

**IN THE UNITED STATES DISTRICT COURT
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 by as Lake County Clerk,)

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.)

Case No. 02 08 CV 287

The Hon. Joseph Van Bokkelen

**LAKE COUNTY BOARD OF ELECTIONS' AND THOMAS PHILPOT'S
MEMORANDUM IN SUPPORT OF PETITION TO
REMOVE AND THIS COURT'S JURISDICTION**

Defendants Lake County Board of Elections and Registration and the Honorable Thomas Philpot, Lake County Clerk (collectively "LCBE") submit this Memorandum in Support of the Petition to Remove filed October 3, 2008 and this Court's jurisdiction.

BACKGROUND

Plaintiffs Curley and Brown (collectively "Curley") initially brought this suit against LCBE in an Indiana Superior Court. The sole claims brought by Curley are based on alleged

violations of certain state law procedures by which LCBE established in-person early absentee voting in Gary, Hammond, and East Chicago. Asserting that Curley's requested relief could violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by compelling the LCBE to maintain early voting locations only in predominantly white parts of Lake County and to shutter early voting locations that had previously been open in the predominantly minority part of Lake County, LCBE removed the action filed by Curley in the Superior Court to this Court. (Dkt. No. 2.) After removal, the Superior Court issued a temporary restraining order that was void *ab initio* because LCBE's removal deprived the Superior Court of jurisdiction. 28 U.S.C. § 1446(d). Following an October 3, 2008 hearing regarding, *inter alia*, the removal, this Court requested further briefing from LCBE to support the assertion that this Court properly has jurisdiction and why the matter should not be remanded to state court.

I. THIS ACTION WAS PROPERLY REMOVED.

A. 28 U.S. C. § 1443(2) Allows for Removal by Defendants Who Have Acted to Prevent a Violation of Any Law Providing for Equal Rights.

This case was properly removed under 42 U.S.C. § 1443(2), which provides:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

* * *

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

This provision, which effects an exception to the "ordinary" rule that only federal questions raised by a state court plaintiff may be ground for removal, *see Jefferson County. v. Acker*, 527 U.S. 423, 430-31 (1999), was first enacted in 1866 to provide a federal forum for an

official who is “sued for acting, as he believes, to prevent a violation of rights guaranteed by the federal constitution.” *Greenberg v. Veteran*, 889 F.2d 418, 418-19 (2d Cir. 1988).

Although the Supreme Court has made clear that Section 1443(2) removal does not extend to constitutional defenses unrelated to racial equality, it has also settled, consistently with the plain statutory terms, that “any law” addressing racial inequality qualifies (not just those in effect when the statute was first enacted). *See Georgia v. Rachel*, 384 U.S. 780, 792 (1966) (“the phrase ‘any law providing for . . . equal civil rights’ must be construed to mean any law providing for specific civil rights stated in terms of racial equality”). Courts have consistently held that it “may be invoked when the removing defendants make a colorable claim that they are being sued for not acting ‘pursuant to a state law, which, though facially neutral, would produce or perpetuate a racially discriminatory practice as applied.’” *White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) (quoting *Bridgeport Educ. Ass’n v. Zinner*, 415 F. Supp. 715, 722 (D.Conn.1976) (Newman, J)). *See also Sexon v. Servaas*, 33 F.3d 799, 803 (7th Cir. 1994) (quoting language from *Greenburg*).¹ It is settled law that an assertion of inconsistency between duties a plaintiff asserts to be imposed by state law and obligations under Section 2 of the Voting Rights Act are proper basis for removal. *See, e.g., White*, 627 F.2d at 586.

Importantly, Section 1443(2) removal does not hinge on *proof* that the (alleged) State duties a defendant refuses to perform are in conflict with those imposed under federal civil rights

¹ In *Sexon*, the Seventh Circuit followed the Second Circuit’s construction of the statute to allow for removal when the defendant has a “colorable claim” that complying with the plaintiff’s reading of state law would violate federal civil rights laws. *See* 33 F.3d at 803 & n.2 (quoting *Greenburg* and “colorable claim” standard for removal under Section 1443(2)). Because the *Sexon* Court upheld the district court’s ruling that the defendants’ Voting Rights Act defense failed on the merits, it was unnecessary to decide whether the case had been properly removed originally – a question that turned on “whether the affirmative defense presented a sufficient ‘colorable claim’ to warrant removal,” *id.* n. 2.

law. On the contrary, federal jurisdiction is appropriate so long as the defendant “demonstrate[s] . . . a *colorable* conflict between state and federal law leading to [their] refusal to follow plaintiff’s interpretation of state law because of a good faith belief that to do so would violate federal law,” *Charter Sch. of Pine Grove, Inc. v. St. Helena Parish Sch. Bd.*, 417 F.3d 444, 446 (5th Cir. 2005) (quoting *White*, 627 F.2d at 587; other citations omitted);

As Judge Newman explained in his highly influential opinion in *Bridgeport Education Association*, 415 F. Supp. 715, 722, (D. Conn. 1976), the “colorable” inconsistency standard follows from the plain language and purposes of Section 1443(2) and from general principles of federal jurisdiction. The statutory language directs federal courts to take jurisdiction based on the “ground” *i.e.*, the defendant’s *reason* for refusing to act as plaintiffs would prefer, rather than limiting them to cases where state and federal law are conclusively determined to be inconsistent. The statute creates a “subjective test”, *id.*, and an approach that requires a conclusive determination would improperly merge the issue of merits and jurisdiction. *See Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (applying “colorable federal defense” requirement under Section 1442, the federal officer removal statute, explaining, “We . . . do not require the officer virtually to ‘win his case before he can have it removed.’”) (quoting *Willingham v. Morgan*, 397 U.S. 402, 407 (1969)); *Bell v. Hood*, 327 U.S. 678, 683 (1945) (case falls within federal district courts’ jurisdiction unless federal question is “insubstantial or frivolous”). Such a limitation would complicate and protract jurisdictional inquiry, *see Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (emphasizing the importance of “clarity and ease of administration” in rules for resolving jurisdictional conflicts”), and it would keep from federal court precisely those cases where the availability of a federal forum would be most important, *i.e.*, ones where the obligations of federal law are not clear on

their face, but rather must be established. *See Acker*, 527 U.S. at 431 (“one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court”) (quoting *Willingham*, 395 U.S. at 407).

It is also clear that a defendant seeking to remove under Section 1443 does not and need not concede that the actions that would be “inconsistent with” federal civil rights law are, as plaintiff asserts, required under State law. Such a rule, as the Second Circuit explained, would be inconsistent with the general principle, expressed in the Federal Rules of Civil Procedure, that pleading in the alternative is permissible, *see* 28 U.S.C. § 1446, and “would exact too high a price” on removal, by requiring defendants either to renounce substantial, potentially meritorious State law defenses in order to get to a federal forum or to pursue their federal civil rights law defenses in state court. *Greenberg v. Veteran*, 889 F.2d at 421.

B. Removal Was Proper Here Because Defendants’ Conduct Duplicates the Voting Rights Act.

These principles make clear that removal was appropriate here. First, the Voting Rights Act is manifestly a “law providing for equal rights ” within the meaning of Section 1443(2), *see, e.g., Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995), and Section 1443(2) is commonly used in cases involving voting. In *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), for example, voters sued state election officials, seeking to enjoin implementation of a reapportionment plan, claiming it was unconstitutional under the North Carolina Constitution. State officials argued not only state law defenses, but also that their action was compelled by the Voting Rights Act and the Fourteenth Amendment to the U.S. Constitution. The state officials removed, and the three-judge federal panel held that the removal was proper, even though decision might ultimately rest exclusively on a state law defense.

Second, the “inconsistency” here – between the alleged mandates of Indiana Law and the requirements imposed by Section 2 – is not merely “colorable” but manifest and serious. Although (1) defendants do *not* concede that the Indiana Code provisions plaintiffs rely on required the LCBE to give a dissenting member a veto over the decision to conduct in-person electronic voting in the clerk’s offices in Gary, Hammond, and East Chicago or that such voting may only be conducted by non-electronic means (even as voters in Crown Point cast electronic votes – and even in the face of evidence that electronic voting is the only means practicable and that plaintiffs approved and supported such voting in the primaries *and*, in the general election, at Crown Point) and (2) an Indiana Court of competent jurisdiction has determined that interpreting those provisions as plaintiffs propose *would likely violate the State Constitution*, if Indiana law did require defendants to maintain such a blatant dual system for casting votes, it would place them in serious jeopardy of Voting Rights Act liability.

Section 2 of the Voting Right Act proscribes any 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.” As the Supreme Court has explained, “practice” is a capacious term, and is one that the Supreme Court specifically has indicated includes decisions as to where to locate polling places, *see Perkins v. Matthews*, 400 U.S. 379, 387 (1971); *Franklin v. City of Marks*, 439 F.2d 665, 670 (5th Cir. 1971), principles that have been upheld and enforced by lower federal courts for decades.

Courts have allowed Section 2 challenges in a variety of areas where voting practices affected minorities, including the harassment of blacks in the voting booth, *Harris v. Siegelman*, 695 F. Supp. 517, 529 (M.D. Ala. 1988), the purging of voter rolls for failure to vote in previous elections, *Ortiz v. City of Philadelphia*, 824 F. Supp. 514, 522 (E.D. Pa. 1993), *aff’d*, 828 F.2d

306 (3d Cir. 1994), the removal of blacks from registration lists for unreported change of addresses, *Toney v. White*, 476 F.2d 203, 207-08 (5th Cir.), *vacated in part on reh'g*, 488 F.2d 310 (1973), and the invalidation of absentee ballots, *Goodloe v. Madison County Bd. of Election Comm'rs*, 610 F. Supp. 240, 243 (S.D. Miss. 1985).

Violations of Section 2 of the Voting Rights Act include not only the direct denial or abridgment of the right of any citizen to vote, but also impairment of minority participation in predicate activities to vote. Thus, in *Brown v. Dean*, 555 F. Supp. 502, 504 (D.R.I. 1982), a class of registered black voters residing in a voting district alleged that a change in polling places would make it considerably more difficult for the class members to vote, and moved for a temporary injunction. Noting that because many of the class members were elderly and/or without automobiles, and because the public transportation options for the class, while available, were difficult to access, the district court found that the location of the polling place was a substantial deterrent to voting by members of the plaintiff class. The court thus held that the plaintiff class sustained their burden of establishing a likelihood of success on the merits under Section 2 of the Voting Rights Act, granted plaintiff's motion, and enjoined the change in polling place. *Id.* at 505-06.²

² Courts have reached the same result in addressing the scope of the preclearance requirements in Section 5 of the Voting Rights Act, consistently concluding that the time and place of voting can impermissibly abridge the right to vote. For instance, in *Garcia v. Guerra*, 774 F.2d 1159, 1164 (5th Cir.), *cert. denied*, 471 U.S. 1065 (1984), migrant Mexican-American farm workers moved to enjoin the holding of a school consolidation election in August. The record established that a significant number of voters in the county at issue were Mexican-American migrant farmworkers, and that these voters migrated between late April and mid-September. *Id.* at 1164-65. The court in *Garcia* noted that the right to vote:

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. This right is similarly abridged if a person does not have prior

Equally important, Section 2 does not require discriminatory intent. Rather, it forbids from adhering to practices or procedures (including ones sanctioned by State law) that, in interaction with background racial inequalities, have the effect of denying members of racial minority groups an equal opportunity to participate in the political process and to elect candidates of their choice. *See Dean*, 555 F. Supp. at 505 (granting a preliminary injunction under Section 2 of the Voting Rights Act notwithstanding the fact that the Court did “not question the good faith of” the defendants). A violation 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.”

That description, of course, fits to a “tee” the “requirements” plaintiffs asked the courts in this case to enforce. Here, there is no question that the Board has refused to comply with the unanimity rules because compliance would result in violations of the Voting Rights Act. Forty percent of Lake County’s population is located in Gary (sixteen miles from Crown Point), Hammond (eighteen miles from Crown Point), and East Chicago (twenty-five miles from Crown Point), while only four percent of the population is located in Crown Point. (*See* Intervenor Defendants’ Mem. in Opp. to TRO at 6-7.) (Dkt. No. 10.) Almost ninety percent of Lake County’s African-American population and sixty-six percent of its Hispanic population live in

notice than an election is to take place or if the date set for the election effectively prevents him from exercising his franchise.

Id. at 1164 (discussing *Perkins v. Matthews*, 400 U.S. at 387). Because the court found that the date of the election would deprive the plaintiffs of the right to meaningfully participate in the election, the court found a Section 5 Voting Rights Act violation. *Id.* at 1165-66.

either Gary, Hammond, or East Chicago. (*Id.*) In contrast, Crown Point is 95 percent white. (*Id.*)

The failure to provide early voting in Gary, Hammond, and East Chicago creates a significant disparity in access to voting. As in *Brown v. Dean*, a significant number of racial minorities in Lake County do not own automobiles, and the public transportation options to Crown Point from Gary, Hammond, and East Chicago are thin and time-consuming. (*Id.* at 7-8.) And as in *Guerra*, many of the working-class residents of these communities will also be unable to take time off from work to travel to Crown Point or to vote on Election Day. Accordingly, allowing early voting in the predominantly white community of Crown Point, while not providing early voting opportunities in Gary, Hammond, and East Chicago would create a dramatic disparity in access to the fundamental right to vote.

As explained, *infra*, pp. 6-7, the relief plaintiffs seek in state court would bar minority citizens – who overwhelmingly live in parts of the county located far from the Crown Point location, and face a variety of serious obstacles to voting there – from exercising the franchise. Whether or not plaintiff Brown, in his capacity as LCEB member, *intended* to deny individual African American and Latino residents of Gary, East Chicago, and Hammond of their opportunity to cast ballots, there can be no doubt that the “practice” plaintiffs urge the Board to pursue will, in interaction with background realities of residential segregation and socio-economic inequality, deny disproportionate numbers of qualified African-American and Latino voters the ability to cast a ballot, let alone an effective one. As set forth in LCBE’s opposition to the TRO, plaintiffs have not identified even a plausible – let alone legitimate – basis for the restriction they seek. Actions similar to those the plaintiffs seek to impose on the LCEB here have been found to violate Section 2. *See* LCBE’s TRO Op. at __ - __ (citing cases).

In sum, Defendants' defense under Section 2 of the voting Rights Act readily satisfies the jurisdictional standard of colorability.

Dated: October 9, 2008

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

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2008, a copy of the foregoing **Lake County Board of Elections' and Thomas Philpot's Memorandum in Support of Petition to Remove and this Court's Jurisdiction** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the following counsel of record. Parties may access this filing through the Court's system:

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I also certify that on the 9th day of October, 2008, a copy of the foregoing was served by first class United States Mail, postage prepaid, and facsimile, upon the following counsel of record:

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