

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

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.)

LAKE COUNTY BOARD OF ELECTIONS)
 AND REGISTRATION, and the)
 HONORABLE THOMAS PHILPOT, not)
 individually but as Lake County Clerk,)

Case No. 02 08 CV 287

The Hon. Joseph Van Bokkelen

Defendants,)

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,)

Intervenor Defendants.)

**LAKE COUNTY BOARD OF ELECTIONS’ AND THOMAS PHILPOT’S
 JOINT MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER**

Defendants Lake County Board of Elections and Registration (“the Board” or “Board of Elections”), and the Honorable Thomas Philpot, Lake County Clerk (individually “Philpot,” and collectively with the Board, “LCBE”), by and through their respective undersigned attorneys, file this Joint Memorandum of Law in Opposition to Plaintiffs’ Motion for Temporary Restraining Order.

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INTRODUCTION

Less than a month before the November 4, 2008, general election, this lawsuit seeks to disenfranchise significant numbers of minority voters in Lake County's largest population centers. Plaintiffs seek to enjoin the Board of Elections and Mr. Philpot from conducting early absentee voting in the communities of East Chicago, Gary, and Hammond, where 90% of Lake County's African-American residents and about 66% of its Latinos live, after allowing absentee voting in those communities only five months ago during the May primary elections, and while permitting early absentee voting in predominately white Crown Point.

Plaintiffs face a high burden in establishing that this Court enjoin early absentee voting in East Chicago, Gary, and Hammond. They cannot show a likelihood of success on the merits, because defendants properly sought to proceed with early voting in those communities -- as well as Crown Point -- to prevent a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et al., and the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. They cannot show that they will suffer any harm, let alone irreparable harm, if the injunction is denied. Moreover, shutting down early absentee voting in East Chicago, Gary, and Hammond would visit a far greater harm on voters in those low-income, largely minority cities than any remotely articulable harm to the plaintiffs. Plain and simple, despite the plaintiffs' unsubstantiated intimations of vote fraud or the possible invalidation of votes, the plaintiffs are Republican Party officials who advance a heavily partisan interest in keeping vote totals low on November 4 in a heavily minority area of Lake County. Denying early voting to the largely minority residents of those cities, while allowing it in heavily white, Republican Crown Point, is not in the public interest. The plaintiffs' motion for a temporary restraining order and preliminary injunction should be denied.

FACTS

Early Absentee Voting in Indiana

Indiana is among a number of states who have made voting easier by allowing voters to cast in-person absentee ballots without having to state a reason why they cannot cast a paper ballot at their designated polling place on Election Day. Under Indiana law, a voter may cast such an absentee ballot during the 29 days before the election at a designated early voting site. *See* Ind. Code § 3-11-4-1(a), 3-11-10-26(a),(c). Indiana's early voting statutes were born of the recommendations of a 2001 bipartisan election task force, which called for, among other things, the adoption of unrestricted absentee voting for voters casting ballots in the court clerk's office or a satellite office before an election, and the use of electronic voting machinery to tabulate absentee voting in clerk's offices. (*See* Intervenor Defendants' Memorandum in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction ("Intervenors' Memo"), Arkush Decl., Ex. B ("In the Best Interest of the Voter: The Final Report of the Indiana Bipartisan Task Force on Election Integrity") at 38, 41 (Dkt. No. 10.)). The task force based its recommendation for "unrestricted" absentee voting on facts including a 2000 U.S. Census Bureau survey showing that when persons were asked why they had not voted, five of the top ten reasons they gave concerned busy schedules or inaccessible polling places. (*Id.* at 38.)

Indiana's early voting laws provide that voters are "entitled" to cast absentee ballots in the office of a circuit court clerk or a board of elections and registration office, and it also allows election officials to establish "satellite" early voting offices. Ind. Code §§ 3-11-10-26(a), 3-11-10-26.3. The statute calls for local election officials to establish "absentee voter boards" to administer the early voting sites, and voters may cast absentee ballots before such boards only if they sign a ballot application and provide proof of identification. Ind. Code § 3-11-10-26(b). Another statutory provision states that at least 10 days before absentee voting begins under

Section 3-11-10-26, the county election board is to notify the two political party chairpersons of the number of boards to be appointed. Ind. Code § 3-11-10-37. A unanimity requirement also appears for resolutions needed under the statute to authorize electronic voting for absentee ballots in a clerk's office or a board of elections and registration office. Ind. Code § 3-11-10-26.2. For the "satellite" offices, county election officials may authorize the circuit court clerk to host such early voting sites, but the statute requires the resolution to be by a unanimous vote. Ind. Code § 3-11-10-26.3. The purposes for these unanimity requirements are not immediately evident from the legislative history.

Voting Procedures in Lake County, Indiana

Lake County has a combined board of elections and registration, which consists of five members: two Democrats, two Republicans, and the county clerk as an ex officio member. (Ex. 1, LaSota Decl. at ¶ 2.) The Board's offices are located in Crown Point, which is 25 miles from East Chicago, 18 miles from Hammond, and 16 miles from Gary. (Intervenors' Memo, Taggares Decl. ¶ 9. (Dkt. No. 10.)) East Chicago, Gary, and Hammond combined make up 90% of Lake County's African-American population, and 66% of its Latinos. (*Id.* ¶¶ 10-11.) According to 2000 census data, the county had a population of about 484,000, of which 102,000 lived in Gary, 83,000 lived in Hammond, and 32,000 lived in East Chicago, making those three cities the county's largest population centers. (*Id.* ¶¶ 4-6.) Crown Point has a population of 19,806, about 95% of whom are white. (*Id.* ¶ 8.)

When registering, a voter fills out a state voter registration form with various personal information such as name, address, and date of birth. (Ex. 1, LaSota Decl. at ¶ 4.) The voter must certify that he or she will be at least 18 years old on the following election day and is a citizen of the United States. (*Id.*) The voter signs at the bottom of the card, and the signature

card is scanned into the Board's computer system as a part of the processing of the registration. (*Id.* at ¶ 5.) The voter is officially registered after a seven-day waiting period. (*Id.*) The Board sends voters an acknowledgement card which serves as proof of registration. (*Id.*)

When a registered voter goes to a precinct polling place on Election Day, the voter must show valid photo identification and sign at the polling place a book known as a "wide list," containing the names of registered voters at the precinct. (*Id.* at ¶ 7.) Procedures at an early absentee voting site are highly similar: The early voter must show valid identification, and must sign an absentee ballot application form. (*Id.* at ¶ 8.) At both the precinct polling place on Election Day and at an early absentee voting site, Republican and Democratic Party representatives are present when the voter presents identification and signs the application form. (*Id.*) Also at both precinct voting and early voting, an election inspector checks the voter's name against the Board's records to confirm valid registration. (*Id.*) While election inspectors and judges watch over voting machines during the day at a precinct polling place, the same monitoring occurs at an early voting site, and at the end of the day, Board staff transports the electronic voting machines used in early voting to a locked, secured ballot room at the Board office in Crown Point before returning them to the early voting site for the opening of the next day's voting. (*Id.* at ¶ 10.)

The Board's Implementation of Early Voting in Lake County

In 2008, pursuant to Indiana state law, the Board passed a series of resolutions and motions concerning early voting. On February 29, 2008, the Board passed a unanimous resolution under Indiana Code 3-11-10-26.2 to authorize electronic voting for the casting of absentee ballots "in the office of the Lake County Board of Elections and Registration." (*Id.* at ¶ 13 and Ex. A thereto, Board Resolution 2008-1.) The resolution did not address particular

voting sites or particular elections; it simply authorized the use of electronic voting machines in the Board's offices.

On April 7, 2008, the Board passed a unanimous motion approving satellite voting at East Chicago, Gary, and Hammond during the May 5, 2008 Indiana primary elections. (*Id.* at ¶ 14 and Ex. B, p. 9 thereto.) Notably, the Board member who made the motion was Republican Patrick Gabrione. In a colloquy with Director of Elections Sally LaSota, Mr. Gabrione made clear that he supported opening absentee voting sites in East Chicago, Gary, and Hammond as a means of providing opportunities for people to vote early, and of relieving pressure on the early voting site at the Board office in Crown Point:

Mr. Gabrione: And the rationale?

Mrs. LaSota: So people can vote like they do here in Crown Point in person. Why deny the three northern —

Mr. Gabrione: No, the rationale for Gary, Hammond and East Chicago as opposed to Schererville, Highland and Lowell.

Mrs. LaSota: They're county buildings, like, if you want to vote in person here, you come to Crown Point.

Mr. Gabrione: So that's the rationale for location?

Mrs. LaSota: Right.

Mr. Gabrione: What's the rationale for having the voting? Is there enough, is there an increase in absentee ballots, or an increase in registration versus 2004 based on numbers? Not on feeling and newspapers.

Mrs. LaSota: No, no, no. Not on numbers. Not on numbers. I think it's more or less for the excitement on the Democratic side.

* * *

Mr. Gabrione: How about the number of registrations? Is the registration up?

Mrs. LaSota: Registration hasn't been going up. We won't know. Today's the last day for filing. In fact, an increase in the week, I've had the staff come in an hour early in the morning last week, and an hour after, because of the registrations that are coming in.

Mr. Saks: Let me just tell you —

Mr. Gabrione: *I'm certainly for opening up more areas for the ability for people to vote early, etc.* I just think that we should have some background of why we've chosen it, why we chose the locations. And more than excitement, *I'd feel more comfortable knowing the registration number is up, and the absentee number is up.* Otherwise we're setting precedent. Now, are we gonna do this —

Mrs. LaSota: Not necessarily. We've had them before. We've had them, we've had them, the county buildings have been open up north for in-person voting.

Mr. Gabrione: In the last primary? In 2004?

Mrs. LaSota: No, a couple of years ago. And that's because of the ballot cards we used. Those were cumbersome. Hopefully, we're trying to push that, that everybody's aware of the Infinity. As you see, we've got the grocery store issue next, had that project. Just the exposure, to have people come to the county courthouses in those three major cities, to come vote in person. Encourage people to come out and vote. And perhaps that'll translate, 2010 and 11, the county --

Mr. Gabrione: *Plus it relieves pressure here, and makes it a little easier here.*

Mrs. LaSota: The line up, yes, yes.

Mr. Gabrione: *Better distance.* Now, tell us about who's gonna be out there to control.

(*Id.*, Ex. B at pp. 2-4 (emphasis added).)

The primary election took place on May 5, 2008, with satellite sites at East Chicago, Gary, and Hammond. Of the 130,000 voters who voted in the primary in Lake County, about 11,000 voted absentee, and nearly 6,000 of those absentee votes were in person at the county's early voting sites at East Chicago, Gary, Hammond, and Crown Point. (*Id.* at ¶ 15.)

On September 23, 2008, the Board discussed early voting for the general election. (*Id.* at ¶ 19 and Ex. C, pp. 1-6.) Board staff gave assurances that difficulties during the primary election with providing satellite voting locations with up-to-date voter registration data had been addressed, and her assurances went unchallenged by Mr. Gabrione and his fellow Republican, plaintiff Jim Brown. (*Id.*, Ex. C, pp. 9-10.) Nor did anyone at the September 23 Board meeting

mention any irregularities, or voice any concerns about possible irregularities, surrounding early voting during the May primary at East Chicago, Gary, and Hammond. (*Id.*, Ex. C, pp. 9-13.)

To the contrary, the public testimony at the September 23 Board meeting was that with an important general election coming on November 4, early absentee voting badly needed to be expanded to East Chicago, Gary, and Hammond. (*Id.*, Ex. C, pp. 1-6.) A number of reasons were advanced to the Board by various elected officials and members of the public as follows:

- Many voters in the East Chicago, Gary, and Hammond areas would not have time or resources to drive to Crown Point to cast their ballots, and if they cannot vote early, long lines would form and would turn away voters.
- The ballot for the general election in Indiana this year is eight pages long, and with voters ordinarily allotted just two minutes to vote in precinct polling places on Election Day, this general election poses a greater than usual likelihood of longer lines and delays, adding to the reasons why early absentee voting should be expanded in Lake County.
- Voters who attempt to take public transportation from Hammond to Crown Point run a risk of being stranded overnight in Crown Point, as the distance and state of public transportation between these towns is simply not conducive to Hammond residents voting early by traveling to Crown Point.
- Many Northwest Indiana residents have been affected by recent flooding, and while they recover from flood damage to their property, they are particularly less able to travel to Crown Point to vote early. Early absentee voting would make it easier for these flood victims to cast their ballots.
- A large number of newly registered voters would be voting for the first time, and it is in the public interest to facilitate their ability to vote through early voting.
- A very large, record turnout is expected in this particular general election, so that the county's election infrastructure would be put under considerable stress. Early voting would ease the pressure on the system and on all voters by allowing more persons to cast their ballots early through the opening of additional early voting sites.
- The Board authorized early voting at the additional sites in the spring primary election, and there is no reason why it ought not to do so in the even more critical general election.

Plaintiff Jim Brown and his fellow Republican Board member Pat Gabrione nonetheless voted against a motion to authorize satellite voting in the general election in East Chicago, Gary,

and Hammond, and a subsequent motion to open early voting sites at the clerk's offices in those cities. (*Id.*, Ex. C, pp. 8, 13.) When asked for the basis for their opposition, neither advanced any reason why early voting should not be allowed, or why the Board should treat the general election any differently than it had treated the primary election, in which it had allowed early voting in East Chicago, Hammond, and Gary. (*Id.*, Ex. C, pp. 12-13.) Instead, the two Republican board members either refused to answer or said they had no comment. (*Id.*) The Board's September 23 motions to authorize early general election voting at satellite office and in the clerk's offices in East Chicago, Gary, and Hammond thus carried by only a 3-2 margin. (*Id.*, Ex. C, p. 13.)

Plaintiff John B. Curley, the Lake County Republican Central Committee chairman, heard about the Board's action (and its plans to open early voting sites before absentee voter board in East Chicago, Gary, and Hammond) almost immediately. Mr. Curley issued a press release, dated September 23, stating in relevant part:

Despite my efforts the Lake County Voter Board has apparently voted to **usurp** the Indiana state law and override the Republican votes illegally placing satellite voting in clerk's offices in **selected** locations in north Lake County. Sites included were **Gary, East Chicago, and Hammond.**

(Ex. 2, 9/23/08 J. Curley Press Release.) (emphasis in original.) Mr. Curley's signature and phone number appear at the bottom of the press release, which contains indicia of being transmitted by fax on September 23. (Ex. 2.) Mr. Curley later stated under oath in this case that he had notice of the Board's action as early as October 1, 2008. (Ex. 3, 10/3/08 Tr. Before Superior Ct. at 60-61.)

The Board's actions prompted the plaintiffs in this removed matter to sue the Board and Mr. Philpot in the Lake County Superior Court, seeking to enjoin the early voting in East Chicago, Gary, and Hammond, but not Crown Point (where in February 2008, the Board had

approved early voting by unanimous resolution). As the Court is aware from the record on file in connection with the removal proceedings, shortly after the removal notice was on file with the Superior Court clerk, the Superior Court issued the plaintiff's temporary restraining order.

The plaintiffs now rely on the record they developed before the Superior Court to support the relief requested here. On the question of why Plaintiff Brown and his Republican colleague on the board withheld unanimous consent from satellite and clerk's office voting in the general election when they had supported it in the primary election, Plaintiff Brown at first said "this is now the presidential election and not a primary election," and then added that "we had some complications with that process in the May election." (Ex. 3, 10/3/08 Tr. Before Superior Ct. at 40). Asked to explain those "complications," he could point to only one instance in which a voter apparently voted twice because "we do not and did not have current data at the satellite voting stations. We were working off of stale data that was not current on a day-to-day basis because of the way the state handles its voter registration." (*Id.*) Such problems could not occur in Crown Point, he said, because in Crown Point, "we were directly tied into the State registration database and all of our information was current on a daily basis." (*Id.* at 40-41.)

Of course, as Board staff told Plaintiff Brown on September 23, the Board already had resolved that data problem by establishing a live data feed between the Board offices at Crown Point and each of the early voting locations in East Chicago, Gary, and Hammond. (Ex. 1, LaSota Decl. at ¶¶ 18-19.) Therefore the same state database available at Crown Point will now be available at any satellite or clerk's office early voting center. (*Id.*) Moreover, in the single irregularity described before the state court by Mr. Brown, the voter cast an absentee ballot twice in East Chicago, but Board staff promptly detected the duplicate absentee ballot application

during the early voting period, and the second vote was not counted in the election results. (*Id.* at ¶ 17.)

With the November 4 general election approaching, voter registration in Lake County has swelled from 285,000 in the primary to about 300,000, with the Board attempting to process another 20,000 pending applications in time for Election Day. (*Id.* at ¶ 23.) The Board had sought to start early voting on October 6, to provide for early voting for the full 29 days permitted by the Indiana Code prior to Election Day. That time frame is now down to 21 days, as early voting could not begin before October 14, 2008, by agreement of the parties and by virtue of an order entered by the Court on October 7, 2008, enjoining a separate state court action filed in the Lake County Circuit Court.

ARGUMENT

An injunction “is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Boucher v. School Bd. of School Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998) (quoting *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1867 (1997)). To demonstrate that interim relief is necessary, a movant is required to demonstrate (1) a likelihood of success on the merits, (2) that it has no adequate remedy at law, and (3) that it will suffer irreparable harm if the relief is not granted. *Promatek Indus. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002). A party with no chance of success on the merits cannot attain a preliminary injunction. *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

If the moving party satisfies those conditions, then the Court considers: any irreparable harm that a preliminary injunction would cause to the non-moving party, balancing such harm against irreparable harm that will be suffered by the moving party if the injunction is denied; and the effect of granting or denying the preliminary injunction on the public interest. *Ty, Inc. v.*

Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001). Sitting as a court of equity, the court then weighs all these factors employing a sliding-scale approach. *Promatek*, 300 F.3d at 811.

As set forth below, plaintiffs cannot meet their burden on any of these prongs, let alone all of them. Part I below explains why the plaintiffs cannot establish a likelihood of success on the merits of their claims, in view of the Board's meritorious concern that shutting down early voting in the minority areas of northern Lake County would violate the civil rights laws, particular Section 2 of the Voting Rights Act. Part II sets forth how the plaintiffs cannot establish irreparable harm, insofar as their references to the fear of votes being invalidated is a specious claim that masks the injury they truly fear: the healthy and unrestricted exercise of the elective franchise by those minority voters -- to the same extent as their white counterparts in Crown Point -- in this hotly contested election. Part III discusses how the balancing of the harms weighs heavily against entering an injunction in these circumstances, in which the plaintiffs' propose that early voting be denied only to the minority communities, whereas the plaintiffs sustain no real harm, save perhaps for their partisan interest in suppressing voter turnout in areas not friendly to their candidates. Part IV notes that none of the relief sought by the plaintiffs is in the public interest. In this historic national election, in which our country will see either its first African-American president or its first woman vice president, the plaintiffs want this Court to make absentee voting significantly more difficult for minority voters in Lake County, without any showing of why that would make the sense it clearly did not make when the Board voted unanimously to allow satellite voting in East Chicago, Gary and Hammond in the primary election only five months ago. Plaintiffs request for injunctive relief should be denied.

I. PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

Plaintiffs cannot meet their burden of showing a likelihood of success on the merits in this proceeding. A majority of the LCBE took action in this case to ensure that minority voters in Gary, East Chicago, and Hammond had the same opportunity to access and participate in the electoral process, as required by the Voting Rights Act and the U.S. and Indiana Constitutions. Plaintiffs' sole argument is that, without any rational or expressed reason, they should be able to use a unanimity requirement in state law to prevent such action and thereby to close in-person absentee voting locations in minority communities that had been open during the primaries, while keeping open an identical polling location in the predominantly white part of the County.¹ As discussed below, plaintiffs' interest in compliance in that statutory provision cannot support the discriminatory outcome for which they seek to use it, and plaintiffs' have little chance of prevailing on the merits if this case were litigated to conclusion. Given the extraordinary and fundamental interests of voters in Gary, East Chicago, and Hammond at stake in this proceeding, plaintiffs cannot meet the stringent test for entry of a preliminary injunction.

This is not a case about voter fraud or concern that ineligible voters will cast ballots. As discussed above, the same safeguards applicable to voting on election day and at the in-person absentee site at Crown Point will apply to the in-person absentee sites in the three other locations. Rather, this is a case where plaintiffs seek to prevent qualified, registered voters from the largely minority parts of the County from being able to cast ballots -- as they have before --

¹Plaintiffs initially claimed that early voting should be enjoined because of Ind. Code § 3-11-10-37, which requires the county party chairpersons to be notified of the number of absentee voter boards at least 10 days before early voting begins. At this point, early voting would begin no earlier than October 14, 2008, and plaintiff Curley has admitted receiving notice as of October 1, which is 13 days earlier. Mr. Curley also issued a press release on September 23 complaining about the establishment of the three early voting sites, and identifying those sites by name, and the press release bears Mr. Curley's signature. (Ex. 2.) Mr. Curley knew about the number of absentee voting boards since virtually the moment the Board voted to create them.

at accessible locations in their communities -- just as white residents of Crown Point can.² Plaintiffs cannot dispute fewer lawful votes from residents of the three targeted communities is the likely result of the relief that they seek: the Bi-Partisan Indiana Task Force on Election Integrity expressly recognized that “conflicting or busy schedules [and] inaccessible polling places” as primary reasons why eligible voters do not cast ballot, and the very provisions at issue here were enacted to implement its recommendations for removing those “significant barrier[s].” (Intervenors’ Memo, Arkush Decl., Ex. B at 38-39.) Indeed, in truly bizarre fashion, it is these lawful votes that would be cast but for plaintiffs’ attempts at obstruction that plaintiffs attempt to manufacture as “injury” to themselves or the “public”: the “injury” plaintiffs allege amounts to an assertion that a greater number of *lawful* votes will be cast if the Board is allowed to carry out in-person voting at all four Court Clerk’s offices than under a Crown-Point-only regime, making the votes plaintiffs or other voters cast “count for less” than they would if voters in Gary, Hammond, and East Chicago were less able to participate in the election.

As we explain below, traditional equitable factors settle that the Court may not award the relief requested. But even leaving these aside, relief must be denied: plaintiffs’ ability to ultimately succeed on the merits requires persuading the Court that the veto power that they claim state law gives them and that plaintiff Brown exercised to maintain in-person polling locations only in white neighborhoods and remove them from minority neighborhoods does not, in the circumstances of this case, violate the federal Voting Rights Act, the United States

² As the Indiana Task Force concluded and affidavits of intervenors here attest, a substantial number of voters have jobs that do not permit them to know with certainty what their work schedules will be – and many more voters have work and family responsibilities that preclude them from waiting on the long lines that often form at polling places before and after work hours on Election Day. *See* Intervenors’ Memo, Arkush Decl., Ex. B at 39 (“many voters do not know in advance of Election Day whether they will meet the qualifications required under statute to vote absentee,” and “[m]any do not know beforehand if their job or family obligations will make it difficult to make it to the polls . . . during the twelve hours the polls are open” then) (Dkt. No. 10.).

Constitution, and the Indiana Constitution. Each of these poses a distinct – and ultimately insurmountable -- barrier to the relief plaintiffs demand.

A. The Two-Tiered Voting Regime Plaintiffs Demand the Court Impose Would Be Impermissible Under the Voting Rights Act.

In relevant part, Section 2 of the Voting Rights Act provides that

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, . . . as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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.

42 U.S.C. § 1973. See also *id.* § 1973(c)(1) (defining the terms “vote” and “voting” to include “all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast”).

This language was enacted by Congress in 1982 to make clear that Section 2 focuses on the discriminatory results of government action, not simply the motivation behind them. See *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1550 n.1 (11th Cir. 1986) (“[S]ection 2 . . . focuses on the results and consequences of challenged electoral practices rather than the motivation behind them”). Accordingly, the provision imposes on defendants “a duty . . . not to engage in any acts or practices . . . which have the effect of discrimination among qualified voters in elections of any kind. This duty include[s] refraining from any conduct which results in allowing white voters opportunities to vote without affording the same opportunities to” members of racial minority groups. *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968); *id.*

(imposing liability, despite finding that election officials acted “entirely in good faith” and without discriminatory intent).

Placement of polling locations is a “practice or procedure” regulated by Section 2. The Supreme Court, construing nearly identical language of Section 5 of the Voting Rights Act, recognized that “[e]ven without going beyond the plain words of the statute, . . . it [is] clear that the location of polling places constitutes a ‘standard, practice, or procedure with respect to voting,’” *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). As *Perkins* explained,

The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise. . . . there inheres in the determination of the location of polling places an obvious potential for ‘denying or abridging the right to vote on account of race or color.’ Locations at distances remote from black communities or at places calculated to intimidate blacks from entering, or failure to publicize changes adequately might well have that effect.

400 U.S. at 387; *Garcia v. Guerra*, 744 F.2d 1159, 1164 (5th Cir. 1984) (interpreting Section 5) (“this right is substantially abridged if polling places are located at distances remote from certain communities or at places where voters would be reluctant to enter because of their race.”). The “standard, practice, or procedure” language of Section 2 has the same meaning. See *Holder v. Hall*, 512 U.S. 874, 886 (1994) (O’Connor, J., concurring in part and in judgment) (citing the “[im]possib[ility of] read[ing] the terms of § 2 more narrowly than the terms of § 5”); *id.* at 946 (Blackmun, J., dissenting) (noting agreement of five Justices on this point).

Accordingly, lower federal courts have for decades held that Section 2 applies to the manner of conducting elections, including, *inter alia*, the times and places made available for casting votes, the rules governing absentee voting, and the manner in which qualified voters may cast such ballots. See, e.g., *Marengo County Comm’n*, 731 F.2d at 1570 (holding that county

“unquestionably discriminated” by conducting registration only in location “less accessible to eligible rural voters, who were more black than white”); *Brown v. Dean*, 555 F. Supp. 502, 504-06 (D. R.I. 1982) (concluding that African-American voters were entitled to preliminary injunction based on likelihood of succeeding on their Section 2 challenge to “the location of the polling place”); *see also Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968) (finding liability where defendants “offered opportunities to white voters to vote by absentee ballot without extending these same opportunities to qualified [African-American] voters”); S. Rep. 97-417 at 30 (“A violation could be proved by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens”); *cf. Perez v. Pasadena Indep. School Dist*, 958 F. Supp. 1196, 1223 (S.D. Tex. 1997) (explaining that locating polling places “inconveniently . . .with respect to where the Hispanic population is concentrated” was a potential “barrier” to minority political participation); *Goosby v. Town of Hempstead*, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring) (“An easy case of a [Section 2(b)] violation might occur where established polling places are geographically inaccessible to a new settlement of voters in a protected class”); *Political Civil Voters Organization v. City of Terrell*, 565 F. Supp. 338 (N.D.Tex. 1983) (finding that having voting only at City Hall and not in minority community was evidence of a Section 2 violation).

Section 2 requires analysis of the totality of the circumstances, based on a list of factors identified by Congress concerning the impact of a challenged practice on the opportunity to participate in elections. S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29. To defeat an injunction at this stage of this litigation, defendants need not prove all aspects of a Section 2 violation, but must simply show that there are serious questions raised about whether plaintiffs could ultimately succeed on the merits. LCBE’s “duty” under Section 2 is to “refrain from any

conduct which results in allowing white voters opportunities to vote without affording the same opportunities to” members of racial minority groups. *Brown*, 279 F. Supp. at 64. It was concern about that duty that led LCBE to act in this case. As LCBE itself concluded and as shown by the evidence presented by Intervenors, the burden on minority voters in Gary, East Chicago, and Hammond of removing the in-person absentee locations that had been available in their communities during the primaries is significant and will result in fewer voters being able to vote.³ Against that burden on a fundamental right, there was no reason to close voting centers that had previously been opened in prior elections. LCBE’s concern has now been vindicated, as it has been subject to a civil rights claim brought under the state constitution, which led to the Circuit Court in Indiana issuing an injunction to open the voting centers at issue.

Given this backdrop, it is neither likely nor plausible that plaintiffs will be able to overcome the conclusion that conducting the election in the manner they urge upon the Court would violate Section 2. Indeed, the purpose and effect of the relief that plaintiffs seek is, on its face, the antithesis of the requirements of Section 2 -- plaintiffs seek to make the political process less “open to participation by members of [historically excluded minority] groups” and to give African-American and Latino Lake County residents less “opportunity . . . to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b).

Plaintiffs are well aware that the burdens of restricting in-person absentee voting to Crown Point only will be born unequally by Lake County’s African American and Latino voters. According to the 2000 census, almost 90% of the County’s 122,723 African American residents live in one of these three cities, as do 66% of its 59,128 Latino residents. (By contrast, Crown

³ Although Crown Point is, in theory accessible by public transportation, for a resident of Gary or East Chicago who does not own a private car, casting a vote there takes heroic efforts. (Intervenors’ Memo, Aaron Decl. ¶¶ 10-14.) (Dkt. No. 10.) In the context of a statute aimed at facilitating voting for busy, working people who would like to exercise the franchise, this kind of minimal access is aggravating, not mitigating the burden on minority voters.

Point’s population is 95% white). Were the Court to require Defendants to implement plaintiffs’ regime, roughly 100,000 minority voters who could, consistent with State law, cast in-person absentee ballots in their home town – and who were eligible and able to do so in the May primary – would be required to travel 16-30 miles to Crown Point (and back) to exercise their right. The magnitude of this burden and racial disparity dwarfs those held suspect or invalid in other cases: In *Perkins*, the polling places were located so that “[n]o voter [was required] to go outside his ward” within the small city of Canton, Mississippi (total pop. 9,707), 301 F. Supp. 565, to cast a ballot. And in *Brown v. Dean*, the challenged voting location was a short distance away, albeit in a neighborhood hostile to minority voters, from the one sought by plaintiffs. In this case, the voters affected include many whose work and family responsibilities make voting even in their home town difficult – and others who do not own a car, whom plaintiffs would relegate to a 5-hour trip via public transportation. (Intervenors’ Memo, Aaron Dec. ¶ 11.).⁴

Far worse, the barriers that plaintiffs seek to erect in this proceeding are wholly unrelated to any legitimate governmental purpose. See S. Rep. at 36-37 (noting that courts conducting the Section 2 “totality of the circumstances” inquiry should ask “whether the policy underlying the state or political subdivision’s use of such . . . standard, practice or procedure is tenuous.”). In this proceeding, there is no policy reason whatsoever to support closing the voting locations that

⁴ These disparities are directly related to the legacy of racial discrimination in Lake County, which is relevant in the Section 2 analysis. The potential for discriminatory impact in this case arises precisely from the interaction of the (proposed) voting regime and residential patterns that owe much to past discrimination. Likewise, the burdens of a requirement that in-person absentee-voters travel to Crown Point are aggravated by (1) socio-economic disparities that make African-American and Latino voters less likely to have the time or the means to travel to the Crown Point location and (2) a perception shared widely among minority residents of other parts of the County that they are not welcome in Crown Point. (Intervenors’ Memo, Phillips Decl. ¶ 15.) (Dkt. No. 10.) *Cf. Lewis v. Silverman*, 2006 WL 2699733 (N.D. Ind. Sept 19, 2006) (allowing challenge to closure of Bureau or Motor Vehicles office in Gary on race discrimination grounds to proceed, noting allegations that Lake County is “a racially segregated region” and that there is a “history of segregation in Lake County”).

have previously been opened. The Board, by a majority, has concluded opening these centers is necessary, and the plaintiffs' associates on the Board also believed it was necessary during the primary when fewer voters were intending to vote. This dispute is not about any legitimate government interest concerning the conduct of elections, but solely about plaintiffs' view of how the Board should administer its responsibilities *under a statute whose exclusive aim was to remove a significant and widely recognized barrier to voting.*

Plaintiffs have not identified *any* legitimate policy underlying the regime they insist upon -- other than their desire to have veto control over maintaining polling places in minority neighborhoods. Indeed, a regime such as that which plaintiffs seek to advance -- which gives them veto power to favor white communities over minority communities and to prevent equal access to the election to minority communities -- cannot stand in the face of the Voting Rights Act. As the Court in *PUSH* recognized, that some level of local discretion might be sensible does not mean that discretion may be exercised capriciously and in a manner that has the purpose or effect of making voting more difficult.

The defendants assert that this discretion is necessary because these local officials are more familiar with local conditions and better able to ascertain when and where any satellite registration should be conducted. While requiring the approval of the board of supervisors might increase the likelihood that more registration sites will be selected, if both the circuit clerk and the board of supervisors have similar partisan aims in having registration at only a handful of precincts, then registration could easily be limited to those precincts. Unfettered discretion in voting registration procedures unnecessarily restricts access to the political process. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1268 (N.D. Miss. 1987).

As discussed above, the arbitrariness of plaintiffs' regime is made even more manifest by (1) the fact that allowing in-person absentee voting could be done, and has been done by

unanimous Board vote, in the recent past in Gary, Hammond, and East Chicago, *see id.* (noting that past practice precluded arguments that increasing access was impracticable); (2) the fact that such voting will be done in a predominantly white community; (3) that, whatever “problems” plaintiffs might hypothesize *post hoc* as the rationale for refusing in-person absentee voting are surely minor in comparison to the problems that will surely occur if voters in Gary, Hammond, and East Chicago are relegated to casting votes at overburdened polling places on Election Day. *See, e.g., Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (finding constitutional defect where inadequate voting facilities caused long lines, because “United States citizens do have a right guaranteed by the Constitution to a reasonable opportunity to vote in local elections, that is, ... to be able to vote within a reasonable time”); *Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 552 (6th Cir. 2004) (Ryan, J., concurring) (recognizing that “inordinate delay” at polls could constitute unconstitutional burden).

Finally, as noted above, the “injury” that plaintiffs claim is that votes cast somehow will not count absent an injunction (an injury that is both of their own making and untrue) or that fully eligible voters in minority communities *will vote* resulting in purported harm to the value of plaintiffs’ and their partisans’ votes and electoral chances. That simply reveals the truth about plaintiffs’ claims here -- plaintiffs’ objective and their claimed injury is to keep minority residents from Gary, Hammond, and East Chicago from voting. Such an objective is not merely “tenuous” -- it is *per se* illegitimate and cannot stand in the face of the Voting Rights Act.

B. Plaintiffs’ Requested Relief Violates the First, Fourteenth, and Fifteenth Amendments.

Separate and apart from the Voting Rights Act, the targeted closing of additional polling sites in minority neighborhoods in Lake County violates the First, Fourteenth, and Fifteenth

Amendments to the Constitution. Against the significant burden on minority voters caused by the closing of these sites, there simply is no governmental interest of any kind.

The right to vote is fundamental because it is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). For that reason, the Supreme Court has made clear that any burden on the right to vote, no matter how large or small, “must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964). Burdens on the right to vote are analyzed on a sliding scale – the more severe the burden, the greater the justification required to support it, with burdens targeted at suspect classes always subject to strict scrutiny. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (U.S. 1983). Where, as here, there is no rational basis at all to support the burden on the right to vote, the action or regulation that causes that burden cannot stand. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 (2008) (Stevens, J., joined by Roberts, C.J., and Kennedy, J.) (“even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications”); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating local ordinance because it had no rational basis).

As discussed in more detail above, the relief requested by plaintiffs here constitutes a significant burden on the right to vote, recognized by a majority of the LCBE. The record is devoid of any countervailing governmental interest of any magnitude -- much less one that could justify a burden that is targeted at minority voters. Against the harm to voters that the LCBE itself perceived, there is no legitimate governmental interest. During the primaries, when plaintiffs’ candidates were not competing with members of another political party and they were less concerned with minority voters who tend to vote Democratic, plaintiffs took the view that

opening up the voting sites was a good and important step. In the general election, now that they fear more lawful votes from Gary, Hammond, and East Chicago, plaintiffs demand that the voting sites be shut down. They provided no explanation whatsoever for their attempt to close these locations, and the actions speak for themselves.

The sole reason the state Superior Court enjoined this case was for violation of a unanimity requirement, which purports to give a single member of the Board veto power to set up voting offices. Whatever the merits of the unanimity rule in other contexts, in this situation it is being used to block maintenance of early voting locations in minority communities, while allowing early voting in a primarily white neighborhood. That unfairly abridges the right to vote of minority residents in violation of the First, Fourteenth, and Fifteenth Amendments.

C. Plaintiffs' Requested Relief Violates the Indiana Constitution.

By closing in-person early voting in three of Lake County's most populous cities, while at the same time providing access to early voting to residents in and around the smaller community of Crown Point, there is a high likelihood that Plaintiffs' requested relief violates Indiana's Constitution. The core principle of elections in Indiana is found in the Article 2, Section 1 of the Indiana Constitution: "All elections shall be free and equal." The Indiana Supreme Court has recognized that the intent of the Indiana Constitution is to "encourage exercise of the franchise." *Gaddis v. McCullough*, 827 N.E.2d 66, 74 (Ind. Ct. App. 2005). Indeed, the Indiana Supreme Court instructs that "we should at all times have before us the fundamental principle that no voter should be deprived of his franchise for the infringement of any technical requirements in casting his ballot." *Id.* (citing *Dobbyn v. Rogers*, 76 N.E.2d 570, 582 (1948)). "This principle applies whether the technical error is committed by the voter or by voting officials." *Id.* The Board believes that it can demonstrate how the failure to provide in-person early voting in Gary, Hammond and East Chicago, while providing it in Crown Point,

will violate Article 2, Section 1. Indeed, a Lake County Circuit Court has already concluded that there is a substantial likelihood that such a showing can be made.

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM.

Plaintiffs' theory of harm in this case is neither valid nor irreparable. Plaintiffs do not allege that they will suffer any harm in their capacity as Republican officials, or even as individual voters. Rather, they purport to protect the interest generally of "voters" -- either, paternalistically, the voters of Gary, East Chicago, and Hammond who cast their ballots in-person at an early voting site because, they claim, these voters "risk having their votes held for naught and disallowed at a later date" or voters of other communities whose votes might be worth less if more people vote in the three communities plaintiffs have targeted.

First, the purported "harm" to voters who might actually use the voting centers is irrelevant in numerous respects. It is not harm suffered by these plaintiffs, and they do not purport to represent voters who will vote in those centers. Moreover, this "harm" is one that plaintiffs created and have the power to remedy. Plaintiff Brown voted against the Board resolution on September 23, 2008, presumably with the support of Plaintiff Curley, thus depriving the Board of the unanimous vote that Plaintiffs now contend is required to open early voting sites. (Ex. 1, LaSota Decl. at ¶ 19 and Ex. C, pp. 7-8, 13.) If Plaintiff Brown and his fellow Board member Patrick Gabrione had voted in favor of the September 23 resolution, there would be no need to protect voters from "illegally established satellite voting sites" because all of the early voting sites would have been established unanimously, thus eliminating any basis to challenge them and their compliance with state law. Plaintiffs have not articulated any basis for the policy that they appeared to have supported and that they ask this Court to impose.

Second, neither Mr. Brown nor Mr. Gabrione articulated any rationale for their refusal to support in September a resolution that virtually was the same in substance as the resolution that

that they or their proxies endorsed -- and in Mr. Gabrione's case, *sponsored* -- in April 2008 for early in-person voting for the primary. In April, Mr. Gabrione expressed support for opening early in-person voting sites if registration numbers were up -- precisely the situation that is present in Lake County for the November elections. (*Id.* at ¶ 14 and Ex. 2, pp. 3-4.) Lake County's voter registration rolls have increased from 285,000 in May 2008 to at least 300,000, with the potential for 320,000 registered voters by the time the Board staff concludes its processing new voter registration applications. (*Id.* at ¶ 23.) Having actively supported a form of early voting that is virtually indistinguishable from the one plaintiffs now seek to enjoin, plaintiffs are hardly in a position to claim irreparable harm.

Third, this purported harm is completely dependent on plaintiffs' prediction about whether votes cast in centers later declared to be improperly maintained are void -- a proposition that is simply not correct. The law in Indiana is clear that, where voters do nothing wrong and there is a technical error by election officials, the voter's vote must be counted. "[I]gnorance, inadvertence, mistake, or even intentional wrong or the performance by an election official of his duty in a mistaken manner will not disfranchise an election district," or an individual voter. *Brown v. Grzeskowiak*, 230 Ind. 110, 130-31 (1951) (*citing, inter alia, McArtor v. State ex rel. Lewis*, 196 Ind. 460, 468 (1925) (stating that an absentee voter "who gets his vote inside the election room in the manner and within the time prescribed by law . . . has voted, and if the officers, inspectors and judges and clerks fail to do their duty in any way, then that is deemed by the law as directory, and the one is voting has a right to have his vote deposited in the ballot box and counted")). *See also State ex rel. Harry v. Ice*, 207 Ind. 65, 71 (1934) ("The purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent

disenfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.”). Thus, in *Curtis v. Butler*, 866 N.E.2d 318 (Ind. Ct. App. 2007), absentee voters initially received ballots that incorrectly listed the candidates for a school board race but correctly listed the candidates for the office of Clerk of the Posey Circuit Court. *Id.* at 319. After some voters had sent in their ballots, the county mailed corrected ballots. Eight voters who previously had cast ballots did not return the corrected ballots. The court held that their votes for Circuit Court Clerk cast on the original, incorrect ballots should count, holding that the original ballots showed the voters’ intent.

Fourth, as noted above, the plaintiffs’ suit is directed at reducing the number of eligible voters who will cast absentee ballots in the minority areas of Lake County, and the true “harm,” to plaintiffs, lies in seeing more of those particular eligible voters casting ballots. The plaintiffs simply do not want to see more voters in Gary, Hammond, and East Chicago casting ballots, although they are content to allow early absentee voting in their stronghold, Crown Point. This sort of partisan political injury is simply not cognizable, let alone irreparable, and it cannot support plaintiffs’ extraordinary claim for injunctive relief.⁵

III. THE HARM RESULTING FROM STOPPING EARLY VOTING FAR OUTWEIGHS ANY POTENTIAL HARM ARTICULATED BY PLAINTIFFS.

Even if plaintiffs had met their burden, the Court must nonetheless deny the requested injunction. The weakness of plaintiffs’ claim that they suffered any harm at all causes the balancing of the harms to come out strongly against issuing the requested injunctive relief. This is particularly true given that the requested relief would have the effect of substantially impairing

⁵ Plaintiffs also are required to show that they have no adequate remedy at law. However in this case, any remedy to which they would be entitled must flow from an actual injury. From that injury, a court might determine whether an adequate remedy may be had in law or only in equity. Here, the plaintiffs cannot demonstrate any injury, except to their partisan interest in keeping vote totals low in northern Lake County. That is simply an illegitimate interest, and not a real injury. Without a clearly articulable injury on the part of the plaintiffs, no relief at all may be had, in law or equity.

an untold number of eligible voters from casting absentee ballots because they would need to travel from East Chicago, Gary, or Hammond to Crown Point to do so. The Court must consider whether the “irreparable harm” the plaintiffs purport to suffer if injunctive relief is not granted is greater than the harm the LCBE and the Intervenors (voters) will suffer if the injunction is granted. *See Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001). The court then weighs these factors, including public interest concerns, employing a sliding-scale approach. *Promatek*, 300 F.3d at 811. “That is, the more likely the plaintiff’s chance of success on the merits, the less the balance of harms need weigh in its favor. *Id.*”

Here, the plaintiffs’ chances of success on the merits are relatively low, given the Voting Rights Act analysis set forth above in Part I. *See supra* pp. 15-21. As a result, the balance of harms would have to weigh heavily in the plaintiffs’ favor, but it does not, because of the grave damage the proposed injunction would do to the ability of voters in northern Lake County to cast absentee ballots. But even if plaintiffs’ chances of success were very high, the complete imbalance of the harms in this case compels denial of an injunction here. If the Court enters an injunction here and it turns out to have been incorrect, the result will be effectively to strip the opportunity to vote in the general election of some number of the residents of the three minority communities targeted by plaintiffs for absolutely no purpose at all. In contrast, if the Court denies an injunction that, upon completion of the litigation, could have been entered, the sole result will be that more residents of the three communities targeted by plaintiffs will have voted - that is not harm, that is the public interest.

The Board seeks to open early in-person voting sites so that more citizens have greater access to polling places for as long as permissible. Under the statute, early in-person voting at multiple locations could have commenced on October 6, as it did in other counties. As of this

filing, Lake County voters have lost four days of voting as a result of Plaintiffs' actions. The Intervenor has presented evidence from voters in East Chicago, Gary and Hammond demonstrating their anticipated inability to vote in their precinct on Election Day, and the hardships that many of them will face if Crown Point is the only location where they are permitted to vote before Election Day. Every day that early in-person voting sites remain closed is yet another blow to a citizen's fundamental right to participate in a democratic society. The longer the delay in opening early in-person voting sites in Lake County's most populous cities, the greater the harm.

IV. ISSUANCE OF THE REQUESTED INJUNCTION IS NOT IN THE PUBLIC INTEREST.

Our appeals court has considered the impact of a requested injunction upon "the public interest" in terms of the effect that granting or denying the injunction would have on third parties. *Stewart v. Taylor*, 104 F.3d 965, 968 (7th Cir. 1997), citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994). Proposed injunctions have been held not to be in the public interest when they have, for example, diminished the authority of school officials to maintain order in a public school, *Coronado v. Valleyview Public School Dist.* 365-U, 591 F.3d 791, 796 (7th Cir. 2008), or limited a park district's ability to deny permits for certain activities that could diminish the ability of members of the public to enjoy parks. *MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 360 (7th Cir. 1997).

In this case, the proposed injunction could not be in greater contravention to the public interest. The very purpose of the early voting facilities that the Board wishes to establish is to promote the ability of members of the public in northern Lake County to participate in our democracy and vote in one of the most celebrated elections of our time, an election in which we will see either the first African-American president of the United States or the first woman vice

president. Plaintiffs' requested injunction makes participation more difficult for voters in northern Lake County, such as Roosevelt Phillips, who must obtain rides to work, whose work schedule is not conducive to polling place voting on Election Day, and who simply cannot make the trip to Crown Point to cast an absentee ballot. (Intervenors' Memo, Phillips Decl. ¶¶ 8-10.)

Plaintiffs' claims that they are actually standing up for voters so their votes are not later challenged is simply contrived. It was within plaintiffs' power to supply the unanimous vote to permit early voting in East Chicago, Gary, and Hammond but plaintiffs opted instead for a regime in which Crown Point was the only available early voting site. If votes are ever challenged in the future, it will almost certainly be plaintiffs' minions who do so. Moreover, the unexplained and unjustified decision not to permit early voting in East Chicago, Gary, and Hammond in the general election, when it was permitted in the primary election, only contributes to a public perception of arbitrariness and unfairness, as the Board was told on September 23 when it approved early voting in northern Lake County but by only a 3-2 vote. And in this case, perception is reality because not having early voting sites in East Chicago, Gary, and Hammond will in fact make it more difficult for some to cast ballots there, and that outcome simply is not in the public interest.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the requested temporary restraining order and injunctive relief sought by the plaintiffs and permit the Board to open early absentee voting centers in East Chicago, Gary, and Hammond, Indiana, forthwith in the waning days before the November 4 general election.

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Respectfully submitted,

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On Behalf of Thomas Philpot, not individually
but as Lake County Clerk

On Behalf of Lake County Board of Elections