

IN THE
Indiana Court of Appeals

No. 45A03-0810-CV-512

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|---|---|---|
| John B. Curley, as Chairman of the Lake County, Indiana, Republican Central Committee, and as a registered voter, and Jim B. Brown, as a member of the Lake County Board of Elections and Registration and as a registered voter, Plaintiffs-Appellants, |) | |
| v. |) | |
| Lake County Board of Elections and Registration, and the Honorable Thomas Philpot, not individually but as Lake County Clerk, Defendants-Appellees, and |) | Lake County Superior Court |
| Linda Peterson, Roosevelt Phillips, Mary Aaron, Service Employees International Union, and Indiana State Conference of National Association for the Advancement of Colored People Branches, Intervenors-Defendants-Appellees, And |) | Cause No. 45D01-0810-PL-00082 |
| United Steelworkers District 7; Hammond Teachers Federation, Local 394, American Federation of Teachers; Earline Rogers; and Roxanna Lugo, Plaintiffs-Appellees, and |) | Special Judge Diane Kavadias Schneider |
| Lake County Board of Elections and Registration, Defendants-Appellees. |) | |

**MOTION OF THE STATE OF INDIANA TO INTERVENE FOR PURPOSES OF
DEFENDING THE VALIDITY OF STATE STATUTES OR, IN THE ALTERNATIVE,
FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
APPELLANTS**

The State of Indiana, by Steve Carter, Attorney General of Indiana, and Thomas M. Fisher, Solicitor General, respectfully moves the Court for leave to intervene in this action for purposes of defending the validity of certain state statutes that have been called into question, or, in the alternative, for leave to file a

brief as *amicus curiae* in support of appellants. In support of this motion, the State asserts as follows.

1. In its order granting the preliminary injunction that is the subject of this appeal, the trial court declared that “the failure to provide the opportunity for in person absentee voting in the cities of Gary, Hammond and East Chicago” violates Article 2, § 1 of the Indiana Constitution. (App. 48, ¶ 27) Whether to provide in-person absentee voting at any particular location is, at least in part, a function of state law. Accordingly, the decision below calls into question the constitutionality of several state statutes, including at least Ind. Code §§ 3-11-10-24, -26 and 26.3, all of which govern the provision of early voting.

2. In that same order, the trial court also declared that “[p]roviding early voting in the community of Crown Point, with an overwhelming white population, and denying accessible early voting to the majority of Lake County’s African-American and Latino residents, would violate Section 2 of the federal Voting Rights Act.” Again, whether to provide in-person absentee voting at any particular location is, at least in part, a function of state law. Accordingly, the decision below calls into question the validity under the Voting Rights Act of several state statutes, including at least Ind. Code §§ 3-11-10-24, -26 and 26.3, all of which govern the provision of early voting.

3. When a declaratory judgment action calls into question the validity of a state statute, the Attorney General is entitled to notice and an opportunity to be heard on behalf of the State. Ind. Code § 34-14-1-11. Generally it is the policy of

the State in such circumstances to seek leave to intervene in the action in order to ensure standing to pursue appeals, if necessary. It is for that same reason that the State principally seeks leave to intervene in this action as well.

4. While the separate trial court actions that have been consolidated leading up to this appeal do not claim on their faces to be declaratory judgment actions, the thrust of the case remains the same: that the validity of certain Indiana statutes, in at least some applications, has been called into question under the State (via Article 2 § 1) and Federal (via the Voting Rights Act and the Supremacy Clause) Constitutions.

5. The State has the same compelling interest in defending statutes duly enacted by the General Assembly in this action as in all other cases.

6. Whether granted status as Intervenor or *amicus curiae*, the state intends to confine its arguments to the validity of state statutes and policies.

7. The State is substantively aligned with Appellants.

8. Tendered with this motion is the proposed Brief of the State of Indiana as Intervenor or *Amicus Curiae*.

WHEREFORE, the State of Indiana respectfully moves the Court for leave to to intervene in this action for purposes of defending the validity of certain state statutes that have been called into question, or, in the alternative, for leave to file a brief as *amicus curiae* in support of appellants.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana
Atty. No. 4150-64

By: _____

Thomas M. Fisher
Solicitor General
Atty. No. 17949-49

CERTIFICATE OF SERVICE

I certify that on the 27th day of October, 2008, service of a copy of the foregoing Motion of the State of Indiana to Intervene for Purposes of Defending the Validity of State Statutes or, in the Alternative, for Leave to File a Brief as *Amicus Curiae* in Support of Appellants was served via e-mail where email address is indicated and otherwise noted on the following:

Karl L. Mulvaney
Nana Quay-Smith
Shannon D. Landreth
Briana L. Kovac
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
317-635-8900
kmulvaney@binghammchale.com
nsmith@binghammchale.com
slandreth@binghammchale.com
bkovac@binghammchale.com
(Hand Delivery)

Barry A. Macey
MACEY SWANSON AND ALLMAN
445 N. Pennsylvania Street,
Suite 401
Indianapolis, IN 46204-1800
317-637-2345
bmacy@maceylaw.com
(Hand Delivery)

Mary Joyce Carlson
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464 843-216-
9115 mjcarlson@motleyrice.com
(UPS Next Day Air)

Donald P. Levinson
Shana D. Levinson
LEVINSON & LEVINSON
122 W. 79th Avenue
Merrillville, IN 46410
219-769-1164
donlevinson@airbaud.net
(UPS Next Day Air)

Stephen P. Berzon
Jonathan Weissglass
Danielle Leonard
Anne Arkush
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415-421-7151
sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com
dleonard@altshulerberzon.com
aarkush@altshulerberzon.com
jw@altber.com
(UPS Next Day Air)

James L. Wieser
WIESER & WYLLIE
429 W. Lincoln Hwy.
Scherverville, IN 46375
219-865-7404
jlw@wieserwyllielaw.com
(UPS Next Day Air)

Barbara A. Bolling
26 E. 15th Avenue
P.O. Box 64715
Gary, IN 46401-0715
219-881-9461
barbarabolling@aol.com
(UPS Next Day Air)

David M. Brooks
BROOKS KOCH & SORG
615 Russell Avenue
Indianapolis, IN 46225
317-822-3700
dmbrooks@bksattorneys.com
(UPS Next Day Air)

Timothy R. Sendak
Peggy Jo Stamper
SENDAK & STAMPER
209 S. Main Street
Crown Point, IN 46307
219-663-0015
tsendak@ameritech.net
(UPS Next Day Air)

Frederick T. Work
FREDERICK T. WORK & ASSOCIATES
3637 Grant Street, Suite 3
Gary, IN 46408
219-884-6000
frederickwork@sbcglobal.net
(UPS Next Day Air)

R. Lawrence Steele
HODGES & DAVIS PC
8700 Broadway
Merrillville, IN 46410
219-641-8700
rsteale@hodgesdavis.com
(UPS Next Day Air)

Maryann Parker PHV
Service Employees International Union –
Was/DC
1800 Massachusetts Avenue NW
Washington, DC 20036
(UPS Next Day Air)

Gabriel A. Fuentes PHV
Terrence J. Truax PHV
JENNER & BLOCK LLP – CHI/IL
330 N. Wabash Avenue
Chicago, IL 60611
312-923-2808
gfuentes@jenner.com
ttruax@jenner.com
(UPS Next Day Air)

Thomas M. Fisher
Solicitor General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis IN 46204
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov

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| and |) | |
| Linda Peterson, Roosevelt Phillips, Mary Aaron, Service Employees International Union, and Indiana State Conference of National Association for the Advancement of Colored People Branches, Intervenors-Defendants-Appellees, |))))))) | |
| And |) | |
| United Steelworkers District 7; Hammond Teachers Federation, Local 394, American Federation of Teachers; Earline Rogers; and Roxanna Lugo, Plaintiffs-Appellees, |))))))) | |
| and |) | |
| Lake County Board of Elections and Registration, Defendants-Appellees. |)) | |

NOTICE OF APPEARANCE

The State of Indiana, through Attorney General Steve Carter and Solicitor General Thomas M. Fisher and Deputy Attorney General Heather L. Hagan, pursuant to Indiana Rule of Appellate Procedure 16(D), hereby submits this appearance as a potential Intervenor or *amicus curiae* in this cause.

1. Appearing Potential Intervenor or *Amicus*: State of Indiana

2. Counsel for Appearing Potential Intervenor or *Amicus*:

| | |
|---|--|
| Steve Carter (Atty No. 4150-64) Attorney General | Office of the Attorney General IGC South, Fifth Floor |
| Thomas M. Fisher (Atty No. 17949-49) Solicitor General | 302 West Washington Street Indianapolis, IN 46204 |
| Heather L. Hagan (Atty No. 24919-49) Deputy Attorney General | Phone: (317) 232-6255 Fax: (317) 232-7979 |

3. The State of Indiana did not seek Intervenor or amicus status in the trial court in this matter.
4. Counsel respectfully requests transmittal of orders and opinions by Fax pursuant to Rule 26.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana

Office of the Attorney General
302 West Washington Street
IGC South, Fifth Floor
Indianapolis, IN 46204
(317) 232-6255
(317) 232-7979 fax
Tom.Fisher@atg.in.gov

By: _____
Thomas M. Fisher
Solicitor General
Attorney No. 17949-49

Office of the Attorney General
302 West Washington Street
IGC South, Fifth Floor
Indianapolis, IN 46204
(317) 234-4918
(317) 232-7979 fax
Heather.Hagan@atg.in.gov

By: _____
Heather L. Hagan
Deputy Attorney General
Attorney No. 24919-49

CERTIFICATE OF SERVICE

I certify that on the 27th day of October, 2008, service of a copy of the foregoing Notice of Appearance was served via e-mail where email address is indicated and otherwise noted on the following:

Karl L. Mulvaney
Nana Quay-Smith
Shannon D. Landreth
Briana L. Kovac
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
317-635-8900
kmulvaney@binghammchale.com
nsmith@binghammchale.com
slandreth@binghammchale.com
bkovac@binghammchale.com
(Hand Delivery)

Barry A. Macey
MACEY SWANSON AND ALLMAN
445 N. Pennsylvania Street,
Suite 401
Indianapolis, IN 46204-1800
317-637-2345
bmacy@maceylaw.com
(Hand Delivery)

Mary Joyce Carlson
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
843-216-9115 mjcarlson@motleyrice.com
(UPS Next Day Air)

Donald P. Levinson
Shana D. Levinson
LEVINSON & LEVINSON
122 W. 79th Avenue
Merrillville, IN 46410
219-769-1164
donlevinson@airbaud.net
(UPS Next Day Air)

Stephen P. Berzon
Jonathan Weissglass
Danielle Leonard
Anne Arkush
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415-421-7151
sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com
dleonard@altshulerberzon.com
aarkush@altshulerberzon.com
jw@altber.com
(UPS Next Day Air)

James L. Wieser
WIESER & WYLLIE
429 W. Lincoln Hwy.
Schererville, IN 46375
219-865-7404
jlw@wieserwyllielaw.com
(UPS Next Day Air)

Barbara A. Bolling
26 E. 15th Avenue
P.O. Box 64715
Gary, IN 46401-0715
219-881-9461
barbarabolling@aol.com
(UPS Next Day Air)

David M. Brooks
BROOKS KOCH & SORG
615 Russell Avenue
Indianapolis, IN 46225
317-822-3700
dmbrooks@bksattorneys.com
(UPS Next Day Air)

Timothy R. Sendak
Peggy Jo Stamper
SENDAK & STAMPER
209 S. Main Street
Crown Point, IN 46307
219-663-0015
tsendak@ameritech.net
(UPS Next Day Air)

Frederick T. Work
FREDERICK T. WORK & ASSOCIATES
3637 Grant Street, Suite 3
Gary, IN 46408
219-884-6000
frederickwork@sbcglobal.net
(UPS Next Day Air)

R. Lawrence Steele
HODGES & DAVIS PC
8700 Broadway
Merrillville, IN 46410
219-641-8700
rsteele@hodgesdavis.com
(UPS Next Day Air)

Maryann Parker PHV
Service Employees International Union
– Was/DC
1800 Massachusetts Avenue NW
Washington, DC 20036
(UPS Next Day Air)

Gabriel A. Fuentes PHV
Terrence J. Truax PHV
JENNER & BLOCK LLP – CHI/IL
330 N. Wabash Avenue
Chicago, IL 60611
312-923-2808
gfuentes@jenner.com
ttruax@jenner.com
(UPS Next Day Air)

Thomas M. Fisher
Solicitor General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis IN 46204
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov

STATEMENT OF THE ISSUE

Whether, consistent with Article 2 § 1 of the Indiana Constitution and Section 2 of the federal Voting Rights Act, the General Assembly may provide early voting at only one location per county absent a unanimous vote of the local board governing elections to establish additional locations.

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INTEREST OF THE STATE OF INDIANA

As explained in the State's Motion for Leave to File Brief as Amicus Curiae, this litigation has called into question the constitutionality (under the Indiana Constitution as well as the federal Voting Rights Act via the Supremacy Clause) of a statutory scheme enacted by the General Assembly that effectively limits each county to one location for early voting absent unanimous action by the local body governing elections. The State has a compelling interest in defending the validity of statutes duly enacted by the General Assembly. In all events, however, the State does not advocate invalidating any votes already cast at any Lake County early voting sites.

DESCRIPTION OF THE STATUTORY MATRIX AT ISSUE

In addition to voting in person at a polling place on Election Day, Indiana law provides three alternate methods by which registered voters in Indiana may cast their ballots: (1) voting by absentee ballot by mail; (2) voting by absentee ballot in person; and (3) voting by traveling absentee voter board. Ind. Code § 3-11-10-24 to -26.

1. Absentee voting by mail requires the applicant to state a specific reason for the need to vote by absentee ballot. A voter is entitled to vote absentee ballot by mail if, among other things, he or she is elderly, disabled, confined to a health care facility or hospital, caring for an individual confined to a private residence because of illness or injury, has a reasonable expectation of being absent from the county on Election day, or is scheduled to work at his or her regular place

of employment during the entire twelve hours that the polls are open. *See* Ind. Code § 3-11-10-24.

2. An individual may cast an absentee ballot *in-person*, on the other hand, for any or no reason. Indiana Code Section 3-11-10-26(a) provides that voters are entitled to cast absentee ballots in-person before an absentee voter board: “(1) in the office of the circuit court clerk (or board of elections and registration in a county subject to Ind. Code 3-6-5.2); or (2) at a satellite office established under Section 26.3 of this chapter.” Chapter 3-6-5.2 provides for a combined election and registration board in Lake County. The office of the Lake County Board of Elections and Registration is located only in Crown Point. The circuit clerk for Lake County has offices in Crown Point, Gary, Hammond, and East Chicago.

A county election board may authorize satellite early voting sites under Section 3-11-10-26.3 by “unanimous vote of the board’s entire membership.” Ind. Code § 3-11-10-26.3(b). A resolution adopted under this section must state the locations of the satellite offices to be established and the hours during which absentee voting may occur at those locations. Ind. Code § 3-11-10-26.3(c).

3. Finally, voters who are confined to their homes or to a hospital or health care facility by illness or injury or voters who are caring for individuals confined to their homes by illness or injury may request that the absentee voter board visit their place of confinement so that they may cast their ballot there. Ind. Code § 3-11-10-25. Voters with disabilities whose precincts are not accessible to them may also request that the absentee voter board travel to their home or place of confinement. *Id.*

SUMMARY OF THE ARGUMENT

In the decision below, the trial court concluded that the language of Section 3-11-10-26 invites seven possible interpretations as to where early voting locations may occur in a county. Order of October 22, 2008 at ¶ 15 (App. 46). According to the court, the statute could possibly provide early voting:

- (1) either in the County Clerk's office or the Board of Elections in a county subject to IC 3-6-5.2, but not both;
- (2) both in the County Clerk's office and the office of the Board of Elections;
- (3) only at the office of the Board of Elections in a county subject to IC 3-6-5.2;
- (4) either in the County Clerk's office or a satellite office but not both;
- (5) either in the office of the Board of Elections or a satellite office, but not both;
- (6) in both the County Clerk's office and a satellite office;
- (7) in the County Clerk's office, the office of the Board of Elections, and a satellite office.

Id. at ¶ 15(A)-(G). The Court found that the Lake County Board of Elections failed to establish satellite voting under Section 26.3 due to the lack of a unanimous vote; however, the court found that the Board did “by majority vote [] establish absentee voting in the office of the circuit court clerk by reason of one of the possible interpretations of Ind. Code Section 3-11-10-26.” *Id.* at ¶ 18.

Absentee voting in the circuit court clerk's offices in Lake County, however, is not permitted by Ind. Code Section 3-11-10-26. Properly understood, that section acknowledges that, in Lake County, the default location for early voting can only be at the office of the board of election and registration. Absentee voting locations

other than at the Lake County board's offices may be established only by unanimous vote of the board pursuant to Section 26.3.

The trial court went on to say (unnecessarily based on its understanding of the statute) that it is likely unconstitutional for Lake County to hold early voting in only one location. To the extent they yield only one early voting site per county, however, Indiana's statutes providing for early voting offend neither the state constitutional guarantee of free and equal elections nor the Voting Rights Act.

ARGUMENT

I. Section 26 Does Not Permit Voting at the Lake County Clerk's Offices

The trial court's central mistake was to conclude that it is reasonable to read Section 26 as authorizing the Lake County Board to establish, by majority vote, early voting at the county clerk's offices in Crown Point, East Chicago, Hammond and Gary. In light of the larger statutory scheme, Section 26 plainly does nothing more than acknowledge that the default location for early voting in Lake County must be at the Board's offices.

Ninety Indiana Counties have separate boards of election and boards of registration. In those counties, the Clerk is not only an ex officio member of the county election board, but also is responsible for executing many election duties, including early voting. Ind. Code §§ 3-11-4-1(a),-10-26.

Two counties, Lake and Tippecanoe, have combined boards of election and registration. See Ind. Code chs. 3-6-5.2, -5.4. The chapters creating the combined boards in these counties bestow on each the powers given in Title 3 of the code to the county election board, the board of registration, and the county executive. *Id.*

Beyond that, the chapters differ, however. Chapter 5.4, governing Tippecanoe County, says that “the circuit court clerk shall perform all the duties of the circuit court clerk under this title.” Ind. Code § 3-6-5.4-6(b). Chapter 5.2, governing Lake County, however, strips the clerk of Title 3 and other election duties and vests them in a “director” of the combined board. In particular, it says that “[t]he director appointed under section 7 of this chapter shall perform *all the duties of the circuit court clerk* under this title and perform the election or voter registration *duties of the circuit court clerk* under other titles of the Indiana Code.” Section 3-6-5.2-6(b) (emphasis added).

When providing for non-mail absentee voting (*i.e.*, early voting) later in the code, the legislature wrote the statutes to acknowledge how Lake County operates slightly differently from other counties. Section 3-11-4-1 mandates that, except as otherwise provided, a voter casting an absentee ballot “must vote in the office of the circuit court clerk (or board of elections and registration in a county subject to Ind. Code 3-6-5.2) or at a satellite office established under Ind. Code 3-11-10-26.3.” And, phrasing that same voter *obligation* in terms of a voter *entitlement*, Section 3-11-10-26 says that “a voter is entitled to cast an absentee ballot before an absentee voter board: (1) in the office of the circuit court clerk (or board of elections and registration in a county subject to IC 3-6-5.2); or (2) at a satellite office established under section 26.3 of this chapter.”

Accordingly, the most natural reading of Section 26 is *not* that it entitles voters in Lake County to vote at their choice of (a) the circuit court clerk’s office or (b) the Board’s office, or even that the Board itself is entitled to pick one or the

other, as the trial court held. Rather, Section 26 only makes sense when it is understood to acknowledge the earlier code provision stripping election-related duties from the Lake County Circuit Court Clerk. Other provisions of the code do the same thing. For example, Section 3-11-4-3 requires that applications for absentee ballots be received by the circuit court clerk by certain deadlines (including noon the day before the election when application is made in person in the clerk's office), but acknowledges the special Lake County process when it says that "an application for an absentee ballot must be received by the circuit court clerk (or, in a county subject to IC 3-6-5.2, the director of the board of elections and registration)"

It does not make sense to read these mere acknowledgements of the Lake County process as restorations of power to the Lake County Circuit Court Clerk. First, it would make no sense to strip those powers from the Clerk only to restore them, at least partially, later in the code. Second, to read Section 26 this way would be to introduce unnecessary ambiguity into the code, as the trial court seemed to understand. That is, if Section 26 restores power to clerk's office, then it is unclear who, the voter or the Board, enjoys the power to choose where the right to early voting may be exercised. The text could be read *either* way. But if Section 26 is understood as merely acknowledging that power has already been stripped from the Lake County Clerk and vested in the Board, Section 26 can be read *neither* way, and there is no ambiguous optional or alternative method for early voting. As in all cases, the Court should read the statute in a way that avoids ambiguity.

II. The Early Voting Statutory Matrix Does Not Violate Article 2, § 1 of the Indiana Constitution's Guaranty of "Free and Equal" Elections

A. A Voting Law Must be "Grossly Unreasonable" to be Invalid

Article 2, § 1 of the Indiana Constitution provides that "[a]ll elections shall be free and equal." As the Indiana Supreme Court has held, "elections are free when the voters are subject to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate," and they are equal "when the vote of every elector is equal in its influence upon the result to the voter of every other elector [and] when each ballot is as effective as every other ballot." *Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N.E. 583, 589 (1934), *overruled on other grounds by Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942). The legislature has wide latitude to promulgate election laws to regulate and uphold the legitimacy of elections in the state. Indeed, "[i]t is for the Legislature to furnish a reasonable regulation under which the right to vote is to be exercised[.]" *Id.*

Thus, anyone challenging voting regulations under Article 2, § 1, faces "a high hurdle." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 843 (S.D. Ind. 2006). Like any legislative enactment, such laws "come[] before the courts clothed with the presumption of validity." *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76 (Ind. 1982). They are presumptively rational and constitutional and the burden is upon the challenger to make any constitutional defect clearly apparent. *Id.* A voting regulation will be found constitutional "so long as what it requires is not so grossly unreasonable that compliance therewith is practically

impossible.” Simmons v. Byrd, 192 Ind. 274, 136 N.E. 14, 18 (1922) (emphasis added).

B. Indiana’s Statutes Regulating When and Where to Vote are Reasonable

The trial court’s decision focuses on the validity of Section 26.3, which authorizes satellite early voting offices upon unanimous consent of the local election governing body. But the court’s analysis surely implicates Indiana’s entire array of laws stating when elections must take place, where electors may vote, who may vote absentee, and under what conditions.

Indiana voters must generally vote in-person at local precinct polling places on Election Day. *See* Ind. Const. Art. 2 § 2, 14; Ind. Code §§ 3-5-1-2; 3-11-8-2; 3-11-8-8. Layered over that general rule is the allowance for mail-in absentee voting by various categories of voters, including those absent from the county for the entirety of election day, poll workers, the elderly, and the disabled. Ind. Code § 3-11-10-24. Also, voters are “entitled to cast an absentee ballot before an absentee voter board” in at least one location per county, which location must permit such voting to occur during regular business hours beginning 29 days before Election Day. Ind. Code § 3-11-10-26(c). This rule permits *all* voters, for any reason or none, to break from the single-day voting rule, though it provides only one location for doing so.

Section 26.3, then, permits local boards of election (or boards of election and registration) to add more early voting sites by unanimous vote. Ind. Code § 3-11-10-26.3. But the real question for purposes of Article 2 § 1 is whether the general rule of single day voting at a single location, as modified by opportunities for mail-in absentee voting, Section 3-11-10-24, and multiple day, single-site voting, Section 3-

11-10-26, is reasonable—or at least not “so grossly unreasonable that compliance therewith is practically impossible”—even without reference to Section 26.3. If so, then it follows that Section 26.3’s unanimous vote requirement is itself reasonable.

1. The general rule requiring all voters to cast their ballots on election day at their local precincts is not “so grossly unreasonable that compliance therewith is practically impossible.” If this were the only way for voters to cast ballots, no one could plausibly say that arrangement violates Article 2 § 1. Indeed, Ind. Const. Article 2 § 1 expressly provides that “all general elections shall be held on the first Tuesday after the first Monday in November.” Ind. Const. Art. 2 § 14. Further, Article 2 provides that eligible voters “resident of a precinct thirty (30) days immediately preceding” an election “shall be entitled to vote *in that precinct*.” Ind. Const. Art. 2 § 2(a) (emphasis added). Accordingly, it stands to reason that a law permitting a resident of a voting precinct to cast a ballot only on “the first Tuesday after the first Monday in November” and only “in that precinct” would be reasonable and constitutional.

To conclude otherwise would not only contravene the text of Article 2, but would also, at the very least, *require* unspecified alternative means of voting, such as mail-in absentee voting or early voting. But a constitutional mandate for such alternatives is unheard of. *Cf. Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (“For it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?”)). Surely the “free and equal” requirement does not *mandate* mail-in voting, early voting,

internet voting, e-mail voting, text-message voting, instant-message voting, YouTube® voting or any other more convenient means of casting a ballot than doing so in-person at one's home precinct on Election Day.

2. Next, we must consider legislative establishment of the right to early voting at the Clerks' office (or Board office in Lake County) in the voter's county of residence. Ind. Code § 3-11-10-26. These locations are in the County Seat of each county. It is reasonable to establish for each county an early voting center at the seat of county government so that voters who find the general requirement of voting on Election Day too onerous will have another alternative. As demonstrated above, having *no* such early voting option would be reasonable. Also, as surely all would concede, having *more than one* such early voting option would be reasonable. So it must be that something in between, namely having only one location for early voting, is also reasonable.

To be sure, this single-location for early voting may not be enough for some voters. But that is true of the availability of precinct polling places on election day, and, inevitably, even multiple early voting sites. There will always be some voters for whom voting is insufficiently convenient. There is no constitutional requirement that voting be made ever easier to accommodate even the most disadvantaged voter.

3. It therefore must follow that Section 26.3 itself is likewise neither grossly unreasonable nor practically impossible to comply with. In the most literal terms, the law on its face is both reasonable and straightforward: a county election board may adopt a resolution to authorize the establishment of satellite voting offices in the county so long as the resolution is "adopted by the unanimous vote of

the board's entire membership." Ind. Code § 3-11-10-26.3. But more to the point, it provides another means—even if one infrequently used in a particular county—for accommodating voters whose voting options are *already* constitutionally reasonable.

4. Notwithstanding the “grossly unreasonable” standard of *Simmons*, the decision below focused on what the trial court concluded to be the unequal *impact* of Section 26.3, principally on racial grounds. Neither this Court nor the Indiana Supreme Court has ever suggested that proving that a facially race-neutral election statute has some sort of disparate racial impact is one way to prove a violation of Article 2, § 1. Rather, cases applying Article 2, § 1 focus only on disparate *treatment*, which plainly does not exist here. This Court should not now engraft Article 2 § 1 with a disparate-impact prohibition.

Nor is it inherently inequitable or unreasonable to permit a county election board to change its mind about satellite early voting from one election to the next. The trial court drew the conclusion that, because the Lake County Board voted unanimously to open satellite early voting offices during the 2008 primary, it was thereafter required to adhere to that plan, apparently in *all* future elections. Section 26.3 plainly does not require that result, and neither does Article 2 § 1.

As a general matter, it was entirely equitable and reasonable for the legislature to require a unanimous vote to establish satellite early voting sites. First, administering an election is no small task. In order to ensure that elections run smoothly and that no member of the electorate is unjustly inconvenienced in voting, county election officials must follow myriad complex regulations, and the unanimous vote requirement is one way to conserve scarce resources.

Second, county election boards are statutorily required to be comprised of members of both political parties. Ind. Code § 3-6-5.2; *see also* Ind. Code § 3-6-5.2-4 (providing bipartisan membership for Lake County’s combined board); Ind. Code § 3-6-5.4-4 (providing bipartisan membership for Tippecanoe County’s combined board). The unanimous vote requirement thus imposes bipartisan agreement as a prerequisite for additional early voting offices. Through this mechanism, the General Assembly reasonably sought to preclude manipulation of satellite early voting centers as a means to gain partisan advantage. Provisions for avoiding partisan control of the electoral process arise throughout Indiana election law. *See, e.g.*, Ind. Code § 3-6-4.1-2(c) (providing for equal bipartisan representation on the Election Commission); Ind. Code § 3-6-4.2-3(b) (providing that co-directors of the Election Division may not be from the same political party).

Particularly in light of such bipartisan consent requirements, financial and political circumstances may change from election to election that translate into different outcomes under Section 26.3. Establishing satellite early voting sites in one election, especially a primary election where voter participation is comparatively lighter and the potential for partisan advantage comparatively smaller, may be reasonable, but that calculus may legitimately change for the general election.

In all events, the outcome for voters remains well within the range of reasonable access to the ballot box protected by Article 2 § 1. Voters will always have the ability to vote in their home precincts on Election Day, or at the county seat beginning 29 days before Election Day—and possibly even by mail-in absentee

ballot. The Indiana Constitution requires no more options for voting, so a regulatory scheme that permits local boards to change their minds about providing additional outlets for voting from one election to the next cannot be “grossly unreasonable” in terms of its impact on voting.

III. The Early Voting Statutes Do Not Violate the Voting Rights Act

A violation of Section 2 occurs if, “based on the totality of circumstances [minority plaintiffs] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). No party in this case has apparently advanced a discriminatory intent theory, so the case turns on whether there is proof of objective factors that, under the totality of the circumstances, show the exclusion of a minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme. On this theory, there can be no valid facial attack on a race-neutral state statute that equally limits early voting to the county seat absent unanimous consent of the local board.

1. The trial court stressed that a VRA claim can be based on discriminatory impact while finding that “[p]roviding early voting in the community of Crown Point, with an overwhelming white population, and denying accessible early voting to the majority of Lake County’s African-American and Latino residents, would violate Section 2 of the Voting Rights Act.” Order of October 22, 2008 at ¶ 28 (App. 49). The trial court also observed that, “[i]n *Brown v. Dean*, 555 F. Supp. 502, 504-06 (D.R.I. 1982), the court held that the location of a polling place distant from, and difficult to reach by, African-Americans, violated Section 2.” Order

of October 22, 2008 at ¶31 (App. 50).

This is the sum total of the trial court's VRA analysis. The court made no findings of actual statistical disparities with respect to early voting and no findings concerning other factors that might bear on Section 2 issue, see *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986), and made no attempt to explain why, when the law creating a single early voting site in Lake County is a state law, the only relevant geographic area for purposes of measuring purported discriminatory impact is Lake County.

2. A recent district court decision from Florida rejected a VRA claim in an early voting context, and in the process demonstrated why the geographic comparison question is important. In *Jacksonville Coalition for Voter Protection v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004), the court rejected the theory that a county supervisor, who under Florida law was required to permit early voting at one main office but had the unilateral authority to open additional early voting sites, violated the VRA by refusing to open early voting sites in multiple predominantly black neighborhoods. Among other things, the plaintiffs provided insufficient evidence concerning the particular impact in Duval County. *Id.* at 1335-36. According to the court, no substantial testimony was given "in regards to actual wait time or other problems experienced at that single early voting site during this current period of early voting." *Id.* at 1335. The court concluded that, "while it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of 'meaningful access to the political process.'" *Id.* (quoting *Osburn v. Cox*, 369 F.3d

1283, 1289 (11th Cir. 2004)).

More fundamental to the decision, however, was the implication of the plaintiffs' legal theory. The dispute arose in Duval County, Florida, which had the highest concentration of black voters among Florida's most densely populated counties. *Id.* at 1334. The Plaintiffs essentially argued that, "because the percentage of African-American registered voters is higher in Duval County than other counties in Florida, any decision to have a smaller number of early voting sites in Duval County, regardless of their placement, will have a disproportionate impact on African-American registered voters and results in a Section 2 violation." *Id.* The Court rejected this attack, however, given that it leads to a never-ending series of comparisons of geographic areas, up to and including other states. *Id.* at 1335-36 ("Following Plaintiffs' theory to its next logical step, it would seem that if a state with a higher percentage of registered African-American voters than Florida did not implement an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida.").

3. Without some better understanding of the relevant geographic area, litigation over whether early voting sites have been adequately provided might continue until there are as many early voting sites as Election Day precinct polling places. Fortunately, the text of the VRA provides the answer. Section 2(b) clarifies that election practices and processes are problematic where members of protected groups "have less opportunity than other members *of the electorate* to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b)

(emphasis added).

That is, at least with respect to allegations of unintentional discrimination, Section 2 liability must be based on the disparate impact of a practice or procedure within a particular *electorate*. This is most easily seen in redistricting and at-large electorate cases, which necessarily remain focused on the potential dilution of minority votes for the particular office affected by the district lines (or lack thereof) at issue. But there is no reason the text of the statute requiring an electorate-level analysis does not apply to other election rules as well. *See Thornburg* 478 U.S. at 45 & n.10 (noting that the text of Section 2 applies to “all forms of voting discrimination, not just vote dilution”).

An electorate, of course, is the body of voters eligible to vote for a particular office. One election may, and almost always does, include races for many different electorates. Voters in Lake County will cast ballots tailored for their membership in many electorates, including President, Governor, Attorney General, and Superintendent of Public Instruction, state representatives, state senators and members of Congress. *See* November 4, 2008, General Election Candidates, available at <http://www.in.gov/sos/elections> (last visited October 26, 2008). These races, however, do not involve *county-wide* electorates. Accordingly, evidence concerning the concentration of minority voters in areas remote from Crown Point, and the unfairness of that situation compared with the proximity of white voters living in Lake County to Crown Point, is off the mark, at least with respect to those races. Proving Section 2 claims as to participation in those electorates would require comparing data on access to early voting on statewide, congressional

district, and legislative district levels, depending on the race. Comparisons with opportunities available to other voters in the same county (as such) are simply not relevant to those races.

As it happens, however, a handful of contested county-wide races do appear on the ballot in Lake County, including races for county coroner, recorder, and surveyor, along with retention of Superior Court judges. But proving a VRA claim with respect to participation in those electorates not only must include data concerning minorities' access to early voting relative to the access of non-minorities in the same electorates, but also evidence demonstrating bloc voting in these races by the racial majority as well as other factors bearing on the "totality of the circumstances" in those electorates as identified in *Thornburg* 478 U.S. at 45. More than statistical impact is necessary, the Court observed in *Thornburg*, because "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

These factors, which the *Thornburg* Court constructed from the Senate Report accompanying the 1982 amendments to the VRA, include not only the history of voting-related discrimination in the relevant electorate, but also (among others) the extent of racially polarized voting among the electorate, the exclusion of minorities from the slating process, the use of racial appeals in political campaigns, the extent to which minorities have been elected to public office "in the jurisdiction," and "evidence demonstrating that elected officials are unresponsive to the

particularized needs of the members of the minority group.” *Id.* at 45.

The parties advancing VRA claims have not even come close to meeting the burden of proving majority bloc voting or that, under the totality of the circumstances, early voting at Crown Point and nowhere else in Lake County creates “an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Thornburg*, 478 U.S. at 47. And it is far from self-evident that such proof might exist. It seems highly unlikely, for example, that there are racial voting blocs at work in the races for county coroner, recorder, surveyor, and superior court, the only county-wide contested races on the ballot in Lake County. Indeed, in *Bradley v. Work*, 154 F.3d 704, 710-11 (7th Cir. 1998), the court rejected a VRA challenge to the at-large appointment-and-retention plan for the Lake Superior Court, observing that “it is not at all clear that the Voters can satisfy the third *Gingles* factor, bloc voting by the majority group. Appellees have pointed out that both of the African-American candidates who have faced retention elections were retained, with a majority of white voters supporting each. Two African-American judges were also elected to the county division in at-large races, again with a majority of white voters supporting them.”

In sum, without proof that bloc voting exist, there is no proof of an impaired ability for minorities to elect their preferred candidates, and preliminary injunctive relief is not justified.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana
Atty. No. 4150-64

By: _____

Thomas M. Fisher
Solicitor General
Atty. No. 17949-49

Heather L. Hagan
Deputy Attorney General
Atty. No. 24919-49

CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 7,000 words.

Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I certify that on the 27th day of October, 2008, service of a copy of the foregoing Brief of the State of Indiana as Intervenor or *Amicus Curiae* was served via e-mail where email address is indicated and otherwise noted on the following:

Karl L. Mulvaney
Nana Quay-Smith
Shannon D. Landreth
Briana L. Kovac
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
317-635-8900
kmulvaney@binghammchale.com
nsmith@binghammchale.com
slandreth@binghammchale.com
bkovac@binghammchale.com
(Hand Delivery)

Barry A. Macey
MACEY SWANSON AND ALLMAN
445 N. Pennsylvania Street,
Suite 401
Indianapolis, IN 46204-1800
317-637-2345
bmacy@maceylaw.com
(Hand Delivery)

Mary Joyce Carlson
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
843-216-9115
mjcarlson@motleyrice.com
(UPS Next Day Air)

Donald P. Levinson
Shana D. Levinson
LEVINSON & LEVINSON
122 W. 79th Avenue
Merrillville, IN 46410
219-769-1164
donlevinson@airbaud.net
(UPS Next Day Air)

Stephen P. Berzon
Jonathan Weissglass
Danielle Leonard
Anne Arkush
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415-421-7151
sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com
dleonard@altshulerberzon.com
aarkush@altshulerberzon.com
jw@altber.com
(UPS Next Day Air)

James L. Wieser
WIESER & WYLLIE
429 W. Lincoln Hwy.
Schererville, IN 46375
219-865-7404
jlw@wieserwyllielaw.com
(UPS Next Day Air)

Barbara A. Bolling
26 E. 15th Avenue
P.O. Box 64715
Gary, IN 46401-0715
219-881-9461
barbarabolling@aol.com
(UPS Next Day Air)

David M. Brooks
BROOKS KOCH & SORG
615 Russell Avenue
Indianapolis, IN 46225
317-822-3700
dmbrooks@bksattorneys.com
(UPS Next Day Air)

Timothy R. Sendak
Peggy Jo Stamper
SENDAK & STAMPER
209 S. Main Street
Crown Point, IN 46307
219-663-0015
tsendak@ameritech.net
(UPS Next Day Air)

Frederick T. Work
FREDERICK T. WORK & ASSOCIATES
3637 Grant Street, Suite 3
Gary, IN 46408
219-884-6000
frederickwork@sbcglobal.net
(UPS Next Day Air)

R. Lawrence Steele
HODGES & DAVIS PC
8700 Broadway
Merrillville, IN 46410
219-641-8700
rsteale@hodgesdavis.com
(UPS Next Day Air)

Maryann Parker PHV
Service Employees International Union
– Was/DC
1800 Massachusetts Avenue NW
Washington, DC 20036
(UPS Next Day Air)

Gabriel A. Fuentes PHV
Terrence J. Truax PHV
JENNER & BLOCK LLP – CHI/IL
330 N. Wabash Avenue
Chicago, IL 60611
312-923-2808
gfuentes@jenner.com
ttruax@jenner.com
(UPS Next Day Air)

Thomas M. Fisher
Solicitor General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis IN 46204
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov