

STATE OF INDIANA ) MARION COUNTY CIRCUIT COURT  
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 ) SS:  
 COUNTY OF MARION ) CAUSE NO.: 49C01-0810-PL-049131

RAYMOND J. SCHOETTLE, )  
 ERICA PUGH and the )  
 MARION COUNTY REPUBLICAN PARTY, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 MARION COUNTY ELECTION BOARD, )  
 )  
 Defendant. )

**FILED**

32 OCT 31 2008

*Elizabeth A. White*  
 CLERK OF THE MARION CIRCUIT COURT

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON COMPLAINT  
 FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION  
 AND DECLARATORY RELIEF**

This matter arises from the Verified Complaint for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief filed by Raymond J. Schoettle, Erica Pugh and the Marion County Republican Party (collectively "Plaintiffs") against the Marion County Election Board. The Complaint seeks to ensure that all mail-in absentee ballots cast in the election of November 4, 2008, be handled and counted pursuant to the Election Code in the State of Indiana. The Court having reviewed the pleadings of the parties, the evidence presented during a hearing on October 31, 2008 and the final arguments of counsel, now makes the following findings of fact and conclusions of law:

1. That the Federal Constitution, the Indiana Constitution, the Help America Vote Act, and common fairness require that every properly cast absentee ballot in Marion County be

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.*, 882*N.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 31<sup>ST</sup> DAY OF OCTOBER, 2008.**

  
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HON. THEODORE M. SOSIN, JUDGE  
MARION COUNTY CIRCUIT COURT

To all Counsel of Record.

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ORDER ON MOTION TO STAY PENDING APPEAL

The Marion County Election Board has moved for a stay pending appeal of the injunction entered this date.

The motion is hereby *denied*.

So ORDERED this *31st* day of October, 2008.

*Theodore M. Soji*  
Judge, Marion Circuit Court

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**NOTICE OF APPEAL FROM TRIAL COURT**

Defendant Marion County Election Board, by counsel, pursuant to Ind. Appellate Rule 9(A), respectfully gives notice of an appeal from the following order entered by the Marion Circuit Court:

Order Granting Plaintiffs' Preliminary Injunction.

This appeal is from interlocutory orders pursuant to Ind. Appellate Rule 14(A).

This appeal will be taken to the Indiana Court of Appeals.

Pursuant to Ind. Appellate Rule 10, the clerk of the Marion Superior Court is requested to assemble the Clerk's Record, as defined in Ind. Appellate Rule 2(E).

Pursuant to Ind. Appellate Rule 11, the court reporter of the Marion Circuit Court is requested to transcribe, certify, and file with the clerk of the Marion Circuit Court the following hearing of record, including exhibits: Hearing held on October 31, 2008.

Respectfully submitted,



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*Attorneys for Marion County Election Board*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal From Trial Court has been served upon the following counsel of record via hand delivery this 31st day of October, 2008:

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