

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 THE LAKE COUNTY BOARD OF ELECTIONS'
OPPOSITION TO 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 Reply to the Defendant Lake County Board of Elections and Registration's ("Election Board") Opposition to Plaintiffs' Motion for Summary Judgment.

A. The Election Board is a proper defendant.

In the Opposition, the Election Board does not in any way argue that the challenged law does not violate the Voting Rights Act ("VRA") or Indiana Constitution. Instead, the Election Board argues that it has not done anything to harm Plaintiffs and that it cannot rectify the harms Plaintiffs have suffered. (Dkt. 102 pp.2-3.) These arguments are materially identical to the arguments the Election Board made in its summary judgment brief. *Compare* Dkt. 93 pp.2-3, with Dkt. 102 pp.2-3.) Therefore, Plaintiffs incorporate their Opposition to the Election Board's summary judgment motion into this brief, rather than restating the same arguments again in full. (Dkt. 98 pp.2-5.)

Nevertheless, election boards are frequently defendants in these types of cases. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185 (2008); *Mulholland v. Marion County Election Bd.*, 746 F.3d 811, 813 (7th Cir. 2014); *Indiana Democratic Party v. Rokita*, 375 F. Supp. 2d 788, 789 (S.D. Ind. 2005); *Common Cause Indiana v. Indiana Secretary of State*, 1:12-cv-01603-RLY-DML, 2013 WL 12284648 *1 (S.D. Ind. Sep. 6, 2013); *Anderson v. Mallamad*, No. IP 94-1447-C H/G, 1997 WL 35024766, at *1 (S.D. Ind. Mar. 28, 1997). Indeed, in many of those cases, state defendants claimed that a local election board is the *only* proper defendant.

The Election Board cites *Hearve v. Board of Education of City of Chicago*, 185 F.3d 770 (7th Cir. 1999). (Dkt. 102 p.2.) But in that case, “the governor ha[d] no role to play in the enforcement of the challenged statutes.” *Id.* at 777. In contrast, here 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. 102 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.

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. 102 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, the Election Board is a proper defendant.

B. The Election Board's arguments under the Declaratory Judgment Act are incorrect.

In the Opposition, the Election Board similarly argues that a declaratory judgment is improper because “[t]here is no evidence that shows that the Plaintiffs sustained a direct injury at the hands of the Election Board or is in any immediate danger because of some action taken by the Election Board.” (Dkt. 102 p.4.) The Election Board is incorrect.

In this case, the Election Board is tasked by Indiana law with placing retention votes on the ballot, Ind. Code § 33-33-45-42(e), and this lesser voting right is Plaintiffs' injury. (*See, e.g.*, Dkt. 84-1 pp.1-2.) Named Plaintiff Lonnie Randolph previously voted for superior court judges in open elections, prior to 1973. (Dkt. 84-1 p.1; Dkt. 84-5 p.2.) Other than the Legislature and Governor that enacted Ind. Code § 33-33-45-42(e), the Election Board most directly injures Plaintiffs by placing retention votes on the ballot.

In *Stewart v. Taylor*, 953 F. Supp. 1047, 1049 (S.D. Ind. 1997), a candidate “brought an Amended Complaint against the named Defendants [including the Marion County Election Board] seeking a declaratory judgment that Indiana Code section 3–9–3–2” violated the constitution. The Southern District of Indiana held that the “threat of injury was clearly the result of the challenged statute and a declaration that the statute is unconstitutional would most likely dissuade the Marion County Election Board from attempting to enforce the statute.” *Id.* at 1053.

In this case, the Election Board has not merely threatened to enforce the challenged statute, but has enforced it numerous times. (Dkt. 84-1 pp.1-2.) The Election Board is, therefore, a proper defendant because if this Court declared that Ind. Code § 33-33-45-42(e) violates the VRA and the Indiana Constitution this would likely dissuade the Election Board from continuing to place retention votes on the ballot. The Indiana Legislature could then enact a legislative fix that complies with the VRA and Indiana Constitution. *Harper v. City of Chicago Heights*, 223

F.3d 593, 599-600 (7th Cir. 2000) (providing that a court should “afford the jurisdiction an opportunity to remedy the violation”). Or, if the Legislature does not do so, this Court could strike down the offending provision, and order the Election Board to place superior court judges for election, as was the law in the state judicial circuit that encompasses Lake County from 1907 to the early 1970s. Burns Code 4-1902 (Dkt. 84-5 p.2.)

C. The Eleventh Amendment does not bar claims against the Election Board.

In its Opposition, the State argued that the Eleventh Amendment bars Plaintiffs’ state-law claims against the Secretary of State. (Dkt. 99 pp.10-11.) In their Reply, Plaintiffs’ have demonstrated that the Secretary of State waived this defense, but the State did not claim that the Eleventh Amendment bars Plaintiffs’ state-law claims against the Election Board. And it does not.

“Under the Eleventh Amendment, the states, including those entities that can be considered ‘arms of the state,’ are generally immune from suit in federal court. This immunity does not extend, however, to other political or municipal entities created by states.” *DuPage Regional Off. of Educ. v. U.S. Dep’t of Educ.*, 58 F.4th 326, 337 (7th Cir. 2023). Determining whether an entity is an arm of the state entitled to Eleventh Amendment immunity “depends, at least in part, upon the nature of the entity created by state law.” *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). “The Seventh Circuit has held that county and local government entities are not arms of the state and thus not sheltered by Eleventh Amendment immunity.” *Lenzo v. Sch. City of E. Chicago*, 140 F. Supp. 2d 947, 960 (N.D. Ind. 2001) (citing *Conley v. Village of Bedford Park*, 215 F.3d 708, 709 n.3 (7th Cir. 2000)); see also *Jensen v. State Bd. of Tax Comm’rs of Ind.*, 763 F.2d 272, 279 (7th Cir. 1985) (explaining that “Indiana counties now constitute the kind of independent governmental units that, by way of analogy, are not entitled to Indiana’s Eleventh Amendment immunity.”).

For example, in *Wilburn v. St. Joseph Cnty. Juv. Justice Ctr.*, the district court determined that the Board of County Commissioners of St. Joseph County and its members, the St. Joseph County Council and its members, and the Executive Director of the St. Joseph County Juvenile Justice Center, were not entitled to Eleventh Amendment immunity. 353 F. Supp. 3d 736, 739-741 (N.D. Ind. 2018). Similarly, the Election Board would not be entitled to Eleventh Amendment immunity.

There is a two-factor test to determine if an entity is an arm of the state: “(1) the extent of the entity’s financial autonomy from the state; and (2) the ‘general legal status’ of the entity.” *DuPage*, 58 F.4th at 339. First, as far as financial autonomy, the Election Board is a board of Lake County. “A county . . . has the authority to exercise a vast variety of traditionally sovereign functions such as to sue and be sued, Ind. Code § 36-1-4-3, to borrow money generally, Ind. Code § 36-1-4-9, to issue bonds for the purpose of paying judgments against it, Ind. Code § 5-1-8-1, and to compromise claims asserted against it, Ind. Code § 36-1-4-17.” *Jensen*, 763 F.2d at 279. Additionally, Ind. Code § 36-1-3-4(b)(2) gives a county “all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.” *Id.* And specific to the Election Board, state law provides that the Election Board’s salaries are “paid out of the county general fund in accordance with IC 3-5-3-1 as other election expenses are paid.” Ind. Code § 3-6-5.2-5. Also, Indiana Code section 3-5-3-1 provides that “the county auditor shall pay the expenses of voter registration and for all election supplies, equipment, and expenses out of the county treasury in the manner provided by law.” Ind. Code § 3-5-3-1(a). The Election Board’s financial autonomy from the State is clearly set forth in the Indiana Code.

As far as general legal status, “[t]his factor involves an examination of Indiana statutory definitions.” *Bd. of Trustees of Hamilton Heights School Corp. v. Landry*, 638 N.E.2d 1261,

1265 (Ind. Ct. App. 1994) (cleaned up). Indiana Code section 4-12-1-2's definition of an "agency of the state" and "state agency" specifically excludes "political subdivisions of the state." Ind. Code § 4-12-1-2(d). And a "political subdivision" statutorily includes a "board or commission" of a "county." Ind. Code § 34-6-2-110(1), (10). The general-legal-status factor also looks to whether the governmental entity "served the state as a whole or only a region." *Wilburn*, 353 F. Supp. 3d at 741 (quoting *Kashani*, 813 F.2d 843, 847 (7th Cir. 1987)). Here, the Election Board serves only Lake County. *See* Ind. Code § 3-6-5-14; § 33-33-45-42. The Election Board clearly does not serve the State "as a whole." *Wilburn*, 353 F. Supp. 3d at 741. Ultimately, the Election Board is not entitled to Eleventh Amendment sovereign immunity

CONCLUSION

The Election Board is a proper defendant and should not be dismissed. The Election Board has not otherwise addressed the merits of Plaintiffs' claims. Therefore, as demonstrated in Plaintiffs' opening brief, this Court should grant summary judgment for Plaintiffs.

Respectfully submitted,

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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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