

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

IN THE ST. JOSEPH SUPERIOR COURT
CAUSE NO. 71D05-2210-PL-000231

THOMAS DIXON, in his capacity as the)
Republican Member of the St. Joseph County)
Election Board,)

INDIANA REPUBLICAN STATE COMMITTEE, INC.,)
and)
ST. JOSEPH COUNTY REPUBLICAN PARTY,)

Plaintiffs,)

v.)

RITA GLENN, in her official capacity as Clerk of)
the St. Joseph County Circuit Court and)
Secretary of the St. Joseph County Election)
Board, and)

CHARLES LEONE, in his official capacity as the)
Chair of the St. Joseph County Election Board)
(Democrat),)

Defendants.)

**DEFENDANTS' REPLY
TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS**

Defendants **Rita Glenn** and **Charles Leone**, by counsel, submit their Reply to the
"Plaintiffs' Response to Motion to Dismiss With Prejudice" and show the Court that:

Introduction

As an initial matter, it is necessary to correct Plaintiffs' mis-characterization of
Defendants' Motion to Dismiss. Plaintiffs' response is styled as a "Response to Motion to
Dismiss With Prejudice". Defendants did not move to dismiss Plaintiffs' case *with prejudice*.
The Defendants' motion to dismiss is captioned as "Defendants' Motion to Dismiss". The basis

for Defendants' motion to dismiss is that Plaintiffs' case is moot. Defendants' Motion to Dismiss states that Defendants:

“move to dismiss this action for the reason that this case is moot. There is no controversy before the court to be decided and the case should be dismissed because it is moot.”

Likewise, Defendants' Objection to Plaintiffs' Motion to Dismiss states that:

“Defendants agree that this case should be dismissed, but dismissal should be for the reason that this case is moot. Defendants have filed contemporaneously a Motion to Dismiss the case for becoming moot.”

Nowhere in their motion to dismiss did Defendants Rita Glenn and Charles Leone ask for the Plaintiffs' case to be dismissed “with prejudice”.

Argument

1. **Plaintiffs' case is moot and should be dismissed for that reason.**

Plaintiffs' case should be dismissed because it is moot. A case is deemed moot when no effective relief can be rendered to the parties before the court. *Matter of Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991). A case will be dismissed as moot when the controversy at issue has been ended or settled, or somehow disposed of so as to render it unnecessary to decide the question involved. *T.W. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 121 N.E.3d 1039, 1042 (Ind. 2019). *See, e.g., McDaniel v. McDaniel*, 150 N.E.3d 282, 292 (Ind. Ct. App. 2020) (declining to address the merits of a moot claim).

Plaintiffs brought this case for declaratory and injunctive relief to enjoin the Defendants Rita Glenn and Charles Leone, as members of the St. Joseph County Election Board, from “adopting and enforcing” the Resolution approved by the St. Joseph County Election Board at its October 7, 2022 meeting to delegate certain election functions to the County Clerk. Rita Glenn

and Michelle Engel (acting chair of the Election Board as Charles Leone was absent) voted in favor of the Resolution. Plaintiff Thomas Dixon voted against it. Plaintiffs' complaint arises from the adoption of the Resolution and is directed to preventing enforcement of the October 7, 2022 Resolution. There no longer is any pending dispute between the parties as the Resolution, by its terms, was effective only for the "2022 election cycle". The 2022 election now is over. Plaintiffs did not obtain any relief on their complaint before the election. There is nothing left to litigate concerning the Resolution as it no longer is effective.

2. Plaintiffs' claim for declaratory relief is moot.

In their Response to Defendants' Motion to Dismiss, Plaintiffs agree that their claim for injunctive relief is moot. (Plaintiffs' Response to Defendants' Motion to Dismiss, p. 2). But, Plaintiffs maintain that their "claim for declaratory relief, ... is not". (*Id.*). Plaintiffs' argument is wrong as a matter of law. A cardinal principle of the judicial function is that courts should not issue advisory opinions but instead should decide cases only on the specific facts of the particular case and not on hypothetical situations. *Snyder v. King*, 958 N.E.2d 764, 786 (Ind. 2011).

The Resolution which gave rise to Plaintiff's claims has expired, the 2022 election is over and Defendant Rita Glenn is no longer the county clerk as of December 31, 2022. A declaratory judgment cannot be issued in a moot case and cannot be used to issue advisory opinions. *City of Hammond v. Board of Zoning Appeals*, 152 Ind.App. 480, 284 N.E.2d 119, 126 (1972); *Saylor v. State*, 81 N.E.3d 228, 232 (Ind. Ct. App. 2017); *Taylor v. St. Vincent Salem Hosp., Inc.*, 180 N.E.3d 278, 289 (Ind. Ct. App. 2021) (declining to grant declaratory relief for mootness). There no longer is a case or controversy to litigate between the parties to this lawsuit. Plaintiffs' claims are moot and the Plaintiffs' claim for declaratory relief must be denied.

3. **Plaintiffs' complaint does not raise a question of great public importance which is likely to reoccur.**

Plaintiffs contend that the “originating claims” in this case stem from an important question affecting the public interest:

“... can an election board, by a contested vote from one political party, effectively shut out that political party¹ from the statutorily delegated duties of verifying absentee ballot signatures and maintaining key access to absentee ballots, both of which require politically unanimous participation?”

Plaintiffs' Response to Defendants' Motion to Dismiss, pp. 1-2.

Plaintiffs want this case dismissed without prejudice so that the dismissal is not on the merits and will not have a *res adjudicata* effect to preclude relitigation of this issue. Plaintiffs' Response to Defendants' Motion to Dismiss, p. 3. But, Plaintiffs' complaint does not raise a question of great public importance which is likely to reoccur that requires the court to reach a decision on the merits despite the mootness of the case. *DeSalle v. Gentry*, 818 N.E.2d 40, 49 (Ind. Ct. App. 2004) (Indiana courts may adjudicate a moot claim on the merits “upon the existence of three elements: the issue concerns a question of great public importance which is likely to recur in a context which will continue to evade review.”); *Yergy's State Rd. BBQ, LLC v. Wells Cnty. Health Dep't*, 189 N.E.3d 189, 193 (Ind. Ct. App. 2022), reh'g denied (declining to apply the public interest exception to executive orders that were no longer effective). There is nothing before the court that is likely to reoccur and requires a ruling on the merits despite the mootness of this case.

¹ This may be a typographical error. The context suggests that the reference may be intended to be to “the other political party”.

As the result of the 2022 election, the composition of the St. Joseph County Election Board will change as the elected county clerk is a Republican. The Republican County Clerk and Plaintiff Thomas Dixon, the Republican Party appointee, now will be the majority members of the County Election Board. There is no reason to dismiss this case “without prejudice” to preserve Plaintiffs claims that they were “shut out” from verifying absentee ballot signatures and having a key to the absentee ballot storage room by a majority vote of the other political party as these claims are unlikely to reoccur while the Republican Party representatives constitute the majority of the County Election Board.

In this regard, is important to point out that not only is Plaintiffs’ claim that an election board “by a contested vote shut out one political party from absentee ballot access and signature review” unlikely to reoccur, it did not occur in this case. Plaintiffs’ contention that the Resolution deprived Plaintiffs of the bi-partisan functions of verifying absentee ballot signatures and having a key for access to the absentee ballot storage room is lacking in candor. The responsibility for evaluating absentee ballot signatures was not delegated to the Clerk by the Resolution. Rita Glenn Affidavit, ¶ 16, ¶ 18. The Election Board remained responsible for this election function. Thomas Dixon participated in every decision of the Election Board to approve absentee ballot signatures, which were all unanimous decisions as required by statute. Plaintiff Thomas Dixon also had possession of and was in control of a key to the storage room where the absentee ballots are stored and he authorized his designee Trisha Carrico to use his key to unlock and lock the storage room where the absentee ballots were stored before the election. Plaintiff Thomas Dixon was not “shut out” of any bi-partisan election function as the result of the Election Board’s adoption of the Resolution.

Plaintiffs further argue that this case should not be dismissed with prejudice (even though Defendants are not requesting a dismissal with prejudice) because to do so would be a “windfall” to Defendants by disposing on the merits the “issue of whether Defendant Glenn acted appropriately in accessing absentee ballots”. Plaintiffs’ Response to Defendants’ Motion to Dismiss, p. 5. This lawsuit has nothing to do with political campaign claims concerning Rita Glenn’s access to absentee ballots in her capacity as County Clerk. Those claims are not at issue in this case. There is no legal reason for the Court to dismiss the case without prejudice to preserve an issue that is not an issue in this case. And, dismissal of this lawsuit as moot does not address the merits of those campaign claims.

4. Plaintiffs complaint does not require the Court to address constitutional issues.

Plaintiffs invoke the United States Constitution, the Indiana Constitution, and even the “independent state legislature” theory to support their argument that the Resolution delegates certain powers of the individual members of the election board to the court clerk. Plaintiffs’ Reply to Defendants’ Motion to Deny Injunctive Relief, filed October 14, 2022, pp. 2 - 4. Plaintiffs’ hyperbole notwithstanding, the simple resolution of this case turns on the plain reading of the applicable statutes, not a constitutional analysis.

It is a cardinal principle of the judicial function that a court will not pass upon a constitutional question unless it is “absolutely necessary to do so”. *Snyder v. King*, 958 N.E.2d 764, 786 (Ind. 2011). The Indiana Supreme Court has repeatedly held that courts should not decide constitutional questions when the case under consideration can be concluded upon other grounds. *Curley v. Lake Cnty. Bd. of Elections & Registration*, 896 N.E.2d 24, 27 (Ind. Ct. App. 2008), citing *State v. Pearson Constr. Co.*, 236 Ind. 602, 141 N.E.2d 448, 450 (Ind.1957);

Bureau of Motor Vehicles v. Scott, 497 N.E.2d 557, 559 (Ind.1986) (“It is long established that a constitutional question unnecessary to a determination of the merits should not be decided.”); *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1241 (Ind.1996) (“Both state and federal courts traditionally foreswear deciding a constitutional question unless no non-constitutional grounds present themselves for resolving the case under consideration.”).

There is no reason for the Court to dismiss this case without prejudice to preserve a constitutional issue for Plaintiffs to litigate in a subsequent case. If a court were to address the merits of this case, this case can be decided by applying rules for statutory construction to determine that two members of the County Election Board had the authority to adopt the October 7, 2022 Resolution to delegate certain functions of the Election Board to the County Clerk.

An election board is specifically authorized by statute to authorize the circuit court clerk to exercise powers and to perform duties imposed upon the election board by Ind. Code § 3-6-5-19:

“A circuit court clerk, with the approval of the county election board, shall exercise the powers and perform the duties imposed upon the board whenever the facilities of the clerk's office make it more reasonable and efficient for the clerk to do so. Any action taken by the clerk with the approval of the board is considered an action of the board.”

Plaintiffs’ contend that more than a “simple majority vote” – a unanimous vote – is required for an election board vote to approve the delegation of powers, but Plaintiffs cite no applicable law in support this proposition. The statutes governing county election boards do not generally require a unanimous vote for their decisions. There may be some specific sections of the election board statutes that require an unanimous vote. (For example, the county election board must unanimously determine that the signature on an absentee ballot envelope is genuine, as provided

by Ind. Code § 3-11.5-4-5). *See, e.g., Curley v. Lake County Board of Elections & Registration*, 896 N.E.2d 24, 37 (Ind. Ct. App. 2008) (holding that while a unanimous vote of election board is required to establish satellite voting sites, only a majority vote is required to authorize absentee voting in the county clerk’s offices.). But, a unanimous vote is not required by Ind. Code § 3-6-5-19 for the Election Board to authorize the county clerk to perform duties of the Election Board.

A guide to the proper reading of this statute is found at Ind. Code § 1-1-4-1(2):

“Sec. 1. The construction of all statutes of this state shall be by the following rules, unless the construction is plainly repugnant to the intent of the legislature or of the context of the statute:

- .
- .
- .

(2) Words importing joint authority to three (3) or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the statute giving authority.

This statutory rule of construction is consistent with the general rule at common law that the vote of a majority of a quorum is all that is necessary to perform an act. *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N.E. 72, 74 (1889); *Bd. of Sch. Trustees of S. Vermillion Sch. Corp. v. Benetti*, 492 N.E.2d 1098, 1102 (Ind. Ct. App. 1986). The County Election Board in this respect is unlike the Indiana Election Commission, which the legislature intended to act only when its co-directors from both major political parties agree unanimously. *See Sammons v. Conrad*, 740 N.E.2d 114, 118 (Ind. 2000). Under the applicable statutes, the Resolution at issue was properly adopted by a majority of two members voting in favor out of the three members present. No constitutional issue is presented by Plaintiff’s complaint that must be preserved for future litigation.

5. The Court should require Plaintiffs to pay the legal fees incurred for Defendants as a condition for the voluntary dismissal of this action.

Plaintiffs moved to dismiss this case without prejudice. Defendants have filed a separate Motion for Attorney Fees that more fully briefs this issue. As set forth in Defendants' Motion for Attorney Fees, if Plaintiffs desire to dismiss this case without prejudice, the court should condition the dismissal on Plaintiffs' reimbursing the legal fees incurred in defending the Defendants in this action.

Ind. Trial Rule 41(A)(2) provides that a plaintiff's motion for voluntary dismissal can be granted only "upon order of the court and upon such terms and conditions as the court deems proper". Attorney fees have been incurred for the defense of Defendants Rita Glenn and Charles Leone. The Court should condition Plaintiffs voluntary dismissal on the payment of defendant's attorney fees under T.R. 41(A)(2). *Highland Realty, Inc. v. Indianapolis Airport Authority*, 563 N.E.2d 1271 (Ind. 1990) ("a trial court may properly condition a plaintiff's voluntary dismissal without prejudice on the payment of a defendant's attorney fees under T.R. 41(A)(2)."); *City of Hammond v. Marina Entm't Complex, Inc.*, 681 N.E.2d 1139, 1144 (Ind. Ct. App. 1997) (under T.R. 41(A)(2) the court may include the payment of attorney's fees to assure that a dismissal does not prejudice or unfairly inconvenience the defendant).

6. Defendants' legal fees should be awarded against Plaintiffs for continuing to litigate this case after it became moot.

Having failed to bring their case before a court before the election, it is plainly obvious that Plaintiffs' intend to continue to litigate this case even after the election is over and the case is moot. Plaintiffs' motion seeks to dismiss the case "without prejudice" rather than simply recognize that the case is moot and that the case should be dismissed for that reason. Ind. Code §

IC 34-52-1-1 provides a basis for an award of attorney fees when a party “continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless”. I. C. § IC 34-52-1-1(2).

A plaintiff’s claim may be frivolous, unreasonable, or groundless if the claim is moot. *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 433–34 (2016) (citations omitted). As Plaintiffs have continued to litigate this case after it is moot, the legal fees incurred for Defendants should be awarded against Plaintiffs pursuant to Ind. Code § IC 34-52-1-1(2).

Conclusion

For the foregoing reasons, Defendants Rita Glenn and Charles Leone move the Court to dismiss this action because it is moot and to award Defendants’ legal fees against Plaintiffs.

/s/ James A. Masters

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CERTIFICATE OF SERVICE

The undersigned certifies that service of a true and complete copy of the above and foregoing pleading was made upon the parties herein by the e-filing system and by e-mail to counsel of record shown below on January 9, 2023:

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