

**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 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

**DEFENDANTS' MOTION TO VACATE THIS COURT'S OCTOBER 7
ORDER AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants Lake County Board of Elections and Registration and the Honorable Thomas Philpot, Lake County Clerk (collectively "LCBE") move this Court to lift its order dated October 7, 2008, vacating a temporary restraining order entered in the Lake County Circuit Court in a proceeding filed by separate plaintiffs after LCBE removed the instant matter to this Court. LCBE respectfully submits that this Court, in vacating the Lake County Circuit Court temporary restraining order and enjoining the Circuit Court, has exceeded its limited authority to enjoin state court proceedings under the Anti-Injunction Act, 28 U.S.C. § 2283 ("the Act").

BACKGROUND

Plaintiffs Curley and Brown (collectively “plaintiffs”) initially brought this suit against LCBE in an Indiana Superior Court. The sole claims brought by plaintiffs and the sole claims at issue in this case are alleged violations of certain state law procedures in the manner by which LCBE established in-person early absentee voting in Gary, Hammond, and East Chicago. Asserting that plaintiffs’ 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 predominantly minority part of Lake County, LCBE removed the action filed by plaintiffs in the Superior Court to this Court. Plaintiffs’ request for a temporary restraining order based on his state law claims was then set for hearing on October 9, 2008.¹ On October 3, 2008, LCBE and plaintiffs agreed that LCBE would not allow voting in Gary, Hammond, and East Chicago until after the October 9 hearing. (Dkt. No. 14.)

On Monday, October 6, 2008, voting began in Crown Point. At that time, a group of Lake County voters and their representatives (the *Steelworker* plaintiffs) separately sued LCBE in Lake County Circuit Court and sought emergency *ex parte* injunctive relief arguing that LCBE violated the Indiana Constitution when it allowed early voting in Crown Point but did not allow voting in Gary, Hammond, and East Chicago. These voters asserted irreparable harm—an impermissible burden on their fundamental right to vote—due to the lack of early voting in Gary, Hammond, and East Chicago. Finding that a substantial likelihood existed that LCBE’s failure to allow voting in those locations violated the Indiana Constitution and that there could be no injury in allowing registered voters to cast ballots at official polls, the Circuit Court issued a

¹ After removal, the Superior Court issued a temporary restraining order that was void *ab initio* because removal deprived the Superior Court of jurisdiction. 28 U.S.C. § 1446(d).

temporary restraining order requiring LCBE to allow voting and set a date for a preliminary injunction hearing. (Ex. 1, 10/6/08 Order Granting Plaintiffs' Motion for Temporary Restraining Order).

None of the *Steelworker* plaintiffs were parties to the Superior Court action, either before or after its removal to this Court. The state constitutional claim raised by the *Steelworker* plaintiffs was not raised by plaintiffs in this proceeding. Moreover, the relief sought in this case and the case brought by the *Steelworker* plaintiffs is distinctly different. In this proceeding, plaintiffs are seeking an injunction to shut down early voting in minority neighborhoods *solely* because of a claimed violation in the procedure followed by LCBE, not because such polling locations, if proper procedures are followed, themselves violate any state or federal law. In contrast, the *Steelworker* plaintiffs are seeking an injunction that, regardless of the procedures used by LCBE, the failure to keep early voting locations open in minority neighborhoods violates the Indiana Constitution. Put another way, even if LCBE were to confess error in this case and agree to all of the relief sought by plaintiffs, it would nonetheless have to open the early voting locations in Gary, Hammond, and East Chicago because it is compelled to do so by the Circuit Court's interpretation of the Indiana Constitution. Rather than seeking leave to intervene in the *Steelworker* proceeding, plaintiffs, who had earlier contested this Court's jurisdiction, quickly changed tune after learning of the TRO entered in the *Steelworker* proceeding. Plaintiffs attempted to use this Court to end-run the proceedings in the state court by asking this Court to vacate the Circuit Court's decision.

This Court, in a telephonic hearing on October 7, 2008, expressed understandable frustration at the order issued by the Circuit Court in favor of the *Steelworker* plaintiffs directing LCBE to open early voting in East Chicago, Gary, and Hammond "forthwith" while an

agreement by LCBE was in place with this Court to not do so until October 9, 2008. On October 7, 2008, the Court granted plaintiffs' motion to vacate the Circuit Court's TRO in the *Steelworker* litigation, and directed the U.S. Marshal Service to deliver its order to the Circuit Court. The Court based its exercise of authority on the conclusion that the Circuit Court order had "intruded on the Court's authority to hear cases assigned to it." Order at 4 (Dkt. No. 20.).

Respectfully, LCBE disagrees with the Court's actions to vacate the TRO issued by the Superior Court in the *Steelworker* plaintiffs' case. The *Steelworker* case involves different parties, different claims, and different alleged injuries, and unlike the underlying state Superior Court action that gave rise to the instant removal, the Circuit Court in the *Steelworker* case was not divested of jurisdiction by virtue of the instant removal of this matter. The Anti-Injunction Act bars federal courts from enjoining state courts, except for a very limited set of exceptions, within which the Court's enjoining of the Circuit Court action does not fall.

I. THE ANTI-INJUNCTION ACT PROHIBITS THIS COURT FROM ENJOINING OR OTHERWISE INTERFERING WITH THE CIRCUIT COURT ACTION.

A. The Act Generally Prohibits Federal Courts from Enjoining State Courts.

The Anti-Injunction Act is a "sweeping" prohibition on federal courts issuing injunctions of state court proceedings.² *Ramsden v. Agri Bank, FCB*, 214 F.3d 865, 868 (7th Cir. 2000) (noting "sweeping" prohibition and reversing injunction of state court); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1988); *Owens-Corning Fiberglass Corp. v. Moran*, 959 F.2d 634, 635 (7th Cir. 1992) ("The Anti-Injunction Act, 28 U.S.C. § 2283, blocks most interference with state litigation."). The Act is rooted in the Constitution and principles of federalism, *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1100-01 (9th Cir. 2008), and serves as a long-

² The All Writs Act, 28 U.S.C. § 1651, provides no additional authority here. The Anti-Injunction Act "serves as a check on the broad authority recognized by the All Writs Act," and a writ may not be issued unless one of the exceptions to the Anti-Injunction Act is met." *Burr & Forman v. Blair*, 470 F.3d 1019, 1027 (11th Cir. 2006).

standing check on a federal court's power derived from the All Writs Act, 28 U.S.C. § 1651(a), *Burr & Forman*, 470 F.3d at 1027-28.

The Supreme Court has noted that the Act is “a necessary concomitant of the Framers’ decision to authorize, and Congress’ decision to implement, a dual system of federal and state courts . . . Prevention of frequent federal court intervention is important to make the dual system work effectively. . . . Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings ‘should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court.’” *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atl.Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 287 (1970)).

This policy of not interfering with state court proceedings is paramount in almost every circumstance, including where a state and a federal court are each hearing very similar claims seeking similar relief involving the same parties at the same time. For example, where a party sought an injunction against picketing in state court, that case was removed to federal court, and the same plaintiff filed a new case in state court seeking an injunction against “violent” picketing by the same defendants, the federal court hearing the removed case could not enjoin the state court from proceeding. *Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers’ Union*, 515 F. Supp. 456, 459-60 (S.D.N.Y. 1981); *Burr & Forman*, 470 F.3d at 1029 (holding that an injunction is not “in aid of a federal court’s jurisdiction when the same claim is being pursued simultaneously in a state court proceeding”); *Zurich Am. Ins. Co. v. Super.Ct. for Cal.*, 326 F.3d 816, 825 (7th Cir. 2003) (describing the general rule that parallel proceedings, other than *in rem* proceedings, must be allowed to proceed); 17 Charles Alan

Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4225 (2d ed. 1988) (holding that outside of *in rem* jurisdiction, “an injunction cannot issue to restrain a state action *in personam* involving the same subject matter from going on at the same time”).

In order to protect the dual system designed by the Framers, the Supreme Court has repeatedly stated that the Act is a broad and “absolute prohibition” on enjoining state courts except under one of the three explicit and limited exceptions. *Atl. Coast Line*, 398 U.S. at 286-87 (rejecting argument that the Act is merely a “principle of comity”); *Amalgamated Clothing Workers of Am. v. Richman Bros.*, 348 U.S. 511, 515-16 (1955) (noting that the Act is a “clear-cut prohibition qualified only by specifically defined exceptions”). The three exceptions include only situations where the injunction is “expressly authorized by Act of Congress, or where necessary in aid of [a federal court’s] jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283.

“Because of the Act’s constitutional foundation, its three exceptions are to be applied narrowly.” *Zurich Am. Ins.*, 326 F.3d at 824 (7th Cir. 2003). Furthermore, the Supreme Court has expressly held that courts should not widen these exceptions. *Amalgamated Clothing*, 348 U.S. at 514 (“Congress [has] made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.”); *Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240, 241 (7th Cir. 1990) (noting Court’s recognition that the exceptions “are narrow and not to be enlarged by loose statutory construction”). Finally, the Court has stated that “[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.” *Atl. Coast Line*, 398 U.S. at 297.

B. The Present Situation Does Not Fall Within an Exception to the Anti-Injunction Act.

There is no exception under the Anti-Injunction Act permitting this Court's injunction of the *Steelworker* plaintiffs' action -- especially where that action involves different parties who are raising different claims and asserting different injuries. In entering its order vacating a state court order based on the Indiana state constitution, the Court has stepped well beyond the exceptions of the Anti-Injunction Act and violated the principles of federalism that are at its foundation.

As an initial matter, two of the three exceptions to the Act indisputably do not apply in this case because no express statutory authority permits the injunction and there is no final federal-court judgment to protect. *See Zurich Am. Ins.*, 326 F.3d at 825 & n.6 (noting that the relitigation exception could not apply because the federal court had not ruled on Zurich's petition when it granted the injunction).

The "necessary in aid of jurisdiction" exception does not apply either. Historically, the exception applied *only* to *in rem* proceedings, where state and federal disputes involve the same piece of property. *Id.* at 825; *Burr & Forman*, 470 F.3d at 1028. The only (and very limited) qualification to this rule has related to federal court management of sprawling, complex cases, including massive desegregation consent decrees and consolidated multidistrict litigation. *Zurich Am. Ins.*, 326 F.3d at 825; *Burr & Forman*, 470 F.3d at 1028. Such cases, however, "represent the outermost limits of the exception." *Burr & Forman*, 470 F.3d at 1029. The exception simply does not apply in this case.

At most, this case presents the familiar situation where litigation in state and federal courts contains overlapping issues. The Supreme Court has flatly rejected the argument that the existence of parallel litigation in federal and state court over similar claims is sufficient to

warrant an exception to the Act. *Atl. Coast Line*, 398 U.S. at 295 (“In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.”). Similarly, the threat that the state court might reach a different and inconsistent result than the federal court does not justify an injunction. *Id.* at 295-96; *Texas v. United States*, 837 F.2d 184, 186 n.4 (5th Cir. 1988) (“In no event may the ‘aid of jurisdiction’ exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court’s decision.”); *Zurich Am. Ins.*, 326 F.3d at 827-28 (same). Moreover, even in a case in which the defendant should have brought a compulsory counterclaim in federal court, but instead chose to file suit on the same ground in state court, the federal court may not enjoin a state court proceeding. *Gunderson v. ADM Investor Servs., Inc.*, 976 F. Supp. 818, 824 (N.D. Iowa 1997) (in case in which federal court defendants sued federal court plaintiffs in subsequent state court action for interpretation of same contracts, “[i]t is well-settled that such circumstances as these do not justify invocation of the exceptions of the Anti-Injunction Act”).

Nor does a concern that a state court may reach judgment before a federal court or even reach a result that will have preclusive effects on the federal court litigation suffice to trigger this exception. *Negrete*, 523 F.3d at 1101 (“But that principle [the ‘necessary-in-aid-of-jurisdiction’ exception] does not authorize interference with parallel *in personam* state actions merely because the state courts might reach a conclusion before the district court does.”); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 429 (2d Cir. 2004) (overturning injunction and holding that the district court “has no interest--no interest that can be vindicated by the exercise of the federal injunction power--in being the first court to hold a trial on the merits”); *Zurich Am. Ins.*, 326 F.3d at 826 (rejecting argument that potential preclusive effects of state proceedings would

satisfy the exception). Finally, a federal court cannot enjoin a state court proceeding merely to ensure that there will remain a case or controversy in the pending federal case. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (Opinion of Rehnquist, J., Stewart J., and Powell, J.) (“No case of this Court has ever held that an injunction to ‘preserve’ a case or controversy fits within the ‘necessary in aid of its jurisdiction’ exception”).

This, of course, is not a situation where the same plaintiffs, once removed from state court, sought to file the same (or essentially similar) claim in state court again. Here a wholly separate group of plaintiffs, alleging a separate state constitutional injury in a separate suit have sought to have their claims adjudicated in state court. That the relief they seek may ultimately moot the relief this Court grants -- because regardless of any violation of state law procedures alleged by plaintiffs, LCBE must still comply with the state constitution -- provides no basis to prevent the *Steelworker* plaintiffs from seeking redress for their claims in state court.

Indeed, this case is not even one where there exists a real possibility of inconsistent judgments. Even if plaintiffs obtained all the relief that they are seeking in this case, the *Steelworker* plaintiffs’ state constitutional claims would remain; a judgment in plaintiffs’ favor in this Court would not bar such claims, and the state courts would remain the best -- and only -- forum to litigate the interpretation of the Indiana state constitution. If their action remains regardless of the outcome of this case, there can be no argument that it would interfere with this Court’s jurisdiction to allow the Circuit Court case to proceed. This is not the typical case where one party to a case gets a ruling that it does not like and then files in another forum hoping to circumvent the first court. Two different sets of plaintiffs sued LCBE arguing different state law claims and alleging different injuries. The fact that both actions involve voting in Gary,

Hammond, and East Chicago is not sufficient to allow this Court to bypass the Anti-Injunction Act's prohibition on federal courts enjoining state courts.

For all the reasons discussed above, the fact that voters are suing LCBE in state court alleging state constitutional violations while plaintiffs allege different state-law claims in this Court does not interfere with this Court's jurisdiction within the meaning of the Anti-Injunction Act.³

C. Furthermore, Equitable Considerations Weigh Against Enjoining the Circuit Court.

Even if a federal court may enjoin a state court without violating the Act, it “does not mean that it should exercise that authority.” *Ramsden*, 214 F.3d at 869; *Chick Kam Choo*, 486 U.S. at 151. Instead, any such injunction still must meet “the traditional equitable requirements such as irreparable harm for which there is no adequate remedy at law.” *Zurich Am. Ins.*, 326 F.3d at 825; *Ramsden*, 214 F.3d at 869 (stating that even if one of § 2283's exceptions is met, it “does not ‘qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.’”) (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)).

As discussed in more detail in Defendants' TRO brief filed herewith, plaintiffs have failed to demonstrate any irreparable harm whatsoever. (See LCBE's and Philpot's Mem. in Opp. to TRO at 23-28.) Allowing other registered voters to cast their ballots does not interfere in any way with plaintiffs' right to vote or any other right. By contrast, the voter plaintiffs in the

³ In addition, there is no justification for this Court's vacatur of the Circuit Court's order. While a writ of injunction is one of the traditional writs codified through the All Writs Act, *see Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 603 (1966), there is no traditional writ giving the authority to vacate another court's decision. Furthermore, lower federal courts may not review decisions of state courts; that power is reserved solely for the Supreme Court. *Atl. Coast Line*, 398 U.S. at 286; *cf. Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Ct. App. v. Feldman*, 460 U.S. 462, 482-86 (1983). Thus, regardless of the Anti-Injunction Act question, this Court's vacatur of the Circuit Court TRO was improper.

Circuit Court action have demonstrated that their Indiana constitutional rights are being irreparably violated by the refusal to allow voting in Gary, Hammond, and East Chicago.

Furthermore, plaintiffs' motion for a stay of the Circuit Court action fundamentally relies on an assumption that the state Circuit Court will somehow misapply Indiana law (otherwise he has no conceivable claim of harm). Plaintiffs raise only state-law claims; the *Steelworker* plaintiffs raise different state-law claims (albeit based on Indiana's Constitution rather than statute) in Circuit Court. The "heart" of the Anti-Injunction Act is to "evidence[] confidence in state courts" when they adjudicate federal questions of law. *Zurich Am. Ins.*, 326 F.3d at 826; *Chick Kam Choo*, 486 U.S. at 149-50. Indeed, the Anti-Injunction Act prohibits enjoining state actions even when a parallel state proceeding may "interfere with a protected federal right" or erroneously apply federal law. *Zurich Am. Ins.*, 326 F.3d at 825. Thus, it seems strange to use the exceptions to the Anti-Injunction Act to enjoin a state court from deciding *state-law* issues, an area where state courts are considered preeminent authorities—especially given that plaintiffs have raised *no federal claims* at all.

In this context, all of the equities weigh against enjoining the state court action.

II. UNDER THE CIRCUMSTANCES, THE MOST APPROPRIATE ACTION IS TO STAY FURTHER ACTION IN THIS MATTER PENDING AN OUTCOME IN THE *STEELWORKER* LITIGATION.

Lower federal courts cannot review or sit as a court of appeal for state court decisions, nor can they reach into state courts and take control over issues that can and should be decided in the state courts. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Plaintiffs raise no federal claims before this Court. If the Circuit Court determines that not allowing voting in Gary, Hammond, and East Chicago violates the Indiana Constitution, this Court cannot review that decision; nor can a decision on plaintiffs' claims in this Court render

the Circuit Court action moot. However, if the Circuit Court determines that refusing to allow voting in the contested locations violates the Indiana Constitution, that determination would control any relief plaintiffs could receive on the basis of their state-law procedural claims, and would be an independent and adequate state ground requiring LCBE to allow voting at the contested sites. Therefore, this Court would not have to reach the federal question of whether § 2 of the Voting Rights Act also compels LCBE to open the sites (or to determine whether plaintiffs' state law claims had merit in the first instance). Given that plaintiffs have demonstrated no cognizable, irreparable injury while the voter plaintiffs have alleged a serious threat to their right to vote as protected by the Indiana Constitution, this situation is particularly appropriate for the Court to stay the federal court proceedings pending the outcome of the state court proceedings addressing the issues of the Indiana Constitution.

CONCLUSION

For the foregoing reasons, LCBE and Mr. Philpot respectfully requests that this Court vacate its October 7, 2008 order enjoining proceedings in the Lake County Circuit Court and vacating that court's temporary restraining order. Further LCBE and Mr. Philpot request that the

Court stay further proceedings in this action pending the outcome of the *Steelworker* litigation pending in the Circuit Court of Lake County, Indiana.

Dated: October 9, 2008

Respectfully submitted,

/s/ Terrence J. Truax

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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 Motion to Vacate this Court's October 7 Order and Memorandum of Law in Support Thereof** 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 forgoing was served by first class United States Mail, postage prepaid, and facsimile, upon the following counsel of record:

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/s/ Terrence J. Truax _____

EXHIBIT 1

STATE OF INDIANA)
)
COUNTY OF LAKE)

IN THE LAKE COUNTY CIRCUIT COURT

Filed in Open Court

United Steelworkers District 7; Hammond Teachers)
Federation, Local 394, American Federation of)
Teachers; Earline Rogers, and Roxanna Lugo,)
)
Plaintiffs,)
)
v.)
)
Lake County Board of Elections and Registration,)
)
Defendant.)

OCT 06 2008

Thomas R. Philpot
CLERK LAKE CIRCUIT COURT

CAUSE NO. 45C010810PL00256

**[PROPOSED] ORDER GRANTING PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs United Steelworkers District 7; Hammond Teachers Federation, Local 394, American Federation of Teachers; Earline Rogers, and Roxanna Lugo have moved for a temporary restraining order and preliminary injunction. The Court finds as follows:

1. Plaintiffs are representatives of registered voters in Gary, Hammond, and East Chicago, and a registered voter in Hammond.
2. Defendant Lake County Board of Elections and Registration (the "Board" or "Board of Elections") has the power to administer elections in Lake County, and is composed of five members: two appointed by the county chairs of each of the two major political parties and the circuit court clerk. Ind. Code §3-6-5.2-1, *et seq.*
3. Under Indiana law, in addition to voting in person at a polling place on election day, a registered voter may cast a ballot in the upcoming 2008 general election by a mailed absentee ballot or by an in-person absentee ballot. Ind. Code §3-11-10, *et seq.* In-person absentee voting,

commonly known as “early voting,” allows any registered voter to cast a ballot during the 29 days before an election by voting at a designated site without a reason. Ind. Code §§3-11-4-1(a), 3-11-10-26(a), (c). A voter can cast an absentee ballot by mail only under certain limited circumstances. Ind. Code §3-11-10-24(a). The early voting law’s sole purpose is to increase voter turnout by making it easier for registered voters to cast their ballots. Other than the day on which the ballot is cast, there is no meaningful difference between the procedures for voting early and voting on election day. Early voters must provide proof of identification and must complete and sign an application for an absentee ballot, including their name and address. Ind. Code §§3-11-4-5.1, 3-11-10-26(b).

4. During the primary election in May 2008, the Lake County Board of Elections provided the opportunity to cast an in-person absentee ballot before election day at four locations: Crown Point, Gary, Hammond, and East Chicago.

5. On September 23, 2008, the Board of Elections met to decide whether to provide early voting for the 2008 general election in locations other than in Crown Point. Many people testified in favor of continuing early voting in Gary, Hammond, and East Chicago, including Mayor Thomas McDermott of Hammond and Mayor Rudy Clay of Gary. Others, including Congressman Peter Visclosky, submitted written statements in favor of the proposal. No person spoke in opposition.

6. The Lake County Board of Elections is comprised of two Democrats, two Republicans, and the County Clerk. The two Democrats and the Clerk’s proxy voted in favor of a resolution that would establish satellite voting locations in Gary, Hammond, and East Chicago; the two Republicans opposed the resolution. Although a majority voted for the resolution, the Board

understood that to “establish satellite offices” under Indiana Code §3-11-10-26.3, a unanimous vote was required, and the resolution was therefore considered defeated.

7. Subsequently, a vote was held on a motion to allow early voting at the circuit court clerk’s offices Gary, Hammond, and East Chicago under Indiana Code §3-11-10-26(a)(1). Again, the vote was three to two, with the same individuals voting in favor and against. During the debate over the renewed motion, the Republican members of the Board who opposed the proposal were asked to explain their opposition. One member refused to respond, and the other responded only with “no comment.”

8. The chairs of the county Democrat and Republican parties were notified more than 10 days before October 6, 2008, that in-person absentee voting would occur in Gary, Hammond, and East Chicago.

9. Early voting begins in Crown Point on October 6, 2008. Absent a court order, early voting will not begin in Gary, Hammond, and East Chicago until at least October 10, 2008, and maybe not at all.

10. Early voting in their communities is the only way that many residents of Gary, Hammond, and East Chicago will be able to vote in the 2008 general election. Many voters are not eligible to cast an absentee ballot by mail yet still have constraints that make voting on election day difficult or impossible. These constraints include job responsibilities and lengthy work commutes and such family responsibilities as taking care of family members with serious medical conditions.

11. Gary, Hammond, and East Chicago are not affluent communities, with the families below the poverty level ranging from 12% to 22.5% and the household incomes below \$25,000 ranging

from 34.4% to 47.3%. Many working-class residents cannot afford to take time away from their jobs, commutes, and family obligations to travel to Crown Point to vote, and they will be unable to vote on election day without difficulty or at all. A significant number of households in Gary, Hammond, and East Chicago do not own a car: 19%, 12%, and 25% respectively. These voters therefore must rely on public transportation or friends and family. Public transportation from Hammond to Crown Point is sparse and takes a long time.

12. Lake County is the second largest county in Indiana in population, with a total population of 484,564 as of the 2000 census. More than 40% of the entire county's population is located in Gary, Hammond, and East Chicago. Based on the 2000 census, Gary has a total population of 102,746, Hammond 83,048, and East Chicago 32,414. Crown Point has a total population of only 19,806. Crown Point is located in the center of Lake County, approximately 25 miles from East Chicago, 18 miles from Hammond, and 16 miles from Gary.

13. Gary and Hammond are the fifth and sixth largest cities in Indiana respectively. If they have no early voting locations, they would be the largest cities in Indiana without early voting.

14. Of Lake County's 122,723 African-American residents, 110,137, or almost 90%, live in either Gary, Hammond, or East Chicago. Gary itself is 84% African-American. 39,266 members, or 66%, of Lake County's total 59,128 Latino population live in either Gary, Hammond, or East Chicago. East Chicago is 51% Latino. Crown Point is 95% white, with 1% or 280 African-American residents, and 4% or 793 Latino residents.

15. There is a substantial likelihood that the failure to provide access to early voting to Gary, Hammond, and East Chicago violates Article 2, Section 1 of the Indiana Constitution for the following reasons, among others, alone and in combination: It is unconstitutional to provide

access to early voting to residents of the small community of Crown Point and not provide it to Lake County's major population centers in Gary, Hammond, and East Chicago; there is no reasonable justification for a change in election procedure from the primary election in May 2008 where there was early voting in Gary, Hammond, and East Chicago; and the failure to provide early voting in Gary, Hammond, and East Chicago would create a very significant racial disparity in access to early voting.

16. The equities weigh heavily in favor of a temporary restraining order. Plaintiffs' fundamental right to vote is threatened absent a temporary restraining order, and this injury would be irreparable. On the other side of the scale, there is no injury from allowing early voting to proceed in Gary, Hammond, and East Chicago. Moreover, the public interest weighs heavily in favor of permitting early voting.

17. Because early voting in Crown Point begins on October 6, 2008, but not in Gary, Hammond, and East Chicago, and because Plaintiffs risk irreparable injury to their fundamental right to vote, an emergency exists, the Plaintiffs are without an adequate remedy at law, and injunctive relief should issue compelling the Board of Elections to commence early voting operations in Gary, Hammond, and East Chicago forthwith.

Accordingly, the motion for a temporary restraining order is GRANTED. It is hereby ORDERED as follows:

1. Defendant Lake County Board of Elections and Registration is hereby ordered to establish early voting sites in the cities of Gary, Hammond, and East Chicago, and to commence their operation forthwith.

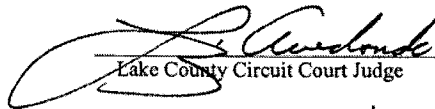
2. Bond for issuance of this temporary restraining order is set in the penal sum of

\$ 100.00.

3. A hearing on the Plaintiffs' Motion for Preliminary Injunction is set for the 14 day of

Oct., at 9:AM o'clock, local time.

Dated: October 6, 2008


Lake County Circuit Court Judge

Order issued at ___ o'clock on October 6, 2008

11:19 A.M.