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.	)	

PLAINTIFFS' REPLY TO STATE DEFENDANTS' STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiffs, City of Hammond, Thomas McDermott, in his official and personal capacities, Eduardo Fontanez, and Lonnie Randolph, by counsel and pursuant to Local Rule 56-1(c)(2), respectfully file their Reply to the Statement of Additional Material Facts filed by the Defendants State of Indiana and the Indiana Secretary of State Diego Morales (collectively, the "State") (Dkt. 101):

A. Parties to this Lawsuit

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

39. Plaintiffs do not dispute this.

40. 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.*].

40. Plaintiffs do not dispute this.

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

41. Plaintiffs do not dispute this.

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

42. Plaintiffs do not dispute this.

B. History of Judicial Elections in Indiana

43. 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)].

43. Plaintiffs do not dispute this.

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

44. Plaintiffs do not dispute this.

45. 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.

45. This is a legal conclusion, not a statement of material fact. Although there is a citation to evidence, namely the Bonnet Affidavit's paragraph 5, that affidavit paragraph contains the same language as above and is also an impermissible legal conclusion. *See Paniaguas v. Aldon Companies, Inc.*, No. 2:04-CV-468-PRC, 2006 WL 2568210, *4-*5 (N.D. Ind. Sept. 5, 2006). "Compelling interest" is indisputably a legal term of art, and asserting that the government possesses a "compelling interest" is a legal

conclusion to be drawn by a court—it is not an admissible statement of material fact that can support summary judgment. *See id*.; *cf. Nat'l Cap. Presbytery v. Mayorkas*, 567 F.Supp.3d 230, 240 (D.C. 2021) (explaining that a "compelling interest" inquiry is a "question[] of law"). Plaintiffs have fully responded to the State's legal arguments within the Plaintiffs' briefing.

46. 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.

46. The Bonnet Affidavit states that Bonnet has worked for the Secretary of State since 2005. Public records subject to judicial notice reflect that he first became an attorney in 2007. https://courtapps.in.gov/rollofattorneys/attorney/c7659a99-14b7-e011-9d34-02215e942453?LastName=Bonnet&OrderBy=0&Page=1. The Bonnet Affidavit does not aver that Bonnet was a member of the General Assembly in 1965. Even if he had been, he would lack personal knowledge of what motivated the entire body to act. Plaintiffs object to Paragraph 46 because Bonnet has not averred facts that would support that he has personal knowledge of the facts he avers to. Evid. R. 602.

47. 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).

47. Plaintiffs do not dispute this.

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

48. Plaintiffs do not dispute this.

49. 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.

49. Plaintiffs do not dispute this.

50. 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.

50. The Bonnet Affidavit states that Bonnet has worked for the Secretary of State since 2005. Public records subject to judicial notice reflect that he first became an attorney in 2007. https://courtapps.in.gov/rollofattorneys/attorney/c7659a99-14b7-e011-9d34-02215e942453?LastName=Bonnet&OrderBy=0&Page=1. The Bonnet Affidavit does not aver that Bonnet was a member of the General Assembly at the time it initiated the constitutional amendment process. Even if he had been, he would lack personal knowledge of what motivated the entire body to act. Plaintiffs object to Paragraph 50 because Bonnet has not averred to facts that would support he has personal knowledge of the facts he avers to. Evid. R. 602.

51. 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.

    51. Plaintiffs do not dispute that the General Assembly imposed a nomination-followed-by-retention-voting scheme on Lake, St. Joseph, Allen, and Vanderburgh counties during that time period; however, the Plaintiffs clarify that all circuit court judges, in every Indiana county, are elected. (*See* Dkt. 85 at 8-9 (explaining trial-court judge selection across Indiana)). Defendants' statement generally referring to "trial court judges" is confusing, as it does not recognize that in Lake, St. Joseph, Allen, and Vanderburgh counties, circuit court judges have always been elected.

52. 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*.].

    52. Plaintiffs dispute this. First, this is not a fact but is an interpretation of Indiana statutes. Second, counties do not have statutes governing judicial selection. Rather, the Indiana Legislature has generally used the boundaries of counties to define judicial circuits. Ind. Code Art. 33-33. The Legislature then established different voting procedures in different judicial circuits. *See id.* Third, in Indiana, nearly all superior court judges are elected in **partisan** elections. *See* Ind. Code Art. 33-33; see also Indiana Judicial Branch, How Judges Are Selected in Indiana, found at https://www.in.gov/courts/selection/. The exceptions are the retention-vote counties (where voters get only a retention vote—Lake, Marion, and St. Joseph) and Allen

County, which has nonpartisan elections for its superior court judges, Ind. Code § 33-33-2-9. Thus, the Defendants incorrectly omit "partisan elections" from their Statement 52.

C. Judicial Selection History in Lake County

53. 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.

53. Plaintiffs do not dispute this.

54. 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.

54. The Bonnet Affidavit states that Bonnet has worked for the Secretary of State since 2005. Public records subject to judicial notice reflect that he first became an attorney in 2007. https://courtapps.in.gov/rollofattorneys/attorney/c7659a99-14b7-e011-9d34-02215e942453?LastName=Bonnet&OrderBy=0&Page=1. The Bonnet Affidavit does not aver any basis for Bonnet to have personal knowledge of the facts averred to in Paragraph 54. Evid. R. 602

55. 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)].

55. Plaintiffs do not dispute this.

56. 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.*

56. Plaintiffs do not dispute this.

57. 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.

57. Plaintiffs dispute that Lake County has judicial selection laws. The Legislature created a judicial circuit using Lake County's boundaries and implemented different voting procedures within that judicial circuit. Plaintiffs dispute that Paragraph 57 contains any facts, but rather summarizes Indiana statutes.

58. 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 Randall 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.

58. Plaintiffs do not dispute this.

59. 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.

59. Plaintiffs do not dispute this.

60. 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.

60. Plaintiffs do not dispute that the motivation behind the retention-only voting scheme being imposed in Lake County was race-based—that is, because Lake County is "highly diverse."

61. 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.

61. Plaintiffs dispute this. Plaintiffs dispute that Paragraph 61 contains facts; rather Paragraph 61 inaccurately summarizes decades of Indiana law. Additionally, Paragraph 61 does not accurately state the path to the current retention vote process in Lake County. In the early 1970's, all Lake County superior court judges were subject

to appointment followed by a retention vote. Then, in 1989, the Legislature provided that three Lake County superior court judges "comprise the county division," Ind. Code § 33-5-29.5-42.5, and that those judges "shall be elected . . . by the electorate of Lake County," Ind. Code § 33-5-29.5-42.5. Then, in 2011, the Legislature repealed the provision of the election of the Lake County superior court judges that made up the county division, Ind. Code § 33-33-45-43; P.L. 201-2011, Sec. 114, leading to all Lake County superior court judges being subject to appointment followed by a retention vote.

62. 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.

62. Plaintiffs do not dispute this.

63. 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).

63. Plaintiffs dispute this. This is a verbatim recitation of Mr. Bonnet's Affidavit Statement 21, which misstates Justice Sullivan's remarks. In Justice Sullivan's speech, he spoke about the merit selection system for Indiana Supreme Court justices. There is simply no mention of "decades-old concerns" about Lake County superior court judges. (Dkt. 81-6 at 3.) In fact, in terms of Justice Sullivan's discussion of judicial selection, Lake County is not mentioned a single time. In other words, Mr. Bonnet's Affidavit Statement 21 lacks supporting evidence and must be stricken. *See*

Paniaguas, 2006 WL 2568210, at *4 (listing categories of improper affidavit statements, including those lacking "supporting evidence"). Additionally, Mr. Bonnet's Affidavit Statement 21 is an opinion not "grounded in observation or other first-hand experience," *id.*, at *4, as there is no indication that Mr. Bonnet had personal knowledge of "decades-old concerns" about Lake County superior court judges, especially considering that Mr. Bonnet did not hold his current position when the challenged statutory scheme was first put in place in 1973. *See* Ind. Code §§ 33-5-29.5-28, 39 (1974). Accordingly, there is a second reason why Affidavit Statement 21 must be stricken. *See Paniaguas*, 2006 WL 2568210, at *4.

64. 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.

64. Plaintiffs dispute this. This is a verbatim recitation of Mr. Bonnet's Affidavit Statement 22, which is a conclusion of law and is thus improper affidavit testimony. *Paniaguas*, 2006 WL 2568210, *5. "Compelling interest" is a legal term of art, and asserting that a governmental entity possesses a "compelling interest" is a legal conclusion to be drawn by a court—not an admissible fact that can support summary judgment. *See id*; *cf. Nat'l Cap. Presbytery*, 567 F.Supp.3d at 240. The Bonnet Affidavit also does not contain any supporting evidence that supports why certain counties allegedly require specialized voting procedures. *See Paniaguas*, 2006 WL 2568210, at *4 (listing categories of improper affidavit statements, including those lacking "supporting evidence").

65. "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).

    65. Plaintiffs dispute this. While Defendants accurately quote a law review article, this statement must be stricken because it is not a recitation of fact, but rather legal argument and opinion. *See Paniaguas*, 2006 WL 2568210, at *4-*5 (explaining that legal arguments and legal opinions are inadmissible affidavit testimony that cannot support a summary judgment motion). In fact, the article itself speaks of merit selection as "an **ostensibly** nonpartisan process" and "**supposedly** nonpartisan," undercutting any factual nature of Affidavit Statement 23. (Dkt. 81-7 at 3, 5 (emphases added)).

66. 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).

    66. Plaintiffs do not dispute this.

67. 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
All Counties	**2,662,272**	**2,790,822**
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).

67. Plaintiffs do not dispute this.

68. 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].

68. Plaintiffs dispute that Lake County itself has a system of selecting or electing judges. The Legislature has imposed lesser voting rights in the judicial circuit that encompasses Lake County. This is a verbatim recitation of Mr. Bonnet's Affidavit Statement 26. Mr. Bonnet's Affidavit Statement 26 is a legal argument that is not grounded in factual support. *See Paniaguas*, 2006 WL 2568210, at *4-*5 (explaining that legal arguments and conclusions absent supporting evidence must be stricken). It accordingly must be stricken. *See id.* To state it another way, there is no admissible evidence that Lake County's challenged nominating scheme has prevented, in any way, voter fraud. Mr. Bonnet's legal argument as to the same is inadmissible and cannot support Defendants' motion for summary judgment. *See id.*

69. 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).

69. Plaintiffs do not dispute this.

70. 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).

70. Plaintiffs do not dispute this.

71. 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).

71. Plaintiffs do not dispute this.

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

72. Plaintiffs do not dispute this.

73. 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

[1] *See* Ind. Code § 33-33-45-38(a) (increasing the number of certified nominees from 3 to 5).

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).

73. Plaintiffs do not dispute this.

74. 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.

74. Plaintiffs do not dispute this.

Respectfully submitted,

/s/ Bryan H. Babb

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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.

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