

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

CITY OF HAMMOND, )  
THOMAS MCDERMOTT, in his official )  
and personal capacities, EDUARDO )  
FONTANEZ, and LONNIE )  
RANDOLPH, )

Plaintiffs, )

v. )

STATE OF INDIANA, INDIANA )  
SECRETARY OF STATE )  
HOLLI SULLIVAN, in her official )  
capacity, and THE LAKE COUNTY )  
BOARD OF ELECTIONS, )

Defendants. )

Case No. 2:21-cv-00160-PPS-JEM

**DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

State of Indiana, and the Indiana Secretary of State Diego Morales, in his official capacity (hereinafter, "State Defendants"), by counsel, hereby submit their Statement of Facts Not in Dispute, in support of their Motion for Summary Judgment against all claims asserted by Plaintiffs, City of Hammond, Thomas McDermott, in his official and personal capacities, Lonnie Randolph, and Eduardo Fontanez, which is being filed contemporaneously with this Motion:

**A. Parties to this Lawsuit**

1. Hammond is an Indiana municipality and governmental organization located in Lake County, Indiana. [ECF 58, ¶ 1].

2. Thomas McDermott is the mayor of Hammond, Indiana and is an attorney that resides in Lake County, Indiana. [*Id.*, ¶ 5]. He is also a registered voter. [*Id.*].

3. Lonnie Randolph is an Indiana State Senator from Lake County, an attorney, and a registered voter. [*Id.*, ¶ 6].

4. Eduardo Fontanez is a registered voter and an attorney that resides in Lake County, Indiana. [*Id.*, ¶ 7-8].

### **B. History of Judicial Elections in Indiana**

5. For over a century, judges at all levels in Indiana were selected through partisan elections. [Exhibit 1 (“Bonnet Aff.”) at ¶ 4; *see also Spencer v. Knight*, 98 N.E. 342, 345 (Ind. 1912) (discussing that judicial elections be held at the time of general elections); *see also Beal v. Ray*, 17 Ind. 554 (Ind. 1861) (discussing the legality of a judicial election in 1861)].

6. This system led to criticism regarding impartiality, judicial independence, and the continued ability to select high quality trial judges. Bonnet Aff. at ¶ 4.

7. Indiana has a compelling interest in protecting the public’s confidence in its representative government officials, including judges, and does not require the State to wait until actual instances of fraud, undue influence, bribery, malfeasance, or breach of public trust have occurred. Bonnet Aff. ¶ 5.

8. To address these concerns and further the state’s interest in protecting public confidence in government officials, Indiana’s 1965 General Assembly

passed an act establishing the Judicial Study Commission (“the Commission”). Bonnet Aff. ¶ 6.

9. The Commission was tasked with evaluating Indiana’s then judicial selection process through partisan political elections and to consider selection alternatives, as part of Indiana’s judicial reform movement. Bonnet Aff. ¶ 7 citing Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Judiciary*, 46 IND. L. REV. 15 (2013); *see also* 1965 Ind. Acts 77; and *McCullough v. State*, 900 N.E.2d 745, 749 (Ind. 2009).

10. As part of the evaluation, the JNC sent questionnaires to Indiana attorneys and judges. Bonnet Aff. ¶ 8 citing Najam at 19.

11. The results of the questionnaire survey showed that 79% of Indiana attorneys believed the partisan election system “could not continue to provide...highly qualified trial judges,” and 87% of Indiana attorneys believed politics influenced judicial selection to varying degrees. *Id.* at ¶ 9 citing Najam at 19.

12. The JNC study findings and recommendations ultimately led to the General Assembly’s initiation of the constitutional amendment process, which included revisions adopting merit selection for the Indiana Supreme Court judges and Indiana Court of Appeals judges under a revised Article 7 of the Indiana Constitution. *Id.* at ¶ 10, citing John G. Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233,

258 (1997); *see also McCullough*, 900 N.E.2d at 749; *see also* Ind. Const. Art. 7 § 9.

13. Although merit selection was not adopted for Indiana trial court judges at that time, the General Assembly later adopted merit selection for counties in major Indiana metropolitan areas with the second through fifth largest cities, being the counties of Lake, St. Joseph, Allen, and Vanderburgh. Bonnet Aff. ¶ 11.

14. Indiana now has a mixed system of merit selection and nonpartisan election to select trial court judges, and each county has its own statute governing its judicial selection process. [Ind. Code § 33-33, *et seq.*].

### **C. Judicial Selection History in Lake County**

15. In 1972, Senate Enrolled Act 22 directed the JNC to conduct a study specific to Lake County's court system and to report its findings during the 1973 legislative session. Bonnet Aff. ¶ 12 citing Institute for Court Management ("ICM"), *Report: A Program for the Improved Administration of Justice in Lake County* at 1 (1972); *see also* 1972 SEA 22.

16. The Commission contracted the Institute for Court Management ("ICM") to perform the study. Bonnet Aff. ¶ 13. The majority of Lake County attorneys and judges ICM interviewed were dissatisfied with partisan election of judges in Lake County, which ICM found contributed to an attorney-managed administration of justice, 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. *Id.* at ¶ 14.

17. The 1973 Indiana General Assembly then adopted a hybrid appointment and retention merit system known as “The Missouri Plan”, for selecting Lake County superior court judges in the civil, criminal, and juvenile divisions. [*Bradley v. Work*, 154 F.3d 706 (7th Cir. 1998)].

18. A version of this hybrid system remains in effect today for Lake County superior court judges, where merit selection is used to appoint judges, with retention elections for incumbents. Bonnet Aff. ¶ 15; *see also* Ind. Code § 33-33, *et seq.* If a judge loses the retention election, the seat is vacant and a new judge is appointed through the merit selection process. *Id.*

19. Lake County’s judicial selection laws provide for a hybrid system, where Lake County Judicial Nominating Commission (“LCJNC”) submits 5 names/nominees to the Governor for each judicial vacancy, who then appoints a person from this list to fill the vacancy, based on qualifications of the nominees and without regard to political affiliation. Ind. Code § 33-33-45-38. Appointees then face retention elections about 2 years after their initial appointment, and then again every 6 years thereafter. *See* Ind. Code § 33-33-45-41.

20. In 2008, the Judicial Conference of Indiana developed a Strategic Plan for the future of Indiana’s judicial branch, steered by a Strategic Planning Committee organized by former Chief Justice Randell T. Shephard. Bonnet

Aff. ¶ 16 citing *A Blueprint for Excellence and to Greater Accountability: Enhanced Access to Justice in Indiana's Judicial System*, INDIANA JUDICIAL BRANCH: STRATEGIC PLANNING COMMITTEE at 1, <https://www.in.gov/courts/iocs/files/strategic-white-paper.pdf>.

21. The plan describes a decades long reform measure to Indiana's judicial branch, including moving towards a unified court system, state-centralized funding source, and push for merit selection of trial court judges, among other things. *Id.* ¶ 17

22. A merit selection process is essential in a highly populated and highly diverse jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts. *Id.* ¶ 18.

23. Despite amendments from time-to-time to the nomination process and LCJNC's structure, the appointment and retention process has remained largely unchanged for the majority of Lake County superior court divisions; except selection of the 4 county division judges did not change from elections to the hybrid process until Ind. Code § 33-33-45-25 was amended in 2011. *Id.* ¶ 19; *see also* P.L. 201-2011, § 61.

24. As amended by HEA 1453, under the current version of Ind. Code § 33-33-45-28(a) – (b), LCJNC members consist of Governor appointees, Lake County board of commissioner appointees, and Indiana's Chief Justice or their Justice designee. Bonnet Aff. ¶ 20.

25. The current appointment, selection, and retention process for Lake County superior court judges is a product of decades-old concerns and detailed study results to ensure fairness, integrity, impartial administration of justice, and judicial accountability. *Id.* ¶ 21 citing Frank Sullivan, Jr., “*What I’ve Learned About Judging*”, 48 VAL. U. L. REV. 195, 198 (2013).

26. The State has a compelling interest in judicial independence, impartiality, fairness, and judicial accountability that has long required some specialization in Indiana counties to ensure the judicial selection process reflects the diversity of the jurisdiction. Bonnet Aff. ¶ 22].

27. “Because the governor may appoint only from these approved finalists, merit selection constrains the ability of political officials to stack the courts with partisan judges.” *Id.* ¶ 23 citing Zachary Reger, *The Power of Attorneys: Addressing the Equal Protection Challenge to Merit-Based Judicial Selection*, 89 U. CHI. L. REV. 253 (2022).

28. Further, HEA’s elimination of local attorney elections for a certain number of LCJNC members prevents actual or public perception of apparent bias of nominee selections influenced by the attorneys who may practice before them. Bonnet Aff. ¶ 24 citing Judicial Conference of Indiana – Strategic Planning Committee, *A New Way Forward*, at 22 (2008).

29. Statistics showing the annual total cases before Indiana trial courts were released by Indiana’s Judiciary for years 2020 and 2021, and include as follows:

County	2020	2021
<b>All Counties</b>	<b>2,662,272</b>	<b>2,790,822</b>
Marion County	480,580	516,776
Lake County	455,707	457,481
Allen	123,586	117,650
St. Joseph	91,913	99,775
Vanderburgh	84,214	89,877
Hamilton	50,188	50,716

Bonnet Aff. ¶ 25 citing Indiana Trial Court Statistics by County, <https://publicaccess.courts.in.gov/ICOR> (last visited June 5, 2023).

30. Lake County's current hybrid system for selecting judicial officers involves various state and local officials through a process involving segregation of duties that vastly reduce the risks that any voter fraud could spill over into selection or retention of judges. Bonnet Aff. ¶ 26].

31. From 2007 - 2021, LCJNC consisted of 9 members: Indiana's chief justice or their appellate court designee as chairman; four attorney members elected by local attorneys; and four non-attorney local residents appointed by the Lake County board of commissioners (each of the three county commissioners appointed one person and the fourth was appointed by majority vote of the county board). Ind. Code § 33-33-45-28 (effective July 1, 2007 to April 28, 2021).

32. Both the elected attorney members and the appointed non-attorney members were required to consist of a minority, two women, and two men. [Ind.



Code § 33-33-45-28(b) – (c) (2007)]. When a judicial vacancy occurred during this period, LCJNC had 60 days to certify three nominees to the Governor for appointment. Ind. Code § 33-33-45-34(a) (2004).

33. Qualified candidates were selected at a public meeting by a majority vote among at least five LCJNC members. [Ind. Code § 33-33-45-34(e) (2004)]. To qualify, LCJNC are required to evaluate candidates based on criteria under Ind. Code § 33-33-45-38; however, LCJNC may not consider political affiliation in evaluating candidates. Ind. Code § 33-33-45-38(4).

34. In 2021, Lake County judicial selection laws were amended by decreasing local control of LCJNC, increasing the number of certified nominees<sup>1</sup>, adding gender and equity provisions to address recent criticism, and establishing a more unified and state-centralized nomination process. P.L. 204-2021, § 11.

35. LCJNC now consists of 7 members: Indiana's chief justice or their designee as chairman and ex officio voting member only in the event of tie; three governor appointees consisting of one attorney, one non-attorney who has never held a law license, and one woman; three Lake County board of commissioner appointees consisting of one attorney, a non-attorney never holding a law license, and a person of racial minority. Ind. Code § 33-33-45-28(a) – (b).

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<sup>1</sup> See Ind. Code § 33-33-45-38(a) (increasing the number of certified nominees from 3 to 5).

36. By implication, nominees are now selected by a majority vote among at least 4 LCJNC members. Ind. Code § 33-33-45-34(e). The General Assembly also granted standing to the chief justice or their designee to dispute the validity of an appointed LCJNC member. Ind. Code § 33-33-45-28(b). Although the Lake County judicial selection laws were amended from time-to-time, substantive portions of the challenged hybrid process remain largely unchanged.

Respectfully submitted,

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Date: June 5, 2023

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