

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

COMMON CAUSE INDIANA;)
NATIONAL ASSOCIATION for the)
ADVANCEMENT OF COLORED PEOPLE,)
by its Greater Indianapolis Branch 3053)
and on behalf of its individual members;)
DORIS A. McDOUGAL; and)
JOHN WINDLE,)

Plaintiffs,)

MARION COUNTY ELECTION BOARD;)
KEITH JOHNSON, MAURA HOFF, and)
MYLA A. ELDRIDGE, each in their official)
capacities as members of the MARION)
COUNTY ELECTION BOARD; and)
CONNIE LAWSON, in her official capacity)
as the Indiana Secretary of State,)

Defendants.)

Case No.: 1:17-cv-01388-SEB-TAB

MOTION TO ALTER OR AMEND CONSENT DECREE

Intervenor, State of Indiana, by Attorney General Curtis T. Hill, Jr., and Deputy Attorneys General Kelly S. Thompson, Bryan R. Findley and Aleksandrina Penkova Pratt, respectfully moves this Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the Consent Decree entered in this matter [Dkt. 86]. The Consent Decree is contrary to Indiana law and against the public interest and should be withdrawn.

I. INTRODUCTION

On September 22, 2017, the Court conditionally granted the State’s motion to intervene in this case. [Dkt. 40] Specifically, the Court granted the State permission to “challenge in a fairness hearing before us any settlement agreement reached between Plaintiff and the Marion County Election Board on the grounds that it is allegedly contrary to the public interest or

violative of state statute(s).” On July 10, 2018, the Court entered an order approving the Plaintiffs’ and Defendants’ Consent Decree. [Dkt. 86] The Consent Decree establishes that for the 2018 general election, the Marion County Election Board (the “Board”) will establish five satellite offices for in-person absentee voting, in addition to absentee voting available at the County Clerk’s office. (Consent Decree ¶ 18.) The Consent Decree further establishes that beginning in 2019, the Board will establish at least two satellite offices for primary elections and five satellite offices for general elections. (Consent Decree ¶ 19.)

The Plaintiffs and Defendants filed their motion to approve the Consent Decree on July 3, 2018. The Court entered the Consent Decree 7 days after it was filed. Although the Court granted the State permission to challenge any settlement agreement in this case, it allowed the State very little time to challenge the Consent Decree. Because the State did not have an opportunity to challenge the Consent Decree before it was entered by the Court, the State now files this Rule 59(e) motion and respectfully requests that the Court reverse its order approving the Consent Decree.¹

A consent decree is generally a final judgment. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Accordingly, it is “subject to the rules generally applicable to other judgments and decrees.” *Id.* Rule 59(e) permits a party to move to alter or amend a judgment within 28 days. That time has not passed.

II. ARGUMENT

1. The Consent Decree is contrary to Indiana law.

Indiana law allows a county election board to establish satellite absentee voting so long as the election board votes unanimously to do so. Ind. Code § 3-11-10-26.5. There is no finding

¹ The State is not challenging the Court’s preliminary injunction, which requires additional satellite voting offices for the 2018 general election.

in the Consent Decree that the Board voted unanimously to establish additional satellite voting for 2019 and beyond. In fact, the record supports the fact that only a majority of the Board supports additional satellite absentee voting offices. (“At all times since 2009, a *majority* of the Election Board has supported creation of satellite office. That majority support remains for the 2018 elections.” Board’s Response to Plaintiffs Motion for Preliminary Injunction [Dkt. 66], p. 1 (emphasis in original); “As a policy matter, a majority of the Election Board has supported since 2010 and continues to support the establishment of satellite offices for early in-person voting.” *Id.*, p. 4; “In general, a majority of the Election Board agrees that establishment of satellite offices is in the public interest because it expands voting opportunities for Marion County voters.” *Id.*; There does not exist the requisite unanimous support from the Election Board to establish satellite offices in 2018 without this Court’s intervention.” *Id.* (citing Deposition of Myra Eldridge at 42:11-20)). Further, it is clear that the Board’s position in litigation has been directed by its majority, rather than unanimously. (State’s Submission of Exhibit in Support of Motion to Intervene [Dkt. 37-1]; Defendants’ Response to State of Indiana’s Motion for Clarification or in the Alternative Reconsideration [Dkt. 47], p. 2 (“Defendants . . . intend to ‘demonstrate the benefit of establishing satellite offices.’”)).²

Accordingly, there is great concern that a majority of the Board cooperated with Plaintiffs to obtain something that Indiana law otherwise would have prohibited. The Seventh Circuit Court of Appeals has warned that courts must ensure there is no collusion between parties who enter consent decrees, and that the consent decree is not contrary to the public interest. *South v. Rowe*, 759 F.2d 610, 614 n.3 (7th Cir. 1985). As this Court has already concluded, “[t]he

² The Court stated, in its Opinion and Order on Plaintiffs’ Motion for Preliminary Injunction, that the Board took its litigation position unanimously. [Dkt. 76, p. 17] However, there is no evidence of that in the record.

uncontradicted evidence in the record is that ‘partisan politics probably plays a hand in decision making’ with respect to satellite offices.” [Dkt. 76, p. 41 (citing Dkt. 63, Ex. 9)]

Any consent decree or other settlement agreement in this case cannot be an end run around Indiana law. *See Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (holding that a federal consent decree cannot override state law); *Kasper v. Board of Election Comm’rs of the City of Chicago*, 814 F.2d 332, 340-41 (7th Cir. 1987) (“[D]istrict judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature; the state as a whole, and not the Board, fixes the structure of the electoral machinery unless the state’s preferred structure violates the Constitution.”).

In *Kasper*, the circuit court upheld the district court’s decision not to enter the parties’ proposed consent decree with respect to local voter registration canvassing. The plaintiffs in *Kasper* were the local Republican parties and the defendant was Chicago’s Board of Election Commissioners. The circuit court specifically found that provisions in the consent decree that expanded the state law on canvassing and added some provisions to the Board’s canvassing duties “do not put the Board into compliance, at long last, with Illinois law. They excuse the Board from such portions of Illinois law as the Republican plaintiffs and the Board find objectionable.” *Kasper*, 814 F.2d at 341. Similarly, the Consent Decree in this case does the opposite of putting the Board in compliance with Indiana law. Instead, it excuses the Board from the state law requirement to authorize additional satellite absentee voting offices only upon a unanimous vote.

Moreover, because the Consent Decree has no end date, it binds every Board going forward. The Board’s make-up changes regularly, and future Board members ought not be bound to a Consent Decree that does not allow them to exercise their right under Indiana law to vote

against the establishment of satellite absentee voting. Even since the advent of this case, two Board members have been replaced, and were substituted as defendants. [Dkt. 38 and Dkt. 81] As Board membership continues to turn over, each new Board will be bound to violate Indiana law by establishing satellite absentee voting absent a unanimous vote by the Board to do so. The Consent Decree, even if agreed to by a current unanimous Board, “bind[s] state and local officials to the policy preferences of their predecessors” and so may “improperly deprive future officials of their designated legislative and executive powers.” *Horne v. Flores*, 557 U.S. 433, 449 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

This is problematic because the Consent Decree does not purport to correct a violation of constitutional or other federal law, and state law is abundantly clear that unanimity is required. The Court’s preliminary injunction order was entered to remedy what the Court saw as a constitutional violation (which the State continues to dispute) in the Board’s vote against offering satellite absentee voting offices for 2018. The preliminary injunction makes sense only in the wake of an actual vote that the Court found to be unconstitutional. However, the Court should not assume, and the Plaintiffs and Defendants have not alleged, that future Board votes will violate the U.S. Constitution. Absent a purported federal law violation that requires a remedy, the Court lacks jurisdiction to enter the Consent Decree. *See Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996). It is worth noting, again, that there has been no finding by the Court that the Indiana statute itself is unconstitutional.

Simply, the Board should not be bound by a Consent Decree that requires it to violate Indiana law and that attempts to address constitutional violations that may never occur.

2. The Consent Decree is contrary to public interest.

The Seventh Circuit Court of Appeals has stated that:

Regulation of election procedures should be left to the political process unless a particular procedure is essential to cure an ongoing violation of federal law, and because ‘[a] federal court must preserve the appropriate relation between state and national power.’

Evans v. City of Chicago, 10 F.3d 474, 480 (7th Cir. 1993) (quoting *Kasper*, 814 F.2d at 340).

Here, there has been no finding that the alleged Constitutional violation will continue. Because no one can know if any particular Board will vote (unanimously) to offer satellite absentee voting, we cannot know that there is an ongoing violation. Indiana Code section 3-11-10-26.5 requires bipartisan support for additional satellite absentee voting. Accordingly, it is not in the public interest for a federal court to enter, enforce, and monitor a consent decree that dictates the operation of state-run elections.

The public interest is further jeopardized by the removal of the Board minority’s leverage in the political process. The unanimity requirement protects both political parties by ensuring that bipartisan support is not lacking. The Board members should have the ability with each election to be heard on the issues of satellite absentee voting and to negotiate the best outcome for Marion County. For this additional reason, the Consent Decree is contrary to public policy.

III. CONCLUSION

The Consent Decree, which is both a settlement contract between the parties and the Court’s final judgment, was entered before the State could be heard on its opposition. The Consent Decree is contrary to both Indiana law and the public interest. For these reasons, the State respectfully requests that the Court withdraw the Consent Decree.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, I electronically filed the foregoing with the clerk using the CM/ECF system.

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