

**IN THE
INDIANA SUPREME COURT
CAUSE NO. _____.**

MARION COUNTY ELECTION BOARD,)	
	)	Indiana Court of Appeals
Appellant (Defendant below),	)	Cause No. 49A05-0810-CV-979
)	
v.	)	Appeal from the Marion Circuit Court
	)	Cause No. 49C01-0810-PL-049131
RAYMOND J. SHOETTLE, ERICA PUGH,)	
and the MARION COUNTY REPUBLICAN	)	The Honorable Theodore M. Sosin,
PARTY,	)	Judge
)	
Appellees (Plaintiff below).)	

**APPELLEES' EMERGENCY VERIFIED
APPELLATE RULE 56(A) MOTION
TO ACCEPT JURISDICTION OVER APPEAL**

The trial court's order in this case will allow all *unchallenged* absentee ballots in Marion County to be counted on Election Day. As to those absentee ballots that are challenged on statutory grounds, the trial court's order gives effect to the 2004 amendments to the Election Code which now require that challenges to absentee ballots be treated the same as challenges to in-person ballots—both types of challenges are to be resolved under the provisional ballot process. (Tab A.)

The trial court's order also ensures that as soon as the challenged absentee ballots are determined to be valid they, too, will be counted and certified as part of the election totals. Thus, every single valid absentee ballot will be counted in this election.

Appellant Marion County Election Board ("Board") nonetheless has requested that the Court of Appeals issue an emergency stay releasing the Board from having to comply with the trial court's mandate that challenged absentee ballots be treated as provisional ballots during the election tomorrow. The problem with the relief sought by the Board is that, once a ballot is

scanned into the ballot box on Election Day, there is no avenue to “take it back out” to determine its validity based on a challenge because a scanned absentee ballot becomes impossible to discern from any other ballot in the box.

This means that absentee ballots which ultimately may have been deemed fraudulent or invalid when vetted through the provisional ballot requirements will instead be irretrievably counted and considered in Election Day totals. This also will cause Marion County’s handling of challenged absentee ballots to differ substantially from that in the other ninety-one counties in Indiana, raising serious equal protection concerns.

For the reasons discussed below and pursuant to Appellate Rule 56(A), Appellees respectfully request that this Court accept jurisdiction over this appeal and immediately rule on the Board’s request that the trial court’s order be stayed. If this Court does not accept jurisdiction and the stay request is instead ruled on by the Court of Appeals later today, then the Court of Appeals will have effectively become the court of last resort because this Court will be closed tomorrow in observance of Election Day. The parties thus will be denied the opportunity to have this Court review any ruling prior to the election.

I. Legal and Procedural Background

A brief summary of Indiana law regarding “in-person” election challenges and absentee ballot election challenges is needed to understand the procedural context of this motion.

A. Challenges when voter appears to vote in-person on Election Day.

If there is reason to believe that a prospective in-person voter is not a legal voter in the precinct in which he or she seeks to vote, Indiana election law allows a challenge to be lodged under penalties of perjury and fraud. §3-11-8-20, -21 (Tab B contains copies of statutes). In

such instances, the voter must cast a “provisional ballot” under Article 11.7. §3-11-8-22.1. Article 11.7 in turn provides that provisional ballots are initially set aside on Election Day pending an subsequent examination by the *county* election board after the polls close (rather than a same-day examination by the *precinct* election board).

Under Indiana election law, the provisional ballots will be declared valid and the votes counted and certified as soon as the county election board determines that the following three conditions have been met:

- (1) The affidavit executed by the provisional voter under IC 3-11.7-2-1 is properly executed.
- (2) The provisional voter is a qualified voter of the precinct and has provided proof of identification, if required, under IC 3-10-1, IC 3-11-8, or IC 3-11-10-26.
- (3) Based on all the information available to the county election board, including:
 - (A) information provided by the provisional voter;
 - (B) information contained in the county’s voter registration records; and
 - (C) information contained in the statewide voter registration file;

the provisional voter registered to vote at a registration agency under this article on a date within the registration period.

§3-11.7-5-2. *See also* §3-11.7-5-4, -8, -16.

B. Challenges when vote is by absentee ballot

To protect the integrity of elections in Indiana, the Election Code strictly regulates voting by absentee ballot. *See* IND. CODE §§3-11-10-1 to -39; Horseman v. Keller, 841 N.E.2d 164, 172 (Ind. 2006).

These statutes provide explicit procedures that must be followed to challenge absentee ballots. On this issue, the Code begins by providing, “The vote of an absentee voter may be challenged at the polls for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast.” §3-11-10-21.¹

Prior to 2004, the rest of this section provided, “The precinct election board may hear and determine a challenge under this section as though the ballot was cast by the voter in person.” §3-11-10-21 (2003).

In 2004, however, the Legislature amended §21 to bring treatment of absentee ballot challenges in line with in-person challenges:

~~The precinct election board may hear and determine a challenge under this section as though the ballot was cast by the voter in person regarding the absentee ballot must be determined using the procedures for counting a provisional ballot under IC 3-11.7.~~

P.L. 14-2004, §122 (Tab C).

Thus, whereas prior to 2004, the *precinct* election board had the power to hear and determine challenges *on Election Day* “as though the ballot was cast by the voter in person,” the 2004 amendment now specifically requires that challenges to an absentee ballot be treated like in-person challenges and must be resolved by the *county* election board *after* the polls close pursuant to the provisional ballot process in §3-11.7-5-2.

As noted above, §3-11.7-5-2 requires the county election board determine that three basic conditions exist before a provisional absentee ballot will be considered valid: (1) The affidavit executed by the provisional voter while at the precinct must have been properly executed; (2)

¹ Both the Board and amici attempt to paint this case as throwing “tens of thousands” of absentee ballot into the “provisional ballot” realm. There is no support for this incendiary claim. Only those absentee ballots which are actually challenged pursuant to the Code’s strict statutory requirements will be considered provisional ballots.

The provisional voter must be a qualified voter of the precinct and must provide proof of identification, if required; and (3) the county election board must examine certain relevant information and conclude that the provisional voter properly registered to vote within the registration period. §3-11.7-5-2.

The Legislature recognized that this first requirement—the affidavit—presumes that the voter actually appeared in person to vote on the day of the election. Because this does not occur in the context of absentee ballots, the Legislature expressly provided that “the application for an absentee ballot shall be considered as the affidavit required to be made by a voter when challenged at the polls while voting in person.” §3-11-10-22(a). Likewise—as is explicitly anticipated in §3-11.7-5-2(a)(2)—the Legislature provided that an absentee voter would *not* be required to provide proof of identification as part of the provisional balloting process. §3-11-10-22(b).

The remaining requirements found in §3-11.7-5-2(a)—that the county election board must (1) determine that the “provisional voter is a qualified voter of the precinct” and (2) examine the specified information and conclude that the provisional voter was in fact registered to vote within the registration period—remain fully in effect as applied to absentee ballots.

C. The Board instructs its precinct workers to treat challenges to absentee ballots in a manner that conflicts with the bipartisan Indiana Election Division Handbook and the Indiana Code

As it has done for all elections since 1997, the bipartisan Indiana Election Division has provided an “Election Day Handbook” to the 5,000 precinct election boards across this State. (Tab D.) This Handbook succinctly describes the relevant Indiana law that governs elections and is to be used by precinct election boards to resolve issues that may arise on Election Day. (*Id.*) Chapter 10 of the Handbook addresses “Absentee Ballots” and specifically provides:

Challenging an Absentee Ballot

- 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!**

(Id. at 30.)

Every other county in Indiana follows this statutory mandate, the prior Marion County Clerk followed it, and until this year the Marion County Election Board followed it.

In mid-October, however, as they continued preparing for the election, Appellees heard rumors that the Board had decided not to follow these mandates for the November 4, 2008 general election and would instead instruct precinct election workers to feed the challenged absentee ballots into the ballot box, thus rendering compliance with the conditions found in §3-11.7-5-2 impossible because once an absentee ballot is run through the optical scan machine, the absentee ballot is irretrievably counted and is physically secured within the ballot box in the machine. (Verified Complaint, ¶ 17.) Once this occurs, the absentee ballot becomes impossible to discern from any other ballot in the box. (Id.)

After confirming these rumors were true and that the Election Board, in fact, intended to ignore what Appellees had thought was settled law, Appellees on October 29, 2008 sought an injunction requiring the Board to comply with the statutory mandate and process challenges to absentee ballots in accordance with the provisional ballot procedures.

Following expedited briefing and hearings, the trial court granted the injunction, ordering that the Board comply with the above statutes. (Tab A at 9-10.) At the end of the day, Indiana law as applied by the trial court will allow for all *valid* absentee ballots to be counted and

certified, while also preventing any fraudulent or invalid absentee ballots from being irrevocably counted.

Nonetheless, late in the evening on Friday night, the Board requested that the Court of Appeals issue an emergency stay of the trial court's order. (Tab E.)

II. Grounds Justifying Appellate Rule 56(A) jurisdiction.

This appeal involves a substantial question of law of great public importance. *See* IND.APPELLATE RULE 56(A). As explained above, in 2004 the Legislature amended the applicable statute to require that challenges to absentee ballots would no longer be resolved by the precinct election board on the day of the election, but instead would be resolved by the county election board through the provisional ballot procedures after the polls close.

If the Board is permitted to disregard these statutory requirements and allow challenges to absentee ballots to be resolved and scanned the day of the election, there can be no compliance with the provisional ballot procedures because once a ballot is scanned into the ballot box on Election Day, there is no avenue to "take it back out" to address a challenge because it becomes impossible to discern the absentee ballot from any other ballot in the box.

Thus, as the trial court noted, both fraudulent and invalid absentee ballots will be counted—and there is no remedy after the election to address it. This creates an emergency requiring this Court's immediate involvement and determination now rather than later. *Id.*

If the case remains in the Court of Appeals and the stay request is instead ruled on by that court later today, the Court of Appeals will have effectively become the court of last resort and the parties will be denied the opportunity to have this Court review that decision prior to the election because this Court will be closed tomorrow in observance of Election Day.

Appellees have informed the Court of Appeals that this Rule 56(A) Motion has been filed and have expressly requested that the Court of Appeals refrain from ruling on the Board's Emergency Motion to Stay until this Court issues a decision on Rule 56(A) transfer.

Appellees therefore respectfully request that this Court grant Appellate Rule 56(A) transfer over this case and then, for the reasons discussed below, immediately deny the Board's Emergency Motion to Stay.²

III. The Board's Request for an Emergency Stay Should Be Denied.

A. The trial court's injunction complies with Indiana law.

As noted above, the absentee statutes require that challenges to absentee ballots “must be determined using the procedures for counting a provisional ballot under IC 3-11.7.” §3-11-10-21.³ The Board claims its proposed actions allowing challenges to absentee ballots to be resolved, scanned, and counted on Election Day are proper because the Board contends Article 11.7—and in particular §3-11.7-5-2(a)—“require[s] *precinct election boards* to verify three elements *on Election Day*.” (Tab E at 7-8.) This is incorrect for three reasons.

First, the Board's argument is expressly defeated by the text of the statute it cites, which on its face requires that “the *county election board* [must] determine that all the following [three elements] apply.” §3-11.7-5-2(a)

² If this Court does accept emergency jurisdiction, it likely will only be to address the merits of the emergency motion to stay, as the injunction automatically will expire following the completion of this election.

³ The Board also contends that this statute's reference to the procedures in Article 11.7 deals only with how a challenged absentee ballot should be “counted” and does not convert the challenged ballot to a provisional ballot. Article 11.7, however, only applies when a ballot has become a provisional ballot. Accepting the Board's argument would mean the Legislature's reference to Article 11.7 is nonsensical, a conclusion not supported by the Election Code.

Second, the procedures in §3-11.7-5-2(a) do not come into play until “[a]fter the close of the polls.” §3-11.7-5-1.

Finally, the Board’s arguments give no effect to the 2004 amendments to the absentee statutes. As noted above, prior to 2004, the absentee statutes *did* specifically give the *precinct* election board the power to hear and determine challenges *on Election Day*.

In 2004, however, the Legislature expressly amended the statute to take away this right and now requires that challenges to an absentee ballot must be treated the same way as in-person challenges, and must be resolved by the *county* election board pursuant to the provisional ballot requirements in §3-11.7-5-2, which—again—comes into play only “[a]fter the close of the polls.” *Id.* The Board’s contrary arguments must be rejected.

The Board also argues that it need not follow the requirements in §21 and can instead have the precinct election board make the decision the day of the election because another absentee ballot statute provides that “the challenge procedure under this section is the same as though the ballot was cast by the voter in person.” §3-11-10-22(b). This section, however, deals with how *challenges* are made, not how provisional ballots must be handled. Thus, §22(b) requires only that—like in-person challenges—the challenger must reduce its challenge to affidavit form and set forth under oath the reasons the voter is being challenged, the source of that information, and a statement by the challenger that making a false statement is punishable as perjury. *See* §3-11-8-20, -21.

The Board finally contends that §22(d) allows it to disregard the requirements in §21. This section, however, simply declares that *if* there ever would exist a circumstance where “a proper affidavit” could be made “that would entitle the absentee voter to vote if the absentee voter had personally appeared, *then* the absentee ballot shall be placed in the ballot box.” §3-11-10-22(d). The Appellant’s own Director of Elections (Andy Mallon) conceded at the hearing

that there do not currently exist any circumstances under Indiana law which “would entitle the absentee voter to vote if the absentee voter had personally appeared.” Thus, §22(d) is not currently applicable.

Moreover, if accepted, the Board’s arguments based on §22(d) would create an inherent conflict between the 2004 amendments to §21 and the provisions of §22(d). As this Court has noted in the context of the absentee ballot statutes, two statutes dealing with a common subject matter are to be read *in pari materia* so as to harmonize and give effect to each other. Horseman, 841 N.E.2d at 168.

The Legislature evinced the public policy of this State in 2004 when it amended the absentee ballot statutes to require that challenges to absentee ballots be treated the same way as in-person challenges. This amendment makes clear that no longer can challenges to absentee ballots be resolved by precinct election boards on the day of the election. Rather, like challenges to in-person voters, challenges to absentee ballots must be resolved by the *county* election board after the close of the polls, pursuant to the provisional ballot requirements in §3-11.7-5-2.

The Board’s contrary interpretation is in conflict with the Legislature’s intent and cannot stand, and its claims that the trial court’s injunction conflicts with Indiana law are wrong. The request for an emergency stay of this injunction must be denied.

B. The trial court’s injunction does not violate Federal law

The Federal Help America Vote Act (“HAVA”) provides, “At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.” 42 U.S.C. §15482.

The Board contends that the trial court's order: (1) deprives voters of their rights under this statute; and (2) requires the Board to violate this statute because the Board did not provide written instructions when the absentee ballot was submitted. This is wrong.

As of today, no absentee ballots have been challenged and, thus, no absentee ballots have been converted into provisional ballots. Nothing in the above HAVA statute requires the Board to have provided the required written instructions when the absentee ballot was sent it; rather HAVA requires the Board to send the required notice *at the time the absentee ballot becomes a provisional ballot*—i.e., on Election Day.

Thus, at the time when an absentee ballot is challenged and becomes a provisional ballot, the Board must send out the above-referenced written information. The trial court's injunction does not violate federal law.⁴

In fact, the trial court's injunction does just the opposite. The relief sought by the Board quite probably in and of itself violates federal law—specifically the federal equal protection and due process clauses.

The United States Supreme Court in Bush v. Gore, 531 U.S. 98 (2000) noted the Constitutional importance of uniform statewide standards for resolving questions of voting procedure. In the present case, if the Board's position is adopted and the trial court's Order stayed, then challenged absentee ballots in Marion County will be treated far differently than those in the other ninety-one counties which will be following the bipartisan Indiana Election Division Handbook and the Indiana Code. This disparate treatment directly violates the mandate in Bush v. Gore that, on a statewide basis, "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." Id. at 110.

⁴ The Board's claim that the injunction also would violate I.C. § 3-11.7-2-2 is not correct because that statute does not apply to absentee ballots; it only applies to *in-person* provisional ballots and, as discussed above, nothing in HAVA requires a contrary interpretation.

B. The balance of harms lies in favor of denying a stay.

By requiring that the Board comply with Indiana law, the trial court's order will treat in-person and absentee challenges the same, and will allow *every* valid absentee ballot to be counted and certified while at the same time preventing fraudulent or invalid absentee ballots from being irretrievably scanned and intermingled with other ballots.

This protects the public's interest and the public policy effectuated by the Legislature in the 2004 amendments. *See Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 955-956 (Ind.Ct.App. 2004) ("We wholeheartedly agree with the trial court's conclusion that the public interest is not disserved 'by the issuance of an injunction that requires only that the [Marion County Election Board] comply with the clear dictates of law.'").

Even if the provisional balloting process is later found to have been improperly invoked in the context of absentee ballots, the worst thing that will have happened is that each of the challenged absentee ballots will have been reviewed by the county election board and, at the end of the day, *all* valid absentee votes will be counted and certified.

The Board nonetheless argues a stay is needed because, given that the election is tomorrow, it will be too hard to tell its precinct workers to comply with Indiana law, and it blames Appellees for creating this situation with what it calls a "last-minute tactic." The Board is wrong on both counts.

First, as noted above, every single Marion County precinct election board has already received and will have at the polling site the bipartisan Indiana Election Division's "Election Day Handbook," and this Handbook specifically provides:

Challenging an Absentee Ballot

- 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!**

(Tab D at 30.) This is an easily-accessible reference to explain what should happen.

Second, absentee ballots have not yet been delivered to any precincts. The Board can place on top of the absentee ballots a cover page which has a brief statement providing:

Despite any contrary training you may have previously received, if a challenge is made to any of these absentee ballots, the challenged absentee ballots must be treated as provisional ballots *just like in-person challenges* and may not be scanned into the ballot box. See Indiana Election Handbook, page 30.

Precinct workers are well-aware of how to treat in-person provisional ballots. Thus, the only “new” information being given to them is the requirement that absentee ballots are to be treated the same way. To the extent there is any confusion is generated by this statement, when a precinct worker calls the Board for clarification, the Board can simply inform them of the proper procedures.

More important, this current situation is created by the Board’s own decision to adopt a new Election Day policy that not only differs from the way the same Board handled challenges to absentee ballots in the elections prior to this one, but is a policy which contravenes Indiana law. Likewise, rather than attempt to provide the revised instructions to as many precinct workers as it could in the last three days since the injunction was handed down, the Board has chosen to do nothing while it sought a stay.

Indiana law will not reward litigants who choose to violate the law by thereafter providing a shield under which they can hide, and this Court should not issue a stay that will in essence reward the Board's decision to adopt an Election Day procedure that is contrary to statute simply because the mess the Board has created in doing so may require additional work to undo. *See, e.g., Hopper Resources, Inc. v. Webster*, 878 N.E.2d 418, 422 (Ind.Ct.App. 2007) (equity will not allow a party relief when that parties' conduct in violation of the law is what caused the controversy in the first place); *Boczar v. Kingen*, 1999 WL 33109074, *12 (S.D.Ind.,1999.) (“[A] party seeking equitable relief should not be allowed to take advantage of his or her own wrong.”).

Finally, the Board's allegations of improper “last-minute” tactics are wrong. In the months and weeks leading up to this election, Appellees remained confident that the Board would not defy the mandates found in the express provisions of the Election Day Handbook and in Indiana law. When Appellees finally did learn the Board, in fact, intended to implement a contrary policy for the upcoming election, Appellees filed this lawsuit within the week. There have been no “last-minute” tactics.

C. The injunction is not self-contradictory and vague.

The Board claims the injunction must be stayed because the reference to “mail-in” absentee ballots in paragraph 28 of the trial court's order purportedly contradicts the reference in paragraph 29 requiring compliance with the Election Handbook, which itself addresses both mail-in and in-person absentee ballots. (Tab A at 9-10.)

Mail-in absentee ballots are a subset of absentee ballots, as are in-person absentee ballots. Paragraph 28 specifically addresses mail-in absentee ballots because those were the primary concern of the Appellees at the hearing. (*Id.*) Paragraph 29 is simply broader in its scope and

addresses all types of absentee ballots. (Id.) At the most, paragraph 28 may be unnecessary and redundant because it is also subsumed in the mandates of paragraph 29, but redundancy has never been a ground to avoid compliance with an injunction.

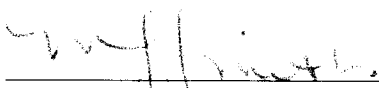
The Board's final challenge is its claim that the language "when necessary" in paragraph 30 of the trial court's order renders the injunction impermissibly vague. (Id.) Again, the Board is wrong.

The language "when necessary" is a temporal reference to the *time* when it becomes necessary to make such notification under HAVA. As noted above, HAVA requires that the notice be sent at the time the absentee ballot becomes a provisional ballot. Thus, to comply with paragraph 30, the Board simply needs to send a notice to the address listed for the absentee voter at the time the absentee ballot becomes a provisional ballot. There are, thus, no vagueness concerns with the language "when necessary."

IV. Conclusion

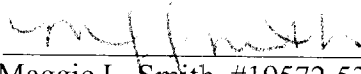
Appellees request that this Court accept jurisdiction over this appeal and deny the Board's request that the trial court's order be stayed.

I HEREBY AFFIRM UNDER THE PENALTIES FOR PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

By: 
Maggie L. Smith, #19572-53

Respectfully submitted,

LOCKE REYNOLDS LLP

By: 
Maggie L. Smith, #19572-53
LOCKE REYNOLDS LLP
201 North Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

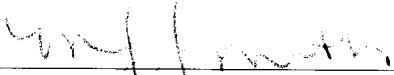
David Michael Brooks, #4028-49
BROOKS KOCH & SORG
615 Russell Avenue
Indianapolis, IN 46225

Attorneys for Appellees Raymond J. Shoettle,
Erica Pugh, and the Marion County Republican
Party.

VERIFIED STATEMENT OF WORD COUNT

Pursuant to Appellate Rule 34(G), the undersigned hereby verifies that the foregoing contains less than 4,200 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief, MS Word XP.

LOCKE REYNOLDS LLP

By: 
Maggie L. Smith, #19572-53

CERTIFICATE OF SERVICE

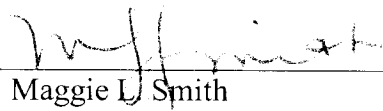
Service of the foregoing was made via electronic transmission and the United States

Mail, first class postage prepaid, this 3rd day of November, 2008, addressed to:

Jon Laramore
A. Scott Chinn
Christopher W. Smith
BAKER & DANIELS
300 N. Meridian Street, Suite 2700
Indianapolis, IN 46204
Jon.Laramore@bakerd.com

Richard McDermott
Assistant Corporation Counsel
City of Indianapolis
1601 City-County Building
200 East Washington Street, # 1601
Indianapolis, Indiana 46204
rmcdermo@indygov.org

Gregory F. Hahn
Tabbert Hahn Earnest & Weddle LLP
One Indiana Square, Suite 1900
Indianapolis, IN 46204-2007
greghahn@tabberthahn.com



Maggie L. Smith

LOCKE REYNOLDS LLP
201 North Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961
317-237-3800
mlsmith@locke.com

- counted.
2. Raymond Schoettle is a resident of Marion County and is a registered voter who intends to vote in the November 2008 General Election.
 3. Erica Pugh is a candidate for the office of Marion County Surveyor in Marion County and a registered voter in Marion County who intends to vote in the November 2008 General Election.
 4. The Marion County Republican Party is a County-wide Major Political Party Organization organized pursuant to the rules of the Indiana Republican Party. It is an Indiana entity with its principal place of business at 120 East Vermont Street, Indianapolis, Indiana.
 5. The Marion County Election Board is the entity responsible for the administration of elections in Marion County pursuant to I.C. § 3-6-5-14.
 6. The Plaintiffs Pugh and Schoettle have a specific interest in this matter that is greater than the general public because as voters in Marion County they have an interest in the avoidance of the dilution of their votes by fraudulently cast and counted votes.
 7. Plaintiff Pugh has a specific interest in this matter as a candidate, in that all votes cast in her election should be legal votes in accordance with the election laws of the State of Indiana.
 8. As a major party in this County with numerous candidates on the ballot under its banner in this general election, the Marion County Republican party has a specific interest in ensuring that all votes cast in this election are legal votes in accordance with the election laws of the State of Indiana.
 9. That Indiana election laws contain the following three statutes relating to the voting,

challenging, and treatment of absentee ballots;

3-11-10-20 Requirements before depositing absentee ballot in ballot box

Sec 20. Before depositing an absentee ballot in a ballot box, the inspector shall:

- (1) notify the challengers and the pollbook holders that the inspector is about to deposit an absentee ballot; and
- (2) provide the challengers and pollbook holders with the name and address of the absentee voter so that the voter may be challenged under this article.

As added by P.L.5-1986, SEC.7.

3-11-10-21 Challenge of absentee vote; hearing and determination

Sec. 21. The vote of an absentee voter may be challenged at the polls for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast. The challenge under this section regarding the absentee ballot must be determined using the procedures for counting a provisional ballot under IC 3-11.7.

As added by P.L.5-1986, SEC.7. Amended by P.L.14-2004, SEC.122, eff. Mar. 16, 2004.

3-11-10-22 Challenge of absentee vote; application to be considered as affidavit; procedure

Sec. 22. (a) If an absentee ballot is challenged under section 21 of this chapter, the absentee voter's application for an absentee ballot shall be considered as the affidavit required to be made by a voter when challenged at the polls while voting in person.

- (b) Except as provided in subsection (c), the challenge procedure under this section is the same as though the ballot was cast by the voter in person.
- (c) An absentee voter is not required to provide proof of identification.
- (d) If a proper affidavit is made that would entitle the absentee voter to vote if the absentee voter had personally appeared, then the absentee ballot shall be placed in the ballot box.

As added by P.L.5-1986, SEC.7. Amended by P.L.109-2005, SEC.9.

10. In addition to said statutes, the 2008 Indiana Election Day Handbook, prepared by the Indiana Secretary of State and the Indiana Election Division, revised November, 2007, offer guidance concerning the current interpretation of the foregoing statutes. Indiana

law gives great weight to administrative interpretations of State statutes related to the interpreting agency. Here, both the Indiana Secretary of State and the Indiana Election Division have offered the following interpretation of Indiana Election Law in the "2008 Indiana Election Day Handbook" at page 30.

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 may be counted. **DO NOT put defective absentee ballots or provisional ballots in the ballot box!**
Indiana Election Day Handbook, p. 30 (Emphasis and punctuation in original)

11. Contrary to the interpretation of Indiana Election law set out in the 2008 Indiana Election Day Handbook, the Marion County Election Board has taken the position that challenged absentee ballots will be voted at the precinct level by considering the affidavit required to obtain an absentee ballot as a counter-affidavit to the challenge affidavit, and then voting said ballot pursuant to the Board's interpretation of I.C. 3-11-22(d).
12. Such interpretation is contrary to Indiana Election law as interpreted by the Secretary of State and the Indiana Election Division and eliminates any opportunity for meaningful review of the challenge process prior to the time that the challenged ballot becomes an indivisible and unidentifiable part of the general votes cast.
13. While Indiana law provides for criminal penalties against those who would violate Indiana Election law, the Marion County Election Board's interpretation of I.C. 11-10-22 allows for no opportunity to rectify a fraudulent vote.
14. The practical effect of the Election Board policy is to eliminate any electoral remedy for

the casting of an illegal or fraudulent vote.

15. The Plaintiffs have shown a substantial risk of harm that cannot be avoided unless an injunction is entered.
16. The Marion County Election Board has not interpreted the law consistent with the State Election Division's bi-partisan interpretation of the statutes and procedures.

CONCLUSIONS OF LAW

17. The Plaintiffs have standing to bring this suit.
18. This Court has personal jurisdiction over the parties and subject matter jurisdiction over this matter.
19. The Marion County Election Board has violated Indiana Law by essentially ignoring I.C. § 3-11-10-20, 21 and 22.
20. The proper treatment of a challenged mail-in absentee ballot is to address it using the provisional ballot procedures pursuant to I.C. § 3-11.7, et seq.
21. The Marion County Election Board has failed to comply with Indiana law by not reviewing mail-in ballots for genuineness immediately upon receipt.
22. The Marion County Election Board has failed to show that the interpretation of the Election Division and this Court have violated the Help America Vote Act or the State or Federal Constitutions.
23. To obtain a Preliminary Injunction, the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success of trial; (2) the remedies of law are inadequate; (3) the threat of injury to the movant outweighs the potential harm to the non-moving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction.

24. The Plaintiffs have met their burden of demonstrating a reasonable likelihood of success at trial because the Marion County Election Board's actions clearly violate the mandatory provisions of I.C. 3-11-10-21. The Marion County Election Board has instructed local precinct election boards and poll workers to, when faced with challenges to absentee ballots, to ignore the express provisions of I.C. 3-11-10-21 requiring provisional status, and instead to simply consider the challenging affidavit, the ballot request/counter-affidavit, and scan the ballot into the M100 voting machine utilized in Marion County. This policy ignores I.C. 3-11-10-21 and the provisions of I.C. 3-11.7 which sets forth in great detail the process by which a provisional ballot shall be challenged. In contrast to the process adopted by the Marion County Election Board I.C. 3-11.7-5-1.5 requires that provisional ballots be counted "(a)fter the close of polls" and "not later than noon ten (10) days following the election." The provisional balloting statute further requires that these ballots be counted by special "provisional ballot counters" appointed by the county election board and not in the local precincts. I.C. 3-11.7-3-1 et seq. A key difference between the two processes is the fact that provisional balloting procedures require that these challenged ballots be maintained separately from unchallenged ballots (see e.g. I.C. 3-11.7-3-7), something which would be made impossible if the absentee ballot envelope is opened and the challenged ballot then fed through the scanner, as the Marion County Election Board's current procedures requires.
25. The Plaintiffs have demonstrated that their remedies at law are inadequate. Krueger, 882 N.E.2d at 727. In Krueger the Indiana Supreme Court characterized this prong of the test as follows: "Injunctive relief is not available where the breach can be adequately satisfied by money damages. However, a legal remedy is adequate only when it is "as plain and

complete and adequate—or, in other words, as practical and efficient to the ends of justice and its prompt administration—as the remedy in equity.” *Id.*, 882N.E.2d at 732. In the present case the Marion County Election Board has erroneously instructed its workers on the manner in which they are to treat absentee ballots. The potential damage to the Plaintiffs as voters, candidates, and a political party cannot be remedied at all by monetary damages. The Plaintiffs have no avenue other than filing this litigation to remedy this clearly erroneous decision, and only equitable relief can remedy this error.

26. The Plaintiffs have met their burden of demonstrating that the threatened injury to the movant (fraudulent voting) outweighs the potential harm to the nonmoving party from the granting of a temporary injunction (complying with the existing state laws). In the present case the Plaintiffs are simply asking this Court to Order that the Marion County Election Board follow Indiana law, and specifically I.C. 3-11-10-21. If this Court grants the injunction requested, the Board will simply be required to abide by this statute and any challenge under this section regarding an absentee ballot would be determined using the procedures for counting a provisional ballot under I.C. 3-11.7. It is difficult to understand what threatened injury could accrue to the Board by forcing it to comply with Indiana law. In sharp contrast to this, the Plaintiffs will be irreparably harmed should the Board’s procedures stand. Under the Board’s flawed procedure, the absentee ballot challenge statute is effectively rendered a nullity. All absentee challenged ballots would automatically and immediately be fed into the optical scanning machine from which they can never be retrieved and examined as part of the statutory mandated challenge procedure. This will lead to a significant likelihood that fraudulent or ineligible ballots will never be examined and therefore will stand as cast. Even if the provisional balloting

process is later found to have been improperly invoked, the worst thing that will have happened is that each of the challenged absentee ballots will have been reviewed and approved or denied by the provisional ballot counters at the County level appointed by this same Board. Under the foregoing scenario, it is clear that the threatened injury to the movant, in this case improper counting of fraudulent challenged absentee ballot, far outweighs the potential harm to the nonmoving party from the granting of an injunction and being forced to examine the challenged absentee ballots under the provisional balloting process.

27. In accordance with Sadler v. State ex rel. Sanders, 811 N.E.2d 936, 955-956 (Ind.App. 2004), this Court finds that the public interest is not disserved by the issuance of an injunction that requires only that the Marion County Election Board comply with the clear dictates of Indiana Election law.

ORDER

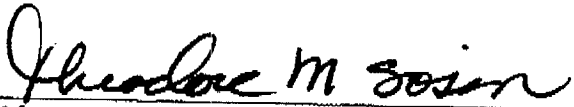
THIS COURT THEREFORE ORDERS:

28. The Marion County Election Board shall instruct the Precinct Inspectors and Election Boards to treat all challenged mail-in absentee votes as provisional and to set them aside for future resolution by the Marion County Election Board, pursuant to I.C. 3-11.7, and within ten (10) days of the closing of the polls.
29. The Marion County Election Board shall instruct all Inspectors and Precinct Board Members to follow the procedure outlined in the Indiana Election Day Handbook on pages 28-30 in the handling of Absentee Ballots.
30. When necessary the Marion County Election Board shall notify any challenged mail-in absentee voter of the challenge and allow them to respond to said challenge, if required,

prior to the Election Board determination as to the propriety of casting the ballot.

31. Declaratory Judgment is entered that the Marion County Election Board's interpretation of I.C. § 3-11-10-20-22 is erroneous and it is restrained from implementing it, but rather must follow the procedures described in this ruling.
32. The Marion County Election Board is mandated to resolve all challenged mail-in absentee votes using the procedures set forth in I.C. § 3-11.7 as is required by I.C. § 3-11-10-21.
33. Bond is waived for the plaintiffs.

SO ORDERED THIS 31ST DAY OF OCTOBER, 2008.



HON. THEODORE M SOSIN, JUDGE
MARION COUNTY CIRCUIT COURT

To all Counsel of Record.

3-11-8-20. Challenges -- Affidavit required.

If a voter offering to vote is challenged by a challenger or by a member of the precinct election board, the person challenging the voter shall reduce the challenge to affidavit form, setting forth succinctly the reasons for the challenge.

History: P.L.5-1986, § 7.

3-11-8-21. Challenges -- Form of affidavit.

The affidavit of challenge prescribed by section 20 [IC 3-11-8-20] of this chapter must set forth under oath or affirmation the following:

- (1) The name of the challenger.
- (2) The name of the person being challenged.
- (3) The reasons the challenger believes the person being challenged is not a legal voter in the precinct.
- (4) The source of the information provided under subdivision (3).
- (5) A statement that the challenger understands that making a false statement on the affidavit is punishable under the penalties of perjury.

History: P.L.5-1986, § 7; P.L.3-1995, § 103.

3-11-8-22.1. Voter whose name does not appear on the poll list for the precinct -- Voter no longer living in precinct.

(a) This subsection applies to a voter:

- (1) whose name does not appear on the poll list for the precinct; and
- (2) who produces a certificate of error issued under IC 3-7-48-1.

If the voter is not challenged under IC 3-10-1 or this chapter, the voter shall be provided with a regular official ballot. However, as provided by IC 3-7-48-1(b), if the voter is challenged under IC 3-10-1 or this chapter, the voter must cast a provisional ballot after complying with IC 3-7-48-7.5 if the voter wishes to cast a ballot.

(b) This subsection applies to a voter:

- (1) whose name does not appear on the poll list for the precinct; and
- (2) who makes an oral or a written affirmation in compliance with IC 3-7-48-5 that the voter continues to reside in the precinct at the address shown as the voter's former residence in the voter registration record.

If the voter is not challenged under IC 3-10-1 or this chapter, the voter shall be provided with a regular official ballot. However, as provided by IC 3-7-48-7.5, if the voter is challenged under IC 3-10-1 or this chapter, the voter must cast a provisional ballot after complying with IC 3-7-48-7.5 if the voter wishes to cast a ballot.

(c) This subsection applies to a voter:

- (1) whose name does not appear on the poll list for the precinct; and
- (2) who produces a registration receipt that complies with IC 3-7-48-7.

If the county election board provides the precinct election board with the information required under IC 3-7-48-7(a)(2) and the voter is not challenged under IC 3-10-1 or this chapter, the voter shall be provided with a regular official ballot. However, as provided by IC 3-7-48-7.5, if the voter is challenged under IC 3-10-1 or this chapter, the voter must cast a provisional ballot after complying with IC 3-7-48-7.5 if the voter wishes to cast a ballot.

(d) This subsection applies to a voter:

- (1) whose name does not appear on the poll list for the precinct; and
- (2) who is not described by subsection (a), (b), or (c).

If the voter is challenged under IC 3-10-1 or this chapter, the voter shall be provided with a provisional ballot under IC 3-11.7 instead of a regular official ballot if the voter wishes to cast a ballot. The voter may proceed to cast a provisional ballot after executing a challenged voter's affidavit under section 23 [IC 3-11-8-23] of this chapter if the voter wishes to cast a ballot.

(e) This subsection applies to a voter:

- (1) whose name appears on the poll list for the precinct; and
- (2) who no longer resides in the precinct but is entitled to vote at the precinct under IC 3-10-10, IC 3-10-11, or IC 3-10-12.

If the voter executes an affidavit in compliance with IC 3-10-10, IC 3-10-11, or IC 3-10-12 and the voter is not challenged under IC 3-10-1 or this chapter, the voter shall be provided with a regular official ballot. However, as provided by IC 3-10-10-9, IC 3-10-11-4.5, or IC 3-10-12-5, if the voter is challenged under IC 3-10-1 or this chapter, the voter must cast a provisional ballot if the voter wishes to cast a ballot.

(f) This subsection applies to a voter:

- (1) whose name appears on the poll list for the precinct; and
- (2) who is not described in subsection (e).

If the voter is challenged under IC 3-10-1 or this chapter, the voter shall be provided with a provisional ballot under IC 3-11.7 rather than a regular official ballot if the voter wishes to cast a vote. The voter may proceed to cast a provisional ballot after executing a challenged voter's affidavit under section 23 of this chapter if the voter wishes to cast a ballot.

History: P.L.164-2006, § 97.

3-11-10-20. Announcement of absentee ballot to challengers and pollbook holders.

Before depositing an absentee ballot in a ballot box, the inspector shall:

- (1) Notify the challengers and the pollbook holders that the inspector is about to deposit an absentee ballot; and
- (2) Provide the challengers and pollbook holders with the name and address of the absentee voter so that the voter may be challenged under this article.

History: P.L.5-1986, § 7.

3-11-10-21. Challenge at polls to absentee voter -- Grounds -- Determination.

The vote of an absentee voter may be challenged at the polls for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast. The challenge under this section regarding the absentee ballot must be determined using the procedures for counting a provisional ballot under IC 3-11.7.

History: P.L.5-1986, § 7; P.L.14-2004, § 122.

3-11-10-22. Challenge at polls to absentee voter -- Evidence -- Procedure.

(a) If an absentee ballot is challenged under section 21 [IC 3-11-10-21] of this chapter, the absentee voter's application for an absentee ballot shall be considered as the affidavit required to be made by a voter when challenged at the polls while voting in person.

(b) Except as provided in subsection (c), the challenge procedure under this section is the same as though the ballot was cast by the voter in person.

(c) An absentee voter is not required to provide proof of identification.

(d) If a proper affidavit is made that would entitle the absentee voter to vote if the absentee voter had personally appeared, then the absentee ballot shall be placed in the ballot box.

History: P.L.5-1986, § 7; P.L.109-2005, § 9.

3-11.7-5-1. Time of count.

(a) After the close of the polls, provisional ballots shall be counted as provided in this chapter.

(b) Notwithstanding IC 3-5-4-1.5 and any legal holiday observed under IC 1-1-9, all provisional ballots must be counted by not later than noon ten (10) days following the election.

History: P.L.126-2002, § 87; P.L.14-2004, § 153; P.L.221-2005, § 56; P.L.164-2006, § 122.

3-11.7-5-2. When provisional ballot valid.

(a) Except as provided in section 5 [IC 3-11.7-5-5] of this chapter, if the county election board determines that all the following apply, a provisional ballot is valid and shall be counted under this chapter:

(1) The affidavit executed by the provisional voter under IC 3-11.7-2-1 is properly executed.

(2) The provisional voter is a qualified voter of the precinct and has provided proof of identification, if required, under IC 3-10-1, IC 3-11-8, or IC 3-11-10-26.

(3) Based on all the information available to the county election board, including:

(A) information provided by the provisional voter;

(B) information contained in the county's voter registration records; and

(C) information contained in the statewide voter registration file;

the provisional voter registered to vote at a registration agency under this article on a date within the registration period.

(b) If the provisional voter has provided information regarding the registration agency where the provisional voter registered to vote, the board shall promptly make an inquiry to the agency regarding the alleged registration. The agency shall respond to the board not later than noon of the first Friday after the election, indicating whether the agency's records contain any information regarding the registration. If the agency does not respond to the board's inquiry, or if the agency responds that the agency has no record of the alleged registration, the board shall reject the provisional ballot. The board shall endorse the ballot with the word "Rejected" and document on the ballot the inquiry and response, if any, by the agency.

(c) Except as provided in section 5 of this chapter, a provisional ballot cast by a voter described in IC 3-11.7-2-1(b) is valid and shall be counted if the county election board determines under this article that the voter filed the documentation required under IC 3-7-33-4.5 and 42 U.S.C. 15483 with the county voter registration office not later than the closing of the polls on election day.

History: P.L.126-2002, § 87; P.L.209-2003, § 176; P.L.103-2005, § 15; P.L.109-2005, § 12.

3-11.7-5-4. Opening and identification of valid ballots.

If the board determines that a provisional ballot is valid under section 2 [IC 3-11.7-5-2] of this chapter, the provisional ballot envelope shall be opened. The outside of each provisional ballot shall also be marked to identify the precinct and the date of the election of the ballots.

History: P.L.126-2002, § 87.

3-11.7-5-16. Certificate of vote tally.

When all the votes have been counted, the counters shall prepare a certificate stating the number of votes that each candidate received for each office and the number of votes cast on each public question.

History: P.L.126-2002, § 87.

INDIANA 2004 LEGISLATIVE SERVICE
2004 Second Regular Session of the 113th General Assembly

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Additions are indicated by **Text**; deletions by
~~Text~~. Changes in tables are made but not highlighted.

P.L. 14-2004
S.E.A. No. 72
ELECTIONS--REGISTRATION OF VOTERS--BALLOTS

AN ACT to amend the Indiana Code concerning elections.

Be it enacted by the General Assembly of the State of Indiana:

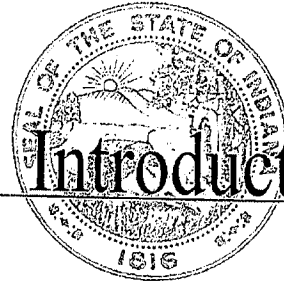
* * *

SECTION 122. IC 3-11-10-21 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

<< IN ST 3-11-10-21 >>

Sec. 21. The vote of an absentee voter may be challenged at the polls for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast. ~~The precinct election board may hear and determine a challenge under this section as though the ballot was cast by the voter in person.~~ **regarding the absentee ballot must be determined using the procedures for counting a provisional ballot under IC 311.7.**

912758_1



Introduction

Dear Precinct Election Boards,

Thank you for your participation in Indiana's election process. In more than 5,000 precincts across the state, an army of dedicated inspectors, judges, poll clerks, assistant poll clerks, sheriffs and other election personnel are providing the invaluable service of helping voters express their views on candidates, political parties and public questions.

You have an important role in this election. Your courteous and efficient service will make an impression on every voter who casts a ballot at your precinct. Remember that Presidents Washington, Jefferson, and Lincoln all stood in line with other voters to cast their ballots. Who knows what future leaders may visit your polling place today?

Thank you for your participation in Indiana's election process.

Julia M. Bauler
Help America Vote Act (HAVA) Education and Outreach Director

General Information

This handbook is designed to help Indiana's precinct election officials by providing basic information about Election Day procedures.

This manual is not designed to provide you with legal advice. If a complicated question of law or procedure arises, contact your county election board for assistance.

When using this manual, remember that three different types of voting systems are used in Indiana (traditional hand-counted paper ballots, optical scan ballot cards and computerized systems), therefore some information in this manual will not apply to every type of voting system.

This manual will be used in the primary and general elections in 2008. Precinct election boards should keep this handbook with their precinct supplies so that it may be reused.

If you wish to obtain additional copies of this handbook, please contact Julia Bauler, HAVA Education and Outreach Director at (317) 232-6541. The handbook is also available on the Secretary of State's website at www.in.gov/sos/elections/hava.

This manual reflects Indiana law as of November 2007. This information is subject to change by the 2008 session of the Indiana General Assembly. Please check www.sos.in.gov/elections for updates.



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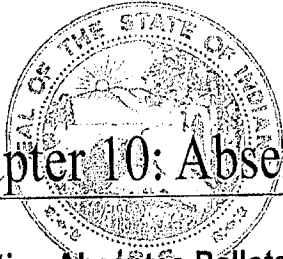
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Chapter 10: Absentee Ballots

Counting Absentee Ballots

Counties can choose to use one of these two ways of counting absentee ballots:

1. Some counties have voted to use a procedure authorized by state law to have absentee ballots counted at a central location rather than at their precincts.
2. Other counties count absentee ballots at the polls.

Step-by-Step Guide to the Absentee Ballot Process

1. Make sure that the ballots are from the voters of that precinct by removing the list of voters who have cast absentee ballots from the outer carrier envelope and checking a few names against the poll list.
2. Sign a receipt for the absentee ballots that are delivered from the county election board.
3. Remove all other materials from the outer carrier envelope in which the ballots were delivered.
 - Check each ballot envelope to make sure that the envelope is **complete, signed and dated**. Compare the signature on the absentee ballot envelopes with the signatures on the absentee ballot applications. State law does not require that the voter's signature on the absentee ballot envelope be notarized.
 - If the ballot envelope was completed by an individual who holds a power of attorney for the voter, the name of the attorney must be indicated on the envelope and a copy of the power of attorney attached to the absentee ballot application.
4. Check the poll list to make sure that the absentee voter is a registered and qualified voter of the precinct. When checking the poll list, make certain that the voter has not already voted in person at the polls in this election.
5. Announce the absentee voter's name. The poll clerks will make a notation on the poll list that the voter has voted absentee.
6. Open each ballot envelope, remove the ballot(s) without unfolding or defacing the ballot(s). Check each ballot for the signature and seal of the circuit court clerk and the initials of the members of the absentee voter board or county election board.
7. Place the ballot in the ballot box.

Counting Absentee Ballots Before the Polls Close

A precinct election board may count absentee ballots before the polls have closed, but is not required to do so. If these ballots are counted before the polls close, the precinct election board may not give any information concerning the results to any other person. It is a **Class D felony** to violate this law.

Rejecting an Absentee Ballot

The inspector shall reject an absentee ballot if:

1. The voter has already voted in person.
2. The voter is not a legally qualified voter of the precinct.
3. The voter died before Election Day. Proof must be given (such as a death certificate) before rejecting a ballot based on this ground.
4. There is no voter's signature on the ballot envelope, or if a copy of the voter's signature has been provided to the precinct election board, and the signature on the ballot envelope does not correspond with the signature on the ballot application.
 - **NOTE:** In some cases, the voter may have been disabled or injured after signing the original voter registration card. If a voter's signature on the envelope is a mark, "X," for example, that has been witnessed by the members of an absentee board, the inspector may rely on the bipartisan witnesses to the voter's signature in determining whether to accept or reject the absentee ballot under this provision.
5. The ballot envelope is open or has been resealed.
6. The absentee ballot affidavit is insufficient or the ballot has not been endorsed with the initials of the two absentee voter board members, the two appointed county election board members, or the two representatives appointed by the county election board members.
7. The ballot envelope contains more than one (1) ballot of the same kind for the same offices or public questions.
8. In a primary, if the voter has not previously voted, the voter has failed to execute the proper declaration relative to the voter's age and qualifications or to designate the political party with which the voter intends to affiliate.
 - **NOTE:** This does not apply if a voter is voting ONLY for school board offices or on public questions on the ballot at the same time as the primary.
 - If an absentee ballot is rejected, the ballot shall not be accepted or counted. On the back of the ballot, without unfolding or disclosing it, the inspector must write the word "REJECTED" and state the specific reasons for rejecting the ballots.
 - All rejected absentee ballots shall be enclosed and securely sealed in an envelope on which the inspector shall write: "DEFECTIVE ABSENTEE BALLOTS" with the precinct name and date.
 - The inspector and judge of the opposite party must return these ballots with the other ballots after the polls close.

Challenging an Absentee Ballot

- 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!**

Voting in Person and Absentee Ballots

- If a voter appears at the polling place on Election Day to vote, but the voter's name has already been marked on the poll list by the precinct judges as receiving an absentee ballot, the voter may NOT vote in person.
- If the absentee voter's ballot has been returned, but the voter's name has NOT yet been marked on the poll list by the precinct judges, the voter may have the ballots opened in the voter's presence and then deposited in the ballot box or the voter may vote in person.
- If the voter chooses to vote in person, the inspector will mark the envelope: "UNOPENED BECAUSE VOTER APPEARED AND VOTED IN PERSON." The envelope should then be placed in the bag with other defective ballots.
- If the absentee voter has not mailed the absentee ballot back to the county election board, the voter may vote in person. However, the voter must return the absentee ballot to the inspector. The ballot shall be marked "CANCELLED" and placed in the bag with the other defective ballots.

IN THE
INDIANA COURT OF APPEALS

No. _____

MARION COUNTY ELECTION BOARD,	)	Appeal from the Marion
	)	Circuit Court
Appellant (Defendant below),)	
	)	No. 49C01-0810-PL-049131
v.)	
	)	Hon. Theodore Sosin, Judge
RAYMOND J. SCHOETTLE,)	
ERICA PUGH, and the)	
MARION COUNTY REPUBLICAN PARTY)	
)	
Appellees (Plaintiffs below).)	

**EMERGENCY MOTION
FOR STAY PENDING APPEAL**

The Marion County Election Board hereby moves that this Court stay pending appeal the preliminary injunction issued on October 31, 2008, against the Board by the Marion Circuit Court. The trial court denied a motion for stay pending appeal, and the Board thereupon filed its notice of appeal. The trial court's order, its denial of the motion for stay, and the notice of appeal are attached to the Appellant's Case Summary.

As explained in more detail below, the injunction requires the Board to use certain procedures relating to counting absentee ballots that violate Indiana law and violate the federal Help America Vote Act. The trial court's order is internally contradictory and, in at least one place, so vague that the Board cannot be sure what it requires.

The Board seeks this emergency stay not only because the injunction is unsupported by law, but also because the injunction requires that hundreds of poll workers who already have been trained on precinct operations would have to be retrained before Tuesday, November 4. Indeed, because the trial court did not enter its injunction until 7 p.m. on Friday, October 31, the

Board will not be able to systematically inform precinct election boards of the requirements of the injunction until Election Day, when information will be delivered to all polling sites.

The injunction thus is likely to lead to confusion and delay at polling sites on Election Day.

The greatest harm from the injunction will be suffered by voters. Tens of thousands of voters chose to vote early in Marion County – and under the injunction, they no longer can be certain that their ballots will be counted on Election Day. Rather, their ballots may be thrown into the murkier, slower process of provisional ballots (most provisional ballots cast in Indiana are never counted). These voters are likely never to know whether their ballots have been counted. In the long run, the injunction will create incentives against early voting.

Background

Plaintiffs are the Marion County Republican Party; Erica Pugh, a candidate for Marion County Surveyor on the November 4 ballot; and Raymond J. Shoettle, a Marion County voter. They have raised claims that the manner in which the Marion County Election Board will treat absentee ballots on November 4, 2008 is unlawful.

As required by Indiana law, the Board collects absentee ballots at a central location. Then, on Election Day, the Board delivers the absentee ballots to polling places in individual precincts, where they are counted by precinct election boards. Specifically, the absentee ballots are run through optical scan machines in the same manner as ballots voted in person on Election Day. None of these procedures is disputed by Plaintiffs.

The Plaintiffs argue that Indiana law requires that absentee ballots that are challenged at the precincts on Election Day should become provisional ballots and be treated in the same manner as provisional ballots. If this were to occur, the challenges would be adjudicated by

election officials at a central location after Election Day rather than by precinct election boards on Election Day. The trial court adopted Plaintiffs' arguments. Specifically, the injunction states:

28. The Marion County Election Board shall instruct the Precinct Inspectors and Election Boards to treat all challenged mail-in absentee votes as provisional and to set them aside for future resolution by the Marion County Election Board, pursuant to I.C. 3-11.7, and within ten (10) days of the closing of the polls.

29. The Marion County Election Board shall instruct all Inspectors and Precinct Board Members to follow the procedure outlined in the Indiana Election Day Handbook on pages 28-30 in the handling of Absentee Ballots.

30. When necessary the Marion County Election Board shall notify any challenged mail-in absentee voter of the challenge and allow them to respond to said challenge, if required, prior to the Election Board determination as to the propriety of casting the ballot.

The trial court then went on to rule on the merits of the declaratory judgment request. The trial court consolidated the preliminary injunction with the merits *despite the fact that neither party asked for consolidation and without informing the parties that the injunction and merits were being consolidated*, thereby precluding the Board from presenting its entire case to the trial court.

The merits ruling is as follows:

31. Declaratory Judgment is entered that the Marion County Election Board's interpretation of I.C. § 3-11-10-20-22 is erroneous and it is restrained from implementing it, but rather must follow the procedures described in this ruling.

32. The Marion County Election Board is mandated to resolve all challenged mail-in absentee votes using the procedures set forth in I.C. § 3-11.7 as is required by I.C. § 3-11-10-21.

These paragraphs are not the subject of the Board's stay motion, but they are included to show the haste with which the trial court addressed these allegations – consolidating the injunction with the merits without notice and thus without permitting the Board to put on its case on the merits.

Reasons for Granting the Stay

Standard

There is little case law outlining the precise standard to be applied in addressing a motion for stay pending appeal, but our Supreme Court has provided some guidance in its published order in *Doe v. O'Connor*, 781 N.E.2d 672 (Ind. 2003). *Doe* indicates that the factors useful in deciding whether to issue a stay pending appeal are similar to the factors used in deciding whether to issue preliminary injunctions. *Id.* at 674. These are "(1) irreparable harm, (2) likelihood of success on the merits, (3) balance of harms, and (4) public interest." *Id.*

Indiana election laws are also to be broadly construed to guarantee the electorate an opportunity to vote freely, to prevent disfranchisement, and to uphold the will of the electorate. *Brown v. Grzeskowiak*, 101 N.E.2d 639, 646 (Ind. 1951) ("In the absence of fraud, election statutes generally will be construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disfranchisement, and to uphold the will of the electorate."); *Lumm v. Simpson*, 194 N.E. 341, 342 (Ind. 1935) ("The purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.").

1. The balance of harms favors the Election Board because the injunction will foment confusion and delay.

The balance of harms in this case clearly favors the Election Board, and this Court therefore should stay the trial court's injunction.

Approximately 2,500 precinct election board members already have been trained for the November 4 election, which is just three days away (two of those days being weekend days). they will work at the 590 separate polling places in Marion County. If this injunction remains in

force, those workers will have to be contacted, informed of the injunction, and their training will have to be revised. The Election Board does not have a system that is certain to reach all poll workers before Election Day to communicate this information; of those reached, some may not have time to undergo retraining, or they may not understand the training materials. Even the best system is not 100 percent effective.

If the injunction remains in effect, it is likely that it will be communicated to most precinct election board members on Election Day, in writing, at the same time the absentee ballots are delivered. Because of the general busyness of Election Day at the polls, and because this communication method does not allow poll workers to ask questions, it is an imperfect method of communicating the contents of the injunction. It may lead to uncertainty at the polls, perhaps complicated by whatever press reports also describe the injunction.

Changing the rules within hours of opening the polls is a prescription for confusion, and on Election Day confusion means long lines, long waits, and discouraged (and sometimes angry) voters. Changing the rules at this late date also is likely to cause disputes on Election Day between challengers and precinct election board members, which also is likely to lead to delays. Adopting the Plaintiffs' approach could also significantly delay certifying the final results of the election in Marion County because it would require challenged absentee ballots to be processed by one, small central staff rather than the hundreds of precinct election board members at 590 separate polling places.

This problem is compounded by the fact that the Plaintiffs could have filed this lawsuit weeks ago, but instead waited until just a few days before Election Day. The Board has used this approach to challenged absentee ballots for the past several elections. Also, the Election Board's training materials have been available for weeks, yet the Plaintiffs chose to file their lawsuit on

October 29, less than a week before the November 4 election. This last-minute tactic also should weigh in favor of this Court's staying the trial court's eleventh-hour injunction. The balance of harms weighs in favor of staying the preliminary injunction.

II. Plaintiffs are unlikely to succeed on the merits.

A. The Board treats absentee ballots as required by Indiana law.

As required by law, the precinct election board checks the validity of all absentee ballots that arrive at the polls as an initial matter. Plaintiffs' allegation that all challenged absentee ballots are run through the ballot counting machine without any review is not correct. Rather, Marion County follows the statutes regarding challenging absentee ballots, which the trial court has misinterpreted in issuing the injunction. The full texts of relevant statutes are attached to this memorandum.

Indiana Code § 3-11-5-22 mandates that this determination be made at the precinct, not in the provisional ballot-counting process. This statute says that "Except as provided in subsection (c) [which states that absentee voters are not required to provide identification], the challenge procedure under this section is the same as though the ballot was cast by the voter in person." In-person challenges may be resolved at the precinct. Section 22 goes on to state: "If a proper affidavit is made that would entitle the absentee voter to vote if the absentee voter had personally appeared, then the absentee ballot shall be placed in the ballot box." Ind. Code § 3-11-5-22(d). This Section also clarifies that the absentee voter's application, appearing on the envelope containing the ballot, constitutes the absentee voter's affidavit for purposes of resolving the challenge: "If an absentee ballot is challenged under section 21 of this chapter, the absentee voter's application for an absentee ballot shall be considered as the affidavit required to be made by a voter when challenged at the polls while voting in person." Ind. Code § 3-11-5-22(a).

Plaintiffs' arguments to the contrary cite statutes out of context and ignore other statutes that contradict Plaintiffs' interpretation and clarify the statutes Plaintiffs rely on. Indiana Code § 3-11-10-21 permits an absentee vote to be challenged *only* "for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast." Ind. Code § 3-11-10-21. This section goes on to explain "the challenge [of an] absentee ballot must be determined using the procedures for *counting* a provisional ballot under IC 3-11.7" *Id.* (emphasis added). It does not state that an absentee ballot can ever *become* a provisional ballot by operation of law. Nowhere has the legislature stated that challenged absentee ballots are to be "converted" to provisional ballots or that absentee ballots are to be segregated with any provisional ballots cast at the precinct. The only reference made to provisional ballots with respect to challenged absentee ballots is that the validity of the challenge must be determined by the precinct election board using the same rules used for *counting* provisional ballots.

Plaintiffs' ignore, as inconvenient to their argument, the fact that Indiana Code § 3-11-10-22(d) confirms what the precinct election board must do if it determines the challenge has failed. "If a proper affidavit is made that would entitle the absentee voter to vote if the absentee voter had personally appeared, then the absentee ballot *shall be placed in the ballot box.*" Ind. Code § 3-11-10-22(d) (emphasis added). If an absentee ballot is challenged and "not supported," an inspector should not count the ballot. Ind. Code § 3-11-10-17. Thus, an absentee ballot is either counted or not---it is not converted into a provisional ballot.

The relevant statutes require precinct election boards to verify three elements at the precinct on election day to determine if a challenged absentee ballot should be counted or rejected. These elements are set forth in Indiana Code § 3-11.7-5-2(a) (1)-(3); they are that: (1) the affidavit on the ballot envelope is properly executed; (2) the voter is qualified to vote in the

precinct; and (3) the voter is registered. Ind. Code § 3-11-10-21 (incorporating Ind. Code 3-11.7).

The precinct election board can make a determination on the first element because Indiana Code § 3-11-10-22(a) provides that "[i]f an absentee ballot is challenged under section 21 of this chapter, the absentee voter's application for an absentee ballot shall be considered as the affidavit required to be made by a voter when challenged at the polls while voting in person." Therefore, the precinct election board only needs to determine if the absentee ballot application is properly executed to determine if the first requirement has been met. Next, the precinct election board can make a determination on the second and third elements by comparing the absentee ballot to the poll list and, if necessary, by checking with the county board of voter registration as to registration status. If, after this review, the precinct election board determines that all three conditions have been met, the provisional ballot counting rules require the board to determine the "ballot is valid and shall be counted." Ind. Code § 3-11.7-5-2(a) (as incorporated by Ind. Code § 3-11-10-21).

The relevant provisions of Title 3, taken together and read as a whole, show that challenges to absentee ballots are to be resolved at the precinct in the same manner as challenges to in-person voters. Ind. Code § 3-11-5-22(b).

B. Processing challenged absentee ballots as the Plaintiffs ask would violate federal election law governing provisional ballots.

The injunction deprives voters of their federal and state statutory right to be informed that their ballot is considered provisional and to determine whether their vote was counted. The preliminary injunction thus requires the Election Board to violate federal and Indiana law. Under the federal Help America Vote Act, the Election Board is required to give a voter "[a]t the time that an individual casts a provisional ballot . . . written information that states that any

individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted." 42 U.S.C. § 15482(5)(a) (emphasis added). This requirement was adopted by the Indiana General Assembly in Indiana Code § 3-11.7-2-2, which states that "[a]s provided by 42 U.S.C. 15482, a precinct election officer shall give the provisional voter a copy of the written instructions prescribed by the county election board under IC 3-11.7-6-3 after the voter returns the envelope containing the provisional voter's ballots." Ind. Code § 3-11.7-2-2 (emphasis added). To comply with these statutory requirements, the Indiana Election Commission created Form PRO-9, Instructions to Provisional Voter, which must be given to any person casting a provisional ballot at the time that an individual ballot is cast.

Under the injunction, however, an absentee voter whose ballot is later challenged and changed to a provisional ballot cannot be given the statutory required notice at the time the voted is cast—as unambiguously required by both federal and Indiana statutes. And the statute's unambiguous identification of a "precinct election officer" as the person charged with giving the instructions to the voter of a provisional ballot underscores that the law only contemplates such notice for ballots cast in person. These provisions further show that Indiana law does not contemplate treating absentee ballots as provisional ballots.

C. The injunction is self-contradictory and vague.

Paragraphs 28 and 29 of the injunction are mutually contradictory, and the "when necessary" language in Paragraph 30 makes the paragraph so vague that the Board cannot know whether it is following the trial court's order. Paragraph 28 required the Board to tell precinct election boards to treat challenged *mail-in* absentee ballots as provisional. It specifically does

not address *in-person* absentee ballots. Paragraph 29, in contrast, requires the Board to follow the State Election Board handbook, which addresses both *mail-in* and *in-person* absentee ballots.

The Board cannot determine from these contradictory provisions whether the injunction is limited to mail-in absentee ballots or covers all absentee ballots. No effort to clarify this contradiction is likely to be successful, since the Board's counsel pointed out this problem to the trial court before it issued the injunction but the trial court did not resolve it. The contradiction appeared in the draft findings and conclusions submitted by the Plaintiffs, the relevant portions of which the trial court adopted despite the fact that the Board's counsel pointed out the contradiction.

Paragraph 30 directs the Board to notify any challenged mail-in absentee voter of the challenge "when necessary." This vague qualification makes the provision unworkable. When is it "necessary" for the Board to give this notification? What happens if the Board is unable to locate the mail-in absentee voter? What happens if the mail-in absentee voter is serving abroad in the military or otherwise cannot be contacted in a timely way? The vagueness of this provision makes it difficult or impossible to comply with and may later subject the Board to liability in a lawsuit filed by someone who could not be contacted.

The vagueness of this provision, and its failure (and the Plaintiffs' failure) to cite any supporting Indiana law, reveals that the Legislature never contemplated giving notice to absentee voters whose ballots are challenged at the polling place. There is clear authority for such notice to in-person voters. Ind. Code § 3-11.7-2-2 (quoted above). The lack of any such Indiana law pertaining to challenged absentee ballots shows that there is no legal basis for classifying challenged absentee ballots as provisional.

The vague and contradictory nature of the three paragraphs that actually enjoin the Board show the haste with which the order was prepared and make the injunction difficult or impossible to comply with, justifying a stay pending appeal.

III. The injunction harms the public interest.

The injunction does not benefit the public interest because there has been no showing that voter fraud is better avoided by the method the injunction requires for challenging absentee voters than by the system the Election Board had planned to use, allowing challenges to be adjudicated at the precincts. In both cases, bipartisan boards would adjudicate challenges.

On the other hand, the injunction injures the public interest because it will promote delay and confusion at the polls on November 4. The enormous crowds expected to vote in the upcoming, historic election will be the victims of the problems that are likely to arise from the self-contradictory, eleventh-hour injunction imposed by the trial court.

Conclusion

For the reasons stated in this memorandum, this Court should stay the preliminary injunction granted by the trial court.

Respectfully submitted,



Jon Laramore, Attorney No. 17166-49
A. Scott Chinn, Attorney No. 17903-49
Christopher W. Smith, Attorney No. 26596-16
Baker & Daniels LLP
300 N. Meridian St., Ste. 2700
Indianapolis, IN 46204
Tel. 317-237-0300
Fax 317-237-1000

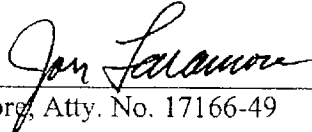
CERTIFICATE OF SERVICE

I hereby certify that the forgoing has been served upon the following counsel of record electronically and by first class United States Mail, postage prepaid, this 31 day of Oct., 2008.

David Michael Brooks
Brooks Koch & Sorg
615 Russell Avenue
Indianapolis, IN 46225

Gregory F. Hahn
Tabbert Hahn Earnest & Weddle, LLP
One Indiana Square, Suite 1900
Indianapolis, IN 46204-2007

Richard McDermott
Assistant Corporation Counsel
City of Indianapolis
1601 City-County Building
200 East Washington Street
Indianapolis, IN 46204



Jon Laramore, Atty. No. 17166-49