precinct election board, and returned unopened to the county election board. The county election board will then determine whether this ballot will be counted. **DO NOT put defective absentee ballots or provisional ballots in the ballot box!**

2008 Indiana Election Day Handbook, p. 30 (Emphasis and punctuation in original). A true and accurate copy of the relevant portions of the Handbook is attached hereto and incorporated herein as Exhibit "B."

22. Upon information and belief, for elections prior to the Special Election for the Seventh Congressional District held in March 2008, the Election Board complied with the requirements to handle challenged absentee ballots as provisional ballots.

23. Commencing not later than the Special Election of March 2008, however, the Election Board adopted a practice and procedure of ignoring Indiana Code 3-11-10-21's requirement to deal with challenged absentee ballots as provisional ballots and instead instructed precinct election boards to cast those ballots into the ES&S Model 100 voting machines.

24. Notwithstanding the unambiguous instructions from the Indiana Secretary of State, the Election Board has issued instructions to its precinct election boards that all absentee ballots are to be voted in the November 4, 2008, general election. The instructions, which are in the form of Powerpoint presentations, contain no provision for challenges to absentee ballots and they affirmatively state—in bold print placed next to the image of a “Stop sign,” that all absentee ballots are to be voted. *See Marion County Judge Training (2008 General Election), Screens 43-50; Marion County Inspector Training (2008 General Election), Screens 60-64 and 74-76; Marion County Clerk Training (2008 General Election), Screens 41-49. (The entire Powerpoint presentations are attached hereto and incorporated herein as Exhibits “C,” “D,” and “E.”)*

25. If not enjoined, the Election Board will continue to direct the precinct election boards in Marion County to vote all absentee ballots at the November 4, 2008, general elections and will not allow properly challenged absentee ballots to be treated as provisional ballots.

IV. CAUSE OF ACTION

26. The Plaintiffs incorporate by reference the allegations contained in Rhetorical Paragraphs 1 through 25 as if fully set forth herein.

27. The Election Board's interpretation of I.C. § 3-11-10-20 through 22 precluding the application of the provisional balloting process (I.C. § 3-11.7 *et seq.*) to challenged absentee ballots violates the mandatory provisions of I.C. § 3-11-10-21 entitled “**Challenge of absentee vote; procedure**” which states, in pertinent part, that “[t]he challenge under this section

regarding the absentee ballot **must be determined** using the procedures for counting a provisional ballot under IC 3-11.7.” (Emphasis supplied).

28. The conflict concerning proper interpretation of Indiana law between the Plaintiffs and the Marion County Election Board necessitates judicial intervention in the form of a declaratory judgment.

29. This obvious conflict on the proper reading of Indiana law threatens the right to vote and the integrity of the voting process in Marion County for all voters, including Plaintiff Raymond J. Schoettle. By precluding the use of the State mandated provisional balloting process for challenged absentee ballots, the Election Board has precluded any challenge to absentee ballots. The elimination of this process for these ballots, which are not subject to Indiana’s voter identification requirements, injects the substantial specter of fraud into this election thus undermining the public’s confidence in the results of the election and directly impacting the candidacy of Plaintiff Erica Pugh.

V. **PRAYER FOR RELIEF**

WHEREFORE. The Plaintiffs pray for relief as follows:

- a) That the Court issue a declaratory judgment order declaring that absentee ballots cast pursuant to I.C. § 3-11-10-2 *et seq.* which are challenged under I.C. § 3-11-10-20 through 22 or otherwise “must be determined using the procedures for counting a provisional ballot under IC 3-11.7” as mandated by I.C. § 3-11-10-21.
- b) That the Court issue a declaratory judgment order declaring that the Marion County Election Board’s interpretation of I.C. § 3-11-10-20 through 22 is erroneous.

- c) That the Court issue a temporary restraining order, preliminary and permanent injunction requiring the Defendant Marion County Election Board to determine challenges to absentee ballots “using the procedures for counting a provisional ballot under IC 3-11.7” as mandated by I.C. § 3-11-10-21, waiving bond for the Plaintiffs; and

That the Court award such other and further relief that may be deemed just and proper.

I AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

10/29/2008

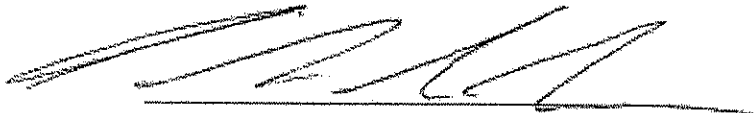
Date

Erica Pugh

Erica Pugh

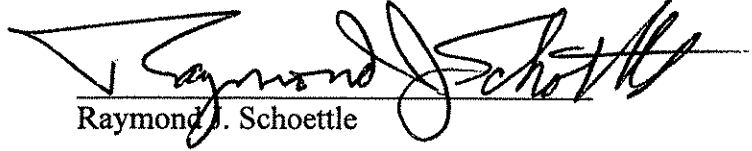
I AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING
STATEMENTS ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE
AND BELIEF.

Date

A handwritten signature in black ink, appearing to read 'Thomas John', written over a horizontal line.

Thomas John, Chairman
Marion County Republican Party

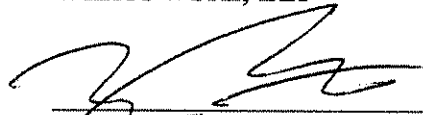
I AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.


Raymond J. Schoettle

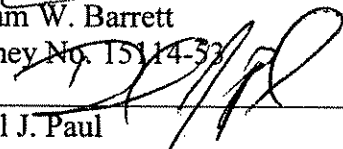
Dated this 29th day of October, 2008.

Respectfully submitted,

WILLIAMS HEWITT BARRETT &
WILKOWSKI, LLP



William W. Barrett
Attorney No. 15114-53


Daniel J. Paul
Attorney No. 20645-41

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via electronic mail/hand delivery/facsimile transmission on the following counsel this 29 day of October, 2008:

Chris W. Cotterill, Esq.
Corporation Counsel
200 East Washington Street, # 1601
Indianapolis, Indiana 46204

A. Scott Chinn, Esq.
BAKER & DANIELS
300 North Meridian Street
Indianapolis, IN 46204


William W. Barrett

William W. Barrett, Esq.
WILLIAMS HEWITT BARRETT & WILKOWSKI, LLP
600 North Emerson Avenue
P.O. Box 405
Greenwood, Indiana 46142
(317) 888-1121