

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT 11
)	
COUNTY OF MARION)	CAUSE NO. 49D11-2302-PL-005795
CITY OF SOUTH BEND,)	
WARREN OUTLAW, and IRIS OUTLAW,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE OF INDIANA ELECTION COMMISSION,)	
)	
Defendant.)	

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

Plaintiffs, City of South Bend (“South Bend”), Warren Outlaw (“Warren”), and Iris Outlaw (“Iris”) (South Bend, Warren, and Iris are sometimes collectively referred to herein as the “Plaintiffs”), by counsel, and for their response to Defendant, State of Indiana Election Commission’s (“Defendant”) Motion to Dismiss, state as follows:

A. FACTUAL BACKGROUND

The Indiana General Assembly has singled out St. Joseph County for special treatment with respect to the redistricting and election of both its county commissioners and council members. Compl. at ¶ 7. In the context of county commissioners, under the general rule applicable to 89 of 92 Indiana counties, each county is to have three county commissioners and those commissioners are to be “elected by the voters of the whole county.” Compl. at ¶ 16; Ind. Code §§ 36-2-2-4(a), 36-2-2-5(d). While under this general rule, all three of each county’s commissioners are required to reside in a separate district within the county, every eligible voter residing in the county has the ability to vote for all three county commissioner positions. Ind. Code § 36-2-2-5(b).

Unlike voters who reside in 89 of Indiana’s 92 counties, St. Joseph County voters are subject to special legislation which limits them to only having the right to vote for one of their three elected county commissioners (the “Special County Commissioner Election Process”). Compl. at ¶¶ 18-20; Ind. Code § 36-2-2-5(d). Under the Special County Commissioner Election Process, voters who reside in St. Joseph County (as well as Lake County) are only provided with the right to vote for the county commissioner who lives in the voter’s district, not all three county commissioners. *Id.*

The same is true with respect to the election of county council members in St. Joseph County. Under the general rule applicable to 89 of Indiana’s 92 counties, there are seven county council members: (a) three county council members are at-large members elected by voters of the whole county; and (b) four county council members are elected by the voters of each of the four districts. Compl. at ¶¶ 23-26; Ind. Code § 36-2-3-4(a). In these 89 counties, each voter may cast a vote for up to four county council members—three at-large members and one member from the voter’s district (i.e. a majority of the county council.) *Id.*

Unlike voters who reside in almost every other county in Indiana, St. Joseph County voters have been singled out and are subject to a unique special legislation scheme for county council member voting (the “Special County Council Election Process”). Compl. at ¶¶ 27-31; Ind. Code § 36-2-3-4(c). Under the Special County Council Election Process, “[t]he fiscal body shall divide the county into nine (9) single-member districts that comply with subsection (d).” It further provides that “[t]hree (3) of these districts must be contained within each of the three (3) districts established under IC 36-2-2-4(c)”—the three single-member county commissioner districts—and “[o]ne (1) member of the fiscal body shall be elected by the voters of each of these nine (9) single-member districts.” *Id.* Thus, under the Special County Council Election Process, St. Joseph

County voters are able to cast a vote for only one of the nine county council members as compared to almost every other county in Indiana where its voters have the right to vote for a majority of their county council members.

In an effort to combat the unique statutory scheme which has resulted in the Special County Commissioner Election Process and Special County Council Election Process, Iris, Warren, and the City have brought this lawsuit asserting that the aforementioned statutory scheme violates their enumerated rights as set forth the Indiana Constitution. Iris and Warren are both African American (and as such members of a minority group), and registered voters in St. Joseph County. Compl. at ¶¶ 2-3. The City is an Indiana municipality and governmental organization that is located in St. Joseph County. Compl. at ¶ 1. Specifically, the Plaintiffs have asserted that the statutory scheme which makes up the Special County Commissioner Election Process and the Special County Council Election Process has resulted in violations of the Plaintiffs' rights under Article 4 Sections 22 and 23 (Special Legislation), Article 1 Section 23 (Equal Privileges and Immunities), and Article 2 Section 1 (Free and Equal Elections Clause) of the Indiana Constitution.

B. TRIAL RULE 12(B)(6) STANDARD

When reviewing a Trial Rule 12(B)(6) motion to dismiss, a court should “accept[] as true the facts alleged in the complaint[,]” and “should not only ‘consider the pleadings in the light most favorable to the plaintiff,’ but also ‘draw every reasonable inference in favor of [the non-moving] party.’” *Trail v. Boys and Girls Clubs of NW Ind.*, 845 N.E.2d 130, 134 (Ind. 2006) (internal citations omitted). Furthermore, a court must deny a motion to dismiss unless it “. . . appears to a certainty that the plaintiff would not be entitled to relief under any set of facts.” *Kitco, Inc. v. Corp. for Gen. Trade.*, 706 N.E.2d 581, 590-91 (Ind. Ct. App. 1999). The Plaintiffs' Complaint meets this standard.

C. ARGUMENT

I. **The Plaintiffs have standing to bring this action under the Declaratory Judgment Act because they have shown injury to their rights under the Indiana Constitution.**

Initially, the Defendant incorrectly argues that the Plaintiffs lack standing to bring this lawsuit because the challenged statutory scheme does not infringe on any legally protected interest belonging to the City, Iris, or Warren. The doctrine of standing asks whether the plaintiff is the proper person to invoke a court's authority. *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019) (citing *City of Indianapolis v. Indiana State Bd. of Tax Comm'rs*, 261 Ind. 635, 638, 308 N.E.2d 868, 870 (1974)). As the Indiana Supreme Court has held, “the party challenging the law must show adequate injury or the immediate danger of sustaining some injury.” *Id.* (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995)).

According to the Defendant, “[t]he only concrete interest articulated throughout the complaint is an assumed right to a particular structure of county government[, and a] . . . preferred county government structure is not a legally cognizable right[.] Defendant’s Motion to Dismiss (“Mot. to Dismiss”) at p.5. This is a gross misunderstanding of how the Plaintiffs have been injured as a result of the statutory scheme that has been overseen and administered by the Defendant.

The Plaintiffs’ injury has not resulted from a failure to provide the Plaintiffs with a “particular structure of county government[.]” but instead because the voting rights of every individual residing in St. Joseph County (including Iris and Warren) have been made lesser and unequal compared to the voting rights of (almost) every other voter residing in the State of Indiana. Such conduct violates the constitutional prohibition against Special Legislation and the Equal

Privileges and Immunities Clause and Free Elections Clause, which have been granted to Hoosiers under the Indiana Constitution.

First, such conduct is violative of Article I, Section 23 of the Indiana Constitution (the Equal Privileges and Immunities Clause) which provides that “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens[,]” Any claim brought under the Equal Privileges and Immunities Clause is reviewed under the two prong test first set forth by the Indiana Supreme Court in *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994):

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269, 1273 (Ind. 2014) (quoting *Collins*, 644 N.E.2d at 80).

Here, St. Joseph County voters (including Iris and Warren) have been subjected to disparate treatment because they receive lesser and unequal voting rights for their county commissioners and county council members than voters in at least 89 of 92 Indiana Counties. Specifically, the Special County Commissioner Election Process means that St. Joseph County voters may cast a vote for only one of their three county commissioners, as compared to voters in 89 other Indiana Counties who may cast a vote for all three of their county commissioners. Similarly, the Special County Council Election Process means that St. Joseph County voters may cast a vote for only one of nine county council members, as compared to voters in nearly every other Indiana county, who may cast a vote for four of seven county council members. In essence, what this means is that while in 89 Indiana Counties a registered voter has the right to elect all of the county commissioners and a majority of the county council members in the county where the voter resides,

a St. Joseph County registered voter only has the right to vote for a single county commissioner and a single county council member.

Through this lawsuit, the Plaintiffs contend that the Defendant will not be able to articulate any “inherent characteristic” of either St. Joseph County, or the people who live in St. Joseph County, that would justify those voters (including Iris and Warren) receiving a lesser say in the election of its county commissioners or county council members than voters in its neighboring counties such as Elkhart, Marshall, LaPorte, or any of the other 89 Indiana Counties which have been provided with a greater say in their county government. If the Defendant is unable to articulate such a justification, then the statutory provisions underlying the Special County Commissioner Election Process and the Special County Council Election Process will fail the first prong of the *Collins* test, as the disparate treatment is not “reasonably related to inherent characteristics which distinguish the unequally treated classes[,]” and the Plaintiffs legally cognizable right as set forth in the Equal Privileges and Immunities Clause will have been violated.

In addition to the above-mentioned statutory scheme violating the Equal Privileges and Immunities Clause, such conduct has also violated the Plaintiffs’ legally cognizable right set forth under the Free and Equal Elections Clause. Specifically, Article II, Section 1 of the Indiana Constitution, provides that “All elections shall be free and equal.” The Indiana Supreme Court has previously recognized that elections are “equal when the vote of every elector is equal in its influence upon the result to vote of any other election” and “each ballot is as effective as every other ballot.” *Blue v. State ex rel. Brown*, 188 N.E. 583, 589 (Ind. 1934).

Here, the Plaintiffs have asserted that the Special County Commissioner Election Process and the Special County Council Election Process are unequal because the voters of St. Joseph County have been deprived of an equal influence to cast a vote and elect county commissioners

and county council members that is afforded to voters in other counties throughout the State. While in almost all other Indiana counties (other than St. Joseph County) voters have been given the right to select all of their county commissioners and a majority of their county council members, voters residing in St. Joseph County are limited to voting for only one of their three county commissioners and one of their nine county council members. To the extent such conduct is deemed to be a violation of Plaintiffs' rights set forth in Article II, Section 1 of the Indiana Constitution, it would necessarily result in a deprivation of a legally cognizable right belonging to the Plaintiffs and would be a sufficient injury to support a claim under the Declaratory Judgment Act.

Finally, the Defendant argues that even if this Court determines that Iris and Warren have standing to challenge the constitutionality of the Special County Commissioner Election Process and Special County Council Election Process, the City nevertheless must be dismissed based for lack of standing because "[t]he complaint makes no reference to any rights infringed, any harm suffered, or even any effect whatsoever that the challenged statutes have on the City." Mot. to Dismiss at p. 5. While it is true that the City (unlike Iris or Warren) does not itself have a right to vote for the commissioners or county council members that represent St. Joseph County, this is by no means dispositive as to whether the City has standing to assert an action concerning the constitutionality of the Special County Commissioner Election Process and Special County Council Election Process.

The Indiana Supreme Court has previously held that "[a] county or an official thereof possesses standing to challenge an interpretation or application of a statute if it can be demonstrated that the party is seeking the resolution of a legitimate controversy surrounding the operation of the statute." *State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Court*, 392

N.E.2d 1161, 1164 (Ind. 1979). Standing has consistently been found to exist where a municipality has been able to assert an injury resulting from an allegedly unconstitutional state statute. *See e.g., Marion Cty. V. State*, 888 N.E.2d 292 (Ind. Ct. App. 2008) (holding that Marion County and St. Joseph County had standing to challenge the constitutionality of a statute authorizing the State to recoup from counties a portion of its expenses in operating juvenile detention facilities when the counties asserted that as a result of the statute the State was seeking \$75 million dollars in arrearage from the counties.) Furthermore, the Indiana General Assembly has expressly delegated to a city’s head of department of law the power to “promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of the city or the public.” Ind. Code § 36-4-9-12(7). To that end, the Indiana appellate courts have previously held that “[c]ounties and their officials ‘possess standing to challenge an interpretation or application of a statute if it can be demonstrated that the party is seeking the resolution of a legitimate controversy surrounding the operation of the statute.’” *State ex rel. Peterson v. State*, 888 N.E.2d 292, 298 (Ind. Ct. App. 2008) (quoting *State ex rel. State Board of Tax Comm'rs v. Marion Superior Court, Civil Div., Room No. 5*, 392 N.E.2d 1161, 1164, (Ind. 1979). That is exactly what is taking place here.

The City (along with Iris and Warren) have filed this lawsuit to ensure that St. Joseph County voters, specifically those that happen to reside in the City, are not subject to lesser and unequal voting rights with respect to the election of their local county commissioners and county council members as compared to their fellow Hoosiers who just so happen to reside in 89 of the 92 other Indiana counties. The City has the statutory and common law right to advocate for its residents, especially in situations like these where their votes are being marginalized by an unconstitutional scheme targeted at minimized the impact of its citizens at the polls. This is not

some type of “fictitious” controversy, and to the extent this operation of state law is not resolved, all voters in St. Joseph County, including Iris and Warren, will be left with a lesser and unequal say in their county government as compared to registered voters living in 89 other Indiana counties. Furthermore the City notes that the Mayor of South Bend, who is the chief executive of the City, is a registered voter of St. Joseph County himself, and thus himself has encountered lesser and unequal voting rights as compared to the registered voters living in 89 other Indiana Counties. Because the Plaintiffs have shown a legally cognizable injury to their legal rights, the Court should reject the Defendant’s request to dismiss this lawsuit due to lack of standing.

II. The Defendant should not be dismissed from this action based upon its role in administering and supervising Indiana’s Election Laws.

In its Motion, the Defendant argues that even if the Plaintiffs have shown an injury to a legally protected interest that this matter must still be dismissed because the Plaintiffs “have not connected any alleged injury to Defendant’s conduct.” Mot. to Dismiss at p. 6. While Indiana state courts are not subject to a constitutional requirement of a case or controversy similar to that imposed by Article III of the federal constitution, Indiana’s Declaratory Judgment Act still “requires a justiciable controversy or question.” *Environmental Management v. Twin Eagle, LLC*, 798 N.E.2d 839, 843 (Ind. 2003). The Indiana Supreme Court has noted that “[t]he controversy requirement is met when a case presents the “ripening seeds” of a controversy.” *Id.* Furthermore, the Indiana Supreme Court has noted that “where . . . the claims of the several parties in interest, while not having reached that active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.” *Id.*

Here, it is still essential for the Plaintiffs to maintain this action against the Defendant based upon its overarching role in overseeing the entire statewide election process which takes place

within Indiana.¹ Specifically, Indiana Code section 3-6-4.1-14 provides that, in addition to other duties prescribed by law, the Defendant shall “administer Indiana election laws[,]” and “[a]dvise and exercise supervision over local election and registration officers.” Ind. Code §§ 3-6-4.1-14(a)(1), (3). By statutorily being obligated to “administer” Indiana’s election laws and “exercise supervision over local election[s ,]” the Defendant has the legal responsibility to ensure that all of Indiana’s election laws (including those making up the Special County Commissioner Election Process or Special County Council Election Process) are being complied with at the local level.

While acknowledging the broad statutory responsibilities granted to it, the Defendant asserts that such language should not result in the Defendant being included as a named party in this litigation because it “is specifically prohibited from divesting county election boards of any of their statutorily prescribed powers and duties, with the limited exception of the Commission’s supervisory role as a tie-break in case of deadlock.” Mot to Dismiss at p. 7 (citing Ind. Code § 3-6-4.1-14(b)). While it is true that Indiana Code section 3-6-4.1-14(b) does not result in a local county election board (such as the St. Joseph County Election Board) not being divested of their powers and duties which they have been provided with under Indiana Code section 3-6-5, it does not mean that the Defendant does not also have duties and responsibilities related to locale elections that were not specifically enumerated in that provision of the Indiana Code.

Furthermore, Indiana Code section 3-6-4.1-14(b) does not prohibit the Defendant from divesting (through its administration and supervision of Indiana’s election laws) the powers

¹ Plaintiffs further note that in conjunction with this filing, they have also filed a Motion for Leave seeking to amend their Complaint to bring identical claims against the St. Joseph County Board of Commissioners (as well as the County’s three commissioners in their official capacity), the St. Joseph County Council (as well as the nine County Council members in their official capacity), and the St. Joseph County Election Board to the claims previously asserted against the Defendant. To that end, the Plaintiffs, concurrently with the filing of this brief, have filed a Motion to Amend Complaint naming these additional parties to the above captioned lawsuit.

granted to the St. Joseph County Board of Commissioners related to the Special County Commissioner Election Process pursuant to Indiana Code Section 36-2-2-4, and/or the powers granted to the St. Joseph County Council related to the Special County Council Election Process pursuant to Indiana Code Section 36-2-3-4. Instead, it is limited only to the powers and duties granted to the county election board under Indiana Code section 3-6-5. In the absence of any reference to Indiana Code sections 36-2-2-3 or 36-2-3-4, it must be assumed that the Defendant is responsible for administering and exercising supervision over the enforcement of such election laws, and therefore the Defendant remains a necessary party to ensure that this case can be fully litigated.

D. CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that the Defendant's Motion to Dismiss be denied, in full, that an order be issued on the merits of Plaintiffs' claims against the Defendant, and for all other just and proper relief.

Respectfully submitted,

/s/ Paul L. Jefferson

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2023, a copy of the foregoing was filed electronically through the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Paul L. Jefferson

Paul L. Jefferson