

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JOHN B. CURLEY, as Chairman of the)
Lake County Indiana Republican Central)
Committee and as a registered voter, and)
JIM B. BROWN, as member of the Lake)
County Board of Elections and Registration)
And as a registered voter,)

Plaintiffs,)

v.)

Case No. 2:08-cv-00287-JVB

LAKE COUNTY BOARD OF)
ELECTIONS AND REGISTRATION,)
HONORABLE THOMAS PHILPOT, not)
Individually but as Lake County Clerk,)
LINDA PETERSON, ROOSEVELT)
PHILLIPS, MARY AARON, SERVICE)
EMPLOYEES INTERNATIONAL)
UNION,)

Defendants,)

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.)

PLAINTIFFS' BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER

Plaintiffs 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

“Plaintiffs”), through their counsel, respectfully submit this Brief in Support of Temporary Restraining Order.

A. Introduction

The Indiana General Assembly supports the right to vote by permitting its citizens to submit absentee ballots by mail, to vote before the election at the circuit clerk’s office in their county of residence (or in the case of Lake County, in the office of the Lake County Board of Elections and Registrations, per Ind. Code § 3-6-5.2), or to vote at the polls on election day. It also allows the election board of each county to open satellite offices for early voting, if the election board members *unanimously* vote in favor of establishing those satellite offices. Additional satellite voting locations for Gary, Hammond and East Chicago were proposed to the Lake County Board of Elections and Registrations (“Board”). The Board did *not* unanimously agree to establish these new satellite locations.

Indiana law, IC § 3-11-10-26.2, also permits electronic voting at in-person absentee ballot voting sites upon a unanimous vote of the Board. On September 29, 2008, the Board unanimously voted to utilize electronic voting for in-person absentee ballot voting at its Crown Point office. No such vote of the Board was proposed or taken with respect to any other in-person absentee ballot voting sites.

The Democrat-controlled Board voted 3-2 to open unauthorized satellite offices in Gary, Hammond and East Chicago. Despite not having the required unanimous vote, plans were implemented to begin accepting early ballots for the 2008 general election on October 6, 2008. Without any vote whatsoever, let alone unanimous approval, steps were taken to implement and use electronic voting devices in these unapproved satellite locations in violation of Ind. Code § 3-11-10-26.2.

Plaintiffs thus brought this action in the Lake Superior Court to restrain and enjoin the Defendants, the Lake County Board of Elections and Registration and the Honorable Thomas Philpot, Lake County Clerk, (“Defendants”) from violating Indiana law by establishing satellite voting offices with electronic voting without a unanimous vote of the Board as required by Ind. Code § 3-11-10-26.3 & § 3-11-10-26.2. On October 3, 2008, the Honorable Judge Hawkins of the Lake Superior Court issued a temporary restraining order against the Defendants which, *inter alia*, enjoined and restrained them from establishing satellite voting offices without a unanimous vote of the Board authorizing that action. The Superior Court’s Order also restrained and enjoined the Defendants from conducting electronic voting at these satellite voting offices without unanimous approval by the Board.

On October 3, 2008, the same date the Lake Superior Court issued its TRO, the Board removed this case to federal court. The state court record was certified and filed with this Court that afternoon. In addition, Linda Peterson, Roosevelt Phillips, Mary Aaron, Service Employees International Union and the Indiana State Conference of National Association for the Advancement of Colored People Branches (collectively, “Intervenors”) sought to intervene as of right and by permission pursuant to Federal Rule of Civil Procedure 24(a) and (b). The motion to intervene was granted.

The parties have agreed that no additional voting locations would be opened until Tuesday, October 14, 2008, pending a hearing in this Court on subject matter jurisdiction and the TRO/injunction. The Plaintiffs submit this Memorandum in accordance with this Court’s Order of October 7, 2008.

The Intervenors have filed an extensive Memorandum in Opposition to the Motion To Enforce The Temporary Restraining Order that suggests that Plaintiffs seek to prevent voters

from having access to early voting in their communities. The Defendants also contend that their actions in establishing satellite voting offices in Gary, Hammond and East Chicago for the upcoming 2008 general election was within their authority because all testimony before the Board of Elections supported this action. The Defendants, however, have overstepped their statutory authority, and have misconstrued the implications of opening or refusing to open satellite voting offices. The Defendants' actions were in blatant violation of Ind. Code §3-11-10-26.3 because the Board must unanimously approve the establishment of these satellite voting offices, and it did **not** vote unanimously to approve these locations. Moreover, the Plaintiffs' suit to enforce this clear statutory prerequisite does not in any way impair the Defendants' constitutional right to vote under the Indiana State Constitution or the federal Voting Rights Act. The Plaintiffs' prosecution of this action is not only consistent with the Indiana General Assembly's mandate that all satellite voting offices be established by unanimous vote, but it maintains equality in voting opportunities for all Lake County citizens by seeking to enforce the same terms and prerequisites to the consideration of all such requests for early satellite voting offices.

B. Argument

I. Jurisdiction

This Court has jurisdiction in this matter. Plaintiffs incorporate by reference the arguments set forth in their Opposition to Intervenor-Defendants' Motion to Remand regarding jurisdiction. Plaintiffs have standing under Article III of the U.S. Constitution because they have a cognizable fundamental voting right that, absent this Court's review will be subjected to vote dilution as a direct result of Defendants' illegal conduct. Moreover, this matter was properly removed pursuant to 28 U.S.C. § 1443(2). In their Notice of Removal, Defendants allege at least

a colorable claim that they refused to enforce Indiana state law based on the belief that opening an early voting site solely in Crown Point was inconsistent with the federal Voting Rights Act.

II. The Defendants Violated Ind. Code § 3-11-10-26.3 by Establishing Satellite Voting Offices Without Unanimous Approval of the Board

The Plaintiffs do not seek to prevent voters from exercising their right to vote, whether in person, by absentee ballot, or by utilizing early voting options. To the contrary, Plaintiffs fully support the mechanisms for employing all early voting options which have been adopted by the Indiana General Assembly. This suit merely seeks to have the Defendants comply with the General Assembly's clear intent in the manner in which one form of early voting, i.e. satellite voting, is to be conducted.

Indiana's primary means for early voting is by absentee ballot is in person at the circuit court clerk's office in the voter's county of residence or, alternatively, by mail. I.C. § 3-11-10-24(a). In the case of Lake County, early voting occurs at the office of the Board. I.C. § 3-11-10-26. In addition, Ind. Code § 3-11-10-26.2 permits electronic voting at in-person absentee ballot voting sites, upon the unanimous approval of the County Election Board. This system is fair to all voters and uniform throughout the state. In addition, the General Assembly has recently provided an additional means for early voting which is to be employed at the discretion of the county election board. Under Ind. Code § 3-11-10-26.3 a county election board **may** adopt a resolution to establish satellite offices in the county, but to exercise this authority the "resolution must be adopted by the unanimous vote of the board's entire membership." *Id.* Thus, if all of the members of a county election board vote to approve the establishment of satellite offices for early voting, the board may approve that action. *Id.* If satellite offices are approved, the procedure for casting an absentee ballot at that office must be substantially the same as that employed for casting an absentee ballot in the office of the circuit court clerk. *Id.*

This statute specifically prevents board members from acting unilaterally, or by party majority, to add satellite voting sites. The legislature was well aware of the fact that the county election boards were comprised of both democratic and republican members when it enacted Ind. Code § 3-11-10-26.3. *See* I.C. § 3-6-5-2(2) (mandating that the circuit court clerk appoint two persons to the board, notably “one (1) from each of the major political parties of the county”). The legislature intentionally imposed the condition of unanimous board approval, and that condition serves valid purposes. Not only does it prevent a locally-prevailing party from hand-selecting the most favorable locations for the installation of satellite offices, but it limits the expense and oversight associated with multiple satellite offices that may be unnecessary. Additional satellite offices create additional opportunity for election irregularities and challenges, especially in close races, and, as in this case, when the proposed satellite locations would not be connected to the Indiana voter registration database. The board’s unanimous approval provides the necessary “check” against corruption, fraud, party favoritism, and unwarranted expense. *See, Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004); *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006).

The Defendants have blatantly ignored this mandatory prerequisite, and thus have violated the “check” the statute employs.¹ The board voted unanimously on September 29, 2008, to utilize electronic voting at the Circuit Court Clerk’s Office in the county seat. However, the members of the Board did **not** vote unanimously to authorize additional early voting locations. Nevertheless, the Board instructed its employees to open satellite voting offices in three heavily-democratic locations though none of the offices would be directly connected to the Indiana voter registration database. As this statute requiring unanimous board approval of satellite offices is

¹ Lake County has a history seeped in voting corruption. *Crawford*, 128 S.Ct. 1610, 1619 (2003 East Chicago Mayoral election).

clear and unambiguous, and the Board acted in flagrant violation of this provision, the Lake County Superior Court's TRO should continue to be enforced, and a preliminary injunction granted consistent with that prior order.

II. The Approval or Disapproval of Satellite Voting Offices In Addition to the Circuit Clerk of Lake County Does Not Implicate Article 2, Section 1 of the Indiana Constitution

Defendants and Intervenors essentially contend that Plaintiffs' prosecution of this TRO violates Article II, §1 of the Indiana Constitution because (1) satellite locations were not approved, and (2) because Plaintiffs brought this action to enforce Indiana law. In either event, it appears that the Defendants and Intervenors contend that Ind. Code § 3-11-10-26.3 is unconstitutional on its face, or in its application to this case because it conflicts with this constitutional provision. This argument fails for numerous reasons.

Article II, §1 simply states, "All elections shall be free and equal." IND. CONST. ART. 2, § 1. Nothing in this case impinges the right to a "free and equal" election. Not surprisingly, Indiana interprets its state constitutional right to vote consistent with federal constitutional right to vote precepts. With regard to Article II, §1 challenges, the Indiana Supreme Court has described those attacks as "fac[ing] a high hurdle" because:

Being charged by the Constitution with the duty to 'provide for the registration of all persons entitled to vote,' and to enact such laws governing registration and the holding of elections that 'all elections shall be free and equal,' the Legislature has the power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible.

Simmons v. Byrd, 136 N.E. 14, 17-18 (Ind. 1922).

Accordingly, the challenged regulation (or in this case statute) is cloaked with the presumption of validity, and "the burden is upon those who challenge its validity to make any

constitutional defect clearly apparent.” *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76 (Ind. 1982); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 842 (S.D. Ind. 2006).

No one has a constitutional right to early voting locations in one’s own neighborhood. The federal constitution “confers on the states broad authority to regulate the conduct of elections, including federal ones.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). Thus, the judgment of the legislature will not be lightly ignored by courts. *Id.* Further, “[i]nequalities of treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection.” *Id.* at 1132.

The Indiana statutes which govern the establishment of satellite offices are not “grossly unreasonable.” Instead, they are balanced and fair and serve reasonable purposes. Requiring a citizen who wishes to vote early to cast his ballot by mail or to travel to the circuit court clerk’s office (or office of the Board) to cast his or her vote is no more burdensome than voting at the polls or complying with Indiana’s registration requirements, which are considered reasonable. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008).

In *Griffin*, the Seventh Circuit held that requiring an Illinois resident to travel some distance to obtain an absentee ballot did not violate the Constitution. Similarly, in *Crawford*, the U.S. Supreme Court held that Indiana did not impair the right to vote by requiring voters to first obtain a photo identification at the bureau of motor vehicles, or to travel to the clerk’s office to verify a provisional ballot. *Id.* at 1620-1621. This requirement was viewed as a generally applicable, nondiscriminatory voting regulation with universal application that did not impose a significantly increased burden on the voter in addition to the usual voting burdens. *Id.* Similarly, Ind. Code § 3-11-10-26.3 is of general application, and is non-discriminatory on its face and in its effect. It does not affect a voter’s ability to cast an absentee ballot by mail, to vote

in person on Election Day or to travel to the county seat to cast an early vote. While it may be inconvenient for some voters to travel to the county seat to cast an early vote, it does not prevent them from doing so. According to *Griffin*, the burden of travel is not unreasonable as “eligible voters . . . may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court’s clerk’s office.” As *Griffin* has already decided that traveling to a clerk’s office to execute an affidavit is not an unconstitutional burden on the right to vote, it cannot be an unconstitutional burden to require a voter who wishes to vote early to travel to the clerk’s office, if the bipartisan election board does not unanimously approve a satellite office closer to home. Because Ind. Code § 3-11-10-26.3 is fair and uniform on its face and non-discriminatory in its application; because it does not limit a voter’s rights to use other early-voting options, it protects a variety of state interests, and because it creates an important “check” in the election process, this statute is consistent with Article 1, §2 of the Indiana Constitution, and must be enforced by continued application of the TRO.

III. Federal Voting Rights Act

A. Standard of Review

The Board contends that failure to open the satellite offices would effectively deny minority voters in Lake County their right to vote under the federal Voting Rights Act. Under this Act, the Board must show that the County’s use of a single satellite office in Crown Point is a “standard, practice, or procedure” that results in the denial of the right to vote on account of race. *See* 42 U.S.C. § 1973(a). To prevail on this defense, the Board must therefore show that “under the totality of the circumstances, ... the political processes ... are not equally open to participation by [members of a protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *See id.* § 1973(b).

In making this determination, “a court must assess the impact of the contested structure or practice on minority electoral opportunities ‘on the basis of objective factors.’” *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S.Rep. No. 97-417 at 27, reprinted in 1982 U.S.C.C.A.N. at 205). These factors include (i) the extent of any history of official discrimination in Lake County; (ii) the extent to which voting in Lake County is racially polarized; (iii) the extent to which Lake County has used other voting practices or procedures to discriminate against minority voters; (iv) the extent to which minority voters bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (v) whether political campaigns in Lake County have been characterized by overt or subtle racial appeals; and, finally, (vi) the extent to which minorities have been elected to public office in Lake County. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 n.20 (11th Cir. 1999); *see also* S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07; *Gingles*, 478 U.S. at 36-37. The Defendants cannot satisfy these factors.

It is also important to recognize that courts reviewing state actions dealing with federal elections employ a deferential standard of review, not strict scrutiny:

We begin by noting that Plaintiffs’ arguments proceed from the oft-criticized, but nonetheless frequently invoked, “erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.” *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). As the Supreme Court explained in *Burdick*:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Id. at 433. Similarly, strict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right. As the Seventh Circuit observed: “Any [election] restriction is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 438-42 (1992); *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004); *Libertarian Party v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997); *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996)).

Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006).²

B. There Has Been No Violation of the Voting Rights Act

1. Plaintiffs were entitled to the Temporary Restraining Order

As a preliminary matter it is noted that the Intervenors have previously alleged that Plaintiffs were not entitled to an injunction because they have not demonstrated irreparable harm and because a balance of harms analysis favors the Defendants. Plaintiffs respectfully disagree, but submit that such an analysis is not required in this case. When the acts sought to be enjoined are unlawful, a plaintiff need show neither irreparable injury nor a balance of hardships. *Rees v. Panhandle Eastern Pipe Line Co.*, 176 Ind. App. 597, 377 N.E.2d 640 (1978); *Indiana Family and Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002) (recognizing “relaxed standard”); *see also Gross v. Bell Savings*, 974 F.2d 403, 407 (3d Cir. 1992) (federal courts have power to enjoin federal corporation acting outside of its statutory powers). The proper scope of an injunction is to enjoin conduct which has been found to have been pursued or is related to the

² In *Griffin*, the plaintiffs, who were working mothers, claimed a hardship in being able to vote on election day and that Illinois’ “expects to be absent on election day” absentee ballot requirement violated the United States Constitution. The plaintiffs argued that the Constitution required all states to allow unlimited absentee voting. Judge Posner recognized the serious state interest of voting fraud and the serious objection to judicially legislating so radical a reform in the name of the Constitution. Judge Posner pondered further that a federal court would not decree weekend voting, multi-day voting, internet voting, noting parenthetically about the need to supply everyone with a laptop, Palm Pilot, or Blackberry, and internet access. Rather, states should be left to allow for reasonable regulation of elections. *Griffin*, 385 F.3d at 1130.

proven unlawful conduct. *Nelson v. Int'l Bd. of Elec. Workers, Local No. 46*, 899 F.2d 1557, 1564-65 (9th Cir. 1990). “In fashioning relief against a party who has transgressed the governing legal standard, a court of equity is free to proscribe activities that, standing alone, would have been unassailable.” *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., et al.*, 549 F.2d 368, 390 (5th Cir. 1977).

2. The Recent Authority On Voting Rights Supports Plaintiff’s Position

The use of a single central office for absentee voting does nothing to deny minority voters an equal opportunity to participate in the political process. Rather than restricting the right to vote, early voting, even with only a single site, expands the right and opportunity to vote. Minority voters in Lake County—like all voters there—may make their voices heard by depositing their absentee ballots in the mail or completing their ballots in person on election day.

Importantly, Indiana has virtually a “no-excuse” absentee voting process, contrary to the Intervenor’s assertion that absentee ballots may be cast only in “limited circumstances.” (Intervenor Brief, Doc. # 10, p. 4) Ind. Code § 3-11-10-24(a) lists ten bases upon which an absentee ballot may be obtained and filed. Section 24(a) states in part:

Except as provided in subsection (b), a voter who satisfies any of the following is entitled to vote by mail:

(1) The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.

(2) The voter will be absent from the precinct of the voter’s residence on election day because of service as:

(A) a precinct election officer under IC 3-6-6;

(B) a watcher under IC 3-6-8, IC 3-6-9, or IC 3-6-10; or

(C) a challenger or pollbook holder under IC 3-6-7; or

(D) a person employed by an election board to administer the election for which the absentee ballot is requested.

(3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.

(4) The voter is a voter with disabilities.

(5) The voter is an elderly voter.

(6) The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.

(7) the voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.

(8) The voter is eligible to vote under IC 3-10-11 or IC 3-10-12.

(9) The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.

(10) The voter is an address confidentiality program participant (as defined in IC 5-26.5-1-6).

I.C. § 3-11-10-24(a). Indiana courts recognize that absentee voting is readily allowed. *See, e.g., Pabey v. Pastrick, and the Lake County Board of Elections and Registration*, 816 N.E.2d 1138, 1155 (Ind. 2006) (Boehm, J., dissenting) ("I believe it is common practice, and permissible, to vote by absentee ballot if there is any chance that voting on election day will not be possible.").

In other words, all voters in Lake County, including minority voters, who wish to vote absentee are not required to offer more than a likelihood of their inability to vote on election day. In fact, confined persons may be visited by an absentee voter board to cast their vote. Ind. Code §3-11-10-25. Nor are any voters required to jump through hurdles when submitting their absentee ballots. Simply put, absentee voters (regardless of race) need only complete their absentee ballots and place them in the mail. There is no barrier—and the Board offers none—to absentee voting by minority voters. The affidavits offered by the defendants claiming hardship

in not having satellite early voting offices is overcome by the fact that most if not all of them qualify for absentee voting by mail.

Using a single office for in-person absentee voting is thus starkly different from practices that have the potential to disenfranchise minority voters. The Board and Intervenors point to two types of practices that they argue are analogous: (i) the location of polling places on election day near majority voters, but not minority voters; and (ii) the distribution of absentee ballots to majority voters, but not minority voters. *See* Intervenors' Br. 15 (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971); *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968)). But those practices actually stand to prevent minority voters from participating in the electoral process because both would prevent those voters from casting a vote.

Unlike those practices, Lake County's use of a single office in the center of the County for in-person absentee balloting will not prevent any voter from casting a ballot. In-person absentee balloting is simply an administrative convenience for voters who would prefer to cast an absentee ballot in person rather than by mail. By their nature, offices for in-person absentee balloting will be more convenient for some voters than others. *See, Griffin*, 385 F.3d at 1132 (recognizing some inequities are unavoidable). The key legal point here is that Lake County has established a single office in Crown Point based on a race-neutral justification: Crown Point is the county seat. Further, Crown Point is located in the center of the County. Limiting in-person absentee balloting to that office does not prevent any voter in the County from casting his or her vote, either in person or by mail. Thus, it is not a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *See* 42 U.S.C. § 1973(a). Indeed, the opportunity for in-person absentee ballot voting expands the right to vote. Moreover, there has been no showing that other voters in Lake

County are not burdened by busy schedules which might allow them to file an absentee ballot, vote early at the clerk's office in Crown Point, or work to arrange their schedules on election day.

The Board and Intervenors cite no case in the history of American law holding that the location of polling places for in-person absentee balloting affects the “equal opportunity to participate in the electoral process.” Intervenors’ Br. 15. That lack of legal support should be the beginning and end of the Board’s Voting Rights Act defense. Intervenors therefore fail to establish a likelihood of success on their Voting Rights defense. *Cf. Ohio Republican Party v. Brunner*, Nos. 08-4242/4243/4251, 2008 WL U.S. App. LEXIS 20677, at *4 (6th Cir. Sept. 30, 2008) (“We are aware of no case—and none was cited in the Plaintiffs’ motion—in which a VRA claim has succeeded based on allegations that state-law authorized observers were unlawfully excluded from a polling facility.”).

The Board and Intervenors argue at length that because multiple satellite offices were open during the recent primary season, they must remain open for the general election. *See* Intervenors’ Br. 2-3, 12-13, 19. As a threshold matter, that argument has nothing to do with the Voting Rights Act. The Act requires that voters have an equal opportunity to participate in the electoral process, not that they have an equal opportunity to cast in-person absentee ballots. Whether the County opens many satellite offices or none at all, voters can cast their votes and participate in the electoral process. Regardless of the number of sites, some voters always will be more inconvenienced than others. *Griffin*, 385 F.3d at 1132.

Even taken on its own terms, the Board’s argument fails. During a primary season, the location of satellite offices often will not implicate partisan concerns, because both political parties share a desire to maximize overall electoral participation and rarely does one political

party have a stake in the outcome of the other political party's primary. But during a general election, the location of satellite offices may be quite important for partisan reasons and for legitimate concerns. That is precisely why the Indiana Code requires unanimity among Board members for electoral choices like the location of satellite offices for in-person absentee balloting. Here, the Board members were far from unanimous on the location of satellite offices, which is why the Board is in direct violation of Indiana state law.

Indeed, there is good reason for Indiana to adopt the unanimity requirement based on past electoral fraud issues in connection with absentee ballots in Lake County itself. *See Pabey v. Pastrick, and the Lake County Board of Elections and Registration*, 816 N.E.2d 1138, 1155 (Ind. 2006); *Crawford*, 128 S.Ct. at 1611-12. The Indiana Supreme Court ordered a special election because of pervasive voter fraud issues in East Chicago. There was also good reason for the local vote against satellite early voting locations. The Republican members of the Board were fully justified in not voting to open up early voting locations in a general election in an area with a history of voter fraud. In addition, from a partisan standpoint, the unanimity requirement could have been intended by the legislature to prevent one party from locating a satellite early voting location in an area where that might be predominantly controlled by the other party. Thus, there are clearly legitimate state interests in insuring balance in the election at work here, but those interests do not unfairly burden the an voters rights.

Recent voting rights cases and the Indiana voter-ID case decided by the United States Supreme Court fully undercut the Board's Voting Rights Act challenge and acknowledge the balancing that is appropriately made. In *Crawford*, the United States Supreme Court found that the inconvenience for some voters to go to the Bureau of Motor Vehicles to obtain government issued photo ID's to be eligible to vote was not a substantial burden on voters' right to vote. 128

S.Ct. 1610. In addition, for those who suffered the burden of having to obtain a birth certificate from out-of-state so as to be able to obtain the government issued ID, the Court found that the burden was mitigated by the fact that they could cast provisional ballots which would be counted if they would go to the circuit court clerk's office to execute the requisite affidavit within ten days of the election. In this case, the individual defendants claim a burden that the United States Supreme Court has effectively found is not a burden on the right to vote—namely traveling to the clerk's office.

The Northern District of Illinois has likewise reached a similar decision in a recent Voting Rights case dealing directly with early voting. *Gustafson v. Illinois State Bd. of Elections*, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209 (N.D.Ill. Sept. 30, 2007). In *Gustafson*, the Court rejected *First Amendment* and *Equal Protection Claims* under an early voting law where the variations on implementation of early voting rights varied widely county to county. On the *First Amendment Claim* the Court found that the early voting provision, “represents an expansion of voters’ ability to express their political viewpoint by expanding their right to vote, or in the worst scenarios, leaving it as it was.” *Id.* at 4. The Court found minimal infringement. With regard to the equal protection argument the Court stated:

The law contains bare minimums that, if followed, will provide all Illinois voters with a new right to vote early; that it allows for district to district variations above and beyond those minimum standards is irrelevant to the fact that the language of the law gives each voter the ability to vote early, regardless of status

Id. at 19. Further,

Notably the law in this instance does not remove the right to vote from any individual, and indeed expands the right for all Illinois voters. Plaintiffs argue that it expands the right for some more than others; however, this is an effect rather than a purpose of the law, and in any event goes towards the questions of ease of voting rather than outright denial of any fundamental right.”

Id. at 7.

Plaintiffs here must claim that they will suffer irreparable injury if satellite early voting locations of their choice are not opened. Respectfully, as in *Gustafson*, the claims being made by the Board and the Intervenors are largely speculative. Contrary to the assertion of the Intervenors, early voting rights are not limited to Crown Point residents but have been extended to all Lake County voters. Some limited number of voters may have the hardship of traveling to Crown Point to cast an early vote, whether it be from Gary, East Chicago, or rural town in Lake County. Nevertheless, arguments such as these have been consistently rejected based upon the discretion afforded to the state to implement voting laws. Federal Courts have refused to engage in line drawing in these instances. *Id.* at 8.

In 1986, the Supreme Court of the United States set forth the standard for determining whether a violation of Section 2 has occurred, namely “whether ‘as a result of the challenged practice or structure plaintiffs ***do not have an equal opportunity to participate*** in the political process and to elect candidates of their choice.’” *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (emphasis added). The factors used to determine whether § 2 has been violated include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction

Id. at 37. An analysis of these factors indicates that the totality of the circumstances in Lake County, reveals no evidence of discriminatory tactics as a result of the early voting provisions set forth in the Indiana Code.

3. Plaintiffs Have Not Demonstrated a History of Voter Discrimination in Lake County and Courts in Indiana Approve of a Strict Interpretation of Early Voting Laws

First, Plaintiffs have entirely failed to identify or allege *any* history of official discrimination that satisfies the *Gingles* test. *Gingles* explicitly requires discrimination with regard to the right to *register, to vote, or otherwise participate in that democratic process.* *Id.* (emphasis added). Plaintiffs cite only cases where racial discrimination was alleged in circumstances that were *wholly unrelated to registration, voting, or participation in the democratic process.* This is insufficient and is indicative of a lack of discrimination in this circumstance.

In addition, there is a complete absence of Congressional, legal, or other findings that restrictions on early voting and other methods used to ensure the integrity of the judicial process are used to discriminate against minority voters. In fact, rather than identify a pattern of discrimination in limitations on early voting, the Supreme Court of Indiana has affirmatively sanctioned the practice of “stringent[] govern[ance] of absentee balloting” to ensure the integrity of the voting process, citing the “inherent difference between absentee and Election Day voters” as the need for this heightened security. *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006)

(identifying and approving “preferential treatment given to Election Day voters” and applying this analysis even when absentee ballots are given directly to election officials).

4. Plaintiffs Have Not Demonstrated that Voting in the State is Racially Polarized, Lake County Does Not Engage in Discriminatory Voting Practices, and Members of Minority Groups Have Not Been Denied Access to any Candidate Slating Process

Plaintiffs have also wholly failed to provide any evidence that voting in Indiana is racially polarized. Again, Plaintiffs attempt to ignore the Supreme Court’s requirement that *voting* be racially polarized and submit only irrelevant allegations that the populations in various cities in the county are comprised of different percentages of African-American, Latino, and Caucasian residents. However, without proof that the *voting* in these separate cities is racially polarized, the *Gingles* factors are not triggered.

Similarly, Lake County has not previously employed any practices or procedures that enhance the opportunity for discrimination against minority groups or bar minorities from access to the voting process. Lake County does not employ unusually large election districts, anti-single shot provisions, or other voting practices and has not denied members of minority groups access to any candidate slating process. Plaintiff has presented no evidence of discrimination and has not even alleged that any of these acts have occurred.

Instead, Lake County opened an early voting site in the county seat – no more than 24 miles (and, at times, as little as 12.7 miles) from East Chicago, Gary, and Hammond - to provide additional opportunities for all Lake County citizens to participate in the electoral process. This centrally-located voting site, in conjunction with Lake County’s absentee ballot provision, greatly enhances the ability of all Lake County residents to vote.

5. Political Campaigns Have been Fairly Conducted in Lake County as Evidenced by the Election of Members of Minority Groups to Public Office

Lake County has been home to many fairly-conducted and race-neutral political campaigns that have provided many opportunities for members of minority groups to be elected to public office. In fact, Richard G. Hatcher, one of the nation's first African-American mayors was elected in Lake County, Indiana and Lake County has been and is currently home to minority judges, mayors, sheriffs, commissioners and prosecutors.

The *Gingles* analysis demonstrates that the totality of the circumstances in Lake County reveal no evidence of discriminatory tactics in Lake County with regard to voting, and Lake County has not, and will not, suffer any discriminatory effect as a result of compliance with the requirements for early voting set forth in the Indiana Code. Thus, no violation of Section 2 has occurred.

CONCLUSION

For the foregoing reasons, a temporary restraining order is appropriate to enjoin or restrain Defendants from violating Indiana law by establishing unauthorized satellite voting offices for early voters.

Respectfully submitted,

/s/ Shannon D. Landreth

Karl L. Mulvaney
Nana Quay-Smith
Shannon D. Landreth
Bingham McHale LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
(317) 635-8900
(317) 236-9907

Attorney for Plaintiffs,
John B. Curley and Jim B. Brown

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2008, a copy of the foregoing “Plaintiffs’ Brief In Support Of Temporary Restraining Order” was filed electronically. Notice of this filing will be sent to the following persons by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

David M. Brooks
Bruner Brooks Koch Sorg & Gerkin
615 Russell Avenue
Indianapolis, IN 46225

Peggy Jo Stamper
Timothy R. Sendak
Sendak & Stamper
pjstammer@ameritech.net
tsendak@ameritech.net

Frederick T. Work
Frederick T. Work & Associates
frederickwork@sbcglobal.net

Barry A. Macey
Macey Swanson and Allman
bmacey@maceylaw.com

Stephen P. Berzon
Jonathan Weissglass
Danielle Leonard
Anne Arkush
Altshuler Berzon LLP
sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com
dleonard@altshulerberzon.com
aarkush@altshulerberzon.com

/s/ Shannon D. Landreth
Attorney for Plaintiffs,
John B. Curley and Jim B. Brown