

**UNITED STATES DISTRICT COURT
FOR THE 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,
and the Honorable Thomas Philpot, not
individually but as Lake County Clerk,

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.

**INTERVENOR-DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

INTRODUCTION

This is a case without an injured plaintiff. Indeed, the *only* injury here is to Intervenor-Defendants' and countless others' ability to participate fully in the electoral process. To grant an emergency injunction would be to allow mere petty partisan politics to outweigh the fundamental right to vote. The federal courts – historically a place where voters' rights have been vindicated – should not now become an obstacle to working people voting.

Intervenor-Defendants previously demonstrated that the Court should deny a temporary restraining order and preliminary injunction to prohibit Defendant Lake County Board of Elections from continuing the same early voting in Gary, Hammond, and East Chicago for the upcoming 2008 general election as was provided for the primary election in May 2008. Mem. in Opp. (Docket No. 10). The merits of Plaintiffs' state statutory claims – which we do not address – are irrelevant. Even were Plaintiffs correct that 10 days notice is necessary and was not given, 10 days will have passed between the time Plaintiffs filed their Complaint on October 2, 2008, and the earliest date early voting could occur after the October 10, 2008 hearing. Thus, any notice requirement is moot. And, even were Plaintiffs correct that a unanimous vote is necessary to open early voting locations, that cannot trump the Indiana Constitution and the federal Voting Rights Act. We have already fully briefed the merits of these defenses. Mem. in Opp. at 9-19.

This supplemental brief first expands on the balance of harms analysis from our prior brief. Mem. in Opp. at 19-21. Then, the brief turns to jurisdictional reasons why the Court should not enter a TRO. Finally, the brief explains that not only should the Court deny Plaintiffs' motion, but vacate its order regarding the state court proceedings.

ARGUMENT

I. INTERVENOR-DEFENDANTS' IRREPARABLE INJURY GREATLY OUTWEIGHS PLAINTIFFS' NON-EXISTENT HARM

Intervenor-Defendants previously explained the significant obstacles to numerous voters making it to the polls on election day. Mem. in Opp. at 7-8, 19. It bears emphasis that, as of October 6, 2008, early voting has started in Crown Point. Thus, voters in Gary, Hammond, and

East Chicago have already suffered irreparable injury to their fundamental right to vote. Every day that passes compounds the injury.

On the other side of the balance of harms, Plaintiffs have no injury whatsoever. There can be no claim that injury results merely because valid, registered voters will be able to vote early. Those voters must meet the *same requirements* they would face on election day. *See* Ind. Code §§3-11-4-5.1, 3-11-10-26(b). So, there can be no claim of fraud or “vote dilution.” (This issue is discussed in more depth in prior briefs. *See* Mem. in Opp. at 20; Mem. in Support of Motion to Remand (Docket No. 23) at 3-4.)

For a similar reason, Plaintiffs’ wholly speculative argument that votes could be invalidated at a later date if an injunction does not issue makes no sense. Given that early voters must meet every requirement to vote that would be applicable on election day, there would be no basis to disallow the votes. Moreover, Plaintiffs’ argument runs counter to established Indiana law, which provides that election laws should be liberally construed to, among other things, prevent disenfranchisement. *Brown v. Grzeskowiak*, 101 N.E. 2d 639, 646 (Ind. 1951) (“In the absence of fraud, election statutes generally will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement, and to uphold the will of the electorate.”)

Nor can there be any injury from the allegation that Plaintiffs did not receive 10 days notice of the continuation of early voting. Not only have Plaintiffs never explained the basis for any such injury, but even under Plaintiffs’ argument the 10 days will have passed by Monday.

In sum, regardless of the Court’s ruling on the likelihood of success, the equities do not permit issuing an injunction.

II. NO INJUNCTION SHOULD ISSUE BECAUSE THE COURT SHOULD REMAND THIS CASE OR ABSTAIN

Intervenor-Defendants have separately briefed why this Court lacks jurisdiction because there is no Article III standing and the removal was improper. Mem. in Support of Motion to Remand (Docket No. 23). We incorporate that discussion by reference as a further reason not to grant an injunction.

In addition, this Court should abstain in light of the action pending in state court – *United Steelworkers District 7 v. Lake County Board of Elections and Registration*, Lake County Superior Court Cause No. 45C010810PL00256.

“[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). Principles of comity direct that “abstention [is] necessary . . . when the federal action raises difficult questions of state law bearing on important matters of state policy.” *Grove v. Emison*, 507 U.S. 25, 32 (1993). As such, abstention is proper when the federal court determines, “based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action, that the State’s interests are paramount and that a dispute would best be adjudicated in a state forum.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (quotation marks and citations omitted).¹

¹ As discussed in Intervenor-Defendants’ motion to remand, this Court lacks jurisdiction. The Court can decline to rule on the jurisdictional question, however, and simply exercise its discretion to abstain from hearing this case. *Ruhrgas AG*, 526 U.S. at 585 (“[D]istrict courts do not overstep Article III limits when they . . . abstain . . . without deciding whether the parties present a case or controversy.”).

Here, the federal interest in retaining jurisdiction is minimal, if it exists at all. Even if this Court has jurisdiction, it has no particular interest in the state statutory questions Plaintiffs present or the defense presented by Intervenor-Defendants under the state Constitution. In contrast, Indiana has an overwhelming interest in adjudicating significant questions of fundamental constitutional rights under its Constitution. See *Quackenbush*, 517 U.S. at 728 (states' interests include "maintaining uniformity in the treatment of an essentially local problem and retaining local control over difficult questions of state law bearing on policy problems of substantial public import") (internal quotation marks and citation omitted). It cannot seriously be disputed that "the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Id.*; see also *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 594 (1968) (reversing lower court refusal to stay federal case pending state courts' resolution of significant question under state constitutional law); *E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage County*, 821 F.2d 433, 436 (7th Cir. 1987) ("Abstention may also be appropriate where the case presents a difficult, undecided question of state law involving policy problems of substantial public import whose importance transcends the result in the case then at bar.").

Abstention is also appropriate because there is a pending parallel state action. Where, as here, "[n]ot only would duplicative litigation waste judicial resources, but it also would create an undue risk of conflicting final judgments on the merits," the proper course is for this Court to abstain from hearing this case. *Tyrer v. City of South Beloit*, 456 F.3d 744, 756-57 (7th Cir. 2006).

To determine whether abstention because of a parallel state proceeding is appropriate, the district court first considers whether the proceedings are parallel. *Clark v. Lacy*, 376 F.3d 682,

685 (7th Cir. 2004). Here, the two proceedings both question the duty and authority of the Lake County Board of Elections to open early voting sites in Gary, Hammond, and East Chicago. As such, they will address largely the same issues and “will be resolved largely by reference to the same evidence.” *Tyrer*, 456 F.3d at 752-53. They are sufficiently parallel to make the simultaneous conduct of both proceedings a waste of judicial resources.

Second, the district court considers ten factors that weigh “the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.” *Tyrer*, 456 F.3d at 754-55. The ten factors are:

- 1) whether the state has assumed jurisdiction over property;
- 2) the inconvenience of the federal forum;
- 3) the desirability of avoiding piecemeal litigation;
- 4) the order in which jurisdiction was obtained by the concurrent forums;
- 5) the source of governing law, state or federal;
- 6) the adequacy of state-court action to protect the federal plaintiff’s rights;
- 7) the relative progress of state and federal proceedings;
- 8) the presence or absence of concurrent jurisdiction;
- 9) the availability of removal; and
- 10) the vexatious or contrived nature of the federal claim.

Id. at 754. Certain factors have no relevance here (for example, factors 1 and 10) and are thus neutral. The federal forum is equally convenient as the state forum, so that factor is neutral as well. One factor may weigh slightly against abstention: Although this Court obtained jurisdiction – if it properly has jurisdiction, which Intervenor-Defendants dispute – before the state court, the difference was only one day. The factor thus leans only weakly, if at all, against abstention.

But the balance of the factors weigh overwhelmingly in favor of abstention. Most significantly, the governing law is primarily state, strongly counseling, as discussed above, in favor of abstention. *See Clark*, 376 F.3d at 687 (“A state court’s expertise in applying its own law favors [abstention].”) (internal quotation marks omitted). In addition, avoiding piecemeal

litigation counsels in favor of abstention.² And, before this Court vacated the state court TRO, the state court proceedings were farther along than the federal proceedings, as the state court had already made a provisional ruling. Finally, concurrent jurisdiction exists and the state court proceedings are not removable, as there is no federal issue. *See Clark*, 376 F.3d at 688 (“Not only does the availability of concurrent jurisdiction weigh in favor of a stay, so does the inability to remove the [state court] action to federal court.”).

In sum, principles of comity and of efficient judicial administration direct that abstention is proper in this case.

III. THIS COURT SHOULD VACATE ITS ORDER WITH RESPECT TO THE STATE COURT PROCEEDINGS

In addition, this Court should vacate its order of October 7, 2008, vacating the Lake County Circuit Court’s temporary restraining order and staying the proceedings in that case.

As an initial matter, this Court has no appellate authority over the state court, and, as such, can no more vacate an order issued by the state court than the state court could vacate an order issued by this Court. “Among federal courts . . . Congress ha[s] empowered only [the United States Supreme Court] to exercise appellate authority ‘to reverse or modify’ a state-court judgment.” *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005) (quoting *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)); *see also Taylor v. Federal Nat. Mortg. Ass’n*, 374 F.3d 529, 533 (7th Cir. 2004) (district court lacks jurisdiction to grant “a request to vacate the state court’s judgment”).

² Although piecemeal litigation has been avoided for now by this Court’s order staying the state court proceeding, this order was plainly an extraordinary (indeed, an improper) remedy to the problem of piecemeal litigation or concerns about inconsistent results. The proper approach is for *this* Court to abstain, not to direct the state court to abstain.

Nor did this Court have authority to direct the Lake County Circuit Court – part of the independent judiciary of the state of Indiana and *not* a party to the action before this Court – to stay its proceedings. The lower federal courts “cannot . . . use our power to issue mandamus to a state judicial officer to control or interfere with state court litigation.” *In re Campbell*, 264 F.3d 730, 730 (7th Cir. 2001).³ Although some circuits have upheld orders binding nonparty state court judges, these have been orders of very limited scope. For example, the Third Circuit upheld a district court’s order directing a state court judge to confer with federal prosecutors about whether a defendant in the state court could obtain production of materials from a federal grand jury investigation of one of the witnesses in his trial. *In re Grand Jury Proceedings*, 654 F.2d 268 (3d Cir. 1981). The Third Circuit based its holding in part, however, on the notion that the order did not “unduly intrude[] into the sensitive area of federal-state relations.” *Id.* at 277-78. The court distinguished the order at issue from ones that would not be authorized under the All Writs Act: “A federal court . . . ordinarily may not issue a writ of mandamus to compel a state court to exercise a jurisdiction entrusted to it, nor may a federal court (with the exception of the Supreme Court) review a decision of a state tribunal through a writ of certiorari.” *Id.* at 278. This very principle is embodied in the Anti-Injunction Act, 28 U.S.C. §2283.

Nor does the “necessary in aid of jurisdiction” exception to the Anti-Injunction Act and the All Writs Act apply here. “Because of the [Anti-Injunction] Act’s constitutional foundation,

³ The Seventh Circuit hypothesized that an exception to this rule might conceivably exist “in some case not yet imagined,” where “the federal court action could not proceed without some action by a state court.” *Campbell*, 264 F.3d at 732. This certainly is not such a case. As discussed above, this Court could and should abstain pending the outcome of the state case. This Court could then – if it determined that it had jurisdiction over the matter – proceed to resolve any remaining issues not adjudicated in the state proceeding.

its three exceptions are to be applied narrowly, and “[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.” *Zurich Am. Ins. Co. v. Superior Court*, 326 F.3d 816, 824 (7th Cir. 2003) (quoting *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297 (1970)).

The “necessary in aid of jurisdiction” exception does not trump “the general rule . . . that parallel in personam proceedings should be allowed to continue concurrently”; accordingly, the exception “[h]istorically . . . applied only to in rem rather than in personam proceedings.” *Zurich*, 326 F.3d at 825; *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality opinion) (“The traditional notion is that in personam actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to §2283 was intended to alter this balance. We have never viewed parallel in personam actions as interfering with the jurisdiction of either court.”). This general principle still applies. “If the ordinary rule that parallel proceedings should be allowed to continue can be overcome in appropriate circumstances by reasons of judicial economy, allowing the district court to abstain . . . , it is hard to see why concurrent state proceedings could be seen as such a serious threat to the district court’s authority that they must be halted by an injunction.” *Zurich*, 326 F.3d at 827 (citation omitted); *see also Atlantic Coast Line*, 398 U.S. at 295 (“[T]he 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.”).

Moreover, even were this case within an exception to §2283, that “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.’ A litigant must still show equitable entitlement to an injunction.” *Ramsden v. AgriBank, FCB*, 214 F.3d 865, 869 (7th Cir. 2000) (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)). As discussed above, Plaintiffs have shown no harm they will suffer if the state court proceedings are not stayed. They are free to move to intervene in the state court proceeding and then appeal the state court’s TRO through the proper appellate channels. *See Zurich*, 326 F.3d at 825 (“Instead of an injunction by the federal district court, the aggrieved party’s recourse is by appeal through the state court system and, ultimately, to the Supreme Court.”).

In short: no extraordinary circumstances justified this Court’s order, nor was the order necessary to protect this Court’s jurisdiction. This Court should vacate the order and permit the state court action to proceed.

CONCLUSION

For the foregoing reasons, the Court should deny the TRO, vacate its October 7, 2008 Order, and either abstain or remand this case to state court.

Dated: October 9, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2008, a copy of the foregoing Memorandum in Support of Motion To Remand 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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