

IN THE
INDIANA COURT OF APPEALS
No.49A02-0810-CV-637

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).)	

**MARION COUNTY ELECTION BOARD'S RESPONSE
TO APPELLATE RULE 56(A) MOTION AND
TO APPELLEES' OPPOSITION TO STAY PENDING APPEAL**

**I. The Marion County Election Board seeks a speedy resolution
of this dispute by the Court of Appeals or Supreme Court.**

Time is of the essence as to this motion for stay pending appeal, and the Marion County Election Board seeks a speedy resolution from the Court of Appeals or Supreme Court. The Court of Appeals already has issued orders on an emergency basis and has shown itself ready and able to handle the appeal. The Board does not oppose Supreme Court jurisdiction, however, as either court is fully able to provide the timely resolution that the Board seeks in advance of tomorrow's election.

II. The balance of harms favors the Board.

The Board sought a stay of last Friday's injunction because the injunction would increase confusion and delays at what already promises to be the busiest election of our

lifetimes. **The Board already has received calls, based on press accounts of the injunction, by early voters who are asking whether they need to return to the polls to vote again because of the injunction.** The injunction is increasing confusion and lack of confidence, and it should be stayed to put this matter to rest until after the election. As explained in its October 31 motion for stay, the Board's task at the November 4 election will be difficult enough without complicating it by requiring precinct election boards to be re-instructed on how to address challenges to absentee ballots.

The Plaintiffs' filings today indicate their understanding that the injunction applies to *all* early votes as well as mail-in absentee votes, which only increases the likely problems on November 4. As the Board pointed out in its motion for stay, the injunction itself is contradictory as to whether it applies to both in-person early votes and mail-in absentees.

The disruption the injunction will engender far outweighs any potential problem with challenged absentee ballots. The small problem being addressed by the injunction is shown by the comments in the press of the Marion County Republican Chairman, who sat at counsel table during the injunction hearing last Friday. He was quoted by the *Indianapolis Star* as saying: "This may be much ado about nothing. It may end up (affecting) one ballot or no ballots." Jon Murray, *Judge rules for GOP on absentee ballots*, *Indianapolis Star*, Nov. 1, 2008 (parenthetical in original). He also said that the Republicans do not plan "mass-challenge efforts" for November 4. *Id.*

Just a few potential absentee ballot challenges cannot justify the seeds of chaos the planted by the injunction, which mandates the Board to instruct precinct election boards to treat some ballots differently than these precinct boards were previously trained to treat them. Because absentee ballots will not be delivered to the precincts until late in the day, most of them are likely to be counted late in the day, at the same time the precincts are dealing with the after-work rush of last-minute voters and, subsequently, going through the intricate process of closing the polls.

The Plaintiffs' statements in their filings today that they only learned about this problem shortly before they filed their complaint in this case is belied by their Complaint in this case. Paragraph 23 of their Verified Complaint states: "Commencing not later than the Special Election of March 2008, however, the Election Board adopted a practice and procedure of ignoring Indiana Code 3-11-10-21's requirement to deal with challenged absentee ballots as provisional ballots and instead instructed precinct election boards to cast those ballots into the ES&S Model 100 voting machines." They introduced no evidence to the contrary at the October 31 hearing. Thus, by their own allegations, they knew of this problem months ago yet waited until 6 days before the election to file their lawsuit. They should not be permitted to profit from this intentional delay.

Moreover, addressing these challenged absentee ballots as provisional ballots will increase the likelihood that they are not counted. Getting provisional ballots delivered to the Board depends on proper action by four different Board employees; while these individuals are dedicated and well-trained, errors are made in the controlled disorder that

often surrounds Election Day. First, precinct election boards must ensure that all important items (including provisional ballots) are properly packaged for return to the Board (these items include electronic media cards; voting results tapes; counted, uncounted, and spoiled ballots; poll books; defective and rejected absentee ballots; and voted and unvoted provisional ballots). These are taken to collection sites, each of which receives this material from about 150 precincts. There, another employee must correctly sort the provisional ballots for return to the Board. These steps add potential human error that could result in provisional ballots being misdirected and not ultimately counted. Most provisional ballots cast in Indiana are not counted for various reasons.

Finally, the Plaintiffs are incorrect that there is no remedy if a fraudulent absentee ballot is run through the optical scanner and counted on Election Day. While the vote will still count, Indiana law mandates harsh penalties for voter fraud and for the perjury that would be entailed in any fraudulent affidavit. *See* Ind. Code §§ 3-14-2; 35-44-2-1. It would be eminently reasonable for the General Assembly to determine that these are sufficient incentives to counter potential vote fraud without complicating Election Day procedures as Plaintiffs request.

The balance of harms favors granting the stay, especially because it is far from clear that the Plaintiffs are right on the law.

III. The Plaintiffs read IC 3-11-10-22(d) out of the statute.

The Plaintiffs' legal argument accounts for many portions of the complex and interrelated election code that applies here, but it ignores Indiana Code § 3-11-10-22(d).

Applying to challenges at the precincts to absentee ballots, that statute says: "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." At the hearing last Friday, Plaintiffs' counsel said that this subsection was obsolete, but Plaintiffs seem not to carry that argument forward in their papers filed today.

The only way to read this statute harmoniously with the other applicable law is to allow a challenged absentee ballot to be voted at the precinct when there is a proper absentee voter application (which constitutes the affidavit under Indiana Code § 3-11-10-21(a)) that contradicts any challenger's affidavit that may be filed. Otherwise subsection 22(d) is a nullity. While the State Election Division's handbook may be read to support Plaintiffs' position, the Marion County Election Board is also a governmental entity charged with applying and interpreting the statutes, and the Plaintiffs point to no law that gives the State Election Division's construction any precedence.

This construction is not inconsistent with Indiana Code § 3-11-10-21, which says that challenges to absentee ballots are to be "determined using the *procedures* for counting a provisional ballot under IC 3-11.7" (emphasis added). It does not say that challenged absentee ballots *become* provisional ballots, only that the *procedures* for counting provisional ballots are used. These procedures, set forth mainly in Indiana Code § 3-11.7-5-2, require the precinct election board to determine that: (1) the affidavit is properly executed; (2) the voter is a qualified voter in the precinct; and (3) the voter is registered. All of these facts can be ascertained at the precinct and should be determined

at the precinct absent some clear instruction to the contrary. The 2004 amendment that removes the specific reference to precinct election boards does not undercut this interpretation when Section 21 is read together with all other applicable statutes.

This construction is further supported by other absentee voting statutes, Indiana Code §§ 3-11-10-5, -6 and -7. These statutes require the absentee voter's signature to be examined first by the county election board. If the county election board believes the voter's signature is not genuine, it still *must* send the ballot to the precinct, albeit with a written notation that the county board doubts the genuineness of the signature. Ind. Code § 3-11-10-5. Once the precinct election board has received this ballot, with the written notation, the "precinct election board shall determine whether each disputed ballot will be voted or rejected." Ind. Code § 3-11-10-7. These provisions further support the Board's position that final decisions on challenged absentee ballots are made at the precincts.

Finally, the Plaintiffs' only response to the Board's argument that the federal Help America Vote Act is violated by the injunction is to argue that the Board is required to do something that no statute contemplates – give personal notice to any absentee voter whose ballot is questioned. *Emerg. Verified App. R. 56(A) Mot.* at 10, 15. Not only is this procedure not contemplated by any federal or state law, it raises a myriad of practical problems (not the least of which is timing, since provisional ballots must be counted within ten days of Election Day), again at the eleventh hour.

The Board's construction is the best way to read together as a whole all portions of the applicable law. Even if this Court is doubtful about the construction of the statutes, it

should grant the stay because the problems engendered by the injunction far outweigh any mischief it might address. No evidence of any potential fraud was introduced at the October 31 hearing, and in their appellate filings the Plaintiffs do not suggest that any fraud will occur absent the injunction. Thus, there is no need for any appellate court to resolve once and for all any conflicts in the applicable statutes until after the election, when they can be fully briefed. *See, e.g., Curley v. Lake Co. Bd. of Elect.*, No. 45A03-0810-CV-512 (Oct. 31, 2008) (slip op. at 26) (where statutory construction is ambiguous, focusing on balance of harms).

Conclusion¹

For the reasons stated in this memorandum and the Board's motion for stay, this Court should stay the preliminary injunction granted by the trial court.

Respectfully submitted,



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¹ This response has been written in the brief time since the Plaintiffs' papers were filed early this morning, and the Board regrets any errors committed in its haste to file quickly (its Motion for Stay similarly was filed about three hours after the trial court's injunction, and that motion erroneously refers on page 6 to 3-11-10 as 3-11-5; the Board regrets this error).

CERTIFICATE OF SERVICE

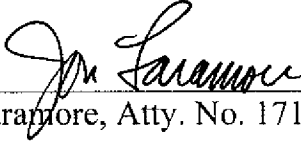
I hereby certify that the forgoing has been served upon the following counsel of record electronically and by first class United States Mail, postage prepaid, this 3 day of Nov., 2008.

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