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 STATE DEFENDANTS' 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 Defendants State of Indiana and the Indiana Secretary of State Diego Morales (collectively, the "State").

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INTRODUCTION

The Indiana Legislature divides Indiana into ninety-one judicial circuits. In the vast majority of them, citizens vote for state superior-court judges in elections. In three judicial circuits, including where Plaintiffs reside, residents only vote on whether to retain state superior-court judges. The State does not dispute that the majority of Indiana's minority residents reside in the three judicial circuits with lesser voting rights. Quite the opposite. The State stunningly designates evidence that it intentionally reduced voting rights ***because*** the circuit that encompasses Lake County is "highly diverse": "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." (Dkt. 81-1 p.6 ¶ 18) (emphases added). That is, the State candidly admits that it has intentionally abridged voting rights based on race.

The Voting Rights Act ("VRA") prohibits the "abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The State has admitted a violation of the VRA. Moreover, the disparities in voting rights in Indiana are so shocking the State could not help but make this admission, but even without it, Indiana's differential voting scheme violates the VRA under the framework established by the United States Supreme Court. *Brnovich v. Democratic Nat. Comm't*, 141 S.Ct. 2321 (2021).

The State argues that *Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998), "litigated and settled the issues presented in this case." (Dkt. 82 p.10.) Not so. *Bradley*, 154 F.3d at 709, held that the "retention elections stage of the Lake County process satisfies this definition of voting, and thus is governed by § 2 of the Voting Rights Act." The Court noted that "[f]uture litigation may prove . . . a violation of the mandates of the Voting Rights Act." *Id.* at 710-11. The State cites *Quinn v. Illinois*, 887 F.3d 322, 324 (7th Cir. 2018), but that case addressed purely "appointive positions."

Here, Plaintiffs challenge lesser voting rights.

The State's Motion as to Plaintiffs' state-law claims fail as well. As for special legislation, the State has not come remotely close to meeting its burden of demonstrating that there are unique characteristics in the three judicial circuits that justify the special legislation. Further, the State fails to explain why a general law cannot be applicable throughout Indiana. And the State wholly fails to cogently address Plaintiffs privilege and immunities claim.

This Court should deny the State's Motion and grant summary judgment for Plaintiffs.

I. Analysis

A. Legal Standard

Both the State and Plaintiffs have moved for summary judgment. "With cross summary judgment motions, we construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made." *Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1016 (7th Cir. 2020) (internal quotation omitted). "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.'" *Id.* (quoting Fed. R. Civ. P. 56).

B. The Voting Rights Act

1. The State has admitted a discriminatory purpose in maintaining retention votes in Lake County and this violates the VRA.

The State has designated evidence that it maintains the current voting scheme for the purpose of "limiting political influence" in a "highly diverse jurisdiction like Lake County." (Dkt. 81-1 p.6 ¶ 18.) The State has admitted that it limits voting rights based on race, and this establishes a violation of the VRA. The State's designated evidence demonstrates that Plaintiffs are entitled to summary judgment.

The United States Supreme Court has very recently emphasized that the "law in the

States shall be the same for the black as well as for the white." *Students for Fair Admissions, Inc. v. Harvard College*, 143 S.Ct. 2141, 2159 (2023) (internal quotation omitted). The Supreme Court has "routinely affirm[ed] lower court decisions that invalidated all manner of race-based state action." *Id.* at 2160. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . .," and "cannot be overridden except in the most extraordinary case." *Id.* at 2162-63 (internal quotation omitted).

The VRA does not countenance intentional discrimination because it was enacted to bring an "end to the denial of the right to vote based on race." *Brnovich*, 141 S.Ct. at 2330. In *Brnovich*, the Supreme Court instructed that court should "start with the text of VRA § 2." *Id.* at 2337. The VRA provides that "[n]o . . . prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). A violation of the VRA is established if "the totality of circumstances" show elections are "not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). Clearly, the prohibition on abridging votes rights "on account of race or color" precludes intentionally doing so.

Courts have repeatedly concluded that intentional discrimination violates the VRA. In *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014), the Seventh Circuit recognized that if a state made "changes for the purpose of curtailing black voting" that this "would clearly violate § 2." The "showing of intent is sufficient to constitute a violation of section 2." *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984). "Congress intended that fulfilling *either* the

more restrictive intent test or the results test would be sufficient to show a violation of section 2." *Id.* "Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group." *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). Today, a plaintiff can prove a violation either through "intent" or through "objective factors." *Id.*

There can be no dispute that the Indiana Legislature has abridged voting rights in the thirty-first judicial circuit (Lake County). The Indiana Legislature has divided the state into ninety-one judicial circuits for state courts. Ind. Code § 33-33-78-2. Generally, the boundaries of judicial circuits coincide with the boundaries of a county, but that is not always the case. *See, e.g.*, Ind. Code §§ 33-33-15-1 (providing that Dearborn and Ohio Counties comprise one judicial circuit). In all but three state judicial circuits, voters vote in contested elections for judges. Ind. Code Article 33-33. In the thirty-first judicial circuit, which comprises Lake County, voters only vote on whether to retain a superior court judge appointed by the Governor. Ind. Code §§ 33-33-45-2, 42(a). The Seventh Circuit has held that the VRA applies to judicial retention votes: "retention elections stage of the Lake County process satisfies this definition of voting, and thus is governed by § 2 of the Voting Rights Act." *Bradley*, 154 F.3d at 709.

The Indiana Legislature has abridged the voting rights in Lake County. Prior to the early 1970s, voters in Lake County voted in open elections for all superior court judges, (Dkt. 84-5 p.2; Burns Code § 4-1902), and they voted for in open elections for certain superior court judges from 1989 to 2011. Ind. Code § 33-33-45-43, P.L. 201-2011. There can be no dispute that voting rights have been abridged by shifting from open elections for all superior court judges to retention votes for all superior court judges. But the Indiana Legislature has not similarly

abridged voting rights in the vast majority of judicial circuits. Ind. Code Article 33-33 (providing for elections for superior court judges in all but Lake, Marion, and St. Joseph Counties).

The question then is whether this "abridgement [is] . . . on account of race or color." 52 U.S.C. 10301(a). The Seventh Circuit has recognized that if a state made "changes for the purpose of curtailing black voting" that this "would clearly violate § 2." *Frank*, 768 F.3d at 754. In support of the Motion, the State submitted the affidavit of the Jerold Bonnet, General Counsel of the Office of the Indiana Secretary of State. (Dkt. 81-1 ¶ 2.) The "Secretary of State 'is the state's chief election official.'" *Common Cause of Ind. v. Ind. Sec'y of State*, No. 1:12-cv-01603-RLY-DML, 2013 WL 12284648 *2 (S.D. Ind. Sep. 6, 2013) (quoting Ind. Code § 3-6-3.7-1). In his affidavit, Mr. Bonnet admitted that voting rights are limited in Lake County ***because*** it is "highly diverse":

> 18. 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.

(Dkt. 81-1 p.6) (highlighting added).

This is a stunning admission. Mr. Bonnet admits that the thirty-first judicial circuit has lesser voting rights to "limit[] political influence in Lake County" because it is "highly diverse." (Dkt. 81-1 p.6) (highlighting added). The VRA prohibits abridgment of voting rights "on account of race or color." 52 U.S.C. 10301(a). The State has expressly admitted that voting rights are limited in Lake County "on account of race or color" and this is a violation of the VRA. A statutory "change[] for the purpose of curtailing black voting" "would clearly violate § 2." *Frank*, 768 F.3d at 754. Given the State's blatant admission that voting in Lake County was limited because it is "highly diverse," Plaintiffs are entitled to summary judgment that Indiana's

intentional abridgment of voting rights "on account of race or color" violates the VRA. 52 U.S.C. 10301(a).

The *Brnovich* factors further confirm that Indiana's differential treatment of certain judicial circuits violates the VRA. In evaluating the "totality of the circumstances," "the size of the burden imposed by a challenged voting rule is highly relevant." *Brnovich*, 141 S.Ct. at 2338. For the individual named plaintiffs in this case to vote in full and open judicial elections for all judgeships would require them to move to a different county at least thirty days before an election. Ind. Code § 3-7-13-1. For named plaintiff Indiana Senator Lonnie Randolph, he could no longer represent the district he was elected to represent. Ind. Code § 2-1-9-9 (providing that "the senator shall represent, after November 7, 2022, the district established under IC 2-1-15 in which the senator's legal residence is located"). Forcing residents to move at least thirty days before an election and give up an elective office to have full voting rights "seriously hinder[s] voting." *Brnovich*, 141 S.Ct. at 2338. As the Seventh Circuit has recognized, "citizens lumped into a district can't extricate themselves except by moving." *Frank*, 768 F.3d at 753. The size of the burden imposed by Indiana's differential voting scheme demonstrates that it violates the VRA.

In evaluating the "totality of the circumstance," a court may look to the "size of any disparities in a rule's impact on members of different racial or ethnic groups." *Brnovich*, 141 S.Ct. at 2339. The intentional nature of the deprivation here should militate against any need to demonstrate a large impact on minority voters because any intentional discrimination is entirely unacceptable and a violation of the VRA. *See Frank*, 768 F.3d at 754. Even if the State only deprived one voter of the right to vote based on race, that would be intolerable.

Regardless, the disparities here large and shocking. As the State admits, "Lake County" is

a "highly diverse jurisdiction." (Dkt. 81-1 p.6 ¶ 18.) The State is correct. Census data shows that approximately 42% of Lake County's voting population is a member of a minority group. (Dkt. 84-10 p.14; Dkt. 86 ¶ 21.) Approximately 66% of Indiana's black residents reside in a judicial circuit with lesser retention voting rights. (Dkt. 86 ¶ 13.) In contrast, more than 80% of Indiana's white residents reside in judicial circuits with full voting rights. (Dkt. 86 ¶ 16.)

The State's frank admission that "highly populated ***and*** highly diverse jurisdiction[s]" require "limiting political influence," makes it clear why some judicial circuit's voting rights have not been abridged. (Dkt. 81-1 p.6) (emphasis added). Hamilton County has a high voting age population (253,195), but is 82% white. (Dkt. 84-10 p.10.) It does not meet the conjunctive test of both high population and high diversity, so Indiana has not limited voting rights there. (*See*, Dkt. 81-1 ¶ 18.) Allen County, similarly, has a high voting age population (287,203), but it is 75% white. (Dkt. 84-10 p.3.) Voters in Allen County do not vote in retention elections. Ind. Code § 33-33-2-9(a). Vanderburgh County has a high population (141,188), but it is 83% white. (Dkt. 84-10 p.23.) It votes for all judges in non-partisan elections. Ind. Code § 33-33-82-31(a). The disparities in the impact of Indiana's differential voting schemes on different judicial circuits are clear and demonstrate a violation of the VRA. *Brnovich*, 141 S.Ct. at 2339. But the State candidly explaining that limited voting rights are only necessary in "highly populated ***and*** highly diverse jurisdiction[s]" confirms that this scheme must be struck down as violating the VRA. (Dkt. 81-1 p.6) (emphasis added).

Finally, in deciding the "totality of the circumstances," a court should look to "the strength of the state interest served by a challenged voting rule." *Brnovich*, 141 S.Ct. at 2339. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . .," and "cannot be overridden except in the most extraordinary case." *Students*

for Fair Admissions, 143 S.Ct. at 2162-63 (internal quotation omitted). It would be impossible for the state to justify limited voting rights in certain judicial circuits because they are "highly diverse," and the evidence it has designated completely undercuts that there is any valid basis for the differential treatment at issue here. The State designates one report that stated "the preferred approach" is to have judges "select[ed] and retain[ed]" "as part of ***a statewide reform***." (Dkt. 81-4 p.11) (emphasis added). Another report criticized the current approach: "At least seven different selection processes exist in the State of Indiana. This creates a confusing landscape for the average citizen and outside observer. Selection processes have been altered or created in an *ad hoc* fashion . . . ." (Dkt. 81-5 p.21.) There is no valid state interest in giving some voters lesser voting rights because they live in a "highly diverse jurisdiction," and the State's designated evidence confirms this.

In conclusion, the State's admission that Indiana intentionally "limit[s] political influence in Lake County" because Lake County is "highly diverse" is an admission that the statute violates the VRA. The *Brnovich* factors lead to the same conclusion. This Court should deny the State's summary judgment and grant summary judgment for Plaintiffs that the lesser voting rights in Lake County violate the VRA.

2. The State's reliance on *Bradley* and *Quinn* is misplaced.

The State argues that *Bradley* and *Quinn* decided the issues in this case as a matter of law. The State is incorrect. Neither case foreclosed this suit.

The State argues that "the hybrid system employed by Lake County is not under the purview of Article 2, as Plaintiffs allege." (Dkt. 82 p.9.) This is inaccurate in two regards. First, as previously detailed, Lake County does not employ any voting system for judges. Instead, the Legislature created judicial circuits and defined the thirty-first judicial circuit's boundaries to be

co-terminus with Lake County's boundaries. Ind. Code § 33-33-45-2. Second, in *Bradley*, 154 F.3d at 709, the Seventh Circuit expressly held that the "retention elections stage of the Lake County process satisfies this definition of voting, and thus is governed by § 2 of the Voting Rights Act." The VRA applies to retention votes. *Id.*

The State then argues that "*Bradley* litigated and settled the issues presented in this case." (Dkt. 82 p.10.) That is not the case for three reasons. First, as previously detailed, in this case, the State has admitted that citizens in Lake County receive lesser voting rights because Lake County is "highly diverse." (Dkt. 81-1 p.6 ¶ 18.) That evidence was not before the court in *Bradley*. Second, the Seventh Circuit stated that "[i]n order to prove a § 2 ***vote dilution claim***, the Voters would first need to show that the minority group they represent satisfies the three *Gingles* factors . . . ." *Bradley*, 154 F.3d at 710. Plaintiffs have not brought a "vote dilution claim" under the "*Gingles* factors." Plaintiffs have moved for summary judgment under the *Brnovich* factors.

Third, in *Bradley*, the statutory scheme had changed recently and the Court "agree[d] that given the extent and timing of the change in statutory scheme any challenge the Voters may have had to the former system is now moot," "and that the district court appropriately found that the record was too thin to support declaratory relief against the new system." *Bradley*, 154 F.3d at 710. The Court expressly held that "[f]uture litigation may prove that the 'totality of the circumstances' under the revised system shows a violation of the mandates of the Voting Rights Act." *Id. Bradley* expressly recognized that future litigation could establish a VRA violation.

The State then argues that *Quinn* requires the Court to enter summary judgment in its favor. (Dkt. 82 pp.10-11.) The State is again incorrect. In *Quinn*, 887 F.3d at 323, Chicago's mayor appointed school board members. The Seventh Circuit noted that the VRA "has been on

the books for 53 years, and as far as we are aware no court has understood § 2 to require that any office be filled by election." *Id.* at 324. The Seventh Circuit held that "unless an office is elected, § 2 as a whole does not apply." *Id.* at 32. Unlike *Quinn*, Lake County residents vote for state superior court judges through retention votes, which the Seventh Circuit has held are "governed by § 2 of the Voting Rights Act." *Bradley*, 154 F.3d at 709. *Quinn* is inapplicable.

Quinn went on to state that "Black and Latino citizens do not vote for the school board in Chicago, but neither does anyone else. Every member of the electorate is treated identically, which is what § 2 requires." *Quinn*, 887 F.3d at 325. Unlike *Quinn*, all voters in Indiana vote for state superior court judges. But in certain state judicial circuits, voters get a lesser voting right (retention vote). *Quinn* did not address that situation at all.

To the extent the State reads *Quinn* to mean that any voting restriction may be put in place so long as it applies to all voters in a particular location, regardless of its effects on minority voters, *Brnovich* forecloses such a reading. In *Brnovich*, 141 S. Ct. at 2333-34, voters challenged facially neutral statutes and regulations that governed when, where, and how someone could vote. If the State's reading of *Quinn* was correct, the Supreme Court could have stopped its analysis there and determined the statutes did not violate the VRA because they applied to all Arizona residents, regardless of race. But that is not what the Supreme Court did. Rather, the Court looked to different factors a court could consider to determine whether the VRA has been violated, including "size of any disparities in a rule's impact on members of different racial or ethnic groups." *Id.* at 2339. Just because a statute applies to all voters in a particular location does not mean it does not violate the VRA.

In conclusion, *Bradley* and *Quinn* do not establish that the State is entitled to summary judgment.

3. The remedy for a VRA violation.

"When a Section 2 violation has been found, the district court must, wherever practicable, afford the jurisdiction an opportunity to remedy the violation first, ... with deference afforded the jurisdiction's plan if it provides a full, legally acceptable remedy.... But if the jurisdiction fails to remedy completely the violation or if a proposed remedial plan itself constitutes a § 2 violation, the court must itself take measures to remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599–600 (7th Cir. 2000) (internal quotation omitted). This Court should provide the Indiana Legislature with the opportunity to provide a legally acceptable remedy. Two options are immediately apparent. Provide for full elections in all judicial circuits, or provide for retention votes in all judicial circuits. If the State chooses not to rectify the offending provision, this Court could "remedy the violation," *id.* at 600, by invalidating the retention vote provision and reinstating Indiana law as it existed for many years with open elections for superior court judges in Lake County. (Dkt. 84-5 p.2.)

C. The Indiana Constitution.

1. This Court has supplemental jurisdiction over Plaintiffs' state-law claims.

The State argues that "Plaintiffs' federal Voting Rights Act claims fails, and thus, so does this Court's jurisdiction to hear Plaintiffs' case under federal question jurisdiction." (Dkt. 82 at 7.) According to the State, should this Court grant summary judgment in its favor on the federal VRA claim, then "it would be inappropriate for this Court to claim jurisdiction under the federal question doctrine of 28 U.S.C. § 1331" because such jurisdiction would "greatly disrupt the federal-state balance discussed in *Gunn* [*v. Minton*, 568 U.S. 251 (2013)]." (*Id.*) The State misunderstands how supplemental jurisdiction works; in fact, the State fails to even acknowledge that jurisdictional doctrine.

The United States Supreme Court has explained that 28 U.S.C. § 1367 provides litigants an "opportunity . . . to pursue complete relief in a federal-court lawsuit." *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235, 1240 (2006). Section 1367 provides the statutory basis upon which a federal district court can exercise subject matter jurisdiction over a state law claim. *Id.* Plaintiffs' VRA claim is a jurisdiction-invoking claim pursuant to federal question jurisdiction under 28 U.S.C. § 1331. *See Pullins v. Eldridge*, No. 1:20-cv-01311-JRS-MJD, 2022 WL 4468389, at * 2 (S.D. Ind. 2022) (addressing plaintiff's VRA claim after plaintiff asserted federal question jurisdiction applied). The State does not contend otherwise.

Even if this Court were to grant summary judgment in favor of the State on the VRA claim (though it should not, as explained above), this Court has discretion to exercise jurisdiction over the state law claims. *See Timm v. Meed Corp.*, 32 F.3d 273, 276–77 (7th Cir. 1994) (citing 28 U.S.C. § 1367(c)**Error! Bookmark not defined.**). Importantly, the State has failed to explain what grounds—outlined in Section 1367(c)—counsel against exercising supplemental jurisdiction; and this Court, on that basis alone, should deny any request to decline exercising supplemental jurisdiction. *See Folk By and Through Folk v. Portfolio Recovery Assocs.*, LLC, 2018 WL 4521223, at *2 (W.D. Mo. 2018).

Regardless, Seventh Circuit case law supports the continuing exercise of supplemental jurisdiction if the VRA claim is resolved in the State's favor (which, again, it should not be). In *Timm*, the Seventh Circuit affirmed the district court's decision to exercise jurisdiction over a former employee's state law claims against a former employer after granting summary judgment to the employer on the employee's federal ADEA claim. 32 F.3d at 277. The Seventh Circuit found no abuse of discretion, as the "balance" of "judicial economy, convenience, fairness, and comity" weighed "in the direction of the district court's discretionary determination." *Id.* In

terms of those factors, the Seventh Circuit found that "the state law claims were ripe for decision, the applicable state law was straightforward, the litigation was well over a year old, and discovery . . . was completed." *Id.* Similarly, here, the case is at the summary judgment stage; the undisputed facts reveal that the state law claims are ripe for decision; the state law claims are informed by well-established, decades-old jurisprudence that this Court is certainly equipped to apply to the undisputed facts; the litigation commenced over two years ago in May 2021; and discovery has been completed as of January 2023. Judicial economy especially counsels in favor of continuing jurisdiction, as the parties have fully briefed the legal issues on cross-motions for summary judgment. This Court need not—and should not—dismiss the state law claims if it resolves the VRA claim in favor of the State (which it should also not do).

2. This Court Should Deny the State's Motion for Summary Judgment on the Plaintiffs' Special-Legislation Claim.

The State concedes that Indiana's process for selecting judges in Lake County is special legislation[1] (Dkt. 82 at 8), but they argue that the statutory scheme is nonetheless constitutional—and so they are entitled to summary judgment on Plaintiffs' Article 4, Section 23 claim. In so arguing, the State misunderstands and misapplies the "meticulous analysis" used to consider special legislation challenges. *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 79 (Ind. 2019). And, in fact, some of the sources upon which the State relies to argue the constitutionality of the special legislation actually (1) acknowledge that the reason for implementing nomination followed by retention votes on certain counties is not because of inherent characteristics those counties possess and/or (2) advocate for a general law of uniform operation throughout the state. This is explained in detail below.

[1] Plaintiffs' brief in support of motion for summary judgment explains why the Lake County statutory scheme for selecting and retaining superior court judges is special legislation—again, something the State does not dispute. (Dkt. 85 at 22-23.)

Preliminarily, however, it is important to set out the parties' respective burdens when it comes to a special legislation challenge:

> [O]nce a special-legislation claim is lodged and the court determines that the law is indeed special, the burden is on the proponent to show that a general law can't be made applicable. This requires the legislation's proponent to clear a low bar by establishing a link between the class's unique characteristics and the legislative fix. If the proponent overcomes its initial hurdle to show a link between the unique characteristics and the special treatment, but the case poses a question of degree—i.e., the characteristics used to justify the special law are common to the specified class and to those outside of the class—then the opponent of the legislation must show why the specified class's characteristics are not defining enough to justify the special legislation. By carrying this burden, the opponent demonstrates that the law's proponent has failed to justify the special treatment.

Herman & Kittle Props., 119 N.E.3d at 84–85.

The State, as the special legislation's proponent, argues that it has met its initial burden to "show that a general law can't be made applicable," *id.* at 84, because there is a link between Lake County's unique characteristics and the legislature's imposition of a purely nominating scheme on that particular county. (Dkt. 82 at 13-14.) More specifically, the State contends, "When legal professionals in Lake County were surveyed and interviewed, it was noted that a majority were unsatisfied with the judges elected via partisan elections, citing 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 13.) According to the State, because Lake County "had a set of issues with an elected judiciary that other counties **may** not have," the legislature's institution of nomination followed by retention votes on the county was constitutional. (*Id.* at 14 (emphasis added).) The State's argument—that the legislative fix of retention votes is linked to Lake County's inherent characteristics—fails for a number of reasons. First, the State never points to actual inherent characteristics of Lake

County that justify nomination followed by retention votes for superior court judges—in fact, they say that other counties "may not have" the same problems as Lake County. (*Id.*) In other words, the State seeks to meet its burden by simply surmising that Lake County had unique inherent characteristics—characteristics that other counties "may" not possess. (*Id.*) This is not enough to clear the State's burden, even if that initial burden is a "low bar." *Herman & Kittle Props.*, 119 N.E.3d at 84.

Rather, the State needs "a factual basis upon which to rest [its] assertion that a general statute could not apply" to meet its initial burden—not a simple guess that the problems "may not" exist in other counties. *Id.* at 83. Regardless, the State's guess must be wrong because nomination followed by retention votes is not imposed only on Lake County; such a scheme is present in both St. Joseph and Marion Counties, as well. *See* Ind. Code §§ 33-33-71-37, -40, -43 (St. Joseph County); Ind. Code §§ 33-33-49-13.3, 13.4 (Marion County). Additionally, such a scheme was present in Allen County for years, Ind. Code §§ 33-5-5.1-38, 39, but now Allen County has nonpartisan elections for its superior court judges, *id.* § 33-33-2-9. What this means is that, presumably, Lake, St. Joseph, and Marion Counties all share some unique characteristics that are linked to the legislative fix of nomination followed by retention votes for their superior court judges ***and*** that Allen County once had those unique characteristics that justified nomination followed by retention but no longer needs the retention votes, for some reason.[2] Yet, the State offers no "factual basis" to explain why certain localities are treated differently than others when it comes to superior court judge selection. To state it another way, the State has offered "no meaningful explanation as to why the problems" Lake County (and presumably

[2] The State also designates evidence that Vanderburgh County once nominating followed by retention votes but no longer does. (Dkt. 81-1 p.4 ¶ 11.) Apparently, it allegedly had the unique characteristics as well at one point, but allegedly lost them.

Marion and St. Joseph Counties (and Allen and Vanderburgh Counties at one time)) face are "any different than those faced by [other counties] throughout the state." *Herman & Kittle Props.*, 119 N.E.3d at 84 (quoting *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cty.*, 849 N.E.2d 1131, 1138 (Ind. 2006)). Importantly, the Indiana Supreme Court has explained that "if the conditions the law addresses are found in at least a variety of places throughout the state, a general law can be made applicable and is required by Article 4, Section 23."*Id.* (quoting *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683, 692–93 (Ind. 2003)).

Second, the path to the current retention vote process in Lake County defeats the State's argument that any inherent characteristics of Lake County are linked to the nomination followed by retention vote scheme imposed on that county. The Lake County JNC was created in 1973; at that time, all Lake County superior court judges were subject to appointment followed by a retention vote, which meant that Lake County residents could not elect any of their superior court judges. *See* Ind. Code §§ 33-5-29.5-28, 39 (1974). This changed in 1989, when the legislature provided that three Lake County superior court judges "comprise the county division," Ind. Code § 33-5-29.5-21(b), 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 for 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; and, once again, all Lake County superior court judges were appointed followed by a retention vote. This shift from a purely retention vote system to one where some, but not all, Lake County superior court judges were elected and back to a purely retention vote system undercuts any argument that unique characteristics of Lake County justified the imposition of a retention vote system for Lake County superior court judges. Here is why: if a retention vote system was the "legislative fix" for whatever unique issues Lake County

was allegedly facing in the early 1970's when the system was put in place, then that system would not have been partially scrapped for over two decades. The State offers nothing to explain how there was a link between Lake County's inherent characteristics and the legislative fix for about fifteen years; then how those inherent characteristics disappeared and did not require the full legislative fix for about two decades; and then how those inherent characteristics reappeared and suddenly required the full legislative fix again in 2011. Presumably, this is because there is no meaningful explanation for this back and forth—or at least an explanation that would successfully defend the constitutionality of the challenged special law.

Third, a source upon which the State relies explains that imposition of retention vote schemes—such as the one imposed on Lake County—are not linked to inherent characteristics of the localities but are knee-jerk political reactions subject to change upon the legislature's whim. Specifically, the State's Exhibit 5—A Blueprint for Excellence and to Greater Accountability: Enhanced Access to Justice In Indiana's Judicial System—explained that, for judicial selection, "processes have been altered or created in an *ad hoc* fashion, particularly when individuals or special interest groups disapprove of a specific judicial decision or individual judicial philosophy." (Dkt. 81-5 at 21.) Exhibit 5 continues, "This largely explains why judicial selection differs among counties. Sometimes the legislature will change the selection process for one county when one political party controls the legislature, only to change the process again when the power structure changes." (*Id.*) In other words, the State's own source has explained that the counties subject to a purely nominating scheme do not possess inherent characteristics to justify the different judicial selection process but that, rather, the special legislation is passed due to a "specific judicial decision or individual judicial philosophy." (*Id.*) Those reasons are not inherent characteristics of the locality—rather, they are suspect justifications that simply cannot support

the constitutionality of special legislation.

Fourth, the State has not explained how a nomination followed by retention votes scheme is the actual fix for the "issues" (inherent characteristics) of Lake County. The State frames the inherent characteristics of Lake County as "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." (Dkt. 82 at 9.) But it is unclear how nomination followed by retention votes cures these issues. In fact, the report on which the State heavily relies offers nearly 200 pages of recommendations specific to Lake County courts separate from the nomination followed by retention votes scheme on superior court judges. (*See* Dkt. 81-4.) While that same report does recommend the nomination followed by retention vote scheme as well, the report's "preferred approach" is "statewide reform." (*Id.* at 11-12.) (More on the statewide recommendation below.) Given the breadth of report's recommendations—ones that do not involve the imposition of a purely nominating scheme—the State has revealed that Lake County's "issues" (inherent characteristics) require fixes different than the special legislation.

Notably, the State has also revealed the true purpose behind the special legislation: that the purely nominating scheme "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." (Dkt. 83 ¶ 22 (emphases added).) In other words, the State confirms that the nomination followed by retention vote scheme is imposed because Lake County is "highly diverse"—meaning it has high percentages of minorities—and so the State has explicitly revealed the impermissible race-based motive behind the challenged special legislation. Not only does this uncover a host of constitutional infirmities with the challenged statutory scheme, it also confirms

that the nomination followed by retention vote scheme (the legislative fix) is imposed because of Lake County's high percentage of minorities (the inherent characteristics)—and not an actual constitutional reason. Surely, special legislation is unconstitutional if its proponents admit that the law is necessary to curtail political influence of minorities in Lake County, while simultaneously offering no meaningful explanation of how the law actually cures certain "issues" plaguing the county. Ultimately, even if there are "characteristics of [Lake County] that may be uncommon or rare across the state, that is not enough; rather, there must be unique characteristics that **justify** the particular piece of legislation." *Herman & Kittle Props.*, 119 N.E.3d at 86 (cleaned up). The State has failed to provide that justification (and rather have revealed the true—and unconstitutional—reason behind the special law).

The aforementioned four reasons—independently (and certainly in concert)—defeat the State's argument that it has met its initial burden to link the proffered unique characteristics of Lake County and the statutory scheme's differential treatment. That is, while Lake County and its retention vote county counterparts, St. Joseph and Marion Counties, may prove to be unique in certain ways, it is a "generalized uniqueness" and not one that "justif[ies]" the imposition of a nominating-versus-full-election process upon Lake County. *Id*. In other words, while Lake County could have certain issues affecting its judicial system, the State cannot prove that a retention vote is the way to fix those problems.

But even if this Court finds that the State has met its initial burden by linking certain unique inherent characteristics of Lake County to the legislative fix, the State cannot show that those characteristics are defining enough to justify the imposition of the purely nominating process on only Lake County and its retention vote county counterparts—that is, the State will fail to explain why retention votes cannot be made applicable throughout the State.

The State claims that they have "shift[ed] the burden to the Plaintiffs to challenge the uniqueness of the class covered by the special law" and that "[t]his is not a showing which can be made by the plaintiffs based on the substantial evidence warranting the special law." (Dkt. 82 at 14.) The State is mistaken, especially considering that the sources upon which they rely specifically and strongly recommend that the special law should actually be general and of uniform operation throughout the State.

As an initial matter, the State has not offered "substantial evidence warranting the special law." What the State has offered is a single 1972 report that is 228 pages long but that devotes only two pages to recommending a nomination followed by retention vote scheme, preferably statewide. (*See* Dkt. 81-4.) Apart from that report, the State offers an affidavit of a non-expert who offers impermissible legal arguments, legal conclusions, and legal opinions as "facts"[3] or who misstates the sources he relies upon.[4] (*See* Dkt. 81-1.) This is far from "substantial

[3] For example, within the affidavit of Jerold A. Bonnet, the following statement appears: 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." (Dkt. 81-1 ¶ 22.) This is a conclusion of law and is thus improper affidavit testimony. *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 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").

[4] Mr. Bonnet claims, "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. *See* Frank Sullivan, Jr.,"*What I've Learned About Judging,"* 48 Val. U. L. Rev. 195, 198 (2013), attached hereto as Exhibit 6. (Dkt. 81-1 at 6.)." But this 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. *See Paniaguas*, 2006 WL 2568210, at *4 (listing

evidence" to support the special legislation.

More, importantly, however, the State's material facts, as well as many of the sources the State cites, confirm that a general law can be—and should be—made applicable throughout the state. First, the State's facts note that "[f]or over a century, judges at all levels in Indiana were selected through partisan elections" and that "[t]his system led to criticism regarding impartiality, judicial independence, and the continued ability to select high quality trial judges." (Dkt. 83 ¶¶ 5-6.) Additionally, the State's facts explain that, as a part of the Judicial Study Commission's evaluation of Indiana's partisan elections of judges, the Commission's questionnaires to Indiana attorneys and judges revealed that "79% of Indiana attorneys believed the partisan election system 'could not continue to provide . . . highly qualified trial judges," and 87% of responding attorneys believed politics influenced judicial selection to varying degrees." (*Id.* ¶ 11.) These statements explain that partisan elections caused issues throughout the State—not just in Lake County and its retention-vote counterparts. In other words, the State admits that the problems Lake County and other nominating counties faced due to partisan elections were no "different than those faced" by other counties in the State, *Alpha Psi*, 849 N.E.2d at 1138. This is "precisely the sort of special law that our [constitution's] drafters in 1850 and 1851 sought to eliminate." *Herman & Kittle Props.*, 119 N.E.3d at 84.

And the sources to which the State cites advocate for a general law, not just the imposition of a nomination followed by retention vote system on a select few counties. The State's Exhibit 3 explains that the Indiana legislature has faced numerous calls to impose

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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.*, 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 id.*

retention votes statewide: "The bar, as well as business and legislative study groups, have consistently advocated eradicating . . . the politicalization of judge selection." (Dkt. 81-3 at 14.) The State's Exhibit 4—the report on Lake County's judicial system—sets forth its "preferred approach" for a "statewide reform" of nomination followed by retention vote systems for trial-judge selection. (Dkt. 81-4 at 11-12.) And the State's Exhibit 5[5] explains, "After discussing and seriously considering the input from judges all over the State of Indiana on the judicial selection issue, the [Strategic Planning] Committee still strongly advocates merit selection as the best system for selecting trial judges." (Dkt. 81-5 at 28.) Given the State's own sources, the State cannot explain why a general law would be "inoperative in portions of the state" or "injurious or unjust" if imposed on all counties, *State v. Buncich*, 51 N.E.3d 136, 141 (Ind. 2016) (cleaned up). In other words, there is no evidence that Lake County and other retention vote counties are facing a particular issue that would justify imposing retention votes on them, and only them; rather a general law can be made applicable statewide.

Finally, the State offers no statistics that would set Lake County and its retention vote counterparts apart from other counties. For example, the State itself points out that, while Marion and Lake Counties had the highest total cases in 2020 and 2021, Allen County had the next highest total cases in 2020 and 2021—higher than St. Joseph County. (Dkt. 83 ¶ 29.) Yet, a purely nominating scheme is not imposed on Allen County. Additionally, St. Joseph County's total annual cases for 2020 and 2021 are only "moderately higher" than that of Vanderburgh County, which has partisan elections for its superior court judges. (*Id.*) That "moderately higher" number cannot support the imposition of a purely nominating system on one locality but not another. *Herman & Kittle Props.*, 119 N.E.3d at 85. Additionally, while Marion and Lake

[5] It appears the State's Exhibits 5 and 8 are the same report. (*See* Dkt. 81-5, 81-8.)

Counties have the highest voting age populations, both Allen and Hamilton Counties have higher voting age populations than St. Joseph County. (Dkt. 86 ¶ 38.) So, voting age population cannot serve as a basis for imposing purely nominating systems on Marion, Lake, and St. Joseph Counties. Ultimately, the Plaintiffs have explained—using the State's own facts and sources—"why the specified class's characteristics are not defining enough to justify the special legislation." *Herman & Kittle Props.*, 119 N.E.3d at 85. Rather, the current piecemeal approach to retention votes for certain superior court judges is unconstitutional. This Court should accordingly deny the State's motion for summary judgment on Plaintiff's Article 4, § 23 claim and grant Plaintiffs summary judgment on this claim.

3. This Court Should Deny the State's Motion for Summary Judgment on Plaintiffs' Privileges-and-Immunities Claim.

In asking for summary judgment on the Plaintiffs' Privileges and Immunities Clause claim, the State first offers a few paragraphs describing generally how an Article 1, Section 23 analysis is conducted. (Dkt. 82 at 14-15.) Then, the State devotes just three sentences of argument in support of its summary judgment request:

> Here, Plaintiffs fail both prongs of the Article 1, Section 23 standard established in *Collins*. While arguing § 33-33-45-28 and the judicial nomination and retention elections violate Article 1, Section 23, Plaintiffs incorrectly apply the law. This statute and the nominations/elections do not violate the Indiana Constitution.

(*Id.* at 11.)

That is the entirety of the State's argument. Nowhere does the State explain (1) how the challenged law satisfies the two-pronged test established in *Collins* or (2) how Plaintiffs "incorrectly apply the law." Rather, the State offers its unsupported legal conclusions, and nothing more. The State's argument is waived. *See Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) (explaining that "perfunctory and undeveloped arguments" are waived).

Putting aside the State's lack of cogent argument on the Privileges and Immunities Clause issue, the State is incorrect that the challenged superior court judge selection procedure in Lake County does not violate Article 1, Section 23 of the Indiana Constitution. As explained in detail in Plaintiffs' brief in support of motion for summary judgment, the challenged law cannot survive a Privileges and Immunities Clause challenge. (*See* Dkt. 85 at 30-32.)

CONCLUSION

In conclusion, this Court should deny the State's Motion and grant summary judgment for Plaintiffs.

Respectfully submitted,

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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.

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