

**UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

MARY J. FREDERICK; JOHN)
JUSTIN COLLIER; WILLIAM L.)
MARKS, JR.; MINNE LEE CLARK;)
and COMMON CAUSE INDIANA,)

Plaintiffs,)

-v-)

Cause No.)

CONNIE LAWSON, in her official)
capacity as Secretary of State; and)
M. CATHERINE FINELLO, RITA)
L. GLENN, and MURRAY WINN,)
in their official capacities as members)
of the St. Joseph County Election)
Board,)

Defendants.)

CLASS ACTION COMPLAINT

BACKGROUND/NATURE OF THE CASE

1. Under current Indiana law, a voter who is otherwise qualified to vote is entitled to vote in-person by absentee ballot in the office of the circuit court clerk or at a satellite office established under IC § 3-11-10-26.3. In addition, a voter who satisfies any of the conditions set forth in IC § 3-11-10-24, including but not limited to being an elderly or disabled voter, a member of the military, a person whose work obligations prevent him from voting while the polls are open, or a public safety officer, is also permitted to vote by mail-in absentee ballot.

2. Upon receipt of a mail-in absentee ballot, a county election board or absentee voter board in the office of the clerk of the circuit court are required by Indiana law to “immediately examine the signature of the absentee voter to determine its genuineness.” IC § 3-11-10-4(a). This must be done by “compar[ing] the signature as it appears upon the envelope containing the absentee ballot with the signature of the voter as it appears upon the application for the absentee ballot...or with any other admittedly genuine signature of the voter.” IC § 3-11-10-4(b).

3. In a county which does not count absentee ballots at a central location, if a member of the absentee voter board questions whether a signature on a ballot envelope is genuine, “the matter shall be referred to the county election board for consideration under section 5.” IC § 3-11-10-4(d). If the county election board unanimously finds that the signature on a ballot envelope or transmitted affidavit is not genuine, the board must write on the envelope: “The county election board has rejected this ballot because the signature of this voter is not genuine.” IC § 3-11-10-5. The ballot is then not counted in the final tallies.

4. If the board is unable to unanimously determine whether the signature on a ballot envelope is genuine, the board must write upon the ballot envelope or transmitted affidavit the words “Signature Disputed.” The board must then deliver all disputed ballot envelopes, together with any evidence of a documentary nature

presented to it, to the proper precinct at the same time that undisputed absentee ballots are delivered. IC § 3-11-10-6. That precinct board must then determine whether each disputed ballot will be accepted or rejected. IC § 3-11-10-7. An absentee ballot may ultimately be opened and counted in the final tally only if the county election board or absentee voter board in the office of the circuit court clerk unanimously finds that the signature on the ballot envelope or transmitted affidavit is “genuine.” I.C. § 3-11-10-8.

5. In a county, such as St. Joseph County, that counts absentee ballots at a central location, if the absentee ballot counters appointed by the county election board pursuant to IC § 3-11.5-4-22 determine that the signatures on the absentee ballot envelope “do not correspond,” the ballot “shall be rejected.” IC § 3-11.5-4-13(a)(2). If the absentee ballot counters are unable to agree whether or not a voter’s signature is genuine, the matter is referred to the county election board. IC § 3-11.5-4-13(e). If the county election board finds that the signature on a ballot envelope or transmitted affidavit is not genuine, the board must write on the envelope the words: “The county election board has rejected this ballot because the signature of this voter is not genuine.” IC § 3-11.5-4-4. That ballot is then not included in final election tallies.

6. Indiana law does not require notification to the voter whose absentee ballot was rejected due to a perceived non-genuine signature. Thus, a voter who

cast a mail-in absentee ballot has no opportunity to cure the rejection of their absentee ballot. For example, there is no opportunity afforded the voter to validate as genuine the signature on their absentee ballot envelope or to be notified, much less given an opportunity to be heard, that the ballot should not have been rejected.

7. A final determination by a county election board or a bipartisan team of absentee ballot counters not to count a voter's mail-in absentee ballot is unreviewable by statute, and in any event the voter whose absentee ballot is invalidated is not informed that his or her ballot has been rejected.

8. The above-described procedures resulted in several hundred and possibly more than a thousand mail-in absentee ballots submitted in the 2018 general election not being counted without any notification or opportunity to cure the alleged signature mismatch.

9. Indiana law contains no standards or criteria absentee ballot counters or members of county election boards are to use in determining whether a signature is "genuine." Indiana offers no training to absentee ballot counters or members of county election boards in handwriting analysis, and none are qualified to make an accurate and reliable determination whether a voter's signature is "genuine."

10. A person's signature may vary for a variety of reasons. Those reasons include age, physical and mental conditions, disability, medication, stress, accidents, and inherent differences in a person's neuromuscular coordination. Such

variations are more prevalent among the elderly, the disabled, or those who speak English as a second language.

11. Indiana's statutory signature-matching requirements are fundamentally flawed and violative of due process in that the voter is given no written or oral notice that his or her ballot has been rejected due to a signature mismatch and is thus given no opportunity to participate in the process that resulted in their absentee ballot being rejected, such as an opportunity to validate their signature so that their vote does not go uncounted.

12. The process of determining whether a voter's signature is "genuine" is fraught with error and the danger of inconsistent application, which is exacerbated by the State's failure to promulgate objective and reliable rules or standards for determining whether a voter's signature is "genuine."

13. The lack of standards, together with the unreviewable discretion imparted by Indiana law to absentee ballot counters and members of county election boards, results in vastly different rates between counties of absentee ballots rejected due to perceived signature mismatches. For example, approximately 45 Hamilton County absentee ballots were invalidated due to signature mismatches, 39 in St. Joseph County, 13 each in Elkhart County and Madison County, but zero in Boone County and Porter County.

14. The right to vote is of fundamental importance under our constitutional system, and the privilege of absentee voting by mail as it has been granted to Indiana voters must accord with the requirements of due process.

15. There are already processes in place that provide at least some semblance of due process for other voters. For example, a voter who is unable or unwilling to present proof of identification, or whose provided identification does not qualify under IC § 3-5-2-40.5, must be offered and permitted to cast a provisional ballot, which the voter has ten (10) days to validate. IC §§ 3-11-10-26(1); 3-11.7-5-2.5(a). In addition, a voter who has cast a provisional ballot on election day is provided a free access system enabling that voter to determine whether his or her provisional ballot was counted, or if not, the reason it was not counted. IC § 3-11.7-6-3.

16. No similar procedures are available to a voter who submits an absentee ballot by mail that is rejected due to a perceived signature mismatch.

17. It would not be administratively burdensome to apply similar procedures to absentee voters whose ballots are questioned on the basis of an alleged signature mismatch by, for example, treating an absentee ballot rejected based on a signature mismatch as a provisional ballot, giving the voter notice that their ballot has been rejected based on a signature mismatch determination, and

then providing the voter an opportunity to validate his signature as being genuine before the final results are certified in person or by affidavit.

JURISDICTION AND VENUE

18. This is a civil and constitutional rights action arising under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

19. Venue in this Court is proper under 28 U.S.C. § 1391 because the Defendant Secretary of State is located within and conducts official business in this district and division.

20. Declaratory relief is authorized by Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

PARTIES

21. Plaintiff Mary J. Frederick is a registered voter in St. Joseph County who has lived in the same home for forty (40) years. She submitted an absentee ballot by mail in the November 6, 2018 general election because medical problems, including Parkinson's Disease, and her age (69), limit her mobility. She was never informed by election officials that her ballot was rejected due to a determination by election officials that her signatures did not match. Because of her Parkinson's, her signature becomes increasingly illegible as the day goes on, although her signature has never been questioned by her bank or anyone else. Had

she been notified that her signature was being questioned by election officials and been given an opportunity to do so, she would have validated that the signature on the absentee ballot security envelope containing her absentee ballot was in fact hers.

22. Plaintiff John Justin Collier is a registered voter in St. Joseph County who has lived at the same address for fourteen (14) years. Although in the past he had voted in person, his work schedule and commitments were such that he was required to submit an absentee ballot by mail. He was never informed by election officials that his ballot was rejected due to a determination by election officials that his signatures did not match. Had he been notified that his signature was being questioned by election officials and given an opportunity to cure, he would have validated that the signature on the absentee ballot security envelope containing his absentee ballot was in fact his.

23. Plaintiff William L. Marks, Jr., is a 68-year old registered voter in St. Joseph County and a retired public school teacher who until moving after the last election had lived at the same address since 1983. Although in the past he had voted in person, he voted by mail-in absentee ballot for the first time in the 2018 general election. He was never informed by election officials that his absentee ballot was rejected due to a determination that his signature was inauthentic. Had he been notified that his signature was being questioned by election officials and

given an opportunity to do so, he would have validated that the signature on the absentee ballot security envelope containing his absentee ballot was in fact his.

24. Plaintiff Minnie Lee Clark is a registered voter in St. Joseph County who lives in a senior living community in South Bend. Although she has long been active in politics, and during her younger years she regularly worked at the polls, at 99 years of age she has become infirm and thus decided to vote by absentee ballot in person before an absentee voter board. Even though she signed in front of a traveling absentee voter board, her absentee ballot was rejected because election officials decided that her signatures did not match.

25. Plaintiff Common Cause Indiana has long worked to expand voter registration and equal access to voting. Common Cause Indiana has approximately 13,000 members who live and vote throughout the State of Indiana, many of whom vote, or are statutorily entitled to vote, by mail-in absentee ballot and whose ballot to be cast in future elections is at peril of being rejected by election officials without notice or due process as a result of a perceived signature mismatch.

26. Defendant Connie Lawson is the Indiana Secretary of State and in that capacity is the chief election official of the State, with her primary office in this judicial district. Ind. Code § 3-6-3.7-1. She is charged with performing all ministerial duties related to the administration of elections by the state of Indiana. I.C. § 3-6-4.2-2(a). She is also responsible for enforcing and implementing

Indiana's election laws and routinely issues guidance to county election officials in each of Indiana's 92 counties through her appointees to the Indiana Election Division and via the Indiana Election Administrator's Manual, the latest edition of which can be accessed at this link:

<https://www.in.gov/sos/elections/files/2019%20Election%20Administrator%27s%20Manual%20Feb%202013%20revision.Final%20edits.pdf> She is sued in her

official capacity.

27. Defendants M. Catherine Fanello, Rita L. Glenn, and Murray Winn, are members of the St. Joseph County Election Board, which is comprised of the circuit court clerk and two persons appointed by the circuit court clerk, one from each of the two major political parties. I.C. § 33-6-5-2. Fanello, Glenn, and Winn are each sued in his or her official capacities.

DEFENDANT CLASS ACTION ALLEGATIONS

28. Certifying a defendant class action is unnecessary because an order enjoining the Secretary of State Lawson will have the effect of enjoining all 92 county election boards and their appointees, and the Secretary of State's office routinely issues guidance to county election officials statewide, who follow her office's guidance, and will conform that advice should this Court determine that Indiana's signature matching procedures violate the Fourteenth Amendment.

29. Nevertheless, to the extent the Court were to deem it necessary to join all the county election boards in all 92 of Indiana's counties, Plaintiffs seek certification of a defendant class of all 92 county election boards, with the St. Joseph County Election Board as the defendant class representative, pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(1) or (b)(3).

30. Joinder would be impracticable because there are 92 county election boards, each of which will share a common set of defenses. Because they are simply doing what the statutes require as explained to them by Secretary Lawson, their defenses will not vary based on individual facts. For the same reasons, the defenses of proposed class representative will be typical of those of the other county election boards. The St. Joseph County Election Board will also be an adequate representative of the class.

31. The defendant class should be certified because "prosecuting separate actions by or against individual class members would create a risk of ...inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Filing 92 separate, identical lawsuits could result in incompatible standards of conduct throughout Indiana and would be a waste of judicial and governmental resources.

32. The defendant class may also be certified because “the questions of law or fact common to the class members predominate over any questions affecting only individual members, and ...a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The questions of law or fact not only predominate, they constitute the only questions that are at the center of this lawsuit, which is: are the Indiana statutes requiring county election officials and their designees to match signatures and invalidate mail-in absentee ballots based on a subjective determination that the voter’s signatures do not match, without notification to the voter whose absentee ballot has been rejected, violate the due process and equal protection clauses of the Fourteenth Amendment both on their face and as applied to the individual Plaintiffs?

CAUSES OF ACTION

COUNT I—DENIAL OF DUE PROCESS

33. Plaintiffs reallege and incorporate by reference the allegations contained in the preceding paragraphs.

34. Section 1 of the Fourteenth Amendment to the United States Constitution prohibits the states from depriving “any person of ...liberty...without due process of law.” This due process principle protects the fundamental right to vote.

35. By mandating the unilateral and unreviewable rejection of mail-in absentee ballots due to an alleged signature mismatch without according pre-rejection notice or an opportunity to be heard and to cure, I.C. §§ 3-11-10-4, -5, -6, -7, -8, -15(3), -17(a)(2) and 3-11.5-4-4 and -13(a)(2), both on their face and as they have been applied to the individual Plaintiffs, violate the Due Process Clause of the Fourteenth Amendment by depriving them and other similarly situated voters of their right to vote without due process.

36. Defendant Lawson has not established a procedure for providing pre-rejection notice to an absentee voter whose ballot has been rejected on the grounds his signature was deemed not to be “genuine,” and there are no procedures that would allow a mail-in absentee voter to contest the rejection of his or her absentee ballot or to cure his or her allegedly defective signature.

37. Signature comparisons made by people who are untrained are known to be highly unreliable and carry a high risk of false negatives. This was most recently demonstrated in a recount conducted following the primary election in May, 2018, when between 15-20 absentee ballots cast in the Democratic Party primary for Sheriff that had been rejected by St. Joseph County election officials due to perceived signature mismatches were subsequently determined by a court-appointed recount commission to have been improperly rejected and ordered opened and counted.

38. Notice and an opportunity to be heard are already provided to other voters. For example, a voter who is unable or unwilling to present proof of identification, or whose identification does not qualify under IC § 3-5-2-40.5, must be permitted to cast an absentee ballot which shall be treated as a provisional ballot, which the voter has 10 days to validate. IC §§ 3-11-10-26(l); 3-11.7-5-2.5(a). A voter who cast a provisional ballot on election day is provided a free access system enabling that provisional voter to determine whether his or her provisional ballot was counted, or if not, the reason it was not counted. IC § 3-11.7-6-3.

39. It would be no more administratively burdensome to apply similar procedures to notify mail-in absentee voters whose signatures have been questioned an opportunity to validate their signature so as to avoid being disenfranchised, such as by granting the opportunity to voters whose ballot is rejected for a purported signature mismatch to cure by attesting in person or by affidavit as to their identity and that they in fact cast the absentee ballot that was rejected.

40. Because voting is fundamental to our democracy, the risk that even one person will be disenfranchised because a signature is wrongly determined not to be genuine is too significant for Indiana to justify depriving absentee voters

whose ballot is rejected due to a perceived signature mismatch of some form of pre-rejection notice and opportunity to be heard.

41. This challenge is both facial and as-applied.

COUNT II-DENIAL OF EQUAL PROTECTION

42. Plaintiffs reallege and incorporate by reference the allegations contained in the preceding paragraphs.

43. The Fourteenth Amendment to the United States Constitution protects the fundamental right to vote. The State may not infringe upon or abridge the right to vote without adequate justification. The greater the magnitude of the infringement, the stronger the State's justification must be.

44. The application of I.C. §§ 3-11-10-4, -5, -6, -7, -8, -15(3), -17(a)(2) and 3-11.5-4-4 and -13(a)(2) have disenfranchised the individual Plaintiffs and other similarly situated voters by depriving them of their right to vote and to have their vote counted. Being disenfranchised is a burden that on its face is severe, especially in the absence of pre-rejection notice or an opportunity to resolve the signature mismatch or otherwise confirm their signature.

45. The collective burdens imposed by these laws are severe.

46. The Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 prohibit Defendants from burdening the exercise of the right to vote by applying laws in an arbitrary, discriminatory and inconsistent manner.

47. Election officials from one county to the next interpret and apply the signature matching statutes inconsistently and arbitrarily. Some election officials, such as in St. Joseph and Hamilton Counties, apply those laws strictly in rejecting a large number of mail-in absentee ballots based on signature mismatches, while election officials in other counties, such as Boone and Porter Counties, apply those laws forgivingly and reject few if any mail-in absentee ballots due to a perceived signature mismatch.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand the following:

- A) That this Court issue a judgment declaring that I.C. §§ 3-11-10-4, -5, -6, -7, -8, -15(3), -17(a)(2) and 3-11.5-4-4 and -13(a)(2) are unconstitutional on their face and as applied to the individual Plaintiffs to the extent they deny them notice and an opportunity to be heard after election officials determined the signature on the envelope containing their absentee ballot not to be “genuine;”
- B) That this Court issue a temporary restraining order, preliminary injunction, and permanent injunction enjoining Defendants from enforcing these statutes to reject absentee ballots based on a signature mismatch to the extent they fail to provide absentee voters with pre-rejection notice and an opportunity to resolve the alleged signature mismatch and validate their signature such as by

written or oral affirmation; in this regard, Plaintiffs ask that absentee voters whose ballots henceforth are rejected due to signature mismatch be notified and given up to ten (10) days after Election Day to confirm their identity through written affirmation via email, mail, or in-person;

C) That Plaintiffs be awarded their attorneys' fees and costs under 42 U.S.C. § 1988; and

D) That the Court award any additional or alternative relief as may be deemed appropriate under the circumstances.

Respectfully submitted,

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