

STATE OF INDIANA) IN THE MARSHALL CIRCUIT COURT
) SS:
COUNTY OF MARSHALL) CAUSE NO.:50C01-2210-PL-31

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

INDIANA REPUBLICAN STATE)
COMMITTEE, INC.,)

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.)

PLAINTIFFS’ REPLY TO DEFENDANTS’ MOTION TO DENY INJUNCTIVE
RELIEF

COME NOW Plaintiffs Thomas Dixon, in his capacity as Member of the St. Joseph County Election Board (“Dixon”), Indiana Republican State Committee, Inc. (“IRSC”), and St. Joseph County Republican Party (“SJCRP”), and for their Reply to Defendants’ Motion to Deny Injunctive Relief, state as follows:

INTRODUCTION

In Indiana, there are certain powers held by an election board collectively, and there are certain powers held by the two partisan appointees to an election board individually.

Ind. Code § 3-6-5-19 (2022), as cited in the Resolution at issue in this case, allows for the delegation to a circuit court clerk of duties held by an election board collectively—*not* the rights or responsibilities held by a board’s partisan appointees individually—in circumstances when the “facilities of the clerk’s office makes it more reasonable and efficient for the clerk to do so.” Ind. Code § 3-6-5-19 (2022).

Ind. Code § 3-6-5-19 in no way applies to the rights and responsibilities held *individually* by the two partisan appointees to an election board, such as the specifically identified rights each partisan appointee has to control access to the absentee ballot storage room. Ind. Code § 3-11-10-10 (2022).

Further, Ind. Code § 3-11.5-4-5 (2022) requires an election board to *unanimously* determine whether or not a signature on an absentee ballot envelope is genuine. Ind. Code § 3-6-5-19 (2022) does not and cannot allow a simple 2-1 majority of an election board to delegate this duty to the circuit court clerk without rendering Ind. Code § 3-11.5-4-5 (2022) meaningless.

ARGUMENT

1. The federal Constitution of the United States provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. art. I §4.

2. There is, at present, a movement and debate in the legal community with respect to interpreting this clause of the Constitution; the so-called “independent legislature theory”. *See, e.g.*, <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained>.
3. This case offers up a state law version of the same debate. The Indiana Constitution, which is binding, has no analogue for the federal constitutional clause. Powers, imposed by statute, may not simply be delegated in the absence of a legal authority to do so. Where the State Constitution and the statutes implemented by the General Assembly imbue upon a particular body a specific power, there is no right of that body to delegate such a power, absent legal authority. In the instant case, a simple majority of the Election Board seeks to delegate a power that it has not been authorized, either by the Indiana Constitution, or by the General Assembly, to delegate. If the power to delegate were the will of the people, the people would have said so.
4. To the contrary, the Indiana Constitution holds that “A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection

(c) or federal law.” Ind. Const. Art. 2 § 2. Delegation of powers instituted to guard such a Constitutional right in such a manner that might abridge such a right is precisely the sort of indiscretion to which a temporary injunction is a tailored remedy.

5. As Defendants correctly note, Ind. Code § 3-6-5-19, passed at the end of the Second World War in 1945, provides:

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.

6. Ind. Code § 3-11-10-10, passed in 2012, provides that:

During the period that absentee ballots are being received, each county election board shall keep the ballots in cabinets, boxes, or a room upon which there are two (2) locks, one (1) for each of the appointed members of the board. Each day the absentee ballots shall be placed in the cabinets, boxes, or room under the direction of the appointed members of the board. If an appointed member cannot be present each day, then that member shall designate someone from the member's political party to be present with the key to the lock at the time the ballots are secured and at the time

the lock is opened the next day. The key of each appointed member of the board shall be kept secure in the manner determined by that appointed member.

Thus, Ind. Code § 3-11-10-10 imposes a responsibility upon the Election Board, and a separate responsibility—the maintenance of a key by each of the partisan appointees—has been imposed. The latter responsibility cannot be delegated. The statute referenced in paragraph five above simply does not apply to the statutory rights and duties of the individual partisan appointees.

7. Defendants argue that Plaintiffs have not shown that the laws of the State of Indiana make a delegation of the responsibility afforded to the two partisan appointees illegal. The real issue, however, is that the delegation of power must be *authorized*. Defendants have cited no authority to the contrary. That is, there is no legal authority establishing that powers, once granted by the General Assembly, may be outsourced to a third party.
8. The purpose of Ind. Code § 3-11-10-10 is to ensure that each of the two partisan appointees to an election board holds and maintains one of the keys to the storage facilities in which absentee ballots are being stored; this is a clear attempt to ensure neutrality. The Resolution at issue here strips one party of that duty and allows for access to the absentee ballots to be exclusively accessed by the other party via a simple majority vote of the Election Board. This is plainly at odds with the intention of the statute. The right to possess a key to the absentee ballot storage area is not a right of the Election Board at

large. It is a specific and enumerated right afforded to each of the partisan appointees of the Board, designed to insulate the democratic process from precisely the abuse being perpetrated by the resolution at issue in the present case.

9. There is good reason that such a delegation of power from the Election Board to the County Clerk is unauthorized. Indiana Code Section 3-11.5-4-5 provides:

If the county election board does not unanimously determine that the signature on a ballot envelope is genuine, the board shall also write on the ballot envelope described in subsection (c) or the transmitted affidavit from a voter under IC 3-11-4-6, the words “SIGNATURE DISPUTED”. The board shall enclose in the same carrier envelope all absentee ballot envelopes and applications for the same precinct.”

To allow a simple majority of the Election Board the power to delegate this ability to the County Clerk is entirely at odds with the Legislature’s mandate that such decisions be made by the board “unanimously.” In other words, if this responsibility can be delegated to the County Clerk by a 2-1 vote, the requirement that it be upheld by a unanimous vote is entirely subverted.

10. The Board complains:

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 bi-partisan 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. Defendant’s Motion p. 3.

This is of no moment. This suit asks the Court to require the Election Board to do the Election Board’s job—unanimously approve absentee ballots—rather than allow the Election Board to delegate its job to a potentially interested third party via a 2-1 vote, regardless of the practical difficulties it may claim lie as a result of doing its job. Similarly, the two partisan appointees on the Board have specific individual rights and responsibilities that exist outside of the rights and responsibilities of the Board as a whole. The Board may not delegate functions if such delegation is inconsistent with statute, nor may it strip away individual rights and responsibilities statute bestows on the individual partisan appointees. If the Board does not have enough employees to perform its functions without abrogating the law, it must hire more. The law is blind to such practicalities.

11. The Election Board may not authorize authority that it does not have. Defendants complaint that Plaintiffs have supported “this claim without any legal authority[,]” Defendant’s Motion p. 3, is without merit. It is axiomatic

that a legal entity may not exercise authority that it does not have. To hold otherwise would be to ignore the rule of law.

12. If the Election Board is unable to meet its statutory duties, its remedy is to seek additional funding, or some other legally appropriate avenue, in order to rise to the occasion for which it was formed.

13. Defendants are correct that “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).” Defendants’ Motion p. 7. Yet that is precisely what the Resolution at issue has done. The injunction proposed here seeks to preserve the status quo. The Resolution challenged is designed to alter it.

14. Defendants’ citation to *Clay v. Marrero*, 774 N.E.2d 520, 521 (Ind. Ct. App. 2002) is inapposite, as that is a case in which the Election Board exercised its power, rather than abdicating it.¹

15. At base, Defendants argue that there is no law prohibiting them from doing what they are doing. But the exercise of a power not granted to a governing body is, by definition, illegal. The fact that the General Assembly has not yet been required to outlaw this particular assumption of a power not granted to a county election board does not alter the reality.

¹ Similarly, Defendants’ reference to *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N.E. 72, 74 (1889) is inapposite as it deals with a city’s power to enter into a contract. Their reference to *Bd. of Sch. Trustees of S. Vermillion Sch. Corp. v. Benetti*, 492 N.E.2d 1098, 1102 (Ind. Ct. App. 1986) is inapposite as it refers to a city’s power to approve a contract.

16. The purpose of a preliminary injunction is to preserve the existing state of affairs so that the court can ultimately render a meaningful decision on the merits. *See, e.g. Indiana State Bd. of Public Welfare v. Tioga Pines Living Center, Inc.*, 637 N.E.2d 1306 (Ind. Ct. App. 1994). Contrary to Defendants' claims, the aim of this suit is to preserve the integrity of absentee ballot voting already underway in St. Joseph County. Granting of an injunction, necessary to preserve said integrity, would in no way disrupt that voting process.

17. The damage done to that process by the Resolution at issue could well be catastrophic. To the extent that Plaintiffs must demonstrate that the threatened harm outweighs the potential harm to the Defendants, the Plaintiffs have clearly done so. Votes may not be properly counted. All the Defendants have to do, by their own admission, is to hire additional employees to carry out their legally-mandated duties. The very threat that votes may not be counted—a threat to the fundamental principles of democracy no less—is sufficient to meet Plaintiffs' burden. The alternative is to allow the resolution to stand and simply see what happens. There is no legal recourse available other than that established by the Indiana Trial Rules and sought by Plaintiffs here.

WHEREFORE. Plaintiffs ask the court to immediately enter a Temporary Restraining Order, without bond, restraining Defendants from adopting and enforcing the Resolution, holding the Resolution violates no less than two Indiana statutes and has no statutory authority to be made.

Respectfully Submitted,

JONES LAW OFFICE LLC

/s/ Andrew B. Jones

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing pleading was served upon all counsel of record via the IEFS on October 14, 2022.

/s/ Andrew B. Jones

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