

**IN THE  
INDIANA COURT OF APPEALS  
CAUSE NO. 49A05-0810-CV-979**

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

**APPELLEES’ VERIFIED MOTION TO CONTINUE TO HOLD THE BOARD’S  
EMERGENCY STAY REQUEST IN ABEYANCE UNTIL THE INDIANA  
SUPREME COURT RULES ON APPELLEES’ PENDING APPELLATE RULE  
56(A) MOTION & RESPONSE TO THE BOARD’S STAY REQUEST**

**I. Appellees’ respectfully request that this Court continue to hold the Board’s Motion for Emergency Stay in abeyance until the Indiana Supreme Court rules on Appellees’ pending Appellate Rule 56(A) Transfer Motion.**

Late Friday night, Appellant Marion County Election Board (“the Board”) filed a Motion for Emergency Stay with this Court. Monday morning, Appellees filed an Appellate Rule 56(A) motion with the Indiana Supreme Court containing the following: (1) a request that the Supreme Court accept emergency jurisdiction over this appeal; (2) a request that the Supreme Court immediately assume jurisdiction over the Board’s Motion for an Emergency Stay; and (3) a response to the merits of the Board’s requested Emergency Stay.

To avoid the continued duplication of efforts relative to the Board’s Emergency Stay, Appellees respectfully request that this Court continue to hold the Board’s Motion in abeyance until the Supreme Court rules on the pending Rule 56(A) Transfer Motion. Appellees have expressly made the Supreme Court aware that they are asking this Court to refrain from ruling on the Stay Motion until the Supreme Court rules on the Rule 56(A) Motion. Accordingly,

Appellees are confident the Supreme Court will rule on the Rule 56(A) Emergency Transfer request expeditiously so that, if the Supreme Court chooses not to accept emergency transfer, this Court will still have enough time to rule on the Stay Motion.

To ensure there are no delays in this Court's ability to rule on the Board's Stay Motion should the Supreme Court decline to accept emergency jurisdiction over this appeal—and in compliance with this Court's Order dated November 1, 2008—Appellees also tender the following Response to the Board's Motion for an Emergency Stay.

## **II. Appellees' Response to the Board's Motion for an Emergency Stay.**

### **A. Introduction.**

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, Appellees respectfully request that the Board's request that the trial court's order be stayed be denied.

## **B. 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.

### **1. 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.

## **2. 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.<sup>1</sup>

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) 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

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<sup>1</sup> 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.

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.

**3. 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.

**C. The Board’s Request for an Emergency Stay Should Be Denied.**

**1. 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.<sup>2</sup> 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)

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

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<sup>2</sup> 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.

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 the Indiana Supreme 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.

## **2. 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.<sup>3</sup>

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.

### **3. 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

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<sup>3</sup> 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.

(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.

**4. 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.”

**D. Conclusion**


Appellees request that the Board’s request that the trial court’s order be stayed be denied.

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,

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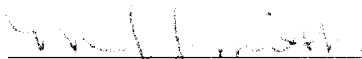
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**VERIFIED STATEMENT OF WORD COUNT**

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

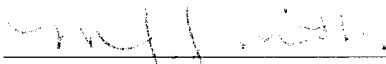
**CERTIFICATE OF SERVICE**

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:

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STATE OF INDIANA ) MARION COUNTY CIRCUIT COURT  
 )  
 ) 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.*, 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.

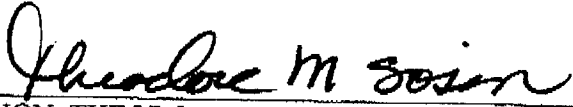
#### **ORDER**

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 31<sup>ST</sup> 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:

\* \* \*

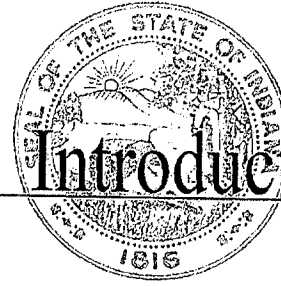
SECTION 122. IC 3-11-10-21 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

<< 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.**

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# Introduction

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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](http://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](http://www.sos.in.gov/elections) for updates.



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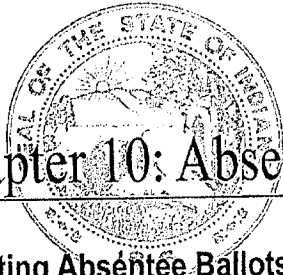
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## Chapter 10: Absentee Ballots

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### 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.

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### 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.