

SOUTHERN DISTRICT COURT OF INDIANA, INDIANAPOLIS DIVISION

Robbin Stewart,

Plaintiff

v

Cause number 1:18 cv 01487-dml

Marion County Election Board,

FILED

Myla Eldridge, Steven Rose,

SEP 17 2018

Loreta Jones, Jane Doe #4,

U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

Defendants.

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Comes now plaintiff and for his motion for leave to file a second amended complaint states as follows.

At a status conference last Tuesday, the Court requested that the first amended complaint, filed in august 2018, be refiled with a motion for leave. This is that motion and that filing. Because of the time constraints, I did not write a longer motion.

Respectfully submitted,



/s/Robbin Stewart

C:\Users\mark\Downloads\20180915012017complaintvoteriddraftfiveconamenecomplint.rtf

Certification:

a copy is being sent to grant helms and curtis hill
via hand delivery or us mail or email.

/s/ Robbin Stewart



UNITED STATES DISTRICT COURT
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SECOND AMENDED COMPLAINT

1. Introduction

This case arises out of the refusal by precinct officials to allow plaintiff to cast a provisional ballot at the 2016 primary, and the subsequent ratification of that action by the county. This has violated plaintiff's clearly established rights under the voter ID statute, the Indiana constitution, a federal statute, and the federal constitution. This is an action for damages and declaratory judgment.

1. A. The first amended complaint fixes some typos, adds a new incident at the 2018 primary, and adds a claim about political literature. The second amended complaint spells out more facts about standing and ripeness.

2. Parties

Plaintiff is a would-be voter in Marion County. Since 2005, he has found it difficult to vote, since he does not display ID except when driving, for privacy reasons discussed in his *Crawford* amicus. This has been the topic of previous litigation, and this new action does not seek to relitigate those cases or issues. The relief sought here is damages, under *Monell*. plus a declaratory judgment that his rights were violated.

3. Defendants are the Marion County Election Board ("the Board") and its three members in their official capacities: Myla A. Eldridge ("Eldridge"), Keith Johnson ("Johnson"), and Melissa Thompson ("Thompson"). By law, the three-member Board consists of the elected clerk of Marion Circuit Court (Eldridge) and her two appointees, one from the county Democratic Party (Johnson) and one from the county Republican

Party (Thompson) Eldridge is also named in her personal capacity, for failure to adequately train and supervise Rose.

Steven Rose was the precinct inspector who refused to let plaintiff vote.

4 Jurisdiction. This court has general civil jurisdiction as well as under 42 USC 1983. Venue is in Marion County.

5 Facts:

The 2016 presidential primary was held May 3rd. Plaintiff wanted to vote in the republican primary for Donald Trump, but was refused the vote when he declined to show ID by Steven Rose, the precinct inspector at the fire station near 350 N Sherman. What Rose was supposed to do under the statute was offer a provisional ballot.

6. Rose is not held to an expert standard, unlike Eldridge. He and the other poll workers were inadequately trained by Eldridge. They may therefore enjoy some qualified or absolute immunity. *Fitzgerald*. Both Eldridge and Rose acted with willful and reckless disregard for the rights of plaintiff.

7. Plaintiff filed a notice of tort claim, 16-T-803, to which the board by counsel sent a letter which ratified the decision to deny plaintiff a provisional ballot, and denied the tort claim. This action follows.

Claims

8. Count 1

Defendants violated Plaintiff's right to vote a provisional ballot under the Indiana voter ID statute.

9. Count 2

Defendants violated Plaintiff's right to vote under Article II section 1, the right to free and equal elections. Elections are not free, in either sense of the word, when the voter must produce a passport or drivers license he has paid for. Under the statute, they were required to offer a provisional ballot to a person who could not or would not show ID. The clerk failed to adequately train and supervise poll workers.

10. Count 3.

Defendants violated Plaintiff's right to vote under Article II section 1, the right to free and equal elections. Elections are not equal when voters willing and able to show a license, such as a passport, are allowed to vote, but those without are not. Under the

statute, they were required to offer a provisional ballot to a person who could not or would not show ID.

Elections are not equal, where other similarly situated voters at other precincts and in other counties were offered provisional ballots, but Plaintiff was not.

11. Count 4

By denying plaintiff a ballot, even a provisional ballot, his rights under article 1 section 9 were violated. Voting is an aspect of the right to speak freely. Voting is political speech given strict scrutiny under *Price v Indiana*. *Yick Wo v Hopkins*.

12. Count 5

Art 1 section 11. Defendant demanded Plaintiff's papers as a condition of exercising his right to vote, thereby violating his freedom from search under section 11. This created an unconstitutional condition, where the exercise of one right was made contingent on waiving another. There was no probable cause or reasonable suspicion. The search was arbitrary and capricious instead of being programmatic and standardized as required under case law independently interpreting section 11.

13. Count 6

Due course of law under art 1 section 12. Plaintiff had a right to a provisional ballot which would have allowed him a hearing before the board as to whether that ballot would be counted. Plaintiff has participated in previous such hearings. The right to a hearing is a fundamental element of due course of law. Plaintiff has a substantive right to vote protected by section 12 which was violated when they refused to allow him to vote.

14. Count 7

Article I Section 23. Equal privileges. Other voters in Plaintiff's situation were given provisional ballots.

Section 23 requires that people in the same situation, legally, be given the same treatment under law.

Here instead Plaintiff was treated in an arbitrary and capricious manner. Here the actions of Defendants were contrary to what was required by the statute.

15 Count 8 Federal claims

Federal statute: The Help America Vote Act (HAVA) ~~and/or the Motor Voter Act~~ require that provisional ballots be offered to a person whose vote is challenged.

16. Count 9

The First Amendment was violated when Defendants refused to allow Plaintiff to vote.

17. Count 10

By refusing to issue a provisional ballot, he was deprived of the right to a hearing by the election board as to whether his vote would be counted. This violated his rights under the 14th Amendment due process clause.

18. Count 11.

By denying the right to vote, they violated his substantive due process rights under the 14th amendment due process clause.

19. Count 12

By denying Plaintiff the right to vote Defendants violated his right to equal protection of the laws under the 14th Amendment.

20. Count 13

24th Amendment claim. When the officials denied him his right to vote for failure to show ID, they violated his rights under the 24th Amendment. In practice, the only document which would have worked is his driver's license. He obtained his drivers license by paying a fee of some \$20, with a regular renewal fee every 4 or so years. Additionally he had had to purchase a birth certificate from his home state at \$10 plus the cost of travel. Because the 24th prohibits the payment of any fee as a condition of voting, he is unwilling to display his driver's license. Additionally, the 24th Amendment, under *Harmon v Forssenius*, prohibits the imposition of obstacles and barriers to voting such as an ID requirement. But see *Stewart v MCEB 2010*.

21. **New incident:**

This lawsuit was filed May 1. On Tuesday May 6th 2018, the primary election was held. I was elected, perhaps unopposed, as a delegate to the GOP state convention.

22. I went to vote at the same location, at about 10 a.m. A new person, Jane Doe #4 was there along with Loreta Jones, who had starred in the 2016 videos. After I declined to show ID, they did not let me vote, and Doe was not aware of how to do a provisional ballot. I had signed the poll book and chosen a republican ballot. I did not get video this time. Jones was actively hostile and told me to "get out", so I went. They were unable to provide any documentation of my visit other than an "I voted" sticker.

Before leaving, I showed them a copy of the lawsuit and a copy of my authorization paperwork as a media observer, and stated that they had violated my rights.

23. Claims:

Count 14. Doe and Jones, by refusing to let me cast a regular or provisional ballot, violated my rights, as detailed above and incorporated by reference, under the voter ID statute,

and sections 1,2,9,11,12, 23, and 31, of the Indiana Bill of Rights, and under article II, section 1, the right to vote freely, section 1, the right to vote equally, section 2, and section 14, both each clause individually, and when read as a whole.

24. Count 15.

Doe and Jones, by refusing to let me cast a regular or provisional ballot, violated my rights, as detailed above and incorporated by reference, under the HAVA statute, and the first fourth fourteenth and twenty-fourth amendments, specifically the speech, press, assembly and petition clauses, as incorporated, due process, equal protection, and privileges and immunities of federal citizenship, of which voting in a federal election is one.

25. Even though suit had already been filed, and the clerk was on specific notice of the problem at this precinct, Eldridge failed to properly train and supervise Jones and Doe.

26. Political literature claim.

Currently in my front yard are two political signs. One says

'Please Vote to Elect

Tony 'Big Dog'

VAN PELT

U.S.CONGRESS.

27. a. This is express advocacy with no disclaimer. It is exempt from Indiana code 3-2-9-2.5, incorporated by reference here* because it pertains only to a federal election. While the constitution protects this sign, *Talley v. California, 1960*, I have not joined the Federal Election Commission as a party, and do not, in this particular lawsuit, challenge the federal statute. I mention it to set the scene.

27. b.

Since at least 1960, the state of indiana, and marion county, have tried to ban political speech of the 'vote for smith' sort, unless the speech also contains compelled speech chosen by the state, and following a complex formula. Like new coke, the statute has

been reformulated after being found unconstitutional. But the new one has the exact same relevant defects as the previous statute, and is unconstitutional for the same reasons, as would be apparent to any reasonable law enforcement officer or government official.

27. c. The purpose and effect of the statute is to chill speech; it need not be used to fill jails to accomplish that goal. It is highly successful; most signs carry the disclaimer.

27.d. The statute itself carries a threat of enforcement. Plaintiff wishes to speak. The statute chills such speech. There is a live controversy, at least for purposes of declaratory judgment. Nothing more is required.

27.e. Here, there is more. In response to my verbal public records request for whether there were any rules my signs had to follow, I was given the political literature brochure, which threatens such speech.

https://www.in.gov/sos/elections/files/2014_Disclaimer_Brochure.pdf

I believe the brochure states a speech-chilling true threat even more broadly than the state court has allowed.

27.f. I wrote seeking clarification that they meant what they said. I requested an exemption under *stewart v taylor* or *ogden* or *mullholland*. I was informed that a statement such as, robbin stewart for township board vote tuesday, must have a disclaimer.

27.g. Because the fall election approaches, it is impractical to go through the usual delay of the tort claims process. In the first amendment context, pleading and standing requirements are sometimes relaxed due to the public interest in a free flow of campaign speech.

28. The other sign, handwritten on a yellow 2'x3' poster, says
x Mark Rutherford
for
secretary of state
vote tuesday november 6th 2018.

29. There is no disclaimer. This is an independent expenditure not authorized by or coordinated with Rutherford or his campaign. Plaintiff hasn't spoken to Mark in several years.

30. Prior to making the sign, he enquired with the county board if there were any rules about his signs. He was given a copy of the political literature flier from the state

division of elections. They are not joined as a party here, but have a right to notice, via the attorney general. I have no objection should the state choose to intervene.

31. In *stewart v taylor* (1997), this court upheld plaintiff's right to a sign that read 'robbin stewart for township board vote tuesday'. That decision is res judicata here and gives plaintiff an as-applied claim for exemption from the statute.

32. In *stewart v taylor* and *majors v abell* the court did not reach the state constitutional claims. Here the disclaimer statute violates article I and II of the state constitution, including Art. I sections 1, 2, 9, 12, 16, and 31, and article two section one, the right to free elections, and section 1, the right to equal elections. The doctrine of avoidance of federal questions suggests that this case can be resolved on state grounds.

33. The disclaimer statute, IC 3-9-3-2.5 violates the 1st and 14th amendments, including the rights to press, speech, petition, assembly, redress, and privacy, and the rights to due process and equal protection. It is unclear whether the P+I clause covers a state race held in conjunction with a federal election.

34. The potential fine for a sign not only deters speech, it is excessive under the 8th amendment as incorporated by the 14th amendment. See *Timbs v Indiana*. This has not yet been clearly established.

35. The right to signs, with or without disclaimers, is clearly established as a matter of federal law, by cases including *talley*, *mcintyre*, *stewart v taylor*, *janus*, *aid v open society institute*, etc. The more recent cases supercede *majors v abell*, which had left the status of indiana's statute indeterminate.

36. I seek a declaratory judgment that I cannot be jailed or fined for the sign in my yard.

I was previously jailed and tortured in marion county and would prefer to avoid that again. Without such a judgment, or injunctive or other relief, my speech will be chilled.

37. This claim is an official capacity claim against the board, and a personal capacity claim against the clerk. I will withdraw the personal capacity claim if she disavows the brochure and stops distributing it. The board is liable under *monell*. although it is not clear that the 7th circuit recognizes *monell* in this kind of case where a county's unconstitutional policy is based on a state's unconstitutional policy.

The county has a long history of unlawfully interfering in political signs.

Relief sought:

as to each count, from each named defendant respectively, damages, as assessed by a jury, injunction, declaratory judgment, costs and legal fees, and such other relief as is in the interest of justice.

Averment: I affirm that the above allegations are true to the best of my knowledge and belief.

Robbin Stewart
/s/ Robbin Stewart



Certification:

a copy is being sent to grant helms and curtis hill
via hand delivery or us mail or email.

/s/ Robbin Stewart

