

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

CITY OF HAMMOND, et al., )  
)  
Plaintiffs, ) CASE NO. 2:21-cv-00160-PPS-JEM  
)  
vs. )  
)  
LAKE COUNTY JUDICIAL )  
NOMINATING COMMISSION, et al., )  
)  
Defendants. )

**OPPOSITION TO LAKE COUNTY BOARD OF ELECTIONS' MOTION FOR  
SUMMARY JUDGMENT**

Plaintiffs, City of Hammond, Thomas McDermott, in his official and personal capacities, Eduardo Fontanez, and Lonnie Randolph, by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully file their opposition to the Motion for Summary Judgment (“Motion”) filed by the Defendant Lake County Board of Elections and Registration (“Election Board”).

**INTRODUCTION**

Through this lawsuit, Plaintiffs allege that judicial retention elections violate the Voting Rights Act (“VRA”) and Indiana Constitution because voters in Lake County enjoy lesser and unequal voting rights than other voters in Indiana. The Election Board administers the challenged statute. Ind. Code § 33-33-45-42(e) (“The Lake County election board shall submit the question of the retention . . . to the electorate of Lake County”). If this Court declared this statute illegal or unconstitutional, it could enjoin the Election Board from enforcing it. In the Motion, the Election Board essentially argues that it is just following orders and it did not enact the challenged statute. The Election Board does not cite any authority to support that a defendant had to enact the

challenged statute. The Election Board is a proper defendant.

## **I. Background**

Ind. Code § 33-33-45-42(e) provides that the “Lake County election board shall submit the question of the retention in office or rejection of a judge described in subsection (a) to the electorate of Lake County.” Plaintiffs have designated evidence that they previously had the right to vote on superior court judges in open elections, but now only have the right to vote on whether to retain an appointed judge. (*See, e.g.*, Dkt. 84-1 pp.1-2.) This lesser voting right that is administered and enforced by the Election Board is Plaintiffs’ injury. (*Id.*) In other Indiana counties, judges are chosen through elections. *See, e.g.*, Ind. Code § 33-33-2-9(a) (providing for non-partisan elections of superior court judges in Allen County); Ind. Code § 33-33-82-5 (providing for election of superior court judges in Vanderburgh County).

## **II. Analysis**

In the Motion, the Election Board argues that it is allegedly not a proper defendant, without citing any authority to support that a local elections board is not a proper defendant in a VRA claim challenging an election procedure administered by the election board. The Election Board is a proper defendant, and this Court should deny the Election Board’s Motion.

For a plaintiff to have standing, three prerequisites are necessary. “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized . . . .” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The Election Board does not challenge that Plaintiffs have suffered a cognizable injury. “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” *Id.* (internal quotation omitted)

(alteration in original). “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.*

Local elections boards are frequently named defendants in cases involving challenges to voting laws. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185 (2008), plaintiffs named the Marion County Election Board as a defendant in a case challenging “an Indiana statute requiring citizens voting . . . to present photo identification.” In *Mulholland v. Marion County Election Bd.*, 746 F.3d 811, 813 (7th Cir. 2014), “[o]ne of the Defendants then was the same defendant before us today: the Marion County Election Board.” In neither of those cases was the propriety of naming a county election board as a defendant challenged.

Indeed, state officials have previously taken the position that local election boards are the *only* proper defendants in these types of cases. In *Indiana Democratic Party v. Rokita*, 375 F. Supp. 2d 788, 789 (S.D. Ind. 2005), voters challenged “the photo identification requirements for voters to qualify to vote.” The Marion County Election Board was a named defendant. *Id.* The Indiana Attorney General and Secretary of State moved to dismiss because they “have no direct role in enforcing the photo identification mandates.” *Id.* The Court declined to dismiss them because “we are unable to say definitively that enforcement of SEA 483 will not implicate at least some of the official statutory responsibilities of Defendants Rokita, King, and Robertson.” *Id.* The Court held this, in part, because “of the fact that the Marion County Election Board is a party defendant and the Indiana Attorney General has intervened in the case to defend the constitutionality of the state statute” meant the state defendants did not need to actively participate in the case. *Id.*

In *Common Cause Indiana v. Indiana Secretary of State*, 1:12-cv-01603-RLY-DML, 2013 WL 12284648 \*1 (S.D. Ind. Sep. 6, 2013), plaintiffs challenged “the unique process by

which judges are elected to the Marion Superior Court.” The Indiana Secretary of State moved to dismiss arguing that “county election boards are enlisted with the requisite powers to administer and enforce local judicial elections.” *Id.* at 3. The Court declined to dismiss the Secretary of State “even if [elections laws are] primarily enforced at the local level.” *Id.* at \*4.

The State Election Commission also moved to dismiss. The Court recognized that a “constitutional challenge to the enforcement of a state statute is not a novel claim. In simple terms, the plaintiff is insisting that, by following the terms of a duly enacted statute, a state official is violating its constitutional rights.” *Id.* “Were the court to find the challenged statute was unconstitutional and thus, unenforceable, the Commission would be duty-bound to follow the court’s order . . . .” *Id.* Likewise, here, Plaintiffs are asserting that by following the terms of a duly enacted statute the Election Board is violating the Voting Rights Act and Indiana Constitution. Were this Court to find the challenged statute illegal or unconstitutional the Election Board would be duty bound to follow this Court’s order and stop placing judges for retention votes. *Id.*

In *Anderson v. Mallamad*, No. IP 94-1447-C H/G, 1997 WL 35024766, at \*1 (S.D. Ind. Mar. 28, 1997), plaintiffs sued state defendants and “members of the Marion County Election Board.” The state defendants contended they were not proper defendants, but the district court rejected that argument because “[t]hese statutorily defined powers and duties sufficiently link the state defendants to the administration and enforcement of the election statutes challenged in this case.” *Id.* at \*3. Likewise, the Election Board is a proper defendant in this case because it is directly linked to the challenged statute. The Court also rejected the state-defendants’ argument that they were not proper defendants because they did not have the authority to change the challenged statute: “Other courts have permitted Voting Rights Act plaintiffs to sue state election

boards or commissions even where those defendants did not have the power to change the challenged electoral system.” *Id.* The Court found the state-defendants were proper defendants because “the state defendants are charged by statute with administering the laws challenged by plaintiffs.” *Id.* \* 4.

In the Motion, (Dkt. 93 p.2), the Election Board cites *Hearve v. Board of Education of City of Chicago*, 185 F.3d 770 (7th Cir. 1999), to argue that it is not a proper defendant. In that case, the Seventh Circuit held that the Illinois governor was not a proper defendant because “the governor has no role to play in the enforcement of the challenged statutes.” *Id.* In this case, in contrast, the Election Board administers the challenged statute. Ind. Code § 33-33-45-42(e).

The Election Board next argues that it is not a proper defendant because “the Election Board [does not] have the power to authorize the remedies sought.” (Dkt. 93 p.3.) The Southern District of Indiana has rejected this exact argument and permitted suit against “election boards or commissions even where those defendants did not have the power to change the challenged electoral system.” *Anderson*, 1997 WL 35024766 at \*1. Only the Indiana Legislature and Governor can amend a statute in Indiana but the Election Board cites nothing to support that they are the only proper parties in a Voting Rights Act case.

The Election Board, finally, argues that the “harms alleged in the Plaintiffs’ Second Amended Complaint are simply not fairly traceable to any conduct of the Election Board.” (Dkt. 93 p.3.) This is not correct. The harm is that retention votes deprive Lake County voters of the right to select judges of their choice. (*See, e.g.*, Dkt. 84-1 pp.1-2.) The Election Board administers the retention votes. Ind. Code § 33-33-45-42(e). The Election Board is most directly involved in Plaintiffs’ harm.

In conclusion, this Court should deny the Election Board’s summary judgment motion

that the Election Board is not a proper defendant.

WHEREFORE, Plaintiffs respectfully request that the Court deny the Election Board's Motion.

Respectfully submitted,

/s/ Bryan H. Babb

Bryan H. Babb, Atty. No. 21535-49  
Bradley M. Dick, Atty. No. 29647-49  
Seema R. Shah, Atty No. 26583-49  
BOSE McKINNEY & EVANS LLP  
111 Monument Circle, Suite 2700  
Indianapolis, IN 46204  
(317) 684-5000  
(317) 684-5173 (Fax)  
[bbabb@boselaw.com](mailto:bbabb@boselaw.com)  
[bdick@boselaw.com](mailto:bdick@boselaw.com)  
[sshah@boselaw.com](mailto:sshah@boselaw.com)

### CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2023, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Jefferson S. Garn

[Jefferson.Garn@atg.in.gov](mailto:Jefferson.Garn@atg.in.gov)

Michael E. Tolbert

[mtolbert@tolbertlegal.com](mailto:mtolbert@tolbertlegal.com)

Candace C. Williams

[cwilliams@tolbertlegal.com](mailto:cwilliams@tolbertlegal.com)

Shelice R. Tolbert

[stolbert@tolbertlegal.com](mailto:stolbert@tolbertlegal.com)

Rogelio Dominguez

[roy@dominguezlawyer.com](mailto:roy@dominguezlawyer.com)

Kari A. Morrigan

[Kari.morrigan@atg.in.gov](mailto:Kari.morrigan@atg.in.gov)

Meredith B. McCutcheon

[Meredith.mccutcheon@atg.in.gov](mailto:Meredith.mccutcheon@atg.in.gov)

/s/ Bryan H. Babb

Bryan H. Babb