

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

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

Plaintiffs, )

v. )

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

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

Defendants, )

LINDA PETERSON, ROOSEVELT )  
PHILLIPS, MARY AARON, SERVICE )  
EMPLOYEES INTERNATIONAL )  
UNION, and INDIANA STATE )  
CONFERENCE OF NATIONAL )  
ASSOCIATION FOR THE )  
ADVANCEMENT OF COLORED )  
PEOPLE BRANCHES, )

Intervenor-Defendants. )

**PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS'**  
**MOTION TO REMAND**

Plaintiffs John B. Curley, as Chairman of the Lake County, Indiana Republican Central Committee, and as a registered voter, and Jim B. Brown as a member of the Lake County Board of Elections, and as a registered voter (collectively "Plaintiffs"), through their counsel,

respectfully submit this Opposition to Intervenor-Defendants' Motion to Remand ("Mot. to Remand"). Plaintiffs maintain that Intervenor-Defendants' Motion to Remand should be denied because Plaintiffs have standing under Article III of the U.S. Constitution and this matter was properly removed pursuant to 28 U.S.C. § 1443(2). Plaintiffs have a cognizable, fundamental voting right that, absent this Court's review, will be subjected to vote dilution as a direct result of Defendants' illegal conduct. Moreover, Defendants have raised a colorable claim that their refusal to enforce Indiana state law is because it is inconsistent with federal law. Accordingly, this Court should deny the Intervenor's Motion to Remand.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **BACKGROUND**

On September 23, 2008 the Lake County Board of Elections and Registration ("Board of Elections" or "Board") voted on a proposed resolution to open satellite offices for absentee voting pursuant to Ind. Code § 3-11-10-26.3 in the cities of Gary, Hammond, and East Chicago. The vote was three (3) in favor and two (2) opposed. Ind. Code § 3-11-10-26.3(a) requires such a resolution to be adopted unanimously by the entire membership of the Board in order to have effect. Thus, the resolution failed. Although the resolution failed, the Board's administrative staff and the Lake County Circuit Clerk took steps to implement the establishment of satellite offices for the purpose of allowing absentee voting in person in the Superior Court Clerk's offices in Gary, Hammond, and East Chicago.

As a result, on October 2, 2008, Plaintiffs commenced an action against the Lake County Board of Elections and Registration and the Honorable Thomas Philpot, not individually but as Lake County Clerk (collectively "Defendants") in the Superior Court of Lake County. Plaintiffs sought a temporary restraining order and permanent injunction enjoining Defendants from establishing satellite voting offices without a unanimous vote of the Board. On October 3,

2008, Defendants removed this case to the United States District Court for the Northern District of Indiana pursuant to 28 U.S.C. § 1443(2). This Court conducted a hearing that same day during which the parties agreed that the Board would not open satellite offices at least until October 10, 2008, allowing the parties time to prepare for a hearing on the motion for a temporary restraining order. During the course of the hearing, Plaintiffs orally moved to remand the case based on lack of jurisdiction. Plaintiffs, however, subsequently withdrew their objections to this Court's jurisdiction. On October 8, 2008, this Court granted the motion to intervene of Linda Petersen, Roosevelt Phillips, Mary Aaron, Service Employees International Union, and Indiana State Conference of the National Association for the Advancement of Colored People Branches ("Intervenors"). On the same day, Intervenors filed this instant motion to remand.

## **ARGUMENT**

### **I. PLAINTIFFS HAVE ARTICLE III STANDING.**

Intervenors maintain this Court lacks jurisdiction over this case because Plaintiffs allegedly lack constitutional standing to seek injunctive relief. Specifically, Intervenors contend that Plaintiffs' claim of vote dilution is insufficient to satisfy the injury prong of Article III. For the reasons set forth below, Plaintiffs have clearly set forth the requisite constitutional injury, thereby conferring this Court with jurisdiction over the instant matter.

The Supreme Court has recognized that to satisfy Article III's standing requirements, a plaintiff must show, *inter alia*, "injury in fact," which is further defined as being "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Allen v. Wright*, 468 U.S. 737, 756 (1984). Within the context of voter's rights cases, the Court has further explained that voters generally have standing under Article III to attack the unconstitutional application of state law. *See Baker v. Carr*, 369 U.S. 186, 204-08 (1962). The Supreme Court has also recognized that "a concrete injury to fundamental voting rights" can satisfy the injury in fact requirement for standing. *Schlesinger v. Reservists Committee to Stop*

*the War*, 418 U.S. 208, 223 n.13 (1974). Plaintiffs here have established a cognizable, fundamental voting right that, absent this Court's review, will be subjected to vote dilution as a direct result of Intervenor's illegal conduct.

Intervenor's aver that Plaintiffs' claim of vote dilution, standing alone, is not sufficient to survive an Article III standing analysis. To that point, Intervenor's argue that "[s]ome injury must flow from the dilution," and even offer examples. Mot. to Remand at 3 (suggesting evidence indicating a dilution of political power among a racial or ethnic minority or evidence that dilution would lead to a lost Congressional representative would be sufficient to establish injury under Article III). Intervenor's fail to recognize, however, that where plaintiffs assert "a plain, direct and adequate interest in maintaining the effectiveness of their votes," they have established standing under Article III. *Baker*, 369 U.S. at 208 (citation omitted). Intervenor's in this case have specifically stated that their valid, registered votes will be diluted in Lake County, Indiana, in the 2008 General Election. Plaintiffs have also made clear that their injury is the dilution of their properly-cast votes by votes submitted in an improper forum established for partisan gain and under unlawful means. Accordingly, they have alleged injury sufficient to establish standing in federal court because they have presented a "discrete factual context" within which "concrete injury" will occur.

This Court would not be the first in this State to exercise federal jurisdiction over a voter's rights case where the actions of the local government were in violation of state law. See *Hawkins v. Wayne Transp. Bd. of Marion Cty.*, 183 F. Supp. 2d 1099 (S.D. Ind. 2002). In *Hawkins*, votes were improperly cast in at least four different precincts, allegedly leading to the plaintiff's subsequent loss in the election. *Id.* at 1103-04. The plaintiff claimed standing because the votes cast in the improper precincts diluted the weight of his vote. *Id.* at 1103. The court agreed, noting that the plaintiff "had a concrete, actual, and imminent right" to have all properly cast votes given equal weight. *Id.* Similarly, Plaintiffs here seek only to protect the value of their valid, registered votes against those votes sought to be cast in satellite offices within Lake County that have not been approved by the Board in accordance with state law.

Intervenors also argue that Plaintiffs' votes will not be diluted because "valid, registered voters will be able to vote early," as long as these voters satisfy all the same registration requirements they would face on election day. Mot. to Remand at 4. They suggest that "plaintiffs' political power will not be weakened in any way, nor will the one-person, one-vote principle be contravened" as long as registered voters meet all the requirements to vote. *Id.* Intervenors' arguments miss the point entirely. The question is not whether the voters themselves are properly registered to cast a ballot under state law. Rather, the issue is whether the actual venue wherein that vote is cast is proper under state law. State law and election procedures make clear that any vote cast in a satellite office not unanimously approved by the Board pursuant to Ind. Code § 3-11-10-26.3(b) is invalid and will not be counted in the General Election. To allow such votes to be counted would ultimately result in the illegal dilution of otherwise valid votes. This dilution is sufficient to satisfy the injury requirement for Article III standing.

Accordingly, Plaintiffs have established that they have Article III standing to pursue this action in federal court.

**II. REMOVAL WAS PROPER UNDER 28 U.S.C. § 1443(2) BECAUSE A COLORABLE CONFLICT BETWEEN STATE AND FEDERAL LAW IS PRESENTED IN THIS CASE.**

Defendants sought removal pursuant to 28 U.S.C. § 1443(2). The statute 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.

28 U.S.C. § 1443(2). Courts interpreting § 1443(2) have held that it may be invoked when the defendant demonstrates that a colorable conflict between state and federal law leads to their refusal to follow state law because of a good faith belief that to do so would violate federal law.

*See Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995); *see also Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989); *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980).

In this case, the Board failed to enforce Indiana statutes, Ind. Code § 3-11-10-26.3(b) and § 3-11-10-26(a)(1) and (2), which require a unanimous vote of the entire Board to establish additional satellite offices. The Indiana General Assembly required one early voting location be open. That site would be the county seat which is Crown Point. Defendants completely disregard that Crown Point is the county seat and claim that because Crown Point is predominately Caucasian there had to be more satellite offices in predominantly African-American and Hispanic communities or rights of minority groups would be adversely impacted in violation of 42 U.S.C. § 1973 (a) and (b). Notice of Removal at 8.

Intervenors contend that this case is not removable under § 1443(2) because the refusal clause is unavailable when a defendant's action, rather than inaction, is being challenged. *See Mot. to Remand* at 6. The Intervenors point solely to Defendants actions in preparing to open satellite sites in Gary, East Chicago and Hammond. In doing so, the Intervenors ignore the critical issue in this analysis: Defendants refused to follow the requirements of Indiana state law. Defendants did not follow the statutorily mandated procedure for opening more offices than the one required by the Indiana legislature. As such, the cases that the Intervenors rely upon are inapposite. The refusal clause is applicable in this context.

Moreover, Plaintiffs do not concede that the first clause of § 1443(2) is inapplicable. *See Mot. to Remand* at 6. While it is true that courts have held that the first clause of § 1443(2) is applicable to federal officers and agents, *see Mot. to Remand* at 6, courts have also held that school boards acting pursuant to specific desegregation directives of federal court orders are acting under "color of authority." *Burns v. Bd of Sch. Com'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 311 (S.D. Ind. 1969). And, in *O'Keefe v. New York City Bd. of Elections*, 246 F. Supp 978, 979 (D.C.N.Y. 1965), the court held that removal was proper under the first clause because an action was brought against an election board, "an official body, for acting

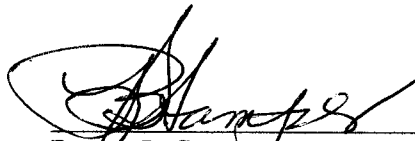
under color of authority derived from § 4(e) of the Voting Rights Act, which is a law providing for equal rights.”

In sum, in their Notice of Removal, Defendants allege at least a colorable claim that they refused to act based on the belief that opening an early voting site solely in Crown Point was inconsistent with the federal Voting Rights Act. *Bridgeport Education Association v. Zinner*, 415 F. Supp. 715, 722-23 (D.C. Conn. 1976) (“The moving defendants have alleged at least a colorable claim that their refusal to act was on the ground that following the civil service requirements would be inconsistent with federal law. The plaintiffs do not dispute that this was the removing defendants good faith belief. That satisfies the terms of the statute.”) Therefore, removal is valid.

#### CONCLUSION

For the reasons set forth herein, this Court should deny the Intervenor’s Motion to Remand.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of October, 2008, a copy of the foregoing  
“Plaintiffs’ Opposition to Intervenor-Defendants’ Motion to Remand was filed electronically.  
Notice of this filing will be sent to the following persons by operation of the Court’s electronic  
filing system. Parties may access this filing through the Court’s system.

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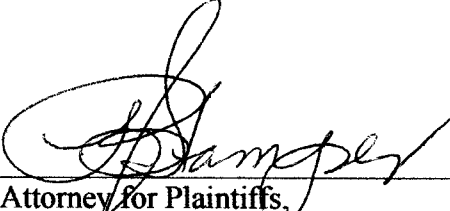
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