

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.").

I. 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,



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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.

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IC 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.

IC 3-11-10-21

Challenge of absentee vote; procedure

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.

IC 3-11-10-22

Challenge of absentee vote; application 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

IC 3-11.7-2-2

Duties of voter; instructions to voter

Sec. 2. (a) A provisional voter shall do the following:

(1) Mark the ballot in the presence of no other person, unless the voter requests help in marking a ballot under IC 3-11-9.

(2) Fold each ballot separately.

(3) Fold each ballot so as to conceal the marking.

(4) Enclose each ballot, with the seal and signature of the circuit court clerk on the outside, together with any unused ballot, in the envelope provided by the county election board under IC 3-11.7-1-8.

(5) Securely seal the envelope.

(b) A provisional voter may mark a ballot with a pen or a lead pencil.

(c) This subsection applies to a provisional voter described in section 1(a)(1), 1(a)(2), or 1(a)(3) of this chapter. As 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.

As added by P.L.126-2002, SEC.87. Amended by P.L.209-2003, SEC.172.

IC 3-11.7-5-2

Criteria for determining validity of ballots

Sec. 2. (a) Except as provided in section 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.

As added by P.L.126-2002, SEC.87. Amended by P.L.209-2003, SEC.176; P.L.109-2005, SEC.12; P.L.103-2005, SEC.15.