UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CITY OF HAMMOND, THOMAS MCDERMOTT, in his official and personal capacities, and EDUARDO FONTANEZ, Plaintiffs, v. STATE OF INDIANA, INDIANA SECRETARY OF STATE DIEGO MORALES, in his official capacity, and THE LAKE COUNTY BOARD OF ELECTIONS, Defendants.	)	Case No. 2:21-cv-00160-PPS-JEM

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, State of Indiana, and the Indiana Secretary of State Diego Morales, in his official capacity (hereinafter, "State Defendants"), by counsel, respectfully submits the following memorandum of law in support of their Motion for Summary Judgment. Defendant requests the Court enter judgment in its favor for the reasons stated more fully below.

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INTRODUCTION

On May 7, 2021, Plaintiffs, City of Hammond, Thomas McDermott, in his official and personal capacities, Lonnie Randolph, Eduardo Fontanez, and Lonnie Randolph (hereinafter "Plaintiffs"), filed this lawsuit alleging that State Defendants violated federal law and the Indiana Constitution. [ECF 1]. Plaintiffs then filed an Amended Complaint on August 17, 2022. [ECF 58]. In their Amended Complaint, Plaintiffs allege that State Defendants have violated the 1965 Voting Rights Act, Article 4, Section 23 of the Indiana Constitution, and Article 1, Section 23 of the Indiana Constitution. [*Id.*].

However, Plaintiffs' claims fail as a matter of law. The statutory scheme does not violate the Voting Rights act. Further, Plaintiffs' remaining claims are first and foremost a question of Indiana constitutional law, and it would be inappropriate for this Court to decide these issues in federal court. Second, if this Court does decide to hear these issues, the method of nomination and retention elections has been heard by other courts before and has been held valid under law. Finally, Plaintiffs are incorrect as to their claims under the Indiana Constitution because the statutory scheme is constitutional special legislation and no special privilege or burden has been created by the nomination and retention method.

Because Plaintiffs present no genuine dispute as to any material fact and State Defendants are entitled to judgment as a matter of law, this Court must grant summary judgment in favor of the State Defendants.

SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(a), summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The movant has the initial burden of production to "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catratt,* 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmovant must establish the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e); *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 884 (1990).

The nonmovant may not rely on the mere allegations of his pleadings to defeat the motion for summary judgment. Fed R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. Nor may the nonmovant defeat summary judgment by challenging the credibility of a supporting affidavit. *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988). If the non-moving party fails to establish the existence of an essential element of the case on which he bears the burden of proof at trial, summary judgment is appropriate. *Celotex*, 477 U.S. at 322.

ARGUMENT

I. Plaintiffs' Claims Must Fail as This Court Does Not Have Jurisdiction to Hear Them.

Generally, plaintiffs have two avenues to enter federal court: (1) diversity jurisdiction and (2) federal question jurisdiction. As no diversity between the parties exists in this case, Plaintiffs are relying on federal question jurisdiction to have their claims heard by this court. Under 28 U.S.C. § 1331, district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the

United States. A case arises under federal law when an essential element of the plaintiff's cause of action depends for its resolution upon validity, construction, or effect of federal law. 28 U.S.C. 1331. However, the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

Of the claims brought by Plaintiffs, only one claim invokes an alleged violation of federal law—the Voting Rights Act claim. [*See* ECF 58, generally]. As discussed below, Plaintiffs' federal Voting Rights Act claim fails, and thus, so does this Court's jurisdiction to hear Plaintiffs' case under federal question jurisdiction. All that remain of Plaintiffs' subsequent claims involve questions of state constitutional law. Therefore, it would be inappropriate for this Court to claim jurisdiction under the federal question doctrine of 28 U.S.C. § 1331.

Moreover, as the Supreme Court stated in *Gunn v. Minton*,

> "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, we held, jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts."

568 U.S. 251, 258 (2013). The issues in this case being decided by a federal court would greatly disrupt the federal-state balance discussed in *Gunn*. The alleged violations of law claimed by Plaintiffs concern questions of Indiana constitutional law and should be decided by an Indiana court, not a federal court. *See generally, Hartland Lakeside Joint No. 3 School Dist. V. WEA Ins.*

Corp., 756 F.3d 1032 (7th Cir. 2014). (State law claim raised in the complaint was not necessarily dependent on federal law for resolution without disrupting the federal-state balance). Nevertheless, to the extent the Court decides to proceed, summary judgment in favor of State Defendants is still proper because neither the Voting Rights Act nor the Indiana Constitution has been violated. *See infra* (Argument sections II-IV below).

II. Plaintiffs Voting Rights Act Claim

"The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The Voting Rights Act ("VRA") is a Congressional means to better solidify and enforce the Fifteenth Amendment to the United States Constitution. *Brnovich*, 141 S. Ct. at 2330. "Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century." *Id.* State political processes would include "poll taxes, literacy tests, property qualifications, 'white primar[ies],' and 'grandfather clause[s].'" *Id.* (citations omitted).

Section 2 of the Voting Rights Act of 1965, as amended, prohibits voting prerequisites, practices, and procedures that discriminate on the basis of race or color. 52 U.S.C. § 10301(a) (formerly 42 U.S.C. § 1973). A Section 2 violation occurs if a plaintiff shows by the totality of circumstances that a state or political subdivision's political process leading to nomination or election are not equally open to a protected class, where members have "less opportunity than other members of the electorate to

participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021). Section 2 does not apply to instances where officials are appointed, not elected. *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 110–11 (1967); *Quinn v. Illinois*, 887 F.3d 322, 324 (7th Cir. 2018); *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir. 1998).

Here, the hybrid system employed by Lake County is not under the purview of Article 2, as Plaintiffs allege. *Bradley* involved the Section 2 implications of the same hybrid system of judicial selection present here. Twenty years later, in *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018), the 7th Circuit upheld a challenged appointment system for school board candidates in the City of Chicago, Illinois, noting that an appointment by an elected official where nobody elects the appointed position does not constitute a violation of the Voting Rights Act.

In *Bradley,* the plaintiffs were self-described as "black citizens, residents of Lake County, Indiana, and registered voters." *Bradley*, 154 F.3d 704, 706. Plaintiffs alleged that the hybrid system for appointing and retaining judges yielded a disproportionately low number of black judges and disenfranchised an entire group of voters in Lake County. *Id.* The District Court granted summary judgment to the Defendants on the grounds that there is no §2 violation where retention elections are held. *Id.* at 710. On appeal, the Seventh Circuit noted the Plaintiffs have abandoned the claim that the Voting Rights Act applies to the nomination process, and therefore, the 7th Circuit did not reach the merits of this issue, but did note that "it was the Voters' burden to show that the new Lake County system was likely to fail them, and

they simply have not done so." *Id*. at 711. The 7th Circuit held the evidence presented by the Plaintiffs did not point to vote dilution and there was evidence that supported the proposition that white voters in Lake County do support minority candidates in sufficient numbers to assure the election or retention of those candidates. *Id*. at 710-11. The 7th Circuit held the plaintiff voters cannot succeed under the Voting Rights Act because the Act does not apply to appointments. *Id.* at 711.

Bradley litigated and settled the issues presented in this case. Though there have been changes in the statute since *Bradley* that addressed the composition and eligibility of Judicial Nominating Commission members, along with changing four of the county division judges to being appointed like the rest of the judges in the county. *Id*. at 706. These changes did not substantially alter the statute to the point that the issues resolved in *Bradley* are inapplicable to the instant case. Therefore, the issues present in the instant case are no different from those in *Bradley,* as Plaintiffs in both cases make nearly identical claims concerning the Voting Rights Act implications of Lake County's judicial selection statute.

Similarly, in *Quinn*, the 7th Circuit again dealt with a §2 case concerning appointments of officials by an elected individual. *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018). The challenged practice involved a state statute that requires Chicago's School Board members be appointed by the city's mayor. *Quinn* at 323. The Plaintiffs in this case were a group of Black and Latino Chicago residents who were registered voters. Plaintiffs claimed that the appointments system for School Board members had a disparate impact on their ability to elect their school board members, and

therefore, their right to vote. *Id.* Plaintiffs' claims were rooted in the notion that school board members elsewhere in the state are popularly elected. *Id.*

The 7th Circuit rejected the plaintiffs' claims, noting there was no disparate impact amongst minority voters because if no voters in Chicago vote for their school board, then there is no vote dilution or disparate impact because there are no groups who vote at all. *Id.* at 325. The Court held since no Chicago voter votes for the school board, "[e]very member of the electorate is treated identically, which is what Section 2 requires." *Id.*

The hybrid judicial selection system in Lake County mirrors the challenged process of appointing school board members in *Quinn*, which the 7th Circuit deemed appropriate under the Voting Rights Act. Further, the 7th Circuit held there is no vote dilution or disparate impact where nobody gets to vote for appointed officials, but instead popularly elect the person in charge of appointing the officials. *Id.* The same holds true here—there is no disparate impact nor vote dilution created by the appointment statutes because, although minority groups do not vote for the position, neither does anyone else and thus, the system does not violate §2 because no group of Lake County voters elects trial judges before they are eligible for retention. Further, as stated by the Seventh Circuit in *Bradley*, §2 of the Voting Rights Act does not apply to appointments of officials. Therefore, as the 7th Circuit upheld the challenged statute and the Plaintiffs' claims do not follow established precedent, there is no genuine dispute of material fact present here and this Court should enter summary judgment in favor of the State Defendants.

III. Plaintiffs Art. 4 § 23 Indiana Constitution Claim

Article 4, Section 23 of Indiana's Constitution places limits on special legislation by requiring that "in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Ind. Const. Art. 4 § 23. The threshold inquiry when analyzing an Art. 4 § 23 challenge is to "determine whether the law is general or special." *Williams v. State*, 724 N.E.2d 1070, 1085 (Ind. 2000). A law is "general" if it applies "to all persons or places of a specified class throughout the state." *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (internal citations omitted). By contrast, a law is "special" if it "pertains to and affects a particular case, person, place, or thing, as opposed to the general public." *Kimsey*, 781 N.E.2d at 689. "If the law is general, we must then determine whether it is applied generally throughout the State. If it is special, we must decide whether it is constitutionally permissible." *Williams*, 724 N.E.2d at 1085. In examining either, judicial analysis must bear in mind "the overarching presumption that the statute is constitutional." *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1264 (Ind. 2020). "So in close cases, the special law will be upheld." *City of Hammond v. Herman & Kittle Properties, Inc.,* 119 N.E.3d 70, 84 (Ind. 2019). Here, the challenged law is undoubtedly special legislation, as it only affects Lake County. *Kimsey*, 781 N.E.2d at 689.

A special law is constitutional if its subject matter "is not amenable to a general law of uniform operation throughout the State[.]" *Williams*, 724 N.E.2d at 1086. "[T]he constitutionality of special legislation hinges on the uniqueness of the

identified class and the relationship between that uniqueness and the law." *Holcomb*, 158 N.E.3d at 1264 (citations omitted). "A special law is permissible 'when an affected class's unique characteristics justify the differential treatment the law provides to that class.'" *Id.* However, a special law is not permissible "when there are no unique circumstances of an affected class that warrant the special treatment—meaning that a general law could be made applicable." *Id.*

The applicable law is a special law because, based on the results of the survey and interviews, judicial elections in Lake County are not amenable to a general law of uniform operation throughout the state. When legal professionals in Lake County were surveyed and interviewed, it was noted that a majority were unsatisfied with the judges elected via partisan elections, citing unequal caseloads among Lake County Judges, inconsistent application of Indiana's trial rules, and an excessive number of cases being sent by Lake County judges to venues in outside counties. Exhibit 1 ("Bonnet Aff.") ¶ 14. These findings necessitated further action, leading to the development of the current hybrid plan at issue. Due to the results of the survey and interviews, Lake County presents a unique scenario that is not amenable to the general unform operation of judicial elections; therefore, the hybrid system in Lake County is a constitutionally allowed special law.

In response to the Article 4, Section 23 claimed violation, Defendants must first "clear a low bar" by "demonstrating a link between the alleged unique characteristics of the class covered by the law and the legislative fix—*i.e.*, the law's special treatment of that class." *Holcomb*, 158 N.E.3d at 1264. If Defendants establish this link, then

Plaintiffs "'must show why the specified class's characteristics are not defining enough to justify the special legislation,' essentially challenging the uniqueness of the class covered by the special law." *Id.*

The link between the unique characteristics and the special treatment of the class is present. The results of the survey show that Lake County had a set of issues with an elected judiciary that other counties may not have. The legislative fix for the unique issues present in Lake County was the institution of the hybrid system by the state legislature. By showing the set of issues and the institution of the hybrid system, the Defendants shift the burden to the Plaintiffs to challenge the uniqueness of the class covered by the special law. This is not a showing which can be made by the plaintiffs based on the substantial evidence warranting the special law. Because Plaintiffs cannot meet their burden to show the characteristics of Lake County are the same as the rest of Indiana and therefore do not require special legislation, their claim here must fail.

IV. Plaintiffs Art. 1 § 23 Indiana Constitution Claims

Article 1, Section 23 of the Indiana constitution forbids the General Assembly from granting any person, or class of citizens, a privilege or immunity that does not equally belong to all citizens. Ind. Const. art. I, § 23. Plaintiffs argue that Ind. Code § 33-33-45-28 violates Article 1, Section 23 as attorneys in Lake County no longer have the privilege of selecting members of the Lake County JNC, [ECF 58, ¶¶ 68-71], and that the judicial nomination and retention elections violate Article 1, Section 23 because Lake County voters do not elect their trial judges. [ECF 58, ¶¶ 73-75].

Indiana Gaming Commission v. Moseley provides an excellent historical perspective regarding analysis of Article 1, Section 23 claims. It describes this section as a measure to limit the General Assembly's involvement in private commercial affairs. 642 N.E.2d 296, 301-02 (Ind. 1994). The Indiana Supreme Court also noted that the Court has sometimes employed notions from the Fourteenth Amendment of the Constitution into its Article 1, Section 23 analysis. *Id.* at 303.

In *Collins v. Day*, the Indiana Supreme Court provided the same historical analysis as above, but the Court expanded *Moseley* and articulated a two-prong standard to review such claims. *Collins*, 644 N.E.2d 72, 75-81 (Ind. 1994). The first prong states that the "disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes." *Id.* at 80. The second prong holds that "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.* The Court also stated, when determining whether a statute complies with or violates Article 1, Section 23, courts must exercise "substantial deference" to legislative discretion. *Id.*

Here, Plaintiffs fail both prongs of the Article 1, Section 23 standard established in *Collins*. While arguing Ind. Code § 33-33-45-28 and the judicial nomination and retention elections violate Article 1, Section 23, Plaintiffs incorrectly apply the law. This statute and the nominations/elections do not violate the Indiana Constitution.

A. Indiana Code Section 33-33-45-28 Does Not Violate Art. 1, § 23 by denying attorneys the right to choose judges.

There is ample reason as to why the disparate treatment accorded by the General Assembly is reasonably related to inherent characteristics which distinguish the unequally treated classes. *Collins*, 644 N.E.2d at 80. Ind. Code § 33-33-45-28 now allows the Governor and the Lake County Board of Commissioners to select the members of the Lake County JNC. *See* Ind. Code § 33-33-45-28. Although the Indiana General Assembly does not maintain an official legislative history that provides a formal explanation for the enactment of statutes, a rational basis for changing the selection process for Lake County JNC is that the Lake County Board of Commissioners, who are elected officials, should have more of a say in deciding the makeup of the Lake County JNC instead of unelected attorneys. Similar to a federal rational basis review of equal protection claims, any review of this reason should be "highly deferential to the government." *Hope v. Comm'r of Indiana Dep't of Correction*, 66 F.4th 647, 650 (7th Cir. 2023). In such a review, "any reasonably conceivable state of facts" may provide the rational basis. *Id*. (internal quotations and citations omitted). A decision to allow elected officials to decide the makeup of the Lake County JNC is rational.

Moreover, the "preferential treatment" of others similarly situated is available in other counties. *Collins*, 644 N.E.2d at 80. St. Joseph County, another Indiana county with a Judicial Nominating Commission, has their JNC selected in the exact same manner as the Lake County JNC. *See* Ind. Code § 33-33-71-30; *compare with* Ind. Code § 33-33-45-28. As St Joseph County, a close neighbor of Lake County, has

the exact same nomination scheme that Lake County does, Plaintiffs cannot claim that Lake County's treatment is different than others similarly situated. Further, as the other 89 counties are not electing the judges for Lake County, there is no special privilege here.

Because there is a rational basis for the statute and others similarly situated are afforded the same treatment, Plaintiffs have not shown the statute violates Indiana Constitution Art. 1, § 23.

B. The Judicial Nomination and Retention Scheme Does Not Violate Art. 1, § 23.

Plaintiffs also claim that the judicial nomination and retention scheme violates Article 1, Section 23 because in 89 of Indiana's counties, voters elect trial judges. [ECF 58, ¶¶ 73-75]. However, this argument also fails to meet the standard established by the Court in *Collins*, 644 N.E.2d at 80.

First, as stated previously, there is ample reason as to why the disparate treatment accorded by the General Assembly is reasonably related to inherent characteristics which distinguish the unequally treated classes. The General Assembly, for various policy reasons, may believe that simply due to the high population of Lake County, trial judges should not be elected officials. As above, under rational basis review, which is highly deferential, any reasonable facts may provide a suitable basis for the action taken by the State. *Hope*, 66 F.4th at 650.

Second, by Plaintiffs' own admission in their Second Amended Complaint, the alleged violation fails the second prong of *Collins*. [*See* ECF 58, ¶¶ 73; 75]. Plaintiff

state that *eighty-nine counties* in Indiana elect their judges. *Id.* (emphasis added). There are three counties in Indiana that do not elect their judges: (1) Marion, (2) Lake, and (3) St. Joseph counties. *See* Ind. Code §§ 33-33-49-13.1, -45-28, and -71-30. Marion, Lake, and St. Joseph are three counties that are similarly situated with each other. All three are highly populated counties in Indiana that the General Assembly decided, for whatever policy reasons, would not elect their judges, but instead these counties would have their trial judges nominated and then retained. *See id.* Therefore, the "preferential treatment" argued by Plaintiffs is equally available to Lake County residents as to others. *Collins,* 644 N.E.2d at 80.

Plaintiffs have not shown the scheme is unrelated to the inherent characteristics that distinguish them from others, *i.e.*, the scheme may have been put into place to allow elected officials to have a voice in the appointment of judges. Further, Plaintiffs have not shown how they have been burdened by any treatment because two other counties use similar statutory schemes to appoint their judges. Plaintiffs' claims of constitutional violation fail and the Court must enter summary judgment against them.

CONCLUSION

The Indiana Constitutional challenges are more properly decided by an Indiana Court. Plaintiffs' claims as to any violation of the Voting Rights Act is not at issue for appointed judges. Further, if the Court were to decide the Indiana Constitutional challenges, Plaintiffs cannot meet their burden to show the special legislation is unconstitutional or that the attorneys in Lake County have been treated

disparately. Therefore, State Defendants respectfully request the Court grant their Motion for Summary Judgment, and to all other relief deemed just and proper by the Court.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

Date: June 5, 2023 By: /s/ Kari Morrigan
Attorney No. 34706-49
Deputy Attorney General
OFFICE OF INDIANA ATTORNEY GENERAL
TODD ROKITA
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Phone: (317) 233-8296
Email: kari.morrigan@atg.in.gov