

STATE OF INDIANA )  
 )  
 MARSHALL COUNTY )

SS:

IN THE MARSHALL CIRCUIT COURT  
 CAUSE NO. 50C01-2210-PL-000031

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. )

**MOTION TO DENY INJUNCTIVE RELIEF**

Defendants **Rita Glenn** and **Charles Leone**, by counsel, move the Court to deny Plaintiffs' requests for injunctive relief in the form of a Temporary Restraining Order and Preliminary and/or Permanent Injunction on the grounds that Plaintiffs have failed to show that there is any legal error in the decision of the St. Joseph County Election Board to adopt the resolution which is the subject of this action and Plaintiffs have failed to meet their burden of proof for injunctive relief. Defendants submit in support of this motion the Affidavit of Rita Glenn. Defendants move the Court to deny Plaintiffs' request for injunctive relief.

## **Basis for Motion**

### **1. Background.**

Plaintiffs seek injunctive relief, including a temporary restraining order without notice, to enjoin the two Defendants, Rita Glenn and Charles Leone, who are two members of the St. Joseph County Election Board, from “adopting and enforcing” a Resolution of the St. Joseph County Election Board approved at its meeting on October 7, 2022. Charles Leone is the Democratic Party appointee to the St. Joseph County Election Board. Rita Glenn is the St. Joseph County Clerk and an *ex officio* member of the County Election Board. One of the Plaintiffs, Thomas Dixon, is the Republican appointee to the St. Joseph County Election Board.

The Resolution at issue was adopted by a vote of two members in favor, Rita Glenn and Michelle Engel, who was acting as a proxy for Charles Leone and as Temporary Chair of the Election Board. Plaintiff Thomas Dixon voted against the Resolution. Verified Complaint, ¶ 13.

The Resolution authorizes the Circuit Court Clerk to exercise certain powers and perform certain duties imposed upon by statute on the Election Board. The Resolution indicates that the powers and duties delegated to the Clerk concern the storage of absentee ballots and the placing of approved unopened absentee ballots envelopes in carrier envelopes for storage until election day. Rita Glenn states in her Affidavit, “the resolution adopted by the St. Joseph County Election Board that is the subject of this lawsuit allows employees of the Clerk to arrange the ballots by precinct and put the ballots in carrier envelopes for counting on election day as required by law.” Glenn Affidavit, ¶ 20. Sorting the absentee ballots by precinct and placing the approved absentee ballots in the carrier envelopes is the only function of the County Election Board that has been delegated to the Clerk:

“21. The resolution adopted by the St. Joseph County Election Board that is the subject of this lawsuit does not delegate any other function of the County Election Board to the Clerk.”

Glenn Affidavit, ¶ 21.

It has been the practice in St. Joseph County for the more than 30 years for the Clerk to sort the absentee ballots by precinct for delivery to the various precincts on election day before the change to central counting of the absentee ballots on election day. Glenn Affidavit, ¶ 18. The County Election Board does not have enough employees to perform the duty to organize the absentee ballots by precinct: “If this function were not delegated to the Clerk, the two bipartisan members of the County Election Board would have to hire more employees to sort and separate the ballots by precinct or do this job themselves.” Glenn Affidavit, ¶ 16.

The gravamen of Plaintiffs’ Complaint is that “Nothing in Indiana law permits an election board by a simple majority vote to delegate a partisan election board member’s statutorily prescribed duties to the circuit court clerk.” Verified Complaint, ¶ 22. Plaintiff do not support this claim with any legal authority. Plaintiffs’ claim has no basis in the law or in fact.

**2. There is no legal error in the Election Board’s Decision.**

A decision of a county election board may be appealed to a circuit, superior or probate court within thirty (30) days of the decision. Ind. Code § 3-6-5-34. Construing Plaintiffs’ action as an “appeal”, it is subject to the legal standard for review of a decision from an administrative body. A trial court may examine an election board’s decision to determine if it was incorrect as a matter of law. *Clay v. Marrero*, 774 N.E.2d 520, 521 (Ind. Ct. App. 2002). However, the court may neither conduct a trial *de novo* nor substitute its decision for that of the board. *Id.* Unless the decision is illegal, the decision must be upheld. *Id.* On appeal, the appellate court is restricted by

the same considerations. *Id.* The standard for review is an abuse of discretion standard applied in the review of decisions of other county boards, e.g., zoning boards. *Id.*, 774 N.E.2d at 521, n.3. *Price v. Lake County Bd. of Elections & Registration*, 952 N.E.2d 807, 809 (Ind. Ct. App. 2011).

There is no illegality in the St. Joseph County Election Board's decision. 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.”

This statute show that there is no basis in law for Plaintiffs' claim that Indiana law does not permit an election board to delegate an election board member's statutorily prescribed duties to the circuit court clerk.

Nor is there any legal basis for the Plaintiffs' claim that more than a “simple majority vote” is required for an election board vote to approve the delegation of powers. Plaintiffs cite no law in support this proposition. Plaintiffs refer only to Ind. Code § 3-6-5-14.5 as requiring an unanimous resolution. This statute provides that:

“The county election board, by unanimous vote of the entire membership of the board, may adopt a resolution providing that certain duties and responsibilities exercised by the circuit court clerk under this title shall be performed by an employee of the county election board.”

Ind. Code § 3-6-5-14.5.

Plaintiffs mis-apply this statute. By it plain terms, this statute applies only to a resolution to authorize an *employee of the election board* to perform duties *of the clerk*. Ind. Code § 3-6-5-

14.5 has no application here, where the subject Resolution authorizes the clerk to perform duties of the election board. As such, the Resolution at issue does not require a unanimous vote under Ind. Code § 3-6-5-14.5.

The statute governing county election board does not require unanimous votes generally for its decisions. There may be some sections of the election board statutes that require an unanimous vote, but a unanimous vote is not required by Ind. Code § 3-6-5-19. The voting requirement for this Resolution is subject to the general rule at common law that the vote of a majority of a quorum is all that is necessary to perm and 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 Resolution at issue was properly adopted by a majority of two members voting in favor out of the three members present.

**3. Plaintiffs Cannot Meet Their Burden to Prove a Likelihood of Success on the Merits.**

To obtain a preliminary injunction, Plaintiffs have the burden of proving by a preponderance of the evidence that: (1) their remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) they had at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) the threatened injury to them outweighed the potential harm to the Appellees resulting from the granting of an injunction; and (4) the public interest would not be disserved by the granting of a preliminary injunction. *Apple Glen Crossing, L.L.C. v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487–88 (Ind. 2003); *Union Twp. Sch. Corp. v. State ex rel. Joyce*, 706 N.E.2d 183, 189 (Ind. Ct. App. 1999), *trans. denied*. If the party moving for an injunction fails to prove any of those four requirements, a grant of an

injunction to that party is an abuse of discretion. *Apple Glen Crossing*, 784 N.E.2d at 487–88.

In considering the grant of injunctive relief, the likelihood of success on the merits and irreparable injury factors are the most critical. *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1039, 2020 WL 6255361 (7th Cir. 2020). Plaintiffs have a dubious legal claim that is not substantiated by any legal authority. It is more likely that Defendants will prevail on the merits than will the Plaintiffs. Plaintiffs cannot meet their burden to show a likelihood of success on the merits.

#### **4. Plaintiffs Cannot Meet Their Burden to Prove an Irreparable Harm.**

Likewise, Plaintiffs cannot show irreparable harm. Plaintiffs allege that enforcement of the Resolution by the Defendants will deprive Plaintiffs of two bi-partisan functions: evaluation of absentee ballot signatures and maintaining and securing key access to absentee ballots. Verified Complaint, ¶ 18. But, the facts as set out in Rita Glenn’s Affidavit belie these claims. The two bi-partisan supervisors employed by the Election Board are responsible for evaluating absentee ballot signatures. Glenn Affidavit, ¶ 17. This responsibility has not been delegated to the Clerk by the Resolution. Glenn Affidavit, ¶ 21. The Plaintiff Thomas Dixon remains in control of a key to the storage room where the absentee ballots are stored. He has authorized his designee Trisha Carrico to use his key to unlock and lock the storage room. Glenn Affidavit, ¶¶ 14 and 15. Plaintiffs’ suggestion that the Republican member of the St. Joseph County Election Board does not have the power to evaluate absentee ballot signatures lacks candor considering the fact that Mr. Dixon voted at the October 7 hearing to reject four absentee ballot applications where the signatures did not match the state voter registration system. Glenn Affidavit, ¶ 18. Plaintiffs cannot meet their burden to show an irreparable harm.

**5. Granting an Injunction Will Disrupt the Early Absentee Voting Process.**

Plaintiffs' request for injunctive relief should be denied because the timing of this action will disrupt the early absentee voting process that has already begun in St. Joseph County. As set out in Rita Glenn's Affidavit, the only function of the County Election Board that has been delegated to the Clerk by the subject Resolution is to allow employees of the Clerk to arrange the ballots by precinct and put the ballots in carrier envelopes for counting on election day as required by law. Glenn Affidavit, ¶ 20. The temporary workers who are hired by the County Election Board to process the in-person absentee voters do not have enough time to sort the mailed absentee ballots by precinct while they are attending to the in-person absentee voters. Glenn Affidavit, ¶ 20. If injunctive relief were to be granted, the early voting process in St. Joseph County will be disrupted and it will lead to chaos on election day because the absentee ballots will not be organized by precinct for counting as is legally required. Glenn Affidavit, ¶ 20.

The United States Supreme Court has warned federal courts to not alter election rules close to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). Entry of an injunction only five weeks before an election runs afoul of this rule. *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1039, 2020 WL 6255361 (7th Cir. 2020). Plaintiff is similarly asking this Court to decide essentially a political question within a month of the November 8, 2022 general election. This Court should consider the admonition of *Purcell v. Gonzalez* to decline to enter an order that effects the conduct of the election at this late date.

In this case Plaintiffs, in essence, are requesting the Court to overrule the lawful decision of the St. Joseph County Election Board because one member of the board finds himself in the

minority and on the losing side of a vote to approve a resolution authorized by statute. The Court should side-step the invitation to intervene in the decisions of the St. Joseph County Election Board. This case is nonjusticiable. The doctrine of separation of powers precludes the Court from granting judicial consideration of the claim for relief, and the Plaintiffs' claims should be denied. *Berry v. Crawford*, 990 N.E.2d 410, 413 (Ind. 2013).

### **Conclusion**

For the foregoing reasons, Defendants Rita Glenn and Charles Leone move the Court to deny Plaintiffs' request for injunctive relief.

Respectfully submitted,

/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 October 13, 2022:

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*/s/ James A. Masters*

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