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.	)	Case No. 2:21-cv-00160-PPS-JEM
STATE OF INDIANA, INDIANA SECRETARY OF STATE DIEGO MORALES, in his official capacity, and THE LAKE COUNTY BOARD OF ELECTIONS,	)	
Defendants.	)	

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The Court should grant State Defendants' motion for summary judgment because Plaintiffs' claims fail as a matter of law as the statutory scheme does not violate the Voting Rights Act. Further, the remaining claims are state constitutional claims over which this Court should decline to opine, but in any case, are not state constitutional violations because Lake County's superior court judge appointment and retention process comports with Indiana's Constitution.

STANDARD OF REVIEW

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." Fed. R. Civ. P. 56(a). 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.

I. ARGUMENT

A. Plaintiffs have incorrectly defined the term "highly diverse" and State Defendants have made no admission the statutory scheme is racially motivated.

In the Merriam-Webster dictionary, "diverse" is defined as "differing from on another" or "composed of distinct or unlike elements or qualities." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/diverse (last visited August 28, 2023). Plaintiffs claim State Defendants have "admitted that [the statutes at issue] limit[ ] voting rights based on race" because State Defendants have used the term "highly diverse" to note the differences between Lake County and other parts of Indiana. ECF 100 ("Pls' Response") at 7. However, Plaintiffs have misunderstood the State Defendants' use of the term "highly diverse."

In *Adashunas v. Negley*, the proposed class of children at issue were considered to be "highly diverse" where they consisted of all the "children entitled to a public

education who have learning disabilities and 'who are not properly identified and/or who are not receiving' special education." 626 F.2d 600, 603-04 (7th Cir. 1980). There, where the proposed group included not only learning-disabled children but also unidentified children, the Court held that class certification was not feasible because the proposed class was so "highly diverse." *Id*. at 604. This analysis carried on for the purposes of class identification in other matters—none of which focused on a particular racial component of the proposed class. *See, e.g., Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658-9 (7th Cir. 2015) (seeking class certification for those who purchased a particular product); and *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012) (seeking class certification of unidentified disabled students in Michigan). While the instant matter is not regarding class certification, it is clear the use of the term "highly diverse" does not solely pertain to a racial equivalency.

Here, the populace of Lake County is "highly diverse" because of its high population that is composed of, amongst other things, those with differences in 1) socioeconomic status; 2) cultural backgrounds; 3) ethnic backgrounds; 4) academic or professional backgrounds; and/or 5) racial backgrounds. Nothing in the State Defendants' Motion for Summary Judgment or Response indicates that this diversity is solely based on any racial component of Lake County—merely that with all these differences, combined with the other reasons in State Defendants' motion and response, the General Assembly has determined that merit selection of Lake County Superior Court judges is warranted.

B. The selection process for Lake County superior court judges does not violate the Voting Rights Act.

As to the initial appointment of superior court judges, the VRA does not apply to judicial appointments, but rather only to judicial elections. *See Bradley v. Work,* 154 F.3d 704, 709 (7th Cir. 1998); *see also Quinn v. Illinois,* 887 F.3d 322, 324 (7th Cir. 2018); *see also* ECF 99 ("State Defendants' Response"), § II(A). State Defendants cite to *Brnovich* to support their analysis of Plaintiffs' claims regarding the election portion of the statutory scheme. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *see also* State Defendants' Response, § II(B). Therein, the factors to be reviewed by the court, if it uses *Brnovich*,[1] include 1) the "size of the burden imposed by the challenged voting rule;" 2) the "degree to which the voting rule departs from the standard practice when § 2 was amended in 1982;" 3) the "size of any disparities in a rule's impact on members of different racial or ethnic groups;" 4) the "opportunities provided by a State's entire system of voting;" and 5) the "strength of the state interests served by a challenged voting rule[.]" *Id.* at 2338-2440. Further, the Court held "§ 2(b) requires consideration of 'the totality of circumstances." *Id.* at 2340

The *Brnovich* factors weigh in favor of State Defendants. Where we compare the correct electorates, *i.e.,* Plaintiffs with all other Lake County registered voters, the size of the burden is the same for all voters. *See Quinn*, 887 F.3d at 323; *see also* State Defendants' Response § II(B)(1). Further, the comparison between the current

[1] The *Brnovich* Court declined to determine a final test and merely provided "guideposts" to aid where prior test were less helpful. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2336, 2340 (2021).

statutory scheme and the scheme in 1982 is virtually identical, excepting four county division superior court judges. *Id.* § II(B)(2). Also, the impact of the disparity and the opportunities offered to the electorate at issue is the same for all involved parties. *Id.* § II(B)(3). Additionally, the strength of the State's interest in aiding in the selection of judges in a highly populated area, with heavy caseloads, and where the public has expressed concerns regarding partisan basis, is compelling. *Id.* § II(B)(4); *see also* State Defendants' SMF ¶ 21. Finally, when viewing all the *Brnovich* factors, the overall weight is in favor of State Defendants; therefore, Plaintiffs' VRA claims fails.

C. Not only should this Court decline to exercise jurisdiction over the Indiana Constitutional claims but even under an Indiana Constitutional analysis, this statutory scheme does not violate the Indiana Constitution.

As previously briefed in their Response, State Defendants argue the Indiana Constitutional challenges are barred under *Pennhurst State Sch. & Hosp. v. Halderman*. 465 U.S. 89, 98 (1984). Even with pendent jurisdiction, a court does not have jurisdiction that overrides the Eleventh Amendment. *Id.* at 121. Indiana has not waived immunity and these claims should be dismissed. *See Cassell v. Snyders,* 990 F.3d 539, 544 (7th Cir. 2021) (the Eleventh Amendment bars relief from a federal court on "all the plaintiffs' state-law claims").

To the extent the Court reviews the Indiana Constitutional claims, as State Defendants have already argued, the statutory scheme is constitutional special legislation, *see Mun. City of S. Bend v. Kimsey,* 781 N.E.2d 683, 692 (Ind. 2003), where the unique characteristics of Lake County are linked to the legislative fix. *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1264 (Ind. 2020). This is a large county with

a high caseload in its courts. Further, the citizens in this county have expressed concern regarding the partisan election of judges. State Defendants' SMF ¶ 16. While a "concern" may not warrant special legislation on first blush, here where the history of issues surrounding Lake County superior court judge selection are incredibly tortured, the special legislation is warranted. *See State ex rel. Atty. Gen. v. Lake Superior Ct.*, 820 N.E.2d 1240, 1249 (Ind. 2005) ("long and tortured" history is a unique circumstance), *reh'g denied, cert. denied.*

As to Plaintiffs' claims of unequal protection under the Indiana Constitution, when the Court compares the proper electorate with Plaintiffs, all have the same privileges. Unlike comparing to another random county in Indiana, the proper electorate to which the Court should compare is the other registered voters in Lake County. Plaintiffs claim this is a racially motivated statutory scheme but have failed in showing that a minority in Lake County has less protection or fewer privileges than any other registered voter in Lake County. Lake County has inherent characteristics *i.e.,* high population, high caseloads, and voiced concern over partisan selection of Lake County superior court judges. Also, the statutes are uniformly applicable and available to all registered voters in Lake County. Lake County's inherent characteristics are reasonably related to the statutory scheme and the scheme's requirements are uniformly applied throughout the selection of all Lake County superior court judges.

II. Conclusion

Notwithstanding Plaintiffs' misunderstanding of the term "highly diverse" as used in State Defendants briefing, this statutory scheme is not racially motivated. As

such, and under the *Brnovich* factors, Indiana's method of selecting Lake County superior court judges does not violate the VRA. Moreover, this Court lacks jurisdiction over the Indiana Constitutional claims. However, to the extent this Court reviews the Indiana Constitutional claims, State Defendants have shown that this is constitutional special legislation that does not violate the equal protections clause of the Indiana Constitution. As such, State Defendants request this Court deny Plaintiffs' Motion for Summary Judgment and enter judgment in favor of the State Defendants.

Respectfully submitted,

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