

IN THE
SUPREME COURT OF INDIANA
CAUSE NO. 45A03-0810-CV-512



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.

Cause No. 45D01-0810-PL-00082

Lake County Board of Elections and Registration, and the Honorable Thomas Philpot, not individually but as Lake County Clerk,

Defendants-Appellees.

Linda Peterson, Roosevelt Phillips, Mary Aaron, Service Employees International Union, and Indiana State Conference of National Association for the Advancement of Colored People Branches,

Intervenor-Defendants-Appellees.

United Steelworkers District 7; Hammond Teachers Federation, Local 394, American Federation of Teachers; Earline Rogers; and Roxanna Lugo,

Plaintiffs-Appellees,

v.

Lake County Board of Elections and Registration,

Defendant-Appellees.

**VERIFIED MOTION TO ACKNOWLEDGE JURISDICTION AND ESTABLISH
EXPEDITED BRIEFING SCHEDULE**

Plaintiffs and Appellants, John B. Curley, as Chairman of the Lake County, Indiana, Republican Central Committee, and as a registered voter (“Curley”) and Jim B. Brown, as a member of the Lake County Board of Elections and Registration and as a

registered voter (“Brown”) (collectively “the Curley Plaintiffs”), by counsel, pursuant to IND. APPELLATE RULES 4(A)(1)(b) and 56(A), respectfully request that this Court affirm its exclusive and mandatory direct appellate jurisdiction over this case, or alternatively, grant immediate transfer because this appeal raises a substantial question of law of great public importance and an emergency exists requiring a speedy determination. Additionally, the Curley Plaintiffs request an expedited briefing schedule and expedited consideration so that this absentee voting controversy can be finally resolved before the general election on November 4, 2008. In support hereof, the Curley Plaintiffs state as follows:

1. On October 22, 2008 the Special Judge, Diane Kavadias Schneider, appointed to hear this matter issued a preliminary injunction against the Lake County Board of Elections and Registration (“Board”) prohibiting it from terminating in person absentee voting in Gary, Hammond, and East Chicago. This preliminary injunction rested on two legal bases: that the absentee voting offices established in Gary, Hammond, and East Chicago were not satellite voting locations which required a unanimous board vote under Indiana Code § 3-11-10-26.3, but were instead absentee voting offices located in circuit court clerk offices under Ind. Code § 3-11-10-26, which could be opened by majority vote. Secondly, the Special Judge held the Board was obligated to maintain these absentee voting offices in Gary, Hammond and East Chicago under Article 2, Section I of the Indiana Constitution, and Section 2 of the Voting Rights Act. By doing so, the Special Judge conclusion implicitly determined that the statute’s requirement of a unanimous Board vote approving these satellite offices for early absentee voting is unconstitutional and thus unenforceable. *See* Ind. Code §3-11-10-26.3 (unanimous board

vote a statutory prerequisite for establishing satellite voting offices). The preliminary injunction also determines that the Plaintiffs in the consolidated action arising out of Lake Circuit Court, United Steelworkers District 7, Hammond Teachers Federation, Local 394, American Federation of Teachers; Earline Rogers; and Roxanna Lugo (collectively the “Steelworker Plaintiffs”), were likely to prevail on their constitutional claims on the merits. A copy of the Lake Superior Court’s Preliminary Injunction Order is attached hereto as Exhibit “A” and the Curley Plaintiff’s Notice of Appeal, filed today, is attached hereto as Exhibit “B.”

2. The Curley Plaintiffs believe this appeal falls within this Court’s mandatory and exclusive direct appellate jurisdiction over judgments which declare a state or federal statute unconstitutional. *See* Ind.App.R. 4(A)(1)(b). This mandatory jurisdiction applies not only to final judgments, but also to preliminary injunctions which declare a state statute unconstitutional. *State v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005). The preliminary injunction issued by the Lake Superior Court finds that satellite voting offices are required by Article 2, Section I of the Indiana Constitution, irrespective of the votes cast by the members of the Board under Ind. Code § 3-11-10-26.3. This determination nullifies the legislature’s statutory requirement that all board members must unanimously approve this action. *See* Ind. Code § 3-11-10-26.3. The preliminary injunction finds there is a constitutional obligation to open these satellite offices irrespective of the board’s lack of unanimity. The result is that the preliminary injunction invalidates Ind. Code § 3-11-10-26.3 on the premise it conflicts with Article 2, Section 1 of the Indiana Constitution. Accordingly, the Curley Plaintiffs tender this appeal pursuant to this Court’s mandatory jurisdiction under App.R. 4(A)(1)(b).

3. The Curley Plaintiffs also recognize that the Preliminary Injunction also rests upon statutory grounds; namely that it finds these three voting offices to be absentee voting offices established in the Lake County circuit court clerk's offices, not satellite offices requiring unanimous board approval under Ind. Code § 3-11-10-26.3. This determination can also be reviewed under this Court's direct appellate jurisdiction. *See State v. Williams*, 430 N.E.2d 756 (Ind. 1982) (Supreme Court reviews all issues in case, not just constitutional questions under its appellate jurisdiction).

4. Furthermore, this determination also belongs before this Court for immediate review because the preliminary injunction raises issues that are of great public importance, and are of an emergent nature within the meaning of App.R. 56(A). Absentee balloting has been ongoing at these three locations since October 14, 2008, in anticipation of the November 4, 2008 election. The issuance of the preliminary injunction raises fundamental issues as to whether the order violates Art. III of the Indiana Constitution inasmuch as it substitutes a court's judgment for that of the legislature. The validity of the preliminary injunction may create a possible subsequent challenge to the validity of the absentee votes cast at those offices, or to Indiana's electoral votes, if the election is close. Both the Board and Lake County residents need a final expeditious resolution of this case before the general election on November 4, 2008 to avoid any possible challenge. Likewise, the Board's ability to enforce Indiana's voting laws and its ability to control the locations at which voting occurs during this hotly contested general election warrants the granting of "emergency" transfer under App.R. 56(A). This authority has been exercised by this Court on numerous occasions where the validity of a ballot, election or candidacy is at stake. *See Stanek v. Marion County Election Board*,

262 Ind. 397; 316 N.E.2d 830 (1974) (Immediate transfer granted of trial court's refusal to order election board to place judicial office on general election ballot); *City of Lawrence v. State*, 670 N.E.2d 8 (Ind. 1996) (emergency transfer granted over phrasing of ballot); *Election Board v. Bayh*, 521 N.E.2d 1313 (Ind. 1988) (emergency transfer to determine residency requirements for governor); *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985) (emergency transfer granted to determine validity of candidacy for office); *Wright v. Gettinger*, 428 N.E.2d 1212 (1981) (emergency transfer granted to resolve election issues).

5. In order to expedite resolution of this controversy, the Curley Plaintiffs request that this Court affirm its exclusive appellate jurisdiction or grant immediate transfer, and immediately establish an expedited briefing schedule, so that it can decide the merits of this case before the November 4, 2008 general election. To that end, the Curley Plaintiffs would offer to file their Appellant's Brief on a greatly expedited schedule, namely by 10 a.m. E.D.T. on **Monday, October 27, 2008**, along with an appendix containing an abbreviated record on appeal, and serve both of these documents upon counsel by simultaneous personal service and/or electronic mail. Likewise, the Curley Plaintiffs would ask that the Board, Clerk, Interveners and Steelworker Plaintiffs file any briefs and appendices by 10 p.m. E.D.T. on **Wednesday, October 29, 2008**, with simultaneous personal or electronic service. The Curley Plaintiffs are willing to waive their right to file a reply brief, or to seek oral argument, if necessary to enable appellate review before the general election. The Curley Plaintiffs are attempting to file their brief and prepare the appendix by Friday night at 11 p.m. E.D.T. If they do so, they would request a filing date for all opposing parties by Tuesday, October 28, 2008 at 11 p.m.

E.D.T. The Attorney General has been notified of this action and is being served with this Verified Motion. All parties to the case below and the original action from this Court were served with this Motion via e-mail, except for Maryann Parker, for which we have no e-mail address.

Wherefore the Appellants, John B. Curley and Jim B. Brown, respectfully request that this Court affirm its exclusive appellate jurisdiction over this matter pursuant to App.R. 4(A)(1)(b) or grant immediate transfer pursuant to App.R. 56(A), and immediately establish a briefing schedule to expedite resolution of this case before the November 4, 2008 general election.

Respectfully submitted,



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I Affirm Under The Penalties For Perjury That The Foregoing Representations Are True to the Best of My Belief.

DATE: 10/23/08



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CERTIFICATE OF SERVICE

I certify that on the 23rd day of October, 2008, service of a copy of the foregoing Verified Motion to Accept Jurisdiction and Establish Briefing Schedule and attachments was made via e-mail and U.S. Mail on the following:

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